

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.593 of 2014

Arising Out of PS.Case No. -146 Year- 2012 Thana -PARIHAR District- SITAMARHI

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Rajdeo Mandal, Son of Late Kharesh Mandal Resident of Village - Gorhari, P.S. -
Parihar, District - Sitamarhi

.... Appellant/s

Versus

The State of Bihar

.... Respondent/s

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Appearance:

For the Appellant/s : Mr. Surendra Kishore Thakur, Advocate.
Mr. Subodh Kumar, Advocate.

For the Respondent/s : Mr. Binod Bihari Singh, APP.

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**CORAM: HONOURABLE MR. JUSTICE PRAKASH CHANDRA
JAISWAL**

ORAL JUDGMENT

Date: 07-09-2017

Heard learned counsel for the appellant as well as
learned APP for the State.

2. This appeal has been preferred against the judgment
and order of conviction dated 04.09.2014 and order of sentence dated
09.09.2014 passed by the 1st Additional Sessions Judge, Sitamarhi in
Trial No. 29 of 2013/23 of 2014 arising out of Parihar P.S. Case No.
146 of 2012, whereby the learned trial court convicted the appellant



under Section 20(b)(II)(C) of the NDPS Act and sentenced him to undergo R.I. for ten years and also slapped him with the fine of Rs. 1 lakh and in case of default of payment of fine, further sentenced him to undergo R.I. for two years.

3. The factual matrix of the case is that Parihar P.S. Case No. 146 of 2012 was instituted under Sections 20 and 22 of the N.D.P.S. Act against the accused persons, namely, Rajdeo Mandal, Jamun Sah and Bhola Sah on the basis of the self-statement of S.I. Satyendra Kumar Manjhi of Parihar Police Station recorded at 4 PM on 18.10.2012 at village Gorahari, P.S.-Parihar, District-Sitamarhi with the allegation in succinct that on 18.10.2012 at 3 P.M., during the course of day patrolling at village Gorahari, he received secret information about keeping of the ganja in the house of Rajdeo Mandal for smuggling. On the said information, he along with constable Tribhuwan Naraian Singh, constable 286 Shivmuni Singh, constable 343 Janak Chauhan, constable 341 Naresh Kumar Sharma and constable 173 Durga Ram arrived at the house of Rajdeo Mandal located in the village Gorahari. On seeing the police force, three persons started escaping out of the house. He apprehended one of them after giving chase, while other two managed to escape. On quizzing the apprehended accused disclosed his identity as Rajdeo



Mandal and also disclosed the identity of his fleeing accomplices as Jamun Sah and Bhola Sah. Thereafter, he made search of the house of Rajdeo Mandal before the two independent witnesses, namely, Laxmi Sah and Nantun Thakur and recovered 4 bundles of ganja weighing 50 Kg from two rooms. The aforesaid contraband was seized and the seizure list was prepared before the said independent witnesses. A copy of the seizure list was furnished to the accused Rajdeo Mandal.

4. The aforesaid case was investigated by the police and on conclusion of the investigation and finding the case true, I.O. submitted chargesheet against the accused Rajdeo Mandal under Sections 20 and 22 of the NDPS Act keeping the investigation pending against the accused Jamun Sah and Bhola Sah.

5. On receiving the chargesheet and the case diary and perusing the same, the learned Sessions Court took cognizance of the offence against the accused Rajdeo Mandal under Sections 20 and 22 of the NDPS Act and on transfer, finally the case came in *seisin* of the Additional Sessions Judge-I, Sitamarhi for trial.

6. Charge against the accused was framed under Section 20(C)(c) of the NDPS Act. Charge was read over and explained to him to which he pleaded not guilty and claimed to be



tried.

