

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No. 247 of 2015

Against the judgment of conviction dated 17.04.2015 and order of sentence dated 24.04.2015 passed by Sri Jitendra Mishra, the learned 4th Additional District & Sessions Judge, Bettiah, West Champaran in Tr. No. 48 of 2011 arising out of Kangali P.S. Case No. - 28 of 2009

- =====
1. Indrajeet Yadav, Son of Satya Narayan Yadav
 2. Babu Lal Paswan, Son of Jaypal Hazra

Both are resident of village - Daptard Majharia, Brit Tola, P.S. -
Kangali, District - West Champaran

.... Appellants

Versus

1. The State of Bihar

.... Respondent

=====

Appearance :

For the Appellants : Mr. Ram Adya Singh, Advocate
Mr. Pramod Ranjan, Advocate
For the Respondent : Mr. Bipin Kumar, A.P.P.

=====

CORAM: HONOURABLE MR. JUSTICE GOPAL PRASAD

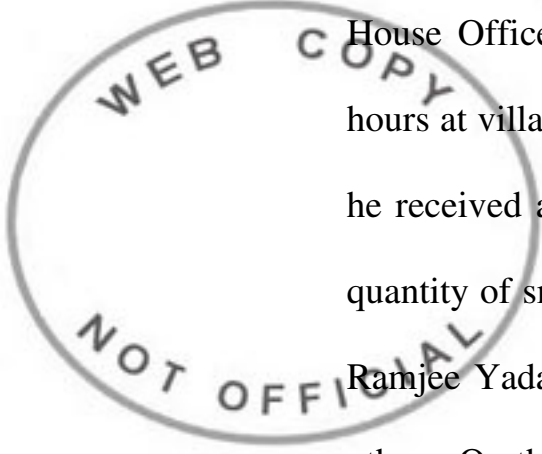
ORAL JUDGMENT

Date: 01-12-2015

Heard learned counsel for the appellants and the learned
counsel for the State.

2. The appellant no. 1 Indradeej Yadav has been convicted under Section 22(c) of the Narcotic Drugs and Psychotropic Substances Act (hereinafter referred to as the “NDPS Act”) and sentenced to undergo rigorous imprisonment for ten years and to pay a fine of Rs.1,00,000/- and in default of payment of fine to undergo additional imprisonment of one year. The appellant no. 2 Babulal Paswan has been convicted under Section 22(b) of the NDPS Act and sentenced to undergo rigorous imprisonment for five years and to pay a fine of Rs.20,000/- and in default of payment of fine to undergo additional imprisonment of three months.

3. The prosecution case, as alleged on the basis of self written statement of the informant, Priya Vrat, Sub-Inspector of Police/Station House Officer, Kangali Police Station recorded on 06.12.2009 at 2:15 hours at village Deeptand Manjharia is that on 06.12.2009 at 10:05 A.M. he received a secret information by his Senior Police Officer that huge quantity of smuggled Ganja was kept in the house of suspended Dafadar Ramjee Yadav and his brother Indrajeet Yadav, the appellant no. 1 and others. On the said information, a Sanha Entry No. 89 was recorded and the force was demanded from the nearby police station as well as from the S.S.B. for co-operation. Thereafter the informant, Assistant Sub-Inspector, K. K. Jha, SAP Force, his police driver as well as the local Chaukidar proceeded for raid at 10:15 A.M. and raided the house of Ramjee Yadav and the appellant no. 1 as well as in the nearby houses. From the room of Ramjee Yadav, 8 packets Ganja each containing 10 Kg. kept in the plastic bag and from the room of appellant no. 1 56 Kg. Ganja in 8 packets each containing 7 Kg. kept in four plastic bags were recovered and from the straw room of appellant no. 2, 18 Kg. Ganja kept in plastic bag in two packets each containing 9 Kg. was recovered. The owner of the house was found fleeing away and total 366 Kg. Ganja was recovered from 10-11 neighbouring houses. Thereafter seizure list was prepared on which the witnesses put their signature and the police lodged a case against 11 persons from whose houses Ganja was recovered. The First Information Report was lodged and investigation was handed over



to Md. Habibullah. The police during investigation recorded the statement of the witnesses, prepared the seizure list of the seized article and finding the accused persons fleeing away took action against them for their apprehension and sent the sample of the seized article to the Forensic Science Laboratory for chemical examination and after completing the investigation, submitted charge-sheet on which cognizance was taken and the case was committed to Court of Sessions. During trial, eight witnesses were examined by the prosecution.

