

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Appeal (SJ) No.2047 of 2017

Arising Out of PS. Case No.-194 Year-2010 Thana- BIDUPUR District- Vaishali

Muneshwar Pandit, aged about 61 years, son of Late Dangar Pandit, resident of Village- Kutubpur Digra, P.S.- Bidupur, District- Vaishali.

... .. Appellant/s

Versus

The State of Bihar.

... .. Respondent/s

Appearance :

For the Appellant/s : Mr. Vikash Kumar Pankaj, Advocate
For the Respondent/s : Mr. Zeyaul Hoda, APP

CORAM: HONOURABLE THE CHIEF JUSTICE

CAV JUDGMENT

Date : 22-09-2017

Challenging his conviction by the Court of Additional Sessions Judge I, Vaishali at Hajipur in Bidupur Police Station Case No.194 of 2010 vide judgment dated 31st August, 2016 and 2nd September, 2016 to undergo 10 years rigorous imprisonment and fine of Rs.1 lacs on each count for offences under Section 20(b) (ii) (c) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as ‘the NDPS Act’), this appeal has been filed by the appellant.

The facts, in brief, go to show that on 20th of July, 2010 at about 9.00 A.M., Sub-Inspector of Police Vinay Kumar Sharma who also happened to be the Station House Officer of the Police Station, Bidupur, and who has been examined as P.W.6, received



secret information at 9:00 A.M. to the effect that one Navdeep Rai and the present appellant Muneshwar Pandit and certain other persons have kept psychotropic substance in their possession and after entry of the information in the police diary, he said to have informed the superior officer Dy. S.P. and thereafter a team was created and all the police personnel conducted raid on the premises in question. They left the police station at 3 P.M., first went to the village Kutubpur Chechar, took with them Chaukidar Virendra Paswan and surrounded the house of Navdeep Rai, before independent witnesses, Satya Prakash Bhagat and Braj Kishore Malakar, P.W. 7 and P.W.4, respectively, raided the house of Navdeep Rai at about 4 P.M. and in the search, seized 12 Kg of Ganja, which was kept concealed and in the possession of Bipin Kumar who disclosed that the Ganja was taken away by his father. It was brought from Nepal for business purpose. The Ganja was found in 12 Kg. One sample was prepared from recovered Ganja. Thereafter, they proceeded to the house of the present appellant Muneshwar Pandit and in his house also, on similar raid being conducted, 90 Kg of Ganja was seized which was kept in 8 packets. Thereafter, samples were prepared from each packet and it is the case of the prosecution that the appellant was arrested and



he was prosecuted. The appellant having been convicted, therefore, this appeal.

It is seen that along with the appellant, Bipin Kumar, who was juvenile, was also prosecuted by the Judicial Magistrate, but the fate of his trial is not available on record.

Be that as it may be, in the trial, the following witnesses were examined. P.W.1, Amit Nandan, the then Station House Officer of Police Station Ganga Bridge, who was a member of the raiding party, P.W.2. Prem Prakash Rai, the then Sub-Inspector of Police in Police Station Bidupur, a member of the raiding party, P.W.3, Birendra Paswan, Choukidar of Police Station Bidupur, P.W.4 Braj Kishore Malakar, an independent witness to the seizure, P.W.5 Arjun Yadav, Investigating Officer of the case, P.W.6 Vinay Kumar Sharma, the informant himself and the then Station House Officer of Police Station Bidupur, P.W.7 Satya Prakash Bhagat, an independent witness to the seizure, P.W.8 Suresh Paswan, the then Assistant Director of Forensic Science Laboratory, Patna, who conducted the forensic test of the substance, P.W.9 Mithilesh Kumar Sharma, A.S.I. of Police Station Bidupur, and P.W.10 Gajendra Kumar Singh, the then S.H.O.

Besides the oral evidence of the prosecution witness, the prosecution produced the following documents:-



Ext.-1 and Ext.-1/1, two seizure lists, prosecution proved the signature of Braj Kishore Malakar, P.W.4 in the seizure list, which was marked as Ext.-2 and Ext.-2/1 and Ext.- 2/2 bearing the signature of the other witness Satya Prakash Bhagat, Ext.-3 is the self written report of the informant, Ext.-4 is the FIR written by Arjun Yadav and Ext.-5 and Ext.-5/1 were the confessional statements of accused Bipin Kumar and the present appellant Muneshwar Pandit. Ext.-6 is the carbon copy of the forwarding memo written by the District & Sessions Judge, Vaishali to the Director, Forensic Science Laboratory, Ext.-7 is the sample seized, Ext.-8 is the arrest memo of the accused persons, Ext.-9 is the report of the Forensic Science Laboratory, Ext.-10 is a letter of the S.H.O. Police Station Bidupur, for production of the seized articles and Ext.-11 is Serista entry with regard to the case in question.

The learned Trial Court, after evaluating the evidence, came to the conclusion that the prosecution has proved the case and directed the conviction.

