

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.230 of 2014

Against the judgment of conviction, dated 05.04.2014, and order of sentenced dated 11.04.2014, passed by Mr. Abhay Kant Jha, Additional Sessions Judge I-cum-Special Judge, N.D.P.S. Act, Khagaria, in Special Case No.5 of 2010

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1. Bhikho Yadav, Son of Late Ram Khelawan Yadav, Resident of Rajendra Nagar (South) Sanhauli, P.S.-Chitragupt Nagar, District-Khagaria Appellant

Versus

1. The State of Bihar Respondent

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Appearance :

For the Appellant : Mr. Krishna Prasad Singh, Sr. Adv. with
Ms. Meena Singh, Adv.

For the Respondent : Mr. Sujit Kumar Singh, APP

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CORAM: HONOURABLE MR. JUSTICE GOPAL PRASAD

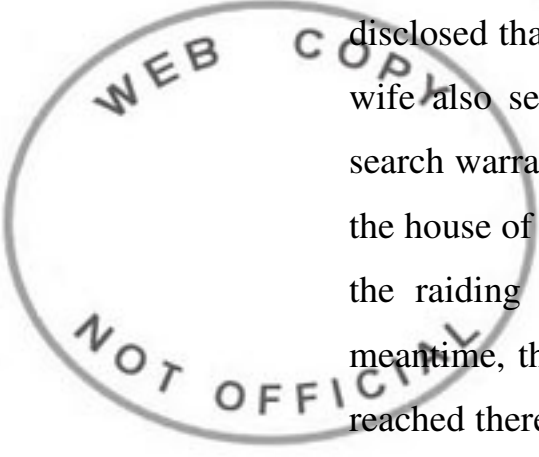
ORAL JUDGMENT

Date: 08-01-2016

Heard the learned counsel for the appellant and the State.

2. The appellant has been convicted under Section 20(C) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as, “the Act”) and sentenced to undergo rigorous imprisonment for ten years and a fine of rupees one lakh and in default of payment of fine to undergo rigorous imprisonment for two years.

3. The prosecution case, as alleged in the first information report, lodged on the basis of self statement of Manoj Kumar, Station House Officer, Khagaria Police Station that on 02.08.2010 as per the direction of the Superintendent of Police, Khagaria, at 05.10 P.M., he proceeded for verification of the secret information after constituting raiding party. The raiding party consists of Shashi Kumar, Sub Inspector of Police, P.W. 1, Ranjee Kumar Rajak, Sub Inspector of Police, P.W. 2, Binod Yadav, Constable, Shanker Sah, Constable, Tulo Prasad Singh, Constable, Prem Shanker Singh, Constable, all not examined. The raiding party proceeded and reached on jeep at 05.50 P.M. at Pakki Road to the north of Khagaria Hospital and, thereafter, saw a person fleeing away from a gumti with a bag and then he apprehended in presence of two independent witnesses, namely, Mukesh Kumar and Dilip Kumar, search was made and from the bag several packets of ganja, each containing 4 gms or 2 gms, in all about 2½ Kgs, were recovered. The person, apprehended, disclosed his name as Bhikho Yadav. He did not



produce any paper with regard to that ganja and so the seizure list was prepared at the place of occurrence and the witnesses signed on the seizure list and one copy of the said seizure list was handed over to the person, named, Bhikho Yadav. During the enquiry Bhikho Yadav disclosed that he used to sell ganja after taking it from his house and his wife also sells ganja at house. Since, time was not there to procure search warrant and there was apprehension that in the meantime ganja at the house of Bhikho Yadav could have been transferred to other place so the raiding party proceeded to the house of Bhikho Yadav, in the meantime, the patrolling party of Chitragupta Nagar Police Station also reached there along with Kiran Kumari, Sub Inspector of Police, P.W. 3, and she was also included in the raiding party, then, they proceeded to the house of Bhikho Yadav. They make a search of the house in presence of two independent witnesses, namely, Mahanand Mandal and Vinod gupta and, thereafter, from the house of Bhikho Yadav, huge quantity of ganja in packets and loose gunny bags were recovered, five packets of ganja were wrapped in plastic punni, each containing about 16 Kgs, with a total of 80 Kgs, and again six red and four blue packets in plastic punni, each containing about 8 Kgs in all about 80 Kgs and from the northern room of Neelam Devi, wife of Bhikho Yadav, packets were seized and 23 Kgs ganja was also recovered in gunny bag and in another gunny bag in all about 5 Kgs ganja also recovered from the other room of Bhikho Yadav and Neelam Devi. Further about rupees one lakhs, in cash, which is alleged to have been proceeds of selling of ganja, recovered. Two mobile phones were also recovered for which the seizure lists were prepared. Bhikho Yadav disclosed that one Sikandar Singh brings ganja from Nepal and keeps in the house of Bhikho Yadav and they sell ganja in partnership. Ganja is being brought from Nepal at the rate of Rs.150/- per kilogram and sells here at the rate of Rs.2,000/- per kilogram and Sikandar Singh disclosed that he and his father had been to jail for several times.

