

IN THE HIGH COURT OF JUDICATURE AT PATNA

Against the judgment of conviction and order of sentence 09.04.2014 passed by Sri Jagdish Prasad Mishra, the learned 2nd Additional Sessions Judge, Bhojpur, Arrah in N.D.P.S. Case No. 12 of 2011(arising out of Shahpur P.S. Case No. 120 of 2011)

Criminal Appeal (SJ) No.266 of 2014

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Bhim Singh Son of Hareram Singh Resident of Village- Mathurapur, P.S- Koilwar, District- Bhojpur.

.... Appellant

Versus

The State of Bihar

.... Respondent

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Appearance :

For the Appellant : Mr. Uday Kumar, Advocate.

For the State : Mr. Z. Hoda, A.P.P.

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CORAM: HONOURABLE MR. JUSTICE GOPAL PRASAD
ORAL JUDGMENT

Date: 13-05-2016

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

2. The appeal arises out of judgment of conviction and order of sentence 09.04.2014 passed by Sri Jagdish Prasad Mishra, the learned 2nd Additional Sessions Judge, Bhojpur, Arrah in N.D.P.S. Case No. 12 of 2011(arising out of Shahpur P.S. Case No. 120 of 2011) by which the appellant had been convicted for offence under Section 20(b)(ii) (C) of N.D.P.S. Act and sentenced to undergo rigorous imprisonment for ten years and payment of fine of Rs. 1,00,000/- and in default of payment of fine further sentenced to undergo rigorous imprisonment for two years.



3. The prosecution as alleged in the First Information Report that while the informant along with police party on patrolling party reached at Arauli bridge, then he received a secret information on mobile that a green colour pick up van loaded with plastic bucket containing Ganja going to Buxar for sale. On the said information, the informant reached at Billouti Chowk and remained there. At about 3.30 A.M. the vehicle passed through the Chowk then the said vehicle was chased and caught at gas godown. On the said vehicle except driver one person was sitting the vehicle but he managed to flee away. On enquiry, the apprehended driver disclosed his name as Bhim Singh and the person who flee away disclosed his name as Kunal Singh. Since there was no independent witness available due to darkness of night so vehicle was checked by the police party then it was found Ganja kept in concealment inside plastic bucket wrapped in 7 bundles and weight of the one bundle was 10 Kgs. and altogether 70 Kgs. Ganja was recovered. Seizure list prepared on police party signed on it and copy of seizure list was handed over to Bhim Singh. Bhim Singh even after article seized could not produce any licence or paper and disclosed that Kunal Singh is main culprit and he has given this Ganja to him to supply to Buxar.

4. On the written report of Hare Krishna Mandal, the informant, the Officer-in-Charge of Shahpur P.S. had lodged F.I.R.

and investigation was handed over to Santosh Kumar Dubey, P.W. 1. The police after investigation submitted charge sheet on which cognizance taken, charge framed and trial proceeded.

5. During trial three witnesses have been examined. P.W.1 is Santosh Kumar Dubey, I.O., P.W. 2 is Hare Krishna Mandal, informant and P.W. 3 is Sheo Bansh Yadav, a member of the raiding party.

6. P.W. 2 is the informant who has supported the prosecution case in connection with received the information during patrolling, they apprehended the vehicle passing through Billouti Chowk. From the vehicle 7 plastic bucket each containing 10 Kgs. Ganja, total 70 Kgs. Ganja recovered. Seizure list was prepared with the signature of the accused and they brought seized article along with seizure list and the accused and handed over to the Officer-in-Charge of police station. The seizure list had been marked as Exhibit-1, written report had been marked as Exhibit-2 and Formal F.I.R. had been marked as Exhibit-3, but there is no mention that when he sealed the seized article. He has mentioned that he taken the sample from the said article. However, there is no evidence that sample was sealed. P.W. 1 is the I.O. However, his evidence in cross-examination was not worth mentioning about article seized before him nor accused was present before him or seizure list was prepared before him. He has further



stated he had not mentioned in the case diary that before whom he took the sample. He has only stated that he opened the packet and from that packet smell of Ganja was coming out. He had stated that he sent the sample as mentioned in the case diary, but he has not written that sample contained in ganja and what amount of Ganja was recovered. He has further stated that he has produced the sample of seized ganja. P.W. 3, is though, member of the raiding party and only witness with regard to alleged seizure of ganja in the vehicle.

7. The trial court taking into consideration the evidence of witnesses convicted and sentenced the appellant as mentioned above.

8. Learned counsel for the appellant however challenged the order of conviction and sentence recorded by the trial court on the ground that no independent witness has been examined before whom ganja was seized. However, it has noted in the First Information Report itself that since the seizure was made in the night at about 3.30 A.M. and due to darkness in the night, there was no person present there. Hence it has been mentioned that signature of only police witness on the seizure list was taken.

9. Learned counsel for the appellant further submitted that neither article seized nor copy of sample taken out from seized article was produced before the court, nor there is mentioned that whether sample of ganja was taken from the seized packet or packets.



However, F.S.L. report suggests that samples were received in seven packets, but the occurrence took place on 29.06.2011 and sample was sent to F.S.L. as per F.S.L report was on 22.07.2011, but there is no evidence whether article seized on the date of occurrence was sealed. There is no evidence where article was kept from the date of occurrence till the date the sample was sent to F.S.L. It has further been contended that neither article seized has been produced before court nor Malkhana register has been produced nor Malkhana In-charge has been examined nor there is any certification of the Magistrate has been produced nor destruction of the article has been mentioned. Hence contends that failure to produce seized drug before the trial court has doubt the recovery of possession of the article seized from the possession of the appellant and this cast prejudice to the appellant.

10. Learned counsel for the State however submits that there is evidence that police received secret information on which the informant proceeded and apprehended the accused along with ganja. Seizure list prepared and sample was sent to F.S.L. and F.S.L. report suggests that the sample received which was found to be ganja and hence prosecution has been able to prove the charges beyond reasonable doubt.

11. However, taking into consideration the respective

submissions, there is force in the argument of the learned counsel for the appellant, though, learned counsel for the State has submitted that recovery of ganja was made from the possession of the appellant and seizure list prepared and sample sent to F.S.L. which was found to be ganja.

12. However, it is apparent that N.D.P.S. Act is very stringent act which has harsh consequence and serious punishment and hence legislator has taken care of right of the citizen and has prescribed the various safeguards provided that ganja kept in sealed cover and produced before the Magistrate. Section 52 A of N.D.P.S. Act provided “that ganja be produced before the Magistrate and officer 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 of such other identifying particulars of the narcotic drugs or psychotropic substances or the packing which they are packed, country of 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 certifying the correctness of the inventory so prepared or taking in the presence of such Magistrate, photographs of such drugs or substances and certifying such

photographs”

13. However, neither the said article produced before the Magistrate nor certification was done. Further, neither Malkhana register has been produced nor there is any evidence to suggest that sample was taken out of the article seized and hence without compliance of the safeguards and even non-production of the article seized itself cast a serious doubt and it cannot be said to be only procedural irregularity, but it has caused prejudice to the accused which is fatal of prosecution and in this connection learned counsel for the appellant has placed reliance upon decision reported in 2004 X SCC 562 and decision reported in 2013 XIV SCC page 527.

14. Having regard to the fact, order of conviction and sentence recorded by the trial court is not sustainable. Hence, order of conviction and sentence recorded by the trial is hereby set aside.

15. As a result, the appeal is allowed.

16. The appellant is in jail custody be set at liberty forthwith if not required in any other cases.

m.p.

(Gopal Prasad, J)

AFR/NAFR	
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