

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.687 of 2015

Against the judgment of conviction dated 05.08.2015 and order of sentence dated 07.08.2015 passed by Shri Ramesh Chandra Dwivedi, learned 3rd Additional Sessions Judge, Bhojpur at Ara, in N.D.P.S. Case No. 14 of 2011 (arising out of Udwant Nagar Police Station Case No. 262 of 2011)

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Jai Prakash Singh son of Late Vishundeo Singh, Resident of village- Nawada Ben, P.S.- Udwant Nagar (Gajrajganj), District- Bhojpur at Ara

.... Appellant

Versus

The State of Bihar

.... Respondent

WITH

Criminal Appeal (SJ) No. 646 of 2015

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Umesh Singh Son of Late Rajendra Singh Resident of Village - Nawada Ben, P.S.- Udwant Nagar, District - Bhojpur

.... Appellant

Versus

The State of Bihar

.... Respondent

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Appearance :

(In CR. APP (SJ) No.687 of 2015)

For the Appellant : Mr. Jagannath Singh, Advocate.
Mr. Gagendra Pd. Yadav, Advocate.

For the State : Mr. Bipin Kumar, A.P.P.

(In CR. APP (SJ) No.646 of 2015)

For the Appel : Mr. Sanjay Parasmani, Advocate.
Mr. Manoj Kumar, Advocate.

For the State : Mr. Z. Hoda, A.P.P.

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CORAM: HONOURABLE MR. JUSTICE GOPAL PRASAD
ORAL JUDGMENT

Date: 22-06-2016

Heard learned counsel for the appellants and learned counsel

for the State.

2. Two appeals are being heard together and disposed of by common judgment against the judgment of conviction dated 05.08.2015 and order of sentence dated 07.08.2015 passed by Shri Ramesh Chandra Dwivedi, learned 3rd Additional Sessions Judge, Bhojpur at Ara, in N.D.P.S. Case No. 14 of 2011 (arising out of Udwant Nagar Police Station Case No. 262 of 2011) by which both the appellants have been convicted for offence under Section 20(B)(ii)(C) of the N.D.P.S. Act and sentenced to undergo rigorous imprisonment for ten years and payment of fine of Rs. 1,00,000/- and in default of payment of fine further sentenced to undergo additional simple imprisonment for one year.

3. The prosecution case as alleged in the First Information Report on the basis of self statement of Sushil Kumar, S.H.O. Gajrajganj O.P. (P.W.2) alleging therein that on 27.09.2011 at about 6.00 A.M. he received information that two persons were going to Nawadaben from Ara by a hired Tempo and they have possessed illegal Ganja. On the said information he recorded a Sanha and he proceeded with along with Executive Magistrate Mustak Ahmad who was present in the police station at that time as well as S.I. Vikash Kumar, A.S.I. Gajendra Prasad Yadav (not examined) and Constable Ram Awatar Singh, P.W. 3, Constable Santosh Kumar Singh, P.W.7,

Constable Ashutosh Kumar, P.W. 1 and Constable Harishankar Manjhi, P.W. 5 reached at Milki Petrol Pump at about 7.00 A.M. then saw that a tempo was coming from Ara and stopped in which two persons were sitting in military dress and identity card bearing photo and two persons were sitting in driving seat and they disclosed their names as Madhesh Yadav and Munna Kumar Yadav and told that Madhesh Yadav is driver and Munna Kumar Yadav was Khalashi of the said tempo. Further they disclosed that both the military men hired tempo for Rs. 200/-. Further it is alleged that two persons were sitting in the tempo possessed with two big bags and one bedding and they disclosed their names as Jai Prakash Singh and Umesh Singh. They disclosed that they were coming from Orissa and going to their respective homes. Thereafter, on search of deep brown coloured bag 14 packets containing 1 K.G. per packet each of alleged ganja recovered and from another chitkabra colloured bag 12 packets containing 1 K.G. Ganja each recovered and from green colour bedding 14 packets ganja each containing 1 K.G. was recovered. Thus in total 40 packets ganja each containing 1 K.G. total 40 K.G. ganja was recovered. Thereafter, seizure list was prepared before two independent witnesses Madhesh Yadav and Munna Kumar Yadav and seizure list was duly signed. Further Jai Prakash Singh and Umesh Singh did not produce any chit of paper regarding possession of the

said ganja. On the basis of self statement of S.H.O. Sushil Kumar, F.I.R. lodged and consequently investigation was handed over to Vikash Kumar, Sub Inspector.

4. During the investigation, I.O. inspected the P.O. and recorded statement of witnesses, perused the seizure list and took out sample from seized article and sent to F.S.L. Thereafter, on receipt of F.S.L. report, charge sheet submitted. After submission of charge sheet, cognizance was taken and case proceeded after framing of the charge.

