

**IN THE HIGH COURT OF JUDICATURE AT PATNA**

**Criminal Appeal (SJ) No.68 of 2015**

Against the judgment of conviction, dated 15.12.2014, and order of sentence, dated 18.12.2014, passed by Mr. Jitendra Kumar Dubey, Additional District and Sessions Judge, V, West Champaran at Bettiah, in Trial No. 20 of 2013 (N.D.P.S. Case No. 71 of 2012 arising out of Nautan P.S. Case No. 332 of 2012

1. Asharfi Thakur son of Prema Thakur Resident of Village- Pandey Tola, Police Station- Nautan, District-West Champaran .... Appellant

Versus

1. The State of Bihar .... Respondent

**Appearance :**

For the Appellant : Mr. Sanjay Kumar no. 7, Adv.

For the Respondent : Mr. S.A. Ahmad, APP

**CORAM: HONOURABLE MR. JUSTICE GOPAL PRASAD**

**ORAL JUDGMENT**

**Date: 08-04-2016**

Heard the learned counsel for the appellant and the State.

2. The appellant has been convicted for offence under Section 20(b)(ii)(c) of the Narcotic Drugs and Psychotropic Substances Act, 1985, and sentenced to undergo rigorous imprisonment for ten years and a fine of rupees one lakh.

3. The prosecution case, as alleged in the first information report, by the informant, is that the informant gets secret information at about 09.00 A.M. that the smugglers are coming along with charas in a black Hero Honda motorcycle and will pass the said charas to Gopalganj. On the said information the informant along with Assistant Sub Inspector of Police, Izharul Haque Khan, P.W. 6, Chowkidar 5/2, Shambhu Nath Yadav, P.W. 4, and Deenanath Yadav, Home Guard Jawan, P.W. 3, proceeded for verification of the information and reached at south Mangal Gudaria Bandh on kachha road and then saw a motorcycle coming on the said road, which was apprehended and after search, before two independent witnesses, namely, Anil Yadav, P.W. 1,

and Amitesh Kumar Pandey, P.W. 2, 18 packets of charas recovered from the dickey and person apprehended disclosed his name as Asharfi Thakur and he did not produce any paper for the said charas. The charas and the Hero Honda motorcycle were seized and seizure list prepared. On the basis of the written report of the informant, the first information report lodged and the investigation was handed over to Assistant Sub Inspector of Police, Udai Singh. After the investigation the charge sheet submitted, cognizance taken and, thereafter, charge framed and after framing of the charge six witnesses were examined.

4. The documentary evidences are Exhibits 1 and 1/1, the signatures of Anil Yadav and Amitesh Kumar Pandey, Exhibit 2 is seizure list, Exhibit 3 is the written report, Exhibit 3/1 is endorsement on the written report, Exhibit 4 is the formal first information report, Exhibit 5 is the Forensic Science Laboratory.

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

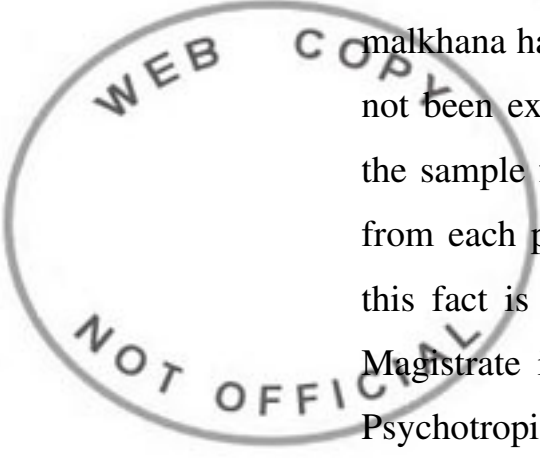
6. The learned counsel for the appellant has challenged the order of conviction and sentenced, recorded by the trial Court, on the ground that the investigating officer has not been examined. It has, further, been contended that the article, seized, has not been produced in the Court nor any certification of Magistrate regarding the article seized has been proved nor any photograph of the same has been produced nor the malkhana register has been produced. It has, further, been contended that the seizure list witnesses though have proved their signatures on the seizure list, but, they have stated that nothing recovered from the possession of the appellant. It has, further, been contended that there is no evidence that who took the sample and whether the sample was taken from all the 18 packets, seized from the possession of the appellant, hence, it has, further, been contended that