7. To substantiate its case in ocular evidence, the prosecution has examined altogether five witnesses namely, the informant Satyendra Kumar Manjhi (PW-1), S.I. Ajeet Kumar Singh (PW-2), Laxmi Sah (PW-3), Nantun Thakur (PW-4) and I.O. Raju Kumar Mishra (PW-5). In documentary evidence, the prosecution has also filed several documents including the FSL report marked as Exhibit-6.

8. The statement of the accused was recorded under Section 313 of the Code of Criminal procedure. The case of the defence is complete denial of the occurrence. The defence has neither adduced any ocular nor documentary evidence in buttress of its case.

9. After hearing the parties and perusing the record, the learned lower court passed the impugned judgment and order of conviction and sentence as detailed in the earlier paragraph.

10. Being aggrieved and dissatisfied with the aforesaid judgment and order of conviction and sentence, the convict Rajdeo Mandal has preferred this appeal.

11. The point for consideration in this case is, as to whether the prosecution has been able to bring home the charge levelled against the appellant beyond all reasonable doubts or not.



12. It is submitted by learned counsel for the appellant that recovery of contraband was not made in presence of the independent witnesses. Barring the informant, none of the member of the raiding party has been examined by the prosecution in support of its case. It is further submitted that the informant did not give any information about the occurrence to the higher police officials in utter violation of the N.D.P.S. Act. It is also submitted that though the seized contraband was deposited in Police Malkhana on 18.10.2012, but it was sent to the FSL on 22.11.2012. The Malkhana incharge examined in this case as PW-2 has stated that after keeping the seized contraband in the Malkhana on 18.10.2012, it was never taken out till its deposition before the Court on 10.01.2014. So the aforesaid aspect of the case creates serious doubt about the sample sent to the FSL for its chemical examination.

13. On the other hand, learned APP for the State advocating the correctness and validity of the impugned judgment and order of conviction and sentence has submitted that the contraband was seized from the house of the appellant in presence of the two independent witnesses and the seizure list was prepared before them. The said seizure list has been proved by the prosecution. The sample of the seized contraband was sent to the



FSL for its chemical examination and on chemical examination, it was found to be ganja. Prosecution has succeeded to substantiate its case by adducing consistent ocular as well as documentary evidence in the case and the learned lower court correctly appreciating the facts and evidence on record passed the impugned judgment and order of conviction and sentence which is liable to be sustained. This appeal has no substance in it and is liable to be dismissed.

14. Section 57 of the NDPS Act provides that whenever any person makes any arrest or seizure under this Act, he shall, within forty-eight hours next after such arrest or seizure, make a full report of all the particulars of such arrest or seizure to his immediate official superior. From perusal of the record, it appears that the informant along with the police party nabbed the appellant from his house on a tip-off and recovered and seized 50 Kg of Ganja from his house, but he has not reported the alleged seizure and arrest to his senior police official within forty-eight hours. Thus, there appears to be utter violation of terms and conditions of Section 57 of the NDPS Act.

15. From perusal of the self-statement of the informant, it appears that after seizure of the contraband from the house of the accused, it was not sealed. Though the informant examined in this



case as PW-1 has stated in Para-10 of his cross-examination that he sealed the ganja at the place of occurrence and sent the sealed ganja to the court, but in quite contradiction to the aforesaid statement, the informant has stated in Para-12 of his cross-examination that he sealed the ganja at the place of occurrence and got it preserved in the Malkhana. None of the member of the raiding party has come forward to substantiate the statement of the informant regarding the sealing of the seized contraband before the independent witnesses at the place of occurrence by the informant. Moreover, from perusal of the Malkhana Register, it appears that the Malkhana in-charge has not mentioned in the register regarding the receiving of the seized contraband in the sealed condition. Malkhana Incharge examined in this case as PW-2 has also not stated about the receiving of the seized contraband in the Malkhana in the sealed condition rather in Para-8 of his cross-examination, he has candidly stated that the bundle which was received by him was not sealed. Thus, the aforesaid Malkhana Register and the statement of PW-2 goes to rule out the statement of PW-1 (informant) regarding sealing of the seized contraband at the place of occurrence by him. The informant neither in his written statement nor in his deposition has stated that he took out the sample from the seized contraband and sealed the same rather



the informant has stated in Para 28 and 30 of his cross-examination that after recovery of the ganja, he had not taken sample from the bundle at the place of occurrence. He had not made any effort to take the sample till the contraband was in his possession. The aforesaid statement of the informant indicates that the informant has not prepared any sample from the seized contraband at the place of occurrence and till retaining the said contraband by him.

