

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.753 of 2015

Against the judgment of conviction, dated 28.07.2015, and order of sentence, dated 29.07.2015, passed by Mr. Satish Chandra Srivastava, Additional Sessions Judge, I, Saran at Chapra, in N.D.P.S. Case No. 11 of 2011 arising out of Amnour P.S. Case No. 101 of 2011, G.R. No. 4269 of 2011

Dilip Singh, son of Late Dhurdev Singh, Resident of village Sar Narayan Amnor, P.S. Amnor, District - Saran at Chapra Appellant

Versus

The State of Bihar Respondent

Appearance :

For the Appellant : M/S Naresh Dixit & Brij Bihari Tiwari, Advs.

For the Respondent : Mr. Bipin Kumar, APP

CORAM: HONOURABLE MR. JUSTICE GOPAL PRASAD

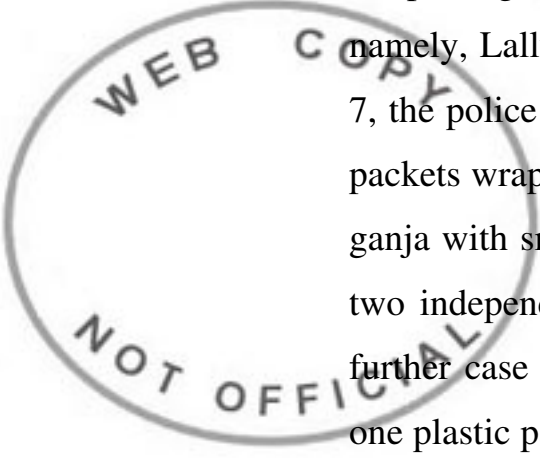
ORAL JUDGMENT

Date: 24-06-2016

Heard the learned counsel for the appellant and the State.

2. The appellant has been convicted under Sections 20(b)(ii)(c) and 22(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 for each of the offences and in default of payment of fine, further, sentenced to undergo simple imprisonment for three years.

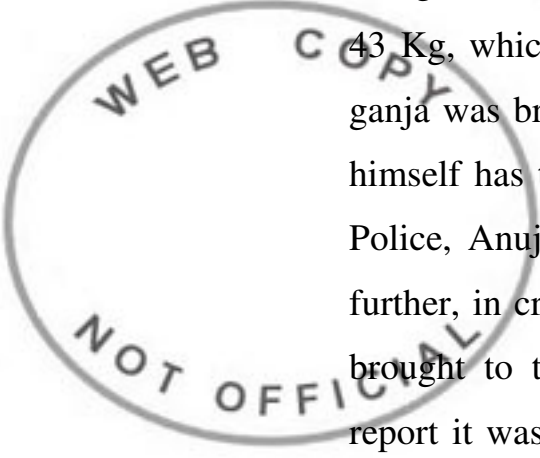
3. The prosecution case as alleged in the first information report by the informant, Om Prakash Singh, Sub Inspector of Police-cum-Station House Officer, Amnor Police Station, that on 24.10.2011 at about 08.50 A.M. he received a secret information that one Dilip Singh, resident of village Amnor has kept illicit ganja in his house. The said information was recorded in the diary of the Police Station bearing no. 433, dated 24.10.2011, and proceeded for verification of the said information and necessary action, he along with Assistant Sub Inspector of Police Madan Mohan Singh, Assistant Sub Inspector of Police Anuj Kumar Pandey, driver Manoj Kumar Pandey and Special Auxiliary Force Jawans, Yogesh Thakur, Prem Shankar Singh, Shambhu Sharan Sharma proceeded and reached Amnor at about 09.00 A.M. at the house of Dilip Singh. In the meantime, one person flees away from the back of



the house and though the attempt was made to attempt, but, he managed to escape. The neighbours disclosed that the person, who fled away, was Dilip Singh, hence, in the presence of two independent witnesses, namely, Lallu Singh (P.W. 3) and Raushan Kumar Pandey, P.Ws. 1 and 7, the police party searched the house of Dilip Singh and on search five packets wrapped in plastic cover and one in open plastic bag containing ganja with small balance (taraju) of steel were recovered and before the two independent witnesses all the articles, seized, were weighed. The further case is that three plastic packets contained 9 Kg of ganja each, one plastic packet contained 8 Kg of ganja and one plastic bag contained 3 Kg of ganja and one plastic packet contained 5 Kg of ganja, so in total 43 Kg of ganja was seized. However, on demand no paper was submitted nor any paper was shown and did not give any reply with regard to possession of ganja and so the seizure list was prepared before the two independent witnesses which were signed by them and in presence of two independent witnesses 400 gm of ganja was taken as sample and was sealed. A first information report was lodged on the basis of self statement, recorded by Sub Inspector of Police-cum-Station House Officer, Amnor Police Station, endorsement was made in the written report to register Amnor P.S. Case No. 101 of 2011, dated 24.10.2011, under Sections 20(b)(ii)(c) and 22(c) of the Act and has taken up the investigation, hence, it is apparent that the informant himself is the investigating officer and on the basis of the report, first information report lodged, the investigation proceeded. The police after investigation submitted charge sheet on which cognizance taken and after framing of the charge the trial proceeded.

