

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.178 of 2015

Against the judgment of conviction dated 29.01.2015 and order of sentence 30.01.2015 passed by Sri Jitendra Kumar dubey, the learned Additional District & Sessions Judge-Vth, West Champaran, Bettiah, in Trial No. 57 of 2010, Subhadra P.S. Case No. 33 of 2010/ /N.D.P.S.Case No. 36 of 2010.

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Kashi Ram, Son of Late Ramjash Ram @ Ramjas Ram, Resident of village-Barwa, P.S.- Dhanaha, Dist.- West Champaran

.... Appellant

Versus

The State of Bihar

.... Respondent

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Appearance :

For the Appellant : Mr. Ajay Kumar Sharma, Advocate.
Mr. Shyam Kumar Singh, Advocate.
For the State : Mr. Sujit Kumar Singh, A.P.P.

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CORAM: HONOURABLE MR. JUSTICE GOPAL PRASAD
ORAL JUDGMENT

Date: 17-02-2016

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

2. This appeal arises out of the judgment of conviction dated 29.01.2015 and order of sentence 30.01.2015 passed by Sri Jitendra Kumar dubey, the learned Additional District & Sessions Judge-Vth, West Champaran, Bettiah, in Trial No. 57 of 2010, Subhadra P.S. Case No. 33 of 2010/N.D.P.S.Case No. 36 of 2010 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. Further convicted for offence under Section 22 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 rigorous imprisonment for one year and further convicted for offence under Section 23C of N.D.P.S. Act and payment of fine of Rs.1,00,000/- and for non-payment of fine further sentenced to undergo rigorous imprisonment for one year. Further ordered, all the sentences to run concurrently.

3. The prosecution case as alleged in the First Information Report that the informant Chakpu Tamar along with Officers of S.S.B, B.O.P while patrolling in the night at Pillar No. 433/78, got information about smuggling of Ganja through the way and so they wait at Pillar No. 433/78 keeping watch over it. At about 1.00 A.M. in the night they heard sound that some persons coming from Nepal through the way and when they came in their range, the informant asked them to stop, but they were taking advantage of darkness of night, started fleeing away thrown away articles which were carrying from their gunny bags. On chase of Nakka party, one person caught hold by them and on asked, he disclosed his name as Kashi Ram. Thereafter, Nakka party called two persons namely Hardayal Singh and Gomar Sora as independent witnesses and in their presence 22

plastic packets of Ganja was recovered which was left by the persons who were fleeing away and total weight of seized Ganja was about 397 kilogram. The arrested person discloses his name as Kashi Ram and he did not able to produce any paper so he was apprehended. Seizure list was prepared.

4. The investigation proceeded. During investigation, charge sheet submitted on which cognizance taken. Thereafter, trial proceeded after framing of the charge. During trial, five witnesses were examined by the prosecution. P.W. 1 Suresh Bhatt is Constable of S.S.B. who was member of the raiding party, P.W.2 Gomar Sora is constable of S.S.B and also member of the raiding party, P.W.3 Hardayal Singh is constable of S.S.B. and also member of the raiding party. P.W.4, is Manoj Kumar Pathak, is Officer-in-Charge of Subhadra P.S. and also I.O. of the case taking charge of investigation on 12.07.2010 after part investigation have been done by his predecessor Priya Ranjan, the erstwhile Officer-in-Charge. P.W.5 Chakpu Tamar who was posted on the date of occurrence on 06.05.2010 as Head Constable of B.O.P. Matujala. The documentary evidence adduced as Exhibit-1 is Seizure list, Exhibit-2 is written report and Exhibit-3 is F.S.L. report.

5. The trial court taking into consideration the evidence of witnesses both oral and documentary holding that witnesses have

supported the prosecution case about recovery of Ganja and one person was apprehended with Ganja taking on his back and in view of evidence of witnesses and in view of F.S.L. report that sample was sent from seized article convicted the appellant for illegal possession of Ganja and carrying for smuggling as mentioned above.

