

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No. 762 of 2015

Against the judgment of conviction dated 08.06.2015 and order of sentence dated 11.06.2015 passed in Special Case No. 07 of 2009/R-722/14 arising out of Fatuha P.S. Case No. 38 of 2009 by Sri Satya Prakash, the learned 6th Additional Sessions Judge, Patna

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Gyanchand Rai @ Gyan Chand Rai, S/o Late Haribansh Rai, R/V - Jethuli, P.S. - Fatuha, Distt - Patna

.... Appellant

Versus

The State of Bihar

.... Respondent

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Appearance :

For the Appellant : Mr. Vijay Kumar Sinha, Advocate
Mr. Arvind Kumar Srivastava, Advocate
Mr. S. K. Bhatnagar, Advocate
Mr. S. S. Prasad, Advocate
Mr. Mithilesh Kumar, Advocate
For the Respondent : Mr. Z. Hoda, A.P.P.

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CORAM: HONOURABLE MR. JUSTICE GOPAL PRASAD

ORAL JUDGMENT

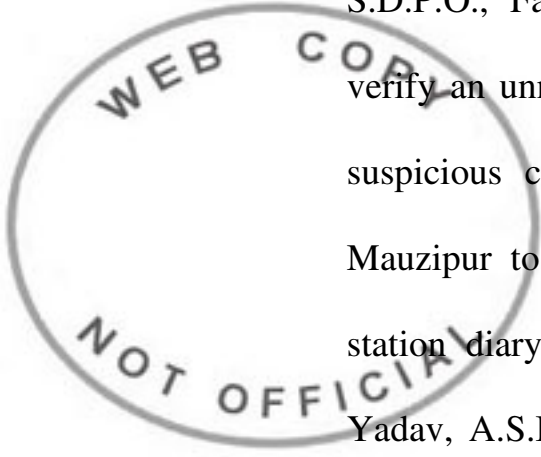
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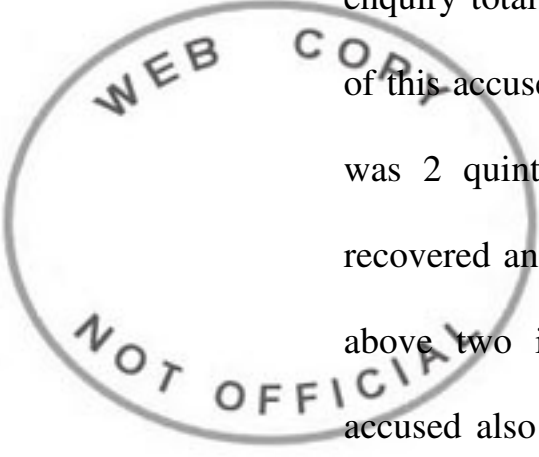
Heard learned counsel for the appellant and the State.

2. The appellant has been convicted under Section 20(b)(ii)(C) of the Narcotics Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the “NDPS Act”) and sentenced to undergo rigorous imprisonment for ten years with a fine of Rs.1,00,000/- (one lac) and in default of payment of fine further to undergo simple imprisonment for one year.

3. The prosecution case, as alleged in the First Information Report drawn on the basis of self statement of the informant S.I. Amar Nath Tiwary (not examined) of Fatuha Police Station recorded on 13.02.2009 at about 3:00 p.m. at village Mauzipur Khandha within the

jurisdiction of Fatuha Police Station is that at about 10:00 a.m., the S.D.P.O., Fatuha had given telephonic information to immediately verify an unnumbered Marshal vehicle with articles which is lying in suspicious condition near west of Railway Bridge in the way of Mauzipur to Vikrampur. Upon information, the informant instituted station diary and rushed there with his associates, S.I. Rama Kant Yadav, A.S.I. Arjun Prasad, A.S.I. Ram Chandra Prasad, A.S.I. Hira Lal Das along with his armed forces and when he reached there he did not find the said vehicle on the road but he found that 6-7 persons were keeping bags on their head and going towards north Mauzipur Khanda. The informant followed them with his associates and told them to stop but they threw their bags in the wheat field and started to flee in which one person, namely, Gyanchand Rai @ Gyan Chand Rai (the appellant) was caught and arrested by the police and he told that on 13.02.2009 at about 8:30 a.m. one Bijay Rai engaged him along with other five labourers for carrying Ganja on remuneration of Rs.500/- each. He has no knowledge about the said laboures. Bijay Rai told him to pull down the bags from Marshal jeep and to carry the said bags towards Mauzipur Khanda. It has been further stated that other accused persons had fled away and this accused was caught by the police with bag. In the meantime, the S.D.P.O., Fatuha also reached there. All the seven bags were recovered and seized in presence of two independent