16. Though the I.O. examined in this case as PW-5 has stated in Para-6 of his examination in chief that the sample was prepared by him on the seizure of ganja. In para-8 of his examination-in-chief, he has further stated that he had taken out a bit of sample from each 4 bundles and kept in a separate box and then sent it to FSL. Thus, in Para-6 of his examination in chief, he has stated that the sample was prepared at the time of seizure of ganja, but in Para-8 of his examination-in-chief, he has stated that the sample was prepared at the time of sending it to FSL for its chemical examination and in Para-3 of his examination-in-chief, he has stated that he sent the sample to FSL for its chemical examination on 22.11.2012 which means he has taken out the sample of seized contraband on 22.11.2012 and not on the date of seizure i.e. on 18.10.2012. The aforesaid statement of PW-5 is ruled out by the



Malkhana incharge (PW-2) as in Para-9 of his cross-examination, he has stated that the contraband was taken out from the Malkhana 15 days preceding to its deposition before the Court on 10.01.2014 and it was not sent earlier. Moreover on perusal of the Malkhana Register, it appears that the said contraband was not taken out from the Malkhana on 22.11.2012, as there is no entry in this regard in the said register. Thus, the aforesaid aspect of the case candidly indicates that the sample of the seized contraband was neither taken by the I.O. at the time of seizure of ganja nor by taking it out from the Malkhana and the sample was also not sealed by the I.O.

17. PW-3 Laxmi Sah and PW-4 Nantun Thakur who happen to be the seizure list witnesses have denied the factum of recovery of the ganja from the possession of the appellant before him in Para-2 of their respective cross-examination. Though PW-3 has identified his signature on the seizure list marked as Exhibit-1/1 and PW-4 has stated in his examination-in-chief that he has put his LTI on the seizure list, but PW-3 has stated in Para-2 of his cross-examination that S.I. had obtained his signature. He is not literate, he anyhow can make his signature. S.I. had obtained his signature without reading out the contents of the paper to him. Thus, from the perusal of the aforesaid testimony of PW-3 and PW-4, it appears that



the independent witnesses of the occurrence have denied the recovery of the ganja from the house of the appellant. Hence search, seizure and recovery of the contraband from the house of the appellant does not stand substantiated by the independent seizure list witnesses and the seizure list also does not stand proved by the seizure list witnesses and the said seizure list is nothing but a document written by the concerned police officer.

18. Section 55 of the NDPS Act provides it as a mandatory requirement that after search and seizure, the seized article will be sealed by the officer, who seized it and concerned officer-in-charge of the police station will take charge of the seized article. It further provides that in case sample of seized narcotic article is taken then the same will be sealed by person seizing it and the officer-in-charge of the police station taking charge of the seized article. Thus, the basic and mandatory requirement of sealing of the article, in view of the provision of Section 55 of the NDPS Act at the time when it was handed over to the officer-in-charge of the police station for keeping it in Malkhana has not been proved and the time of sealing of the article has not been proved. Since any sealing of the article was not proved at the time of seizure nor any exact date and time has been proved in taking of the sample by the informant or the



officer-in-charge grave doubt is entertained over the matter that actual article, which was seized has been the subject matter of the act of taking sample and the examination by the F.S.L.