5. During trial nine witnesses were examined by the prosecution. P.W. 1 is Ashutosh Kumar, Constable and a member of the raiding party who supported the prosecution case that they proceeded and a tempo was apprehended and from the said tempo two persons were apprehended with bags and bedding and from the said bags and bedding 40 K.G. ganja was recovered. Seizure list prepared. P.W.2 is Sushil Kumar, the informant who had supported the prosecution case and on his self statement F.I.R. lodged. He deposed that he received information that a tempo was coming and from the said tempo alleged ganja is being transported. He constituted a team and the said tempo was raided and recovery of 40 K.G. illegal ganja from two bags and bedding in possession of two persons in military dress sitting in the back seat of the aforesaid tempo. On search,

seizure list was prepared and also a list prepared regarding military dress, mobile etc. He also proved formal F.I.R. P.W. 3 is Ram Auytar Singh, Constable and a member of the raiding party, who supported the search and seizure and recovery of ganja. P.W. 4 is Vikash Kumar, Sub Inspector, is also a member of the raiding party and had deposed that he sent the sample of the seized article to the F.S.L. and has specifically stated sample was taken from each one of the said packets and sent to F.S.L. However, in his cross-examination, he has stated that sample was taken at the P.O. itself and seizure list was prepared by the Incharge of O.P. Further he had stated that the seized article was kept in Malkhana. Further, he had stated that sample was taken from the seized ganja by the Officer-in-Charge, but he has not written in the case diary that sample was taken from which packet. P.W. 5 is Harishankar Manjhi, Constable and also a member of the raiding party who supported the prosecution case about search and seizure of alleged ganja from the possession of the appellants. P.W. 6 is Madhesh Yadav, driver of the said tempo and has proved his thumb impression of the seizure list. However, in his cross-examination he has stated that police had taken his thumb impression on a plain paper. P.W. 7 is Santosh Kumar Singh is also a Constable and also a member of the raiding party and supported the prosecution case that 40 packets each containing 1 K.G. ganja was recovered from



the possession of the appellants Jai Prakash singh and Umesh Singh and sample was taken from the seized article and sent to F.S.L. P.W.8 is Mustaque Ahmad, Executive Magistrate and also a member of the raiding party who supported the search and seizure of alleged ganja. During investigation, he had deposed that he also signed on the seizure list. He had deposed in his examination that sample was taken out from the seized article and said article is ganja. P.W.9 is Gajendra Prasad Yadav, A.S.I. and also a member of the raiding party and on the date of occurrence he was posted at A.S.I. Gajrajganj P.S. and he supported the prosecution case regarding information received and constituted a team for raiding of the tempo and article seized and seizure list was prepared marked as Exhibit-1, Exhibit-1/1 seizure list of material articles, Exhibit-2 is self statement of informant, Exhibit-3 is formal F.I.R., Exhibit-4 and 5 are the case diary, Exhibit- 6 is F.S.L. report from Patna and Exhibit-7 is F.S.L. report from F.S.L. Kolkata.

6. The trial court taking into consideration the evidence and document sentenced the appellants as mentioned above.

7. Learned counsel for the appellants challenged the order of conviction and sentence recorded by the trial court and submits that there is violation of Section 50 of N.D.P.S. Act. it has further been contended that independent witness P.W. 6 is Madhesh Yadav, driver of the said tempo has proved his thumb impression on the seizure list.



However, in his cross-examination he has stated that police had taken his thumb impression on a plain paper. He has further contended that as per evidence of the prosecution witnesses, it is apparent that sample has not been taken from each and every packet. Further, it is contended that prosecution witnesses have stated that sample was taken out in the police station. Further stated that sample was not taken from each and every packet and it cannot be said articles seized are ganja. It has further been contended that neither article seized was sealed with seal of the Officer-in-Charge of police nor it has come in evidence that seized article was kept in sealed cover with seal of Officer-in-Charge of the police station. Further evidence of P.W. 4 I.O. that sample was taken from seized article, but he has not been stated that from which packet sample was taken. Further evidence of P.W. 8 Mustaque Ahmad, Executive Magistrate had deposed that sample was taken from only one packet.

8. Learned counsel for the State however submits that prosecution has been able to prove that on secret information, raid was conducted by the informant along with other constables. During raid, a tempo was stopped and from the said tempo two persons apprehended and from their two bags and bedding ganja was recovered and sample was taken out from seized article and sent to F.S.L. Hence, the prosecution has been able to prove the charges

beyond reasonable doubt.

9. Taking into consideration the respective submissions, it is for consideration whether prosecution has been able to prove the charges beyond reasonable doubt.