witnesses, namely, Shiv Shankar Rai and Raj Hans Rai and during enquiry total 23 packets of Ganja were recovered from the possession of this accused, in total seven bundles bags. The total Ganja recovered was 2 quintals 70-75 Kgs. in seven bags. The seized Ganja was recovered and accordingly the seizure list was prepared in presence of above two independent witnesses. Both witnesses signed and the accused also put his Left Thumb Impression on the seizure list and a copy of seizure list was given to the accused. Just after that S.I. Rama Kant Yadav raided the house of Kapildeo Rai and found a girl, namely, Priyanka Kumari fleeing away a carry-bag with but she was caught by the police and after inquiry Rs.79,000/- were found in the bag. It was also seized by the police and accordingly the seizure list was prepared in presence of two independent witnesses, namely, Shiv Kumar and Girdhari Gop. The said cash was with regard to the sale of Ganja. The seizure list was also signed by Priyanka Kumari and copy of seizure list was given to her. The accused Kapildeo Rai had escaped from his house. It has been stated that according to the statement this Kapildeo Rai was also with the bags of Ganja in the Marshal jeep.

4. On the self statement, the First Information Report was lodged and after procuring the investigation, charge-sheet was submitted. After submission of the charge, cognizance was taken, charge was framed and trial proceeded. During trial, five witnesses

were examined on behalf of the prosecution.

5. The trial Court taking into consideration the evidence of the witnesses that Ganja was seized from the possession of the appellant and witnesses have supported the prosecution case regarding the recovery of Ganja for which seizure list was prepared and further taking into consideration the report of the Forensic Science Laboratory, Ext.5, convicted the appellant and sentenced as mentioned above.

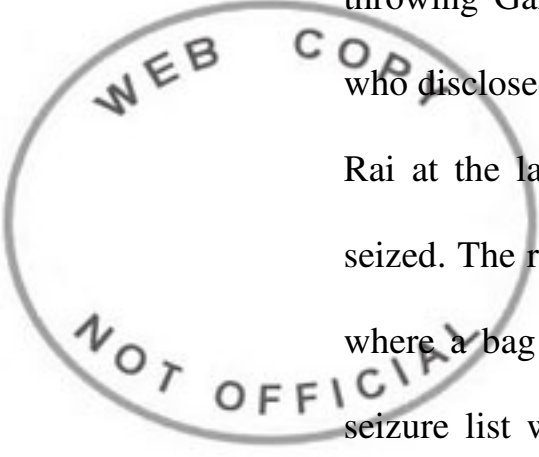
6. Learned counsel for the appellant challenged the judgment of conviction and order of sentence recorded by the trial Court. He has been contended that the Ganja was seized from the field though the appellant has been apprehended, but there is no evidence that the appellant has got knowledge of the Ganja in gunny bag and further there is non-compliance of Section 50 of the NDPS Act. It has further been contended that as per the allegation itself, the appellant had stated that he was engaged for carrying the Ganja by one Bijay Rai and that Kapildeo Rai had taken the rest of the Ganja on the vehicle and hence, since the Ganja belonged to Kapildeo Rai and not to the appellant hence, it can be held that the appellant was in conscious possession and had knowledge about the Ganja in the gunny bag.

7. Learned counsel for the State, however, contended that the Ganja was being carried out by the appellant who was apprehended by the police while the appellant was fleeing away after throwing the

Ganja in the wheat filed and on arrival of the police the persons carrying the Ganja threw gunny bags and started fleeing away and only the appellant was apprehended and the conduct itself showed that the appellant had knowledge about the Ganja in the gunny bag.

8. However, going into the entire records, it is apparent that the informant of the case has not been examined. P.Ws.2, 3 and 5 are the members of the raiding party. P.W. 4 is said to be the independent witness before whom the search and seizure were allegedly made. The witnesses have supported the prosecution case in the first part that on secret information the informant along with the raiding party proceeded to the place of occurrence and saw the seven persons, but did not find the marshal jeep and then the police challenged and apprehended one out of the seven persons carrying gunny bags on their heads containing Ganja and while fleeing away one person (the appellant) threw the gunny bag containing Ganja was apprehended and the seizure list prepared.

9. However, the investigation was handed over to P.W.1 Rama Kant Yadav who is the Investigating Officer and a member of the raiding party and he has supported the prosecution case regarding the information received and thereafter he proceeded to the place of occurrence after recording the statement in the station diary and when they reached they saw seven persons going along with Ganja bag on



their heads and when they were chased they started fleeing away throwing Ganja in the wheat field and one person was apprehended, who disclosed that they were carrying the Ganja at the instance of Vijay Rai at the labour cost of Rs.500/- and thereafter the guuny bag was seized. The raid was also conducted in the house of Kapildeo Rai from where a bag containing Rs.79,000/- was recovered and thereafter the seizure list was prepared regarding the articles seized in presence of two independent witnesses Shiv Kumar (not examined) and Girdhari Gop (not examined). This witness has stated that the accused person was brought to the police station and the seized articles were kept in the Malkhana. He has further stated that during the investigation, he recorded the further statement of the witnesses, inspected the place of occurrence, recorded the statements of the witnesses and sent the sample of the seized Ganja to the Forensic Science Laboratory and he has proved the letter given to the Court marked as Ext.4. The other witnesses i.e. P.Ws. 2, 3 and 5 have also supported the prosecution case regarding the recovery of the Ganja, preparation of the seizure list and apprehension of the accused-appellant.