4. P.W.1 is Priya Vrat, the informant, Station House Officer, Kangli Police Station. P.W.2 is Md. Habibullah, (Investigating Officer), P.W.3 Prithwi Nath Tiwari, retired A.S.I., is a member of the raiding party before whom the articles were alleged to have been recovered from the houses of the accused persons and others. Thereafter seizure list was prepared of the seized articles. P.W.4 Ramashankar Prasad (Home Guard) is also member of the raiding party. P.W.5 Gayanand Singh is the A.S.I., a member of the raiding party, who supported the prosecution case about the raid and recovery of about 366 Kg. Ganja. P.W.6 Kamlesh Kumar Jha, Sub-Inspector of Police, is also member of the raiding party, who supported the prosecution case about the recovery and seizure. P.W.7 Yogendra Hazra is Chaukidar and P.W.8 Santosh Kumar Singh has identified his signature on the seizure and proved his signature but has not supported the search and seizure.

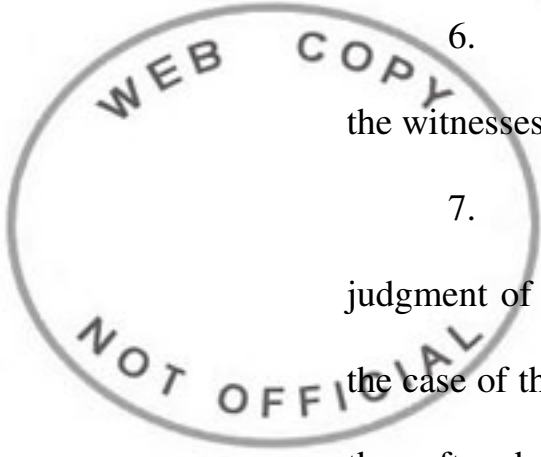
5. The defence has also adduced a witness as D.W.1 Manoj

Kumar Srivastava and has proved the complaint case which has been marked as Ext.A.

6. The trial Court, taking into consideration the evidence of the witnesses, convicted and sentenced the appellant as mentioned above.

7. Learned counsel for the appellants has challenged the judgment of conviction and order of sentence on the ground that as per the case of the prosecution the informant received secret information and thereafter he raided the house. However, Sanha Entry No. 89 is mentioned in the First Information Report but the said Sanha Entry has not been proved or brought on record in this case. It has been submitted that the informant proceeded for raid on the basis of secret information received by him, but there is no compliance of provision of Section 42(2) of the NDPS Act. It has further been contended that though there is evidence that the First Information Report was lodged after the raid but the Investigating Officer has not complied with the provision of Section 42(2) of the Act, i.e., where an officer takes down any information in writing under sub-section (1) or records grounds for his belief under the proviso thereto, he shall within seventy-two hours send a copy thereof to his immediate official superior. It has further been contended that there is no compliance of provisions of Sections 52-A, 55 and 57 of the NDPS Act and hence, the judgment of conviction and order of sentence recorded by the trial Court are not sustainable and fit to be set aside.

8. Learned counsel for the State, however, contended that

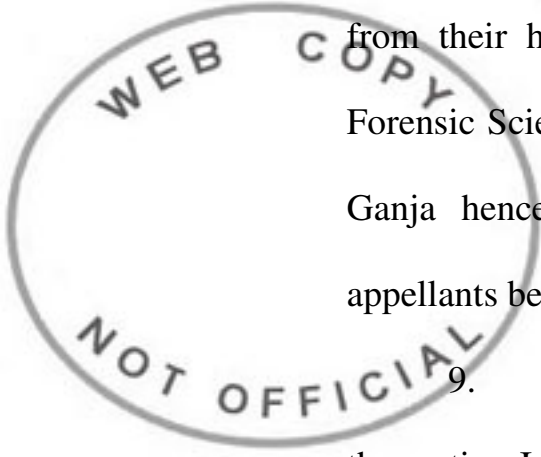


there is evidence to show that on secret information the informant raided the house of the appellants and huge quantity of Ganja was recovered from their houses as well as from the neighbouring houses and the Forensic Science Laboratory report was received showing the sample as Ganja hence, the prosecution has proved the charges against the appellants beyond all reasonable doubts.

9. However, before considering the respective submissions of the parties, I proceed to consider the evidence of the witnesses.