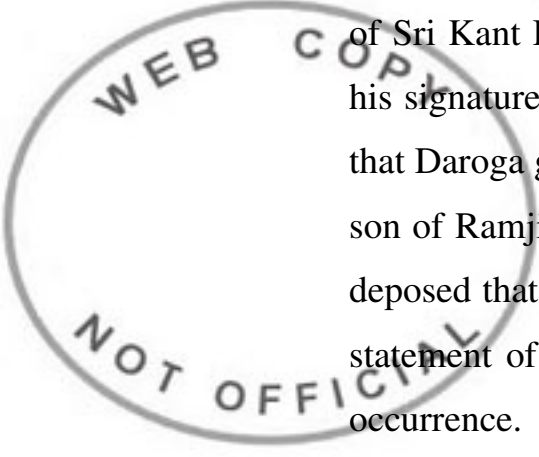
4. The written report of the informant was forwarded to the Station House Officer, Khagaria Police Station, for instituting a case and it was ordered that Mukesh Kumar, Station House Officer, Chitragupta

Nagar Police Station, will investigate the case. On the basis of the written report first information report lodged and investigation proceeded.

5. During the investigation, the investigating officer, P.W. 2, Ranjeet Kumar Rajak, recorded the statement of the witnesses, inspected the place of occurrence and sent the sample to the Forensic Science Laboratory for chemical examination and after completion of investigation submitted the charge sheet.

6. After the submission of the charge, cognizance taken, the trial proceeded after framing of the charge against three accused persons, the appellant as well as Nellam Devi and Sikandar Singh.

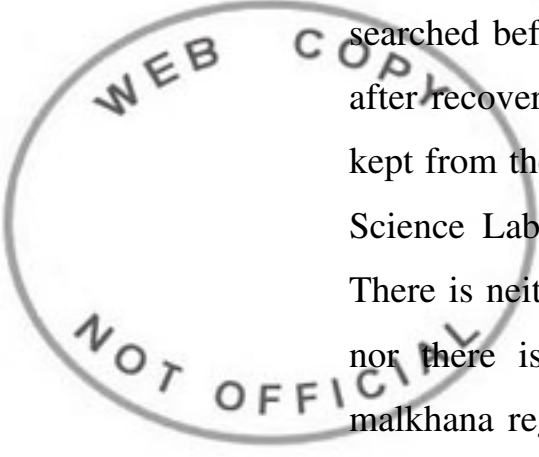
7. During the trial, twelve witnesses were examined by the prosecution. P.W. 1 is Shashi Kumar, member of the raiding party, supported the prosecution case regarding the recovery of ganja from the possession of Bhikho Yadav while he was fleeing away from the gumti as well as recovery of ganja from the house of Bhikho Yadav. P.W. 2, Ranjeet Kumar Rajak, and P.W. 3, Kiran Kumari, are also members of the raiding party and have supported the prosecution case regarding the recovery of ganja from the jhola of Bhikho Yadav as well as from his house. P.W. 4 is Mahanand Mandal though he is a seizure list witness and has proved his signature on seizure list, marked as Exhibit 1, but, has denied that any search made before him and asserted to have signed on a plain paper and this witness has been declared hostile by the prosecution. P.W. 5, Dilip Kumar, is another seizure list witness, has also been declared hostile and has not supported the prosecution case regarding the recovery of another ganja in the gumti of Bhikho Yadav though he has proved his signature on the seizure list, but, he stated that seizure list not prepared before him. P.W. 6, Binod Kumar Sao, is again a seizure list witness and has been declared hostile and has not supported the prosecution case regarding the recovery of ganja from the house of Bhikho Yadav. P.W. 7 is Rajesh Yadav. He has come to depose that he does not have any knowledge about the occurrence and police has not recorded his statement. He has also been declared hostile and cross-examined. P.W. 8 is Ram Sagar Yadav. This witness has also been