4. During the trial, eight witnesses were examined by the prosecution.

5. P.W. 1 is the informant and he has supported the prosecution case regarding the secret information received about the ganja and, thereafter, he constituted the team and proceeded for



verification and when reached Amnor, then, on search the said ganja was recovered for which seizure list prepared, which was duly signed and though the witnesses stated that the ganja was weighed and found to be 43 Kg, which was sealed at the place of occurrence itself and the said ganja was brought to the Police Station. He has, further, stated that he himself has taken sample of ganja which was sent by Sub Inspector of Police, Anuj Kumar Pandey for chemical examination though he has, further, in cross-examination, in paragraph 14 has stated that ganja was brought to the Police Station and after lodging the first information report it was kept in malkhana. He has, further, stated that he has not sealed the article in seal cover rather it was kept without seal and sample of the ganja was sent by another daroga and till it was sent it was remained in the Police Station. He has, further, stated that the sample of the seized ganja was also kept and the said sample was kept in un-sealed cover. P.W. 2 is Madan Mohan Singh, Sub Inspector of Police, who has supported the prosecution case regarding the secret information, received, and conduct of the raid, search and recovery was made and 400 gms of ganja taken as sample and brought to the Police Station. P.Ws. 5 and 7 are the seizure list witnesses, who have proved the signatures on the seizure list, but, have not supported the prosecution case regarding the seizure of the article before them and they deposed that the signature was taken on plain paper. P.Ws. 4, 5 and 6 are the Special Auxiliary Force Jawans, who were the members of the raiding party and their evidences are only to the effect that the raid was conducted in the house of the appellant and seizure list prepared with regard to the recovery of ganja. P.W. 8 is the investigating officer and he was also a member of the raiding party and he has stated that he filed a petition for sending the sample of the seized article to the Forensic Science Laboratory and the sample was sent to the Forensic Science Laboratory and he has proved the petition, marked as Exhibit 6. He has deposed that he has filed petition before the Session's Judge on 12.11.2011 for sending the sample

for examination, but, he has not change the sample in the Court room. However, taking into consideration the evidence of the witnesses the trial Court convicted the appellant and sentenced, as mentioned above holding trial the prosecution witnesses fully established the recovery of ganja and the sample was sealed and kept in malkhana was sent to the Forensic Science Laboratory and the Forensic Science Laboratory report established that the recovered article was ganja.

6. The learned counsel for the appellant has challenged the order of the conviction and sentence, recorded by the trial Court, on the ground that there is violation of Section 42(2) of the Act which is mandatory and for which a reliance has been placed on a decision reported in **2016 (1) P.L.J.R., 2 (Narain Mahto & Anr. Vrs. The State of Bihar)**. He has, further, contended that there is violation of Section 50 of the Act. It has, further, been contended that though the article, seized, alleged to have been kept in malkhana, but, has pointed out in the evidence of P.W. 1, the informant, who was instrumental in seizing the article has deposed that the said article seized was kept in malkhana, but, was not kept in seal cover, but, was kept in malakhana as it is. It has, further, been contended that the malkhana register has also not been proved and, further, it has been submitted that there is no evidence adduced by the prosecution that from where and which packet the sample was taken. There is no evidence, at all, that the sample was taken from each and every packets, seized, and the evidence of the prosecution on this point is quite vague to infer that all the articles seized in four or five packets were all ganja.

7. The learned counsel for the State, however, contends that there is ample evidence that on receipt of the information, the Officer-in-Charge of Amnor Police Station constituted a police party and proceeded for verification and on search of the house of Dilip Singh the ganja was recovered which was seized, seizure list prepared and the said ganja was kept in malkhana and even produced before the Court as material

Exhibits I to I/D. It has, further, been contended that 400 gms of sample was taken, hence, it can be deemed that the sample has been taken from each and every packets. It has, further, been contended that it was incumbent upon the informant to seek clarification from the witnesses whether the sample has been taken from each packets or any one. He has not questioned the witnesses as to whether sample has been taken from each of the packets he shall not be deemed to allow to raise the issue at this stage.