10. P.Ws. 2, 3 and 5 are members of the raiding party and their evidence is only to the effect of the recovery of Ganja from the gunny bags and they apprehended the appellant, prepared seizure list for seizure of Ganja in gunny bags and then brought the Ganja and the

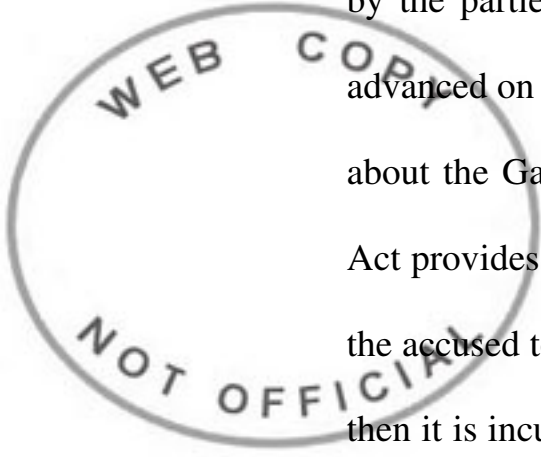
arrested accused to the Police Station and the evidence of P.W.1 is that he kept Ganja in Malkhana and took sample and sent the same to the Forensic Science Laboratory.

11. However, from the evidence, it is apparent that the Ganja seized has not been produced before the Court. Though, it is stated that seized Ganja was kept in Malkhana, but neither the Malkhana register has been produced and proved in the case nor there is any certification of the Magistrate under Section 52A of the NDPS Act. There is neither any evidence that the article seized was sealed with the seal of the Officer-in-Charge of the Police Station. The independent witness also has not supported the search and seizure.

12. Section 52A of the NDPS Act provides that the person authorized under the NDPS Act shall produce the article seized before the Magistrate for certification of the article seized after making inventory of such narcotic drugs or psychotropic substances, mode of packing, the origin of the country but neither the article seized was produced before the Magistrate nor the representative sample taken before the Magistrate nor the article seized or sample taken was sealed with the seal of the Officer-in-Charge of the Police Station nor the report sent to the Superior Officer. Hence, there is violation of Section 52A, 55 and 57 of the NDPS Act

13. However, taking into consideration the entire facts and

circumstances of the case and the evidence and the submissions made by the parties, it is apparent that there is no merit in the submission advanced on behalf of the appellant that the appellant has no knowledge about the Ganja in the gunny bag. However, Section 54 of the NDPS Act provides presumption from possession of illicit articles and it is for the accused to take the defence that he had knowledge of the possession then it is incumbent on the appellant to prove that he has no knowledge as the presumption is in favour of the appellant. However, safeguard provided to the accused has not been complied with that the articles seized are required to be sealed with the seal of the officer-in-charge and the representative sample is required to be taken before the Magistrate and further the articles seized were also to be produced before the Magistrate for certification of the articles. However, neither the articles seized were produced before the Magistrate nor the representative samples were taken before the Magistrate and there is no evidence whether the sample was taken from each of the packets of the seized articles in seven gunny bags. The article has neither been produced before the Court nor before the Magistrate, nor certification of the Magistrate has been made, nor the photographs of the said articles were taken and though it is stated that the articles seized were kept in Malkhana, but neither the Malkhana-In-Charge nor the Malkhana register has been produced, nor the articles seized have been



produced, nor there is any report of the destruction of the article has been produced. It is true that the provisions contained in Sections 52A and 55, 57 of the NDPS Act are not mandatory but are directory. The variation of these provisions would not ipso facto violate the trial. However, the Investigating Officer cannot ignore these provisions and such failure will have bearing on an appreciation of evidence regarding the arrest of the accused and seizure of the article.

14. However, having regard to the fact that the articles seized have not been produced in Court nor any certificate of the Magistrate has been produced nor articles seized were sealed nor the Malkhana register was produced and brought in evidence nor the representative sample was taken before the Magistrate and it casts serious doubt on prosecution to prove the charges as taking into consideration the stringent punishment under the NDPS Act and the Act itself provided the safeguard and the safeguard provided under the NDPS Act has not been complied and hence, the conviction on the basis of this evidence without adhering to the safeguard it is neither proper nor reasonable to convict the appellant and the appellant is entitled to get benefit of doubt and I give the appellant benefit of doubt and hence, the judgment of conviction dated 08.06.2015 and order of sentence dated 11.06.2015 passed in Special Case No. 07 of 2009/R-722/14 arising out of Fatuha P.S. Case No. 38 of 2009 by Sri Satya Prakash, the learned 6th

Additional Sessions Judge, Patna are hereby set aside and the appeal is allowed. Since the appellant, namely, Gyanchand Rai @ Gyan Chand Rai, is in jail, he is ordered to be released forthwith if not required to be detained in any other case.

(Gopal Prasad, J)

Kundan

AFR/NAFR	NAFR
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