though there is allegation that the informant has received a secret information regarding charas and though it is alleged that the said statement was recorded as sanha entry, but, there is no evidence that whether the said information was recorded ever sent to the superior officer or not, hence, it is contended that the order of conviction and sentenced, recorded by the trial Court, is not sustainable.

7. The learned counsel for the State, however, contended that the prosecution has been able to prove the said article, seized, as the witnesses supported and merely because the seizure list witnesses have turned hostile and deposed that no seizure made before them, but, they have proved their signatures on the seizure list and it has been contended that the informant and other witnesses supported Exhibit 3, but, it has been submitted that other have supported the prosecution case and the report of the Forensic Science Laboratory, Exhibit 5, shows that the sample of the seized article, sent, was charas, cannabis sativa, an intoxicating ingredient.

8. Having regard to the submission, it is apparent that the informant supported the prosecution case that on secret information, he recorded in writing and then proceeded along with P.Ws. 3, 4 and 5 and in the presence of two independent witnesses, P.Ws. 1 and 2, the charas, contained in 18 packets were seized and seizure list prepared and the accused person was brought to the Police Station. P.W. 5, the informant, in his evidence, has proved the seizure list regarding the recovery of 18 packets and have deposed that the said articles were kept in malkhana of the Police Station and each packet contains about half kilogram charas. However, there is nothing in the evidence of the informant and other witnesses, i.e., P.Ws. 3, 4 and 6 that any sample was taken from the seized article.

9. Taking into consideration the entire evidence, it is apparent that there is no evidence that the article, seized, has been produced in



Court though it is stated that the article was kept in malkhana, but, neither the malkhana register was produced nor the In-Charge of the malkhana has come to depose. The investigating officer of the case has not been examined as witness and there is no evidence that who took the sample from the article, seized, and whether the sample was taken from each packet or not or of which packet. The evidence regarding this fact is missing. There is no evidence that the article seized by Magistrate in compliance of Section 52A of the Narcotic Drugs and Psychotropic Substances Act, 1985, was ever placed before a Magistrate or there is no evidence regarding the certification of the article seized regarding packing, nature or photograph of the article, seized. Since, there is no evidence whether the sample taken from the article, seized, and here no evidence that sample sent to Forensic Science Laboratory was the sample taken from seized article is concerned as it is asserted that information received was not recorded and the same was not sent to superior officer, but, having regard to the fact that the seizure made on motorcycle while in transit at public place and, hence, Section 43 of the Narcotic Drugs and Psychotropic Substances Act, 1985, comes to play and violation of Section 42 of the Narcotic Drugs and Psychotropic Substances Act, 1985, is irrelevant.

10. However, having regard to the fact that the investigating officer of the case has not been examined and it has not been proved that whether sample taken from the article, seized, and, further, there is no compliance of Sections 52, 55 and 57 of the Narcotic Drugs and Psychotropic Substances Act, 1985. Though the provision contained in Sections 52A, 55 and 57 of the Narcotic Drugs and Psychotropic Substances Act, 1985, is not mandatory, but, the violation of these provisions though not violated, but, trial or conviction can not be totally ignored and the failure will have the bearing on appreciation of the evidence. However, having regard to the facts and circumstances of the

case since the investigating officer has not been examined and there is no evidence whether sample taken from the seized article, it is not sufficient to record the conviction on the basis of the Forensic Science Laboratory report.

11. Hence, the order of conviction and sentence, recorded by the trial Court, is here **set aside** as the prosecution has not been able to prove the charge beyond reasonable doubt. The appeal is **allowed**.

12. Since, the appellant is in jail, he is directed to be released forthwith, if not wanted in any other case.

**(Gopal Prasad, J)**

SA/-

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