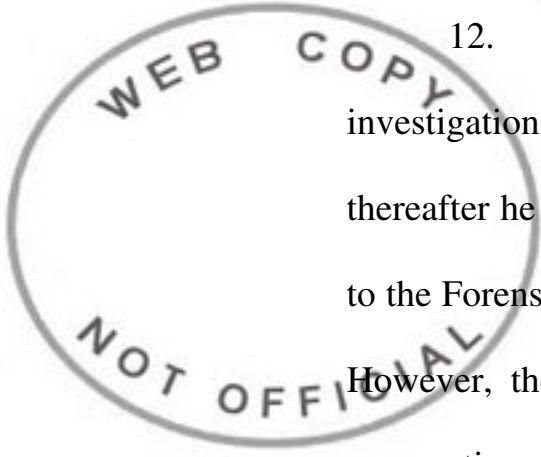
10. The prosecution case is that on secret information the police recorded the Sanha Entry then proceeded for raid. During raid 56 Kg. Ganja was recovered from the house of the appellant no. 1 and 18 Kg. Ganja was recovered from the house of appellant no. 2. Altogether 366 Kgs. Ganja was recovered from the houses of the appellants. Seizure lists were prepared with regard to the seized articles from the house of the accused persons and others.

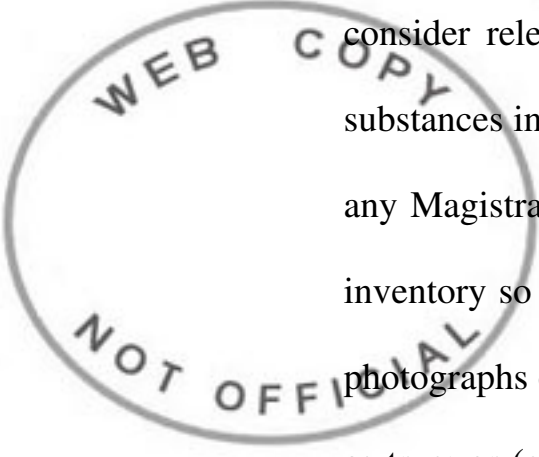
11. P.W. 1 is the informant who has supported the prosecution case about the search and seizure and recovery of Ganja from the houses of the appellants. The evidence of P.W.1 is that the Ganja was sealed at the place of occurrence but subsequently said that Ganja was sealed in the Police Station. However, he has not whispered in the entire evidence that where the Ganja was kept. P.Ws.3, 4, 5 and 6 are the members of the raiding party and they have also supported the prosecution case regarding the search and seizure of Ganja. However, they have stated that the



Ganja was not sealed before them and hence, their evidence is limited to the raid, search and seizure of ganja from the houses of the appellants.

12. P.W.2 is the Investigating Officer. He has stated that the investigation was handed over to him by the informant, Priya Vrat and thereafter he recorded the statements of the witnesses and sent the Ganja to the Forensic Science Laboratory as per the direction of the Magistrate. However, there is no whisper in the entire evidence adduced by the prosecution as to where the Ganja was kept after the seizure on the date of occurrence. No witnesses have whispered in the entire prosecution evidence as to whether the Ganja was kept in sealed cover with the seal of the Officer-in-Charge of the Police Station. The Ganja seized has neither been produced before the Court nor marked as exhibit nor is there any evidence that the seized Ganja was destructed nor is there any evidence of certification of those Ganja by the Magistrate nor has the provision of Section 52-A of the NDPS Act been complied with. The provisions contained in Section 52-A of the NDPS Act provide that where any narcotic drug or psychotropic substances has been seized and forwarded to the officer-in-charge of the nearest police station or to the officer empowered under Section 53, the officer referred to in sub-section (1) shall prepare an inventory of such narcotic drugs or psychotropic substances containing such details relating to their description, quality, quantity, mode of packing, marks, numbers or such other identifying particulars of the narcotic drugs or psychotropic





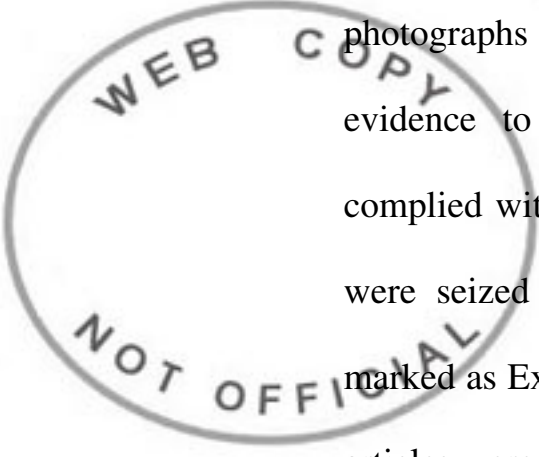
substances or the packing in which they are packed, country or origin and other particulars as the officer referred to in sub-section (1) may consider relevant to the identity of the narcotic drugs or psychotropic substances in any proceedings under this Act and make an application, to any Magistrate for the purpose of – (a) certifying the correctness of the inventory so prepared; or (b) taking, in the presence of such Magistrate, photographs of such drugs or substances and certifying such photographs as true; or (c) allowing to draw representative samples of such drugs or substances, in the presence of such Magistrate and certifying the correctness of any list of samples so drawn.

