

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.719 of 2015

Against the judgment of conviction, dated 23.09.2015, and order of sentence, dated 28.09.2015, passed by Mr. Shailendra Kumar Pandey, Session's Judge, West Champaran at Bettiah in N.D.P.S. Case No. 72 of 2010, Trial No. 21 of 2011 arising out of Shikarpur P.S. Case No. 251 of 2010

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Md. Aslam, Son of Md. Sattar, Resident of Mohalla- Shahjangi, P.S.- Habibur,
District- Bhagalpur Appellant

Versus

1. The State of Bihar

.... Respondent

With

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Criminal Appeal (SJ) No. 66 of 2016

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Kameshwar Yadav Son of Late Yaddu Yadav, Resident of Village - achaina, P.O. -
Naya Moha Madpur, P.S. - Koilwar, District - Arah, Bhojpur

.... Appellant

Versus

1. The State of Bihar

.... Respondent

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Appearance :

(In CR. APP (SJ) No. 719 of 2015)

For the Appellant : Mr. Krishna Kant Singh, Adv.

For the Respondent : Mr. Bipin Kumar, APP

(In CR. APP (SJ) No. 66 of 2016)

For the Appellant : Mr. Vikas Ratan Bharti, Adv.

For the Respondent : Mr. Sujit Kumar Singh, APP

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CORAM: HONOURABLE MR. JUSTICE GOPAL PRASAD

ORAL JUDGMENT

Date: 04-05-2016

Heard the learned counsel for the appellants and the State.

2. Both these appeals have been heard together and disposed off by this common judgment as both arise out of same judgment of conviction, dated 23.09.2015, and order of sentence, dated 28.09.2015, passed in N.D.P.S. Case No. 72 of 2010, Trial No. 21 of 2011 arising out of Shikarpur P.S. Case No. 251 of 2010, by Mr. Shailendra Kumar Pandey, Session's Judge, West Champaran at Bettiah, by which the appellants have been convicted under Section 22(c) of the Narcotic Drugs and Psychotropic Substances Act, 1985, and sentence to undergo rigorous imprisonment for ten years and a fine of rupees one lakh each and for non-payment of fine they have further been convicted rigorous imprisonment for one year each. The appellants have, further, been convicted under Section 414 of the Penal Code and sentenced to undergo rigorous imprisonment for three years each.

3. The prosecution case, as alleged in the written report by the informant, Krishna Murari Gupta, P.W. 7 that on 04.09.2010 at about 10.00 P.M. the Subdivisional Police Officer, Narkatiyaganj, asked him to immediately reach to his residence as an important raid has to be conducted. The informant, thereafter, recorded sanha and proceeded on the basis of the information and, thereafter, along with the Subdivisional Police Officer, Constable Nagendra Kumar, Constable Ravi Shanker Rai and the Driver, Madan Rajak, and spy reached at the place pointed out by the spy and there they waited. The, further, case is that the informant received information that some persons will pass with ganja on Sumo vehicle from Nepal. At about 01.15 A.M. in the mid-night they saw a Sumo vehicle which was coming from east and on seeing the vehicle the spy gave the signal and, thereafter, the Subdivisional Police Officer put his car in way in front of the said Sumo vehicle and, then, the said Sumo vehicle stopped and the accused persons tried to flee away from the said vehicle, then, the informant and the body guard of the Subdivisional Police Officer caught hold of the accused persons.

4. The, further, case that out of the accused persons, two persons managed to flee away and rest accused persons were caught before Jitendra Kumar Soni and Dinesh Kumar. On enquiry they disclosed their name as Kameshwar Yadav and Md. Aslam and also disclosed the name of persons who managed to flee away as Rajesh, who was driving Sumo vehicle and also disclosed that he has loaded ganja in the forest from the house of one Arfeen and the ganja was to be taken to Bettiah where it was required to handed over to Chunnu Singh and Lalan Singh through Vijay Shahi of Majhauria. The ganja seized from Sumo vehicle wrapped in a polythene bag and about 29 packets of ganja were recovered, each containing 12 Kg. Thereafter, in presence of the witnesses, Jitendra Kumar Soni and Dinesh Kumar, the seizure list prepared and the articles were seized and the witnesses signed on the seizure list and one copy was handed over to the accused persons and, thereafter, intimation was given to the Police Station on telephone and the clothes and seal were called upon and the ganja was sealed in presence of the witnesses. On the written report, first information report

lodge and investigation proceeded. During the investigation, the investigating officer, P.W. 5, Md. Neyaz Ahmad Ansari, recorded the further statement of the informant as well as the Constables and other witnesses, inspected the place of occurrence, recorded the confessional statement of the accused and forwarded the accused and took the sample of the ganja from the packets and sent it for examination to Forensic Science Laboratory, Patna, and, thereafter, submitted the charge sheet. After submission of the charge sheet, cognizance was taken and after framing of the charge the trial proceeded.