10. The case of prosecution, it is apparent that on secret information that ganja was being carried on a tempo, a team was constituted. During raid 40 packets each containing 1 K.G. ganja and total 40 K.G. ganja was recovered from the two bags and bedding of the appellants. After recovery, seizure list prepared. P.W. 1 to 5, 7, 8 and 9 have supported the prosecution case that on secret information a raid was conducted. During raid, 40 packets ganja each containing 1 K.G. of alleged ganja was recovered from the possession of the appellants which were carrying in two bags and bedding of the appellants. However, seizure list was prepared with regard to 40 packets of ganja each containing 1 K.G. However, witnesses have not deposed that whether ganja seized was sealed. Further, the occurrence took place on 27th September, 2011 and sample was taken on the same day, though, F.S.L. report suggests that Memo No. 945 dated 29.09.2011 sent through special messenger Daffadar Ramdarshan Singh has been received in the office on 18.10.2011, but the prosecution has not been mentioned that where article was kept from the date of occurrence till the date of sample was received. There is



no mention that said sample was sent with signature of the Officer-in-Charge of the police station. The prosecution had not produced the article seized nor the sample taken from the seized article produce before the court to verify report of the F.S.L. Further neither the certification of the article has been proved nor there is any evidence regarding compliance of Section 52(A) of N.D.P.S. Act. It has neither been mentioned that article has been produced before the Magistrate nor sample was taken out before the Magistrate nor there is mentioned article seized was sealed with seal of Officer-in-Charge of the police station or there is no mention sample taken was sent to Officer-in-Charge of the P.S. which required under Section 52(2) of N.D.P.S. Act.

11. Hence, having regard to the fact, since the article seized has not been produced in court nor the same has been marked as material exhibit nor the sample of the article seized has been produced or marked exhibit nor the certifying the correctness of the inventory so prepared or taking in the presence of such Magistrate, no photographs of such drugs or substances nor certification of such photographs as true nor representative sample of such drugs or substances was drawn in presence of such Magistrate and certifying the correctness of any list of samples so drawn or certification or description of the article which requires under Section 52A (2 and 4)



of N.D.P.S. Act has been proved. Hence, none production of article seized, had grave consequence and serious doubt about recovery and possession of the article from the appellants and mere applying features of the article from seizure list cannot be decided, though, it is true that witnesses have supported the prosecution case regarding seizure of the article, but in absence of evidence either production of the article seized or even without certification or destruction of the article is fatal to the prosecution which enshrine punishment under N.D.P.S. Act.

12. However, even sample taken from the seized article has not been properly made and an attempt was made by the prosecution witnesses. Though, P.W. 2 and 4 are informant and I.O. deposed from their evidence, it is apparent sampling has not been done properly. P.W. 4 has stated that he did not take sample from the seized article, but the sample was taken by P.W. 2. Further, nor the witnesses have stated that sample was taken from each of the packet rather evidence is contrary that sample was taken out from only one packet. However, article seized from two bags and one bedding, but it is not clear from which packet sample was taken out to fasten the liability on the date of occurrence.

13. However, contention of the learned counsel for the appellants that there is violation of Section 50 of N.D.P.S. Act is

concerned, it is apparent that there is neither any evidence that personal search on the person of the appellant was conducted and there is complete violation of Section 52 of N.D.P.S. Act.

14. Further learned counsel for the appellants submits that P.W. 6 had not supported the prosecution case regarding search and seizure. However, P.W. 6 has proved his thumb impression on the seizure list, though, he has deposed that his thumb has taken on a plain paper does not of much consequence.

15. Taking into consideration the fact, there is no compliance of Section 52A of N.D.P.S. Act that said article has been produced before the Magistrate either for certifying or description of the article seized. Further there is violation of Section 52 A of N.D.P.S. Act that sample was taken from each packet and there is no evidence seized article was sealed by the Officer-in-Charge of the police station. There is violation of Section 55 and 52 A of the N.D.P.S. Act.

16. Having regard to the fact that article seized has not been produced before the court nor the sample has been proved as exhibit nor the certification nor the destruction of the article seized as per Section 52A of N.D.P.S. Act proved and so the best evidence of possession has been withheld. The sample taken does not properly sealed with seal of Officer-in-Charge of Police Station and the sample sent on 29.09.2011 by Special Messenger was received in F.S.L. on

18.10.2011 and there is no explanation where sample was kept during the period cast a doubt on F.S.L. report as well as since the article seized nor produce hence, there is no material to verify. Hence, I find and hold that prosecution has not been able to prove the charges beyond reasonable doubt and report of F.S.L. in absence of article seized having been produced and sample has not been produced in the court, there is no legality to record the conviction under Section 20 (B)(ii)(C) of N.D.P.S. Act. Hence, conviction and sentence recorded by the trial court is not sustainable and order of conviction and sentence recorded by the trial court is set aside.

17. As a result, two appeals are allowed.

18. Hence, the appellants who are in custody be set at liberty forthwith if not required in any other case.

m.p.

(Gopal Prasad, J)

AFR/NAFR	NAFR
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