8. Now, taking into consideration the respective submission, it is apparent that the prosecution case on secret information the police proceeded after recording a sanha entry, however, there is no evidence, at all, that prosecution complied with the provision of Section 42 of the Act. However, it has come in evidence of the witness, P.W. 2 in paragraph 11 that the Dy.S.P. was informed about the information after they reached at the Police Station, but, it has again been mentioned in the cross-examination that with regard to the intimation the information has not been entered or mentioned in the station diary. However, even assuming, it is not a compliance of Section 42 of the Act. However, even duly compliance of Section 42(2) of the Act if provided with the reasons and if the reasons are liable to be accepted, then, there can be held it's subsistence compliance. However, having regard to the fact that in the evidence there is no mention of the compliance of Section 42(2) of the Act as it neither transpire from the evidence of P.W. 1 nor transpire from the evidence of P.W. 8 that they ever intimated to the superior officials regarding the said recovery on the basis of secret information received for which it is stated that sanha entry was made bearing sanha entry no. 433, dated 24.10.2011.

9. However, having regard to the fact that the police proceeded and searched the house in absence of the appellant as it is stated that the appellant fled a way from the place of occurrence and it was narrated by the neighbours that the person, who fled away, was the appellant. Since,

the search made of a house on secret information, hence, the compliance of Section 42(1) of the Act is mandatory. However, since, the non-compliance of Section 50 of the Act, since, the appellant has neither been apprehended nor personal search alleged, hence, there is no material in the submission of violation of Section 50 of the Act.

10. However, having regard to the fact that the fact that though P.Ws.3 and 5, the seizure list witnesses have not supported the prosecution though they have proved their signatures on the seizure list and P.Ws. 4, 5 and 6 are the Special Auxiliary Force Jawans, who supported the prosecution case regarding the raid and recovery and, further, the evidence of P.Ws. 1, 2 and 8 regarding the fact that on the information, received, he proceeded and made a search and on search five packets of ganja recovered from the house of the appellant, however, though it is stated that said ganja was taken to Police Station and kept in malkhana, but, though P.W. 1 has stated in his evidence that ganja was seized was kept in malkhana and even the sample was taken to the tune of 400 gms though in the written report there is mention of taking the sample of 400 gms is evidence of P.W. 1, it has not been stated the fact that 400 gms were taken as sample, but, has stated in answer to a Court question that he has taken the sample of the seized article, but, the evidence, in this regard, is quite vague as he has not mentioned that from which of the packets he took the sample. He has also not mentioned that he took sample from one packet or each of the packets. P.W. 2 has stated in his evidence that 400 gms of ganja was taken, but, he has also not mentioned that the ganja was taken from each of the packets or whether the ganja was taken one packet, the evidence, in this regard, regarding the evidence of P.W. 8, the investigating officer, who has stated that he sent the ganja after taking permission of the Court on 21.11.2011. However, the Forensic Science Laboratory report shows that in pursuance of the memo no. 1489, dated 12.11.2011, advising dispatch of a parcel received on 25.11.2011 as per the special messenger,

Assistant Sub Inspector of Police, Anuj Kumar Pandey. However, P.W. 8 is Anuj Kumar Pandey and he, in his deposition, stated that he is not the member to whom he assigned the ganja. However, having regard to the fact that the ganja was seized on 24.10.2011 and though alleged to have been kept in malkhana, but, without a seal cover and though it is stated that sample was taken which was sealed, but, there is no mention that the sample was taken from each of the packets or from which of the packets or whether the sample was taken from each of the packets out of the five packets alleged to have been seized. Hence, it is stated that whether the entire ganja, seized, was ganja as there is no specific evidence that ganja was taken from each of the packets or from which of the packets.

11. Hence, having regard to the fact that there is violation of Section 42 of the Act as there is no mention that the secret information, received, which was recorded as sanha entry no. 433, dated 24.10.2011, was not communicated the intimation under Section 42(2) of the Act to the superior official is, again, another blow to the prosecution case, as the provision contained are mandatory in nature. Hence, I find and hold that the safe guard provided under the Act has not been adhere to and there is violation of mandatory provision of the Act so the appellant is entitled to benefit of doubt.

12. Hence, the order of conviction and sentence, recorded by the trial Court, is hereby **set aside** and the appeal is **allowed**.

13. Since, the appellant is in jail, he is directed to be released forthwith, if not wanted in any other case.

(Gopal Prasad, J)

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