The appellant has been in custody ever since the date of his arrest, i.e. 20.07.2010 and this appeal has been filed on the basis of legal aid provided by the State.

Learned counsel appearing for the appellant argued that the appellant has been in custody for more than seven years now. He



has been falsely implicated and it is said that statutory requirements, as contemplated under Section 42 and 50 of the NDPS Act, have been violated. Learned counsel took us through the statements of witnesses, particularly P.W.6, the informant, P.W.4 Braj Kishore Malakar and P.W.7 Satya Prakash Bhagat and argued that at the time when the incident took place, the appellant was more than 60 years of age. It is alleged that 90 Kg. Ganja was seized from his house on the date of the incident, i.e. 20th July, 2010 which was kept in eight packets and the raid was conducted at 7 P.M.

Learned counsel for the appellant argued that the conviction is based solely on the testimony of P.W.7, P.W.4 and P.W.6, the informant. P.W.4 and P.W.7, the witness to the seizure list and recovery of psychotropic substance, have categorically stated that nothing was recovered in their presence. They were made to sign on blank sheets, in spite of this they have not been declared as hostile and cross-examined. It was argued that as the prosecution has failed to prove recovery itself, the case of the prosecution becomes doubtful. He thereafter took us through the statement of P.W.6, the informant, Vinay Kumar Sharma, and points out that he has specifically stated the Sub-Divisional Magistrate (SDPO) was leading the raiding team and had gone with them at the time of



search and seizure, but surprisingly, this crucial Gazetted Officer is not examined as a prosecution witness and even his signature does not appear in the seizure memo, Ext.-1 or the seal of the seized packets, Ext.-7. It is stated that a Gazetted Officer was present, the action of not recording statement and conducting the proceedings in his presence violates the requirement of law as contemplated under Section 42(1) and 42(2) of the NDPS Act and if the same is considered in the backdrop of the law laid down by the Hon'ble Supreme Court in the case of **State of Rajasthan v. Jag Raj Singh @ Hansa**, (2016) 3 PLJR (SC 285, the conviction is unsustainable.

It was further argued by the learned counsel for the appellant that in both the raids, total 12 Kg. of Ganja, in one packet, and 90 Kg. Ganja from the appellant's premises, in eight packets, were recovered, but out of total nine packets, the sample seized, Ext.-7 only contains six sample seals. There is no explanation for missing of three sample seals.

That apart, it is argued that the seized samples from both the raids were sent together vide Ext.-6 to the Forensic Science Laboratory. It was received in the office of the Forensic Science Laboratory on 10.08.2010, i.e. after more than 20 days. The delay for sending the samples is not explained and in view of the



Division Bench judgment of this Court in the case of **Pratibha Devi Vs. State of Bihar**: 2017 (3) PLJR 694, it is argued that the delay of 20 days is sufficient enough to set aside the conviction.

Learned counsel thereafter refers to the statement of P.W.6, the informant Vinay Kumar Sharma, and the averments made in para 2 wherein he speaks about the appellant that he was duly informed about his rights under the law and that the search is being conducted in the presence of a Gazetted Officer. However, neither the presence of the Gazetted Officer is proved, nor did the Gazetted Officer, who was present, inform the petitioner. Placing reliance on Section 50 of the NDPS Act and the law laid down by the Hon'ble Supreme Court in the case of **State of Rajasthan v. Ram Chandra**, AIR 2005 SC 2221, it was argued that the Gazetted Officer, who was also conducting the raid, cannot act in the dual capacity and fulfill the mandatory requirement of Section 50 of the NDPS Act.

It is further stated that the statement of the appellant-accused under Section 313 Cr. P.C. was an empty formality, crucial questions were not put to him with regard to availability of weighing machine, presence of the SDPO and other Gazetted Officer and, therefore, there is breach of statutory provision.



That apart, it is argued that as to how the information was received and how the raiding party was formed, who identified both the accused and showed the house and the manner in which the proceedings were conducted, are not explained by the prosecution. It is the case of the appellant that merely because huge quantity is seized, the appellant is being falsely implicated. It is argued that there is no evidence to show availability of weighing machine to weigh the substance that was recovered.

Refuting the aforesaid contentions, learned counsel for the State argued that all the formalities were fulfilled. He takes through the statement of P.W.6, the informant, and the other witnesses to say that all the statutory requirements were complied with and, therefore, there is no lacuna in the conduct of the raid and the seizure.

Having heard learned counsel for the parties at length, before proceeding to deal with the various issues, in question, it may be appropriate to take note of the judgments relied upon and the principles discussed in the said judgment.