5. During the trial eight witnesses were examined. P.W. 1 is Md. Manzoor Khan. He has been declared hostile as has not been supported the prosecution case and deposed that he does not know anything about the occurrence. P.W. 2, Tanveer Alam, is in same fashion declared hostile for not supporting the prosecution case. P.Ws. 3 and 4, namely, Jitendra Kumar Soni and Dinesh Kumar, are the seizure list witnesses and they have proved their signatures on the seizure list as Exhibits 1 and 1/1 respectively and have stated that the police have neither recorded their statement nor anything was recovered before them. However, P.W. 6, Madan Rajak, was the Driver of Subdivisional Police Officer, Narkatiyaganj, and supported the prosecution case regarding the conduct of the raid and apprehension of the two accused persons and recovery of ganja. P.W. 7, Krishna Murari Gupta, is the informant. He deposed supporting the prosecution case about the recovery of ganja from the Sumo vehicle which was intercepted by the prosecution witnesses and has proved the written report on the basis of which first information report lodged as well as the endorsement on the said written report and, further, supported the prosecution case regarding the conduct of the raid at the instance of Subdivisional Police Officer, Narkatiyaganj, for the recovery of ganja and after interception of the said Sumo vehicle 29 bundles of ganja were recovered, each containing 12 Kg of ganja and apprehension of the two persons from the said vehicle and the persons who were apprehended disclosed that the article, seized, was ganja and has, further, deposed that after recovery of said ganja it was sealed and kept in malkhana. However, P.W. 5, Md. Neyaz Ahmad Ansari, is the

investigating officer, who has deposed that he was entrusted the investigation of the case during the investigation he recorded the confessional statement of the accused persons and, thereafter, he took the sample of ganja and sent it to the Forensic Science Laboratory, Patna.

The trial Court, taking into consideration the evidence of the witnesses, convicted and sentenced the appellants by the judgment and order, as mentioned above.

6. The learned counsel for the appellants has challenged the order of conviction and sentence, recorded by the trial Court, particularly, on the ground that the articles seized were said to have been kept in malkhana, as per evidence of P.W. 7 in sealed cover, but, neither the article, seized, has been produced nor the malkhana register has been produced nor there is any certification by the Magistrate regarding the production of the article nor there is any certification by the Magistrate for the destruction of the article, seized, in consonance with Section 52A of the Narcotic Drugs and Psychotropic Substances Act, 1985. It has, further, been contended that though it is stated that the sample was sent, but, there is no evidence that from where the sample was taken though the prosecution case in the first information report that 29 packets of ganja were seized, each containing 12 Kg. However, the learned counsel for the appellants has stated that sample was taken from only one packet. However, there is no evidence that from which packet the sample was taken and there is no evidence, at all, that the sample was taken before the Magistrate in consonance of the provision of Section 52A of the Narcotic Drugs and Psychotropic Substances Act, 1985. It has, further, been contended that provisions containing in Sections 55 and 57 of the Narcotic Drugs and Psychotropic Substances Act, 1985, were not complied with. It has, further, been contended that two independent witnesses examined in the case have not supported the prosecution case regarding the recovery nor the ganja seized has been produced nor the certification of the Magistrate has been produced and except the evidence of P.W. 7, the informant, and P.W. 6, the Driver of the Subdivisional Police Officer, none of the witnesses have come forward to support the prosecution case regarding the recovery of ganja nor there

is any evidence that the sample has been taken before the Magistrate in consonance with provision contained in Section 52A of the Narcotic Drugs and Psychotropic Substances Act, 1985, hence, it casts serious doubt about the possession of the article alleged to have been seized.

7. The learned counsel for the State, however, contends that there is evidence regarding the recovery of the article seized and there is evidence that the sample was sent to the Forensic Science Laboratory and the Forensic Science Laboratory report received showing the article, seized, as ganja, hence, it is contended that the prosecution has been able to prove that the article, seized, was ganja.

8. However, taking into consideration the respective submissions, there is much force in the submission of the learned counsel for the appellants. The prosecution case, as alleged that on the secret information from the Subdivisional Police Officer, the informant proceeded along with the Subdivisional Police Officer and two Constables and spy and they apprehended the vehicle and out of the said vehicle two persons tried to flee away were apprehended and from the vehicle ganja was recovered. The informant, P.W. 7, though have stated that he sealed the ganja in seal cover and sent to malkhana, however, except the informant none has supported the prosecution case regarding the recovery. The two Constables, namely, Nagendra Kumar and Ravi Shanker Rai, have not been examined. Madan Rajak deposed that he has not made any statement before the statement made in Court. Hence, the only witness supported the prosecution case regarding the recovery of ganja is the evidence of P.W. 7. however, the ganja, seized, said to be kept in malkhana, but, neither the same was produced before the Magistrate nor the sample was taken out before the Magistrate and though it is stated that there are 29 packets recovered, but, the sample taken from only one packet and the sample taken was not taken in presence of the Magistrate nor there is any certification of the article nor any certification has been produced regarding the destruction of the article, hence, in such condition non-production of the article, seized, in Court and there is no evidence that the representative sample taken from the article, seized, having been brought on record, hence, it casts a

serious doubt about the recovery and possession of the article.

9. Hence, the order of conviction and sentence, recorded by the trial Court, is **set aside** and both the appeals are **allowed**.

10. Since, both the appellants are in jail, they are directed to be released forthwith, if not wanted in any other case.

(Gopal Prasad, J)

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