19. On perusal of the Malkhana Register and account of witnesses, it appears that the seized contraband was kept in the Malkhana on 18.10.2012 and it was sent to the FSL on 22.11.2012, but the Malkhana in-charge (PW-2) has stated in Para-4 of his examination-in-chief that the contraband which was received by him in Malkhana on 18.10.2012 was neither given by him to anyone nor anyone had taken it out from there till its deposition before the Court on 10.01.2014. The Malkhana register also indicates that the said contraband was not taken out from the Malkhana on 22.11.2012, the date of sending the sample to FSL for its chemical examination. Such statement of Malkhana incharge also rules out taking out of sample of the seized contraband and sending it to the FSL on 22.11.2012. The aforesaid aspect of the case goes to create serious doubt as to whether the sample sent to the FSL for its chemical examination was taken out from the seized contraband. From perusal of the FSL report, it appears that the memo for sending the sample to the FSL was dated 22.11.2012 which means it was sent to FSL on 22.11.2012 but it was received in the FSL on 29.12.2012 i.e. after long span of



one month and seven days. The prosecution has not explained as to where the aforesaid sample was kept during the said period. Moreover, the FSL report was submitted on 13.02.2013 i.e. after long span of around one and half month and no reason has been given by the prosecution for said delay. This aspect of the case creates serious doubt about the prosecution case.

20. From perusal of the record, it appears that seized contraband was not produced before the court during trial. The prosecution has not given any explanation for non-production of material object before the court. Non-production of material object before the court is not mere procedural irregularity rather a best evidence to prove that the alleged quantity of contraband was seized from the possession of the accused and there is no evidence to connect the forensic report with the substance that was allegedly seized from the possession of the appellant.

21. Hon'ble Apex Court in the case of **Jitendra v. State of M.P.** reported in **2004 SCC (Cri) 2028** has been pleased to rule that in the trial for an offence under the NDPS act, it was necessary for the prosecution to establish by cogent evidence that the alleged quantities of the contraband goods were seized from the possession of the accused and the best evidence to prove this fact is



to produce during the trial, the seized materials as material objects and where the contraband materials alleged to have been seized are not produced and there is no explanation for the failure to produce the contraband materials by the prosecution, mere oral evidence that the materials were seized from the accused would not be sufficient to make out an offence under the NDPS act particularly when the panch witnesses have turned hostile. Hon'ble Apex Court in the case of **Ashok v. State of M.P.** reported in **(2011) 5 SCC 123** has been pleased to rule that when the alleged narcotic powder seized from the possession of the accused was not produced before the trial court as material exhibit and there was no explanation for its non-production, there was therefore no evidence to connect the forensic report with the substance that was seized from the possession of the appellant. Hon'ble Apex Court in the case of **Vijay Jain v. State of M.P.** reported in **(2013) 14 SCC 527** has also been pleased to rule that the prosecution has not produced the brown sugar before the Court and has also not offered any explanation for non-production of the brown sugar alleged to have been seized from the appellants and as the evidence of the witnesses (PW2 and PW3) to the seizure of the materials does not establish the seizure of the brown sugar from the possession of the appellants, the judgment of the trial court



convicting the appellants and the judgment of the High Court maintaining the conviction are not sustainable

22. Considering the aforesaid facts and circumstances of the case, I find and hold that the prosecution has utterly and miserably failed to substantiate its case and charge levelled against the appellant by adducing cogent, trustworthy, worth credence and reliable ocular and documentary evidence. Hence, the appellant is entitled to get benefit of doubt. Accordingly, the impugned judgment and order of conviction and sentence passed by learned lower court is set aside and the appellant is acquitted from the charge levelled against him. As the appellant is in custody, he is directed to be released forthwith from custody if not wanted in any other case. Accordingly, this appeal is allowed.

(Prakash Chandra Jaiswal, J)

Mishra/-

AFR/NAFR	A.F.R.
CAV DATE	N.A.
Uploading Date	15.09.2017
Transmission Date	15.09.2017