declared hostile as has not supported the prosecution case though he has supported the prosecution case regarding the fact that police came at the house of the appellant, entered into the house and returned back, but, he does not know what for police had come. P.W. 9, Mukesh Kumar, son of Sri Kant Das, is again a witness of seizure list though he has proved his signature on seizure list and in his cross-examination. He has stated that Daroga got his signature on plain paper. P.W. 10 is Mukesh Kumar, son of Ramji Mahto. He is the investigating officer of the case and has deposed that after taking the charge of the investigation, he recorded the statement of Manoj Kumar and other witnesses, inspected the place of occurrence. There are two places of occurrence in the case, one is gumti and another is house and, further, deposed that he sent the seized ganja to Forensic Science Laboratory, thereafter, submitted charge sheet. P.W. 11, Madhav Kumar, produced the seized ganja in 18 packets weighing about 188 Kg and in one bag of about 2½ Kg and he also produced eight bundles of notes of Rs.100/- denomination, which is in all Rs.80,000/- and 52 notes of Rs.100/- denomination and three notes Rs.1000/- denomination, 24 notes of Rs.500/- denomination, 6 notes of Rs.50/- denomination and these include about rupees one lakh, Eighteen bundles of ganja were marked as Exhibits 1 to 18 and the bundle of notes, worth rupees one lakh, was marked as Exhibit 19. In cross-examination he has stated that the number of the notes have not been mentioned in the seizure list and he, again, say whether or not the notes or the rupees seized are counterfeit or genuine notes. P.W. 12 is Kamal Yadav, an Advocate Clerk, proved the formal first information report, marked as Exhibit 2.

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

9. The learned counsel for the appellant challenged the order of conviction and sentence, recorded by the trial Court. It has been contended that there is no compliance of Sections 42 (1) and (2) of the Act. It has, further, been contended that the raid was conducted in the house as well as in the gumti after the sun-set and before the sun-rise and



it was apparent that the raid was conducted after 07.30 P.M., but, the reasons have not been recorded. It has, further, been contended that there is non-compliance of Section 50 of the Act as though the recovery made from the jhola, but, accused was not made aware of his right to be searched before a gazetted officer. It has, further, been contended that after recovery of the article, there is no mention where the article was kept from the time of the seizure till sending the sample to the Forensic Science Laboratory or taking out the sample from the seized article. There is neither any mention that the articles were kept in sealed cover nor there is any evidence where the article was kept, neither the malkhana register has been proved nor there is any other evidence. It has, further, been contended that there is no mention whether the sample was taken from each of the seized packets nor there is any mention that what amount was taken out from the seized article for sampling as the investigating officer has not whispered, where the seized article has been kept nor there is compliance of Sections 50, 52A, 55 and 57 of the Act, hence, it has not been specifically mentioned that how sample were taken and sent to the Forensic Science Laboratory specifically with regard to each samples, hence, it can well be conferred that the prosecution has not been able to prove the charges beyond reasonable doubt and the appellant is entitled to benefit of doubt. It has, further, been contended that the informant has not been examined in the case, hence, there is none to depose that whether the secret information received was recorded in writing nor there is any evidence to suggest whether the compliance of Sections 42(1) and (2) of the Act were made. There is no evidence, in this regard, whereas Section 42 of the Act has been held to be mandatory.

10. The learned counsel for the State, however, contends that there is material evidence to suggest, as per the evidence of P.W. 3 that the articles were seized at the place of occurrence and the seized articles were sent to Police Station as per the evidence of P.W. 3 and as per the evidence of P.W. 10, the investigating officer, that the articles were sent to Police Station, hence, must have been kept well and there is evidence of investigating officer that the samples sent to the Forensic Science

Laboratory from the article seized and the report of the Forensic Science Laboratory suggests that the articles seized were ganja.

11. Hence, having regard to the respective submissions, the question for consideration whether the prosecution has been able to prove the charges.

12. The first point raised by the learned counsel for the appellant is the violation of Section 42 of the Act. The prosecution case alleged that the police on secret information or as per the direction of the Superintendent of Police, Khagaria, constituted a raiding party for verification of the secret information, however, the informant has not been examined in the case and there is no evidence in the evidence of the other witnesses whether the information, received, was recorded.

13. However, Section 42 of the Act provides that any officer, which has been empowered if a person records information about or belief about commission of offence has to take down in writing regarding the offence committed under this Act shall enter into the house in between the sun-rise and sun-set to seize the drugs and substance, but, in case for entering the house in between sun-set or sun-rise he is either to take a warrant or record reasons for entering the ground of his belief. Section 42 of the Act provides that the information first required to be recorded in writing and, thereafter, if it is a period in between sun-set and sun-rise recording a ground for entering into the house. Section 42 of the Act provides that the information received regarding the commission of offence under the Narcotic Drugs and Psychotropic Substances Act, 1985, reason to be recorded in writing and, thereafter, if it is a period in between sun-set and sun-rise, then, either search warrant be taken or recording a ground for entering into the house. Section 42(2) of the Act provides that if a person take down the information in writing or records ground under the proviso to sub section (1) of Section 42 of the Act, then, as per Section 42(2) of the Act he shall within 72 hours sent a copy thereof to an immediately superior. However, neither there is compliance of Sections 42(1) nor 42(2) of the Act. In the entire evidence, neither the witnesses have stated regarding the compliance of Section 42(1) of the Act nor there is any evidence regarding the