13. However, there is no evidence that either the informant or the Investigating Officer has ever proceeded for complying with these provisions or whether it is complied with. Moreover, Section 42 of the NDPS Act provides that power of entry, search, seizure and arrest without warrant or authorization and Section 42(2) of the NDPS Act provides that where an officer takes down any information in writing under sub-section (1) or records grounds for his belief under the proviso thereto, he shall within seventy-two hours send a copy thereof to his immediate official superior. However, there is no compliance of the provisions of the aforesaid Sections of the NDPS Act. However, Section 55 provides that an officer in-charge of a police station shall take charge of and keep in safe custody, pending the orders of the Magistrate, all articles seized under this Act within the local area of that police station

and which may be delivered to him, and shall allow any officer who may accompany such articles to the police station or who may be deputed for the purpose, to affix his seal to such articles or to take samples of and from them and all samples so taken shall also be sealed with a seal of the officer-in-charge of the police station. However, there is no evidence to the effect whether Section 55 of the NDPS Act has been complied with or not.

14. Section 57 of the NDPS Act provides that whenever any person makes any arrest or seizure under this Act, he shall, within forty eight hours next after such arrest or seizure, make a full report of all the particulars of such arrest or seizure to his immediate official superior. However, after going through the entire evidence, I find that there is no evidence as to whether the prosecution or the Investigating Officer/informant ever complied the provisions contained in Sections 42(2), 52-A, 55 and 57 of the NDPS Act. It is true that the provisions contained in Section 52-A and Section 57 of the NDPS Act are not mandatory but the violation of these provisions ip so facto does not vitiate the trial but the Investigating Officer cannot ignore these provisions, as such failure will have bearing on appreciation of evidence regarding the arrest and seizure.

15. However, having regard to the fact that neither the articles seized were produced before the Court nor any certification of the Magistrate has been shown that any order has been passed for seizure of



the articles nor is there any evidence that any certification of the articles seized nor the photographs of the articles seized were taken, nor the photographs or the certification have been proved nor is there any evidence to suggest that these provisions have substantially been complied with. However, it is also pertinent to mention that the articles were seized on 06.12.2009. The Forensic Science Laboratory report marked as Ext.4 mentions that the samples received of the alleged seized articles were signed by Memo No. 313/2010, dated 21.11.2010, whereas, the occurrence is of 06.12.2009 and hence, it is apparent that the articles seized were sent to the Forensic Science Laboratory after more than 11 months. Neither there is evidence as to where the articles seized were kept nor is there any evidence as to where the samples were taken from each of the packets seized. It is stated that several packets of Ganja were seized from the several persons including the appellants as it is mentioned in the fardbeyan itself. It has been reported that the raid was conducted and the seizures were made from the 11 houses and the articles were seized in several packets. Hence, there appears to be lack in the evidence whether the sample was taken from each of the packets and further there is no evidence as to from which packets the representative sample was taken for sending it to the Forensic Science Laboratory.

16. Hence, having regard to the facts and circumstances of the case, it appears that there is violation of Sections 42(2), 52-A(2), 55 and 57 of the NDPS Act as well as even the articles seized were not

produced nor there is any evidence that from where the sample was taken. Hence, it is not safe to record a conviction on the basis of these evidences. Therefore, I find and hold that the prosecution has not been able to prove the charges against the appellants beyond reasonable doubts and the judgment of conviction dated 17.04.2015 and order of sentence dated 24.04.2015 passed in Tr. No. 48 of 2011 arising out of Kangali P.S. Case No. - 28 of 2009 by the learned 4th Additional District & Sessions Judge, Bettiah, West Champaran are hereby set aside and the appeal is allowed. As appellant No. 2 Babu Lal Paswan is on bail, he is discharged from the liability of his bail bond. Let appellant no. 1 Indrajeet Yadav, who is in custody, be released forthwith if not wanted in any other case.

17. Learned counsel for the appellants seeks permission to make necessary correction in the prayer portion of the appeal in course of the day. Permission is accorded.

(Gopal Prasad, J)

Kundan/-

U			
---	--	--	--