In the case of **Jag Raj Singh @ Hansa** (supra), the Hon'ble Supreme Court after considering various judgments with regard to complying with the statutory requirements of the NDPS Act, including the judgment in the case of **State of Punjab vs. Balbir**



Singh, (1994) 3 SCC 299; **Saiyed Mohd. Saiyed Umar Saiyed & others v. The State of Gujarat**, (1995) 3 SCC 610, took note of the fact that the object of the NDPS Act is to make stringent provisions for control and regulation of operations relating to those drugs and substances, at the same time to avoid harm to the innocent persons and to avoid abuse of the provisions by the officers, certain safeguards have been provided which have to be strictly adhered to and if there is any breach of the provision, the entire trial stands vitiated. In the case of **Saiyed Mohd. Saiyed Uma Saiyed** (supra), the safeguard contained in Section 50 is taken note of and the right available to the accused to have raid conducted by a gazetted officer and the Magistrate is emphasized. After taking note of all the judgments relied upon the Hon'ble Supreme Court comes to the conclusion that the requirement of Sections 42 and 50 is a mandatory requirement and if there is breach of any of the aforesaid provision, the same has a result of the conviction being set aside.

In the case of **Ram Chandra** (supra), the Hon'ble Supreme Court after taking note of Section 50 of the NDPS Act has held that when a person is about to be searched and a search is being carried out in his presence, the requirement of Section 50 would be that the officer proposing to effect the search cannot act in a dual



capacity; first as an officer authorized under Section 42 to search a person and second as the Gazetted Officer in whose presence the action is given to the accused. It is indicated that the officer conducting the search cannot discharge the dual function both under Section 42 and Section 50 of the NDPS Act.

Finally, a Division Bench of this Court in the case of **Pratibha Devi** (supra) has taken note of the fact that the delay in sending the samples and the seized articles to the office of the Forensic Science Laboratory to the extent of 10 days is fatal to the prosecution and amounts to non-compliance with the statutory provision of Section 57 of the NDPS Act which makes the trial vitiated.

If we analyze the case in hand, we find that P.W.6, Vinay Kumar Sharma, the informant, admits in his evidence that the Sub-Divisional Magistrate was leading the raiding party and it was in his presence that the seizure and sampling was conducted, but surprisingly, this Gazetted Officer is not examined and even his signatures are not available in the seizure list Ext.-1 and 1/1 and in the seals of the seized packets, Ext.-7. This is in clear violation of the requirement of Sections 42 (1) and 42(2) of the NDPS Act and if he was a gazetted officer and he has discharged the dual function, then as held by the Hon'ble Supreme Court in the case



of **Ramchandra** (supra), there is violation of the mandatory requirement of Section 50 of the NDPS Act.

Accordingly, if the case of the prosecution is analysed in the backdrop of the law laid down by the Hon'ble Supreme Court in the case of **Ram Chandra** (supra) and the manner in which the raid was conducted and the requirement of Sections 42 and 50 of the NDPS Act, it is clear that the statutory provision of Sections 42 and 50 have been violated. That itself is enough to hold the trial as vitiated.

That apart, the following lacuna, material in nature, are writ large on a scrutiny of the original record.

According to the evidence that has come on record, 12 Kg. Ganja seized from the house of Navdeep Rai was in one packet and 90 kg. Ganja seized from the appellant's premises was kept in 8 packets. This means in all there were 9 packets, but the seal is only of six packets as is evident from Ext.-7. It is not known as to what had happened to the remaining three packets, whether they were also sealed properly and what had happened before samples were sealed. They are not accounted for in Ext.- 7.

The delay of 20 days in sending the samples to the Forensic Science Laboratory properly is also not explained. The samples had been sent to the Forensic Science Laboratory on 10th August,



2010 whereas the seizure was conducted on 20th July, 2010. A Division Bench of this Court, as detailed hereinabove, in the case of **Pratibha Devi** (supra) has held that a delay of even 10 days is fatal and has set aside the conviction.

Apart from the aforesaid, P.W.4 and P.W.7, who are witnesses to the seizure, have not supported the case of the prosecution. They categorically say that no seizure took place in their presence, but their signatures were taken on the blank paper. They have not been declared hostile and they have not been cross-examined. This also is lacking in the case of the prosecution. That apart, it is the defence of the appellant that the premises did not belong to him. It belonged to his younger brother and there is no evidence to show that the premises was in the exclusive possession of the appellant, on the contrary, it is the case of the appellant that the premises was an open place accessible to other persons. The prosecution has failed to bring any evidence to show that the premises was in the exclusive possession of the appellant and it was beyond access of any other person, except the appellant.

Taking note of all the circumstances, this Court is of the considered view that the prosecution has miserably failed to bring home the guilty of the appellant in accordance to the requirements of law and the statutory violation, as indicated hereinabove, is



sufficient enough to allow this appeal, quash the case of the prosecution and set aside the conviction.

It is also to be taken note of that there is no previous criminal record of the appellant. There is nothing to indicate that he has been indulged in such case in the past also and, therefore, taking note of the totality of the circumstances, this appeal is allowed, judgment set aside, conviction quashed. The appellant, who is in custody, be set free forthwith, if not required in any other case.

(Rajendra Menon, CJ)

Sunil/-

AFR/NAFR	NAFR
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