compliance of Section 42(2) of the Act, which is specifically held to be a mandatory provision and the non-compliance of said provisions are said to be fatal to the prosecution. However, in the first information report the informant himself has stated that he got an information and direction for raid and, then, he proceeded for verification of the secret information. The informant has not been examined and there is no evidence to suggest that whether the compliance under Sections 42(1) or (2) of the Act has been made or whether a sanha entry was made with regard to the secret information received by informant nor there is any evidence that any grounds was recorded before entry into the house for search and seizure after the sun-set as enshrined in Section 42(1) of the Act as the occurrence alleged to be of 07.30 P.M., after sun-set, nor there is any evidence regarding the compliance of Section 42(2) of the Act that is the information about seizure and arrest has been reported after 72 hours to immediate senior officer. However, it is apparent that the informant has not been examined to the compliance of Sections 42(1) or (2) of the Act.

14. However, the prosecution case that the article seized was given to the investigating officer on the same day after two hours, of the search and seizure, the investigating officer has not whispered where he kept the said article.

15. The learned counsel for the State have pointed out that in the evidence of P.W. 3 she has stated that the article seized was taken to Police Station, however, there is no evidence that where it has been kept. From strict scrutiny of the evidence of P.Ws. 1, 2 and 3, who are seizure list witnesses as well as the evidence of investigating officer, P.W. 10, I find that there is no evidence where the articles were kept or the articles seized were sealed in a seal cover at the Police Station nor there is any whisper that the articles seized were kept in malkhana of Police Station, however, the articles were produced in Court, but, there is no mention that from where these articles were produced, neither the malkhana register has been proved or produced in Court nor there is any evidence that where the articles were seized. More over, there is no compliance of Section 52 A of the Act, which provides that narcotic drugs and

psychotropic substance seized forwarded to the Officer-in-Charge of the nearest Police Station or to the officer empowered under Section 53 of the Act, shall prepared an inventory of such narcotic drugs and psychotropic substance containing such details relating to their description, quality, quantity, mode of packing, marks, numbers or such other identifying particulars of the narcotic drugs and psychotropic substance or the packing in which they are packed and, further, the investigating agency may make an application to any Magistrate for the purpose of (a) certifying the correctness of the inventory so prepared, (b) taking the photographs of such drugs or substance in presence of the Magistrate and certifying such photographs as true and (c) allowing to draw representative samples of such drugs or substance and certifying the correctness of any list of sample so drawn. However, no such certification has been proved or produced before the Court and so there is apparent violation of Section 52A(2) of the Act.

16. Section 55 of the Act provides that the Officer-in-Charge of the Police Station shall take charge and keep in safe custody, all articles seized under this Act within the local area of that Police Station 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 that either the articles seized were kept with the seal of the Officer-in-Charge of the Police Station or there is any evidence that the samples were sent with the seal of the Officer-in-Charge of the Police Station, hence, there is no compliance of Section 55 of the Act.

17. Section 57 of the 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 of seizure to his immediate official superior. However, there is no evidence that there is any compliance of Section 57 of the Act.

18. Hence, it is apparent that there is non-compliance of

Sections 42(1) and (2) of the Act as well as Sections 52, 55 and 57 of the Act.

19. The learned counsel for the appellant, however, contends that there is violation of Section 50 of the Act. It is well settled that the compliance of Section of Section 50 of the Act is not required in case when the recovery has not been made from the person of the appellant. However, here in the facts and circumstances the recovery has been made from jhola or house so Section 50 of the Act is not applicable. Hence, there is no merit in the submission that there is any violation of Section 50 of the Act.

20. However, having regard to the fact that since there is clear violation of Sections 42(1) and (2), 52A, 55 and 57 of the Act there is no evidence at all how the sample was taken from the seized article or whether the sample were sealed with the seal of the Officer-in-Charge of the Police Station or not. There is no mention that whether the articles were kept from the date of seizure till taking sample of the seized article and the malkhana register has also not been proved.

21. I find and hold that the prosecution has not been able to prove the charges beyond reasonable doubt. The order of conviction and sentence, recorded by the trial Court is **set aside** and the appeal is **allowed**. Since, the appellant is in jai, he is directed to be released forthwith, if not wanted in any other case.

(Gopal Prasad, J)

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