6. Learned counsel for the appellant however challenged the order of conviction and sentence recorded by the trial court. It is contended that though, there is allegation of 22 plastic packets of Ganja which is weight of 397 kilogram had been recovered and seized, but seized Ganja had not been produced in court. There is neither certification of the Magistrate about article seized has been produced nor there is mentioned that where the seized Ganja was kept. It is further submitted that neither Malkhana register had been produced nor there is evidence that Ganja seized was sealed with the seal of Officer-in-Charge of police station nor there is evidence that the sample was taken from seized Ganja in gunny bag. It is further submitted that neither sample was taken before the Magistrate with certification of article seized nor sample taken before the appellant from the said Ganja seized from the possession of the appellant. It has further been contended that there is violation of Section 52A, 55 and 57 of N.D.P.S. Act. Since sample had not been taken before the Magistrate in compliance of Section 52A of N.D.P.S. Act and there is

no evidence that when sample was taken and where seized Ganja was kept from the time or the date of seizure to the date of sample taken.

7. From perusal of the record itself appears that occurrence took place on 06.05.2010 and sample as per F.S.L. report send vide Memo No. 1041 dated 18.05.2010. However, there is no evidence that where Ganja was kept from 06.05.2010 the date of occurrence to 18.05.2010 the sample was taken and there is no evidence that the said Ganja was kept in seal cover.

8. Learned counsel for the State however contends that there is evidence of witnesses P.Ws. 1, 2 and 5 that Ganja was seized from the possession of the appellant and seizure list was prepared. The evidence of P.W. 5 the informant had stated that Ganja was sent for chemical examination and F.S.L. report indicates that the sample sent for chemical examination was Ganja. Hence the prosecution has been able to prove the charges against the appellant.

9. With respective submissions, I proceed to consider whether the prosecution has been able to prove the charges beyond reasonable doubt. However, P.Ws. 1, 2, 3 and 5 were members of the raiding party and their evidence only to the effect that while they were watching in Pillar No. 433/78 they heard sound that some one coming from the side of Nepal towards India, when the accused persons reached in their vicinity, they chased and catch hold of the appellant,



but other accused persons had fled away throwing away their gunny bags and from the gunny bags 22 plastic bags which containing 397 Kilogram of Ganja was recovered. Thereafter, seizure list was prepared. However, P.W.5 had asserted that he smell Ganja by making a hole in the gunny bags. However, P.W.5 is not an expert and is a member of raiding party who seized Ganja. However, this witness in paragraph 16 stated that Ganja was sent for chemical examination. However, there is no mentioned that how the sample was taken from the article seized. There is no mentioned where sample was taken from article seized. There is no evidence that seized article was sealed at the time of seizure or before any Magistrate after seizure of the article seized for certification regarding description, quality, quantity, mode of packing, marks, numbers of 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 as provided under Section 52A in sub-section (1) for the identity of the narcotic drugs or psychotropic substances in any proceedings under this Act nor make an application, to any Magistrate for the purpose of—

- (a) certifying the correctness of the inventory so prepared; or
- (b) taking in the presence of such Magistrate, photographs of such drugs of substances and certifying such photographs

as true; or

(c) 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.

10. However, there is neither any evidence that who took the sample and in what manner and who sent it to Forensic Science Laboratory and whether the seized article produced before the Magistrate or not. Furthermore, whether sample was taken from the article seized. There is neither any evidence who took the sample and who sent it and whether the sample taken from the seized Ganja or not whatsoever where the said Ganja was kept. Further, neither the seized Ganja was produced in court nor any Malkhana register was produced showing the place where the Ganja was kept and hence there is violation of Section 52 of N.D.P.S. Act. However, the second I.O. who submitted charge sheet has been examined as P.W. 4, but the first I.O. who initiated the investigation and investigated the case is material particular has not been examined in this case.

11. Having regard to the fact, that the Act itself draconian act having harsh and serious consequence so the safe guard provided is required to be strictly followed but the same having not been complied and it is not proper to convict the appellant on the evidence when there is no evidence that where the seized Ganja was kept and

who took the sample and whether sample taken from the seized article and neither seized Ganja had been produced before court nor certification of the said Ganja with photographs of the same had been produced before the trial court.

12. In the result, the conviction of the accused-appellant and the sentence passed against him by the judgment and order, under appeal, is not sustainable and set aside. **The appeal is allowed.**

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

m.p.
N.A.F.R.

(Gopal Prasad, J)

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