

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.732 of 2013

Against the judgment of conviction dated 13.08.2013 and order of sentence dated 20.08.2013 passed Shri Shailendra Kumar Pandey, learned 1st First Additional Sessions Judge, Siwan, in Siwan Town Police Station Case No. 33 of 2011/N.D.P.S. Case No. 55 of 2013.

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Sukhari Yadav Son of Sri Daroga Yadav Resident of Village- Gola Ghat Dumri, Police Station- Jogapatti, District- West Champaran (Bettiah).

.... Appellant

Versus

1. The State of Bihar

.... Respondent

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Appearance :

For the Appellant : Mr. Amarendra Nath Verma, Advocate.
Mr. Narendra Kumar, Advocate.

For the State : Smt. Abha Singh, A.P.P.

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CORAM: HONOURABLE MR. JUSTICE GOPAL PRASAD
ORAL JUDGMENT

Date: 11-02-2016

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

2. This appeal arises out of the judgment of conviction dated 13.08.2013 and order of sentence dated 20.08.2013 passed Shri Shailendra Kumar Pandey, learned 1st First Additional Sessions Judge, Siwan, in Siwan Town Police Station Case No. 33 of 2011/N.D.P.S. Case No. 55 of 2013 by which the appellant had been convicted for offence under Section 20 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 for non-payment of fine further

sentenced to undergo imprisonment for one year.

3. The prosecution case as alleged in the First Information Report by the informant that on 31.01.2011 at about 16.00 hours he got telephonic information from the Superintendent of Police, Siwan, to initiate checking of illegal arms at Darbar Maszid. In pursuance of the said direction, the informant, Arbind Kumar, Officer-in-Charge of Dhanauti P.S. under the leadership of S.D.P.O., Siwan proceeded to start checking of the vehicle. During course of checking a Tempo came at Darbar Maszid was apprehended on which two travelers at the tempo started fleeing away, they were chased and caught hold of. On enquiry, they disclosed their names as Rakesh Yadav and Sukhari Yadav and in presence of Badri Prasad and Shailesh Kumar, body of two accused persons were searched. During search, from the possession of one black colour bag on the shoulder of Rakesh Yadav which containing five packets Charas wrapped with polythene sheet containing one kilogram each had been recovered. Further case is that from one black colour bag found on the shoulder of Sukhari Yadav five packets of charas wrapped in yellow colour polythene containing one kilogram each recovered and seized. The further case is that seizure list was prepared with regard to 10 kilogram Charas and both independent witnesses signed on it and copy of seizure list was handed over to the accused persons. Both the accused persons had not

produced any paper with regard to article seized.

4. On the Fardbeyan, a case was registered under Sections 18, 20 and 22 of the N.D.P.S.Act. After lodging of the First Information Report, investigation proceeded. Sample of seized article kept in sealed cover and was sent to F.S.L. On receipt of F.S.L. report charge sheet submitted. Cognizance taken and trial proceeded after framing of the charge.

5. During trial nine witnesses were examined by the prosecution. P.W. 1 Ram Sakal Singh is member of the raiding party and he supported the prosecution case regarding apprehension of the accused persons from tempo. He has further stated that Daroga told that search will made before the Magistrate, if he has no objection search will be made, on which he stated that they themselves searched the two accused persons and from their possession two bags five packets each containing 10 kilogram of charas had been recovered. P.W. 2, is Arbind Kumar, informant in his evidence had stated that after apprehension of the accused persons, on asking them about search before the Magistrate, since the Magistrate was not present, so search was made before two independent witnesses and from their possession of two bags, 5 packets charas each containing 1 kilogram each were recovered separately. Further this witness in his cross-examination has specifically stated the place, where the appellant was



