

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.418 of 2015

Arising Out of PS.Case No. -97 Year- 2008 Thana -MAJHAULIA District-
WESTCHAMPARAN(BETTIAH)

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Bhikhari Paswan Son of Late Shankar Paswan Resident of Village : Indu Khutiya
Bisambharpur, P.S. : Manjhauliya, District : West Champaran.

.... Appellant/s

Versus

The State of Bihar.

.... Respondent/s

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Appearance :

For the Appellant/s : Mr. Ram Adya Singh
Mr.Arjun Prasad No.
Mr. Pramod Ranjan
For the State : Mr.s. Abha Singh, A.P.P.

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI

ORAL JUDGMENT

Date: 20-11-2017

Sole appellant Bhikhari Paswan has been found guilty for an offence punishable under Section 20(B) (II) (C) of the N.D.P.S. Act and sentenced to undergo R.I. for 10 years as well as to pay fine appertaining to Rs.1/- lac in default thereof to undergo S.I. for one year, additionally, under Section 22 (C) of the N.D.P.S. Act and sentenced to undergo R.I. for 10 years as well as to pay a fine appertaining to Rs.1/- lac and in default thereof to undergo S.I. for one year, additionally, with further direction to run sentences concurrently with a further direction that the period having



already undergone during course of trial will be set off in terms of Section 428 of the Code of Criminal Procedure by the Additional District and Sessions Judge 4th, West Champaran, Bettia, in Manjhaulia P.S. Case No.97 of 2008, Tr. No.32 of 2008 vide Judgment of conviction dated 19.05.2015 and order of sentence 20.05.2015.

2. Basudeo Prasad Yadav (not examined) a S.I., recorded his own fard-e-beyan on 17.05.2008 at 4.A.M.disclosing therein that after getting confidential information with regard to narcotic substance as well as illegal arms by the appellant, Bhikhari Paswan, the Officer-in-Charge constituted raiding party headed by him proceeded on a police jeep and after reaching at the house of Bhikhari Paswan lying at Village- Khutiya Khurd, conducted raid during course of which, two persons succeeded in their escape after scaling wall who were identified as Bhakhari Paswan as well as Bishwanath Paswan @ Bhut Nut, while three females namely, Druv Pati Devi, Bachiya Devi and Sunaina Devi were apprehended. Further more one quintal of



ganja was found duly wrapped and kept in a bag, balance for weighing, weights, two single barrel gun, two live cartridges, 5 empty cartridges, one Rajdoot Motor cycle and seizure lists were prepared in presence of two witnesses, namely, Yogendra Paswan, Mukesh Nut. After returning therefrom along with the aforesaid accused, as well as seized articles, were produced before the O/C. It is further evident from the written report that with regard to the recovery of the Arms, a separate prosecution has been lodged.

3. On the basis of the aforesaid written report, Manjhaulia P.S. Case No.97 of 2008 was registered followed with an investigation as well as submission of charge sheet whereupon, trial commenced and concluded in a manner, the subject matter of the instant appeal.

4. Defence case as is evident from the mode of cross examination as well as statement recorded under Section 313 Cr.P.C. is of complete denial. However, neither oral nor documentary evidence has been produced.

5. In order to substantiate its case prosecution has



examined altogether eight P.Ws who are P.W.1, Mukti Nath Paswan, P.W.2 Pramod Kumar, P.W.3 Yogendra Paswan, P.W.4 Mukesh Nut, P.W.5 Zafar Jawed Khan, P.W.6 Upendra Kumar, P.W.7 Bani Ram, P.W.8 Paras Sah, side by side has also exhibited as Ext.1 endorsement over the written report, Ext. 2-FSL report Ext.3 Written report, Ext.4 formal first information report, Ext. 5 Seizure list. As stated above, nothing has been adduced on behalf of the appellant.

6. After going through the lower court record it is apparent that the conviction and sentence of the appellant happens to be non-sustainable in the eye of law on account of severe flaw persisting in the prosecution case. The first and the foremost happens to be that though informant has not been examined but, the other police official of the raiding party, P.W.6 Upendra Kumar who also stood as an Investigating Officer, during course of evidence had not deposed that a copy of the seizure list was ever served upon the apprehended accused. In likewise manner, Seizure list, Ext. 5, did not show presence of receipt at the end of the any



of the apprehended accused. Apart from this, P.W.6 had not deposed either as a member of the raiding party or being an investigating officer that a sample was prepared at the spot, the ganja and the arms (though trial has been separated) were sealed at the spot and even, after coming to police station they were produced before the Officer Incharge who had sealed it and kept it in malkhana under relevant entry in the register. In its continuity, the evidence of Officer Incharge, P.W.5, Zafar Jawed Khan, is also to be taken into consideration who had not deposed that seized articles were produced before him and he kept the same in Malkhana having proper entry under Malkhana Register as well as having the same properly sealed with his own seal as provided under Section 55 of the N.D.P.S.Act. It is further evident from the evidence of P.W.6 that he handed over charge of investigation to the Officer Incharge on 12.08.2007, on account of his transfer and till then, he had not taken care to take the seized articles in his custody, prepared the sample, prayed before the Special Judge for



getting the sample examined by the Forensic Science Laboratory. He virtually kept mum with regard to custody of the seized article. The other witnesses, namely, P.W.1, P.W.7, and P.W.8 have not improved the fate of the prosecution case on that very score.

7. It is further evident from the evidence of P.W.5 as well as P.W.6 that they have not informed the superior officials as provided under Section 42 (2) as well as Section 57 of the N.D.P.S. Act. Further more, during course of trial, the seized ganja as well as motor cycle have not been produced nor there happens to be any kind of explanation for non-production including its destruction in accordance with Section 52 (A) of the Act by placing sample thereof.

8. Now coming to the status of the seizure list witness, it is apparent that P.O. village happens to be Khutiya Indu, while both seizure list witnesses happen to be of village Balrampur. Not only this, they were examined before the learned lower court by the prosecution as P.W.3, P.W.4 respectively and virtually, they disowned the factum of



search and seizure. P.W.1, P.W.2, P.W.7, P.W.8 have not shown presence of these two seizure list witnesses to be the member of the raiding party and in this likewise manner two persons managed to escape after scaling the wall.

9. In the case of *Vijay Jain v. State of Madhya Pradesh* as reported in (2013) 14 SCC 527, the Hon'ble Apex Court had held that:