apprehended and on the place articles were seized and before seizing the article, body search of two accused persons was made, even prior to search, and talk was made with the appellant and appellant was communicated that search will be made. P.W. 3, is Ramesh Kumar Mishra had also stated that accused was asked prior to his search and whether he will likely to be searched before a Gazetted Officer and the accused disclosed that he has no objection. P.W. 4 Prem Sagar, he is Officer-in-Charge of Siwan Nagar P.S. had stated that from the search of two persons five packets each were recovered from their possession. He has further stated in paragraph 30 that seized article were kept on his chest and wrapped in their body and articles were seized from their possession. P.W.5 Bachha Kumar Rai, is also member of the raiding party and he had supported about search and seizure. He had also stated that he chased the accused person and catch hold of him. P.W. 6 is Shailesh Kumar, though, he had proved the signature on the seizure list as a seizure list witness, but he had not supported the search and seizure. P.W. 7 Saroj Kumar is I.O. of this case and had stated that he recorded the statement of the witnesses with the permission of the District & Sessions Judge. He sent the sample of seized article to Forensic Science Laboratory, Patna for chemical examination. P.W. 8 Badri Prasad is seizure list witness, though, he had supported his signature on the seizure list, but has not

come to support the seizure list. P.W. 9 is Neetu Pandey, Senior Scientist of Forensic Science Laboratory and had proved the F.S.L. report, marked as Exhibit-6.

6. The trial court taking into consideration the evidence of witnesses that since articles had been seized from the possession of the appellant and in view of search, five kilogram Charas had been recovered from the possession of the appellant, Sukhari Yadav convict. However, case of co-accused Rakesh Yadav had been separated in view of the fact that Rakesh Yadav was a juvenile and his case was transferred to the Juvenile Justice Board. Seized article was sent to F.S.L. and F.S.L. report confirmed the article seized is Charas, convicted and sentenced the appellant as mentioned above.

7. Learned counsel for the petitioner has challenged the order of conviction and sentence recorded on three accounts. It has been submitted that there is violation of Sections 42 and 50 of the N.D.P.S. Act. It has further been submitted that there is also violation of Section 52A of N.D.P.S. Act and hence contends that since the informant who proceeded for search on the basis of information received regarding checking of the vehicle, he did not recorded the Sanha entry and further which is require to take down any information in writing under Section 42(2) of N.D.P.S. Act is require to send a copy thereof to his immediate official superior within seventy-two



hours. It has further been contended that in case personal search, the accused required to be intimated of his right of being search before a Gazetted Officer or a Magistrate and further on the seizure of article, the I.O. is require to place seized article before the Magistrate for certifying regarding article seized before the Magistrate for certifying regarding article seized as per Section 52(2) of N.D.P.S. Act. to record details 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 of origin and other particulars as the officer referred and get certifying the correctness of the inventory so prepared; or taking in the presence of such Magistrate, photographs or such drugs or substances and certifying such photographs as true; or 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. Hence, it is contended that several save guards under the Act had not taken and it is not safe to convict the appellant.

8. Learned counsel for the State however submits that search was made while the appellants were on transiting passing on a vehicle in public place and hence the case does not fall under Section 42 and fall under Section 43 of N.D.P.S. Act. Hence, compliance of Section 42 of N.D.P.S. is not require. It has further contended that, though,



the allegation made in the First information Report about body search, but nothing has been recovered from the body and the question asked whether he want to be searched before a Magistrate or a Gazetted officer and in the First Information Report itself recovery has been made from the bag hanging on the shoulder of the appellant. It has further been contended that search was made and on the spot itself articles seized and sample was taken from the seized article and same was sealed and hence contended that representative sample taken from the seized article and the same was sent and there is sufficient compliance of Section 52A of the N.D.P.S. Act.

9. Having regard to the respective submissions, I proceed to consider the evidence of the witnesses as to whether the prosecution has been able to prove the charges beyond all reasonable doubt.

10. However, under the N.D.P.S. Act there is harsh punishment hence, it required strict compliance of the safeguard provided under the Act. It is true that Section 42 of the N.D.P.S. Act provides that any Officer and authorities under Section 41, 42 and 43 empowered on information has to reason to believe the violation of the Act then he shall take down in writing of the information and Section 42(2) of N.D.P.S. Act provides that when he takes down such information in writing under sub-section (1) or records ground for his belief under the proviso, he shall within seventy-two hours send a copy thereof to

his immediate official superior. Further Section 43 of N.D.P.S. Act provides that any person authorised under Section 42 to act if seized article was narcotic drug or psychotropic substance in public place or in transit.

11. Having regard to the facts and circumstance of the case, there is allegation that the informant received a direction from the S.P., to make out search of the vehicle for disturbance near Darbar Maszid for catching of the criminals in possession of illegal arms. During the checking of the vehicle, the appellant was apprehended along with co-accused while they were in transit going on vehicle on road i.e. public place tried to flee away from the tempo and were caught hold and search was made.

12. Hence having regard to the fact that search was made in a public place while the appellant was in transit and hence Section 42 of the N.D.P.S. act is not applicable and hence compliance of Section 42 of N.D.P.S. Act is not required under the fact and circumstance of the case.

13. However, the next question raised regarding non-compliance of Section 50 of N.D.P.S. Act itself in the First Information Report, it is apparent that body of both the accused were searched and recovery had been made from the bags hanging on the shoulder and it is alleged that five packets each one kilogram of

charas was recovered from the bag of the appellant.

14. So far evidence of witnesses are concerned as mentioned above, though, P.W. 1 had stated that appellant was asked whether he want to be searched before a Magistrate, the appellant did not give any explanation. However, P.W. 2 had also stated that search of the body of the appellant was made and he had stated that since there was no Magistrate so in absence of the Magistrate search was made before two witnesses. Further other witnesses have also stated body was search and the appellant kept the charas having tied on his chest. The witness has also deposed that recovery was made from the bag, so there was some fluctuation in evidence of witnesses. Some one had stated article recovered tied in the chest and some one stated that articles recovered from the bag which was hanging on the shoulder of the appellant. However, witnesses have stated in the First Information Report that body of the appellant was searched. However, Section 50 of N.D.P.S. Act provides when any officer duly authorised under Section 42 is about to search any person under the provisions of Section 41, Section 42 or section 43, he shall, if such person so requires, take such person without unnecessary delay to the nearest Gazetted Officer of any of the departments mentioned in Section 42 or to the nearest Magistrate and Section 50 make its impediment for empowering officer to inform the suspect of his right to be searched

before a Gazetted Officer or a Magistrate and this has been held to be mandatory. The point issued is res-integra well settled.

15. Having regard to the facts that there is evidence that the body of the victim was searched and whatever coming in evidence that witness says that he can be searched before the Magistrate. However, what has been required under Section 50 to inform the suspect of his right to be searched before the Gazetted Officer or a Magistrate. However, there is no evidence that the appellant was informed of his right to be searched before the Gazetted Officer and hence, there is implicit non-compliance of Section 50 of N.D.P.S. Act and since Section 50 of N.D.P.S. act is mandatory and requires strict compliance and non-compliance to the safeguard is mandatory and hence, conviction cannot be recorded under Section 22 of the N.D.P.S. Act. Section 50 of the N.D.P.S. Act has been found non-mandatory and it is well settled in decision reported in **2011 (1) PLJR page 100**. It is also well settled that even if the body search is made then even non-recovery of narcotic drug and psychotropic substance from the body even article seized from the bag hanging on the shoulder for Section 50 of N.D.P.S. not respecting even not aware of the appellant and making search of a person is fatal to the prosecution as has been held in decision reported in **2014 (2) BBCJ (4) page 241**.

16. Hence having regard to the fact order of conviction and

sentence recorded by the trial court is set aside. Accordingly, **the appeal is allowed.**

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

(Gopal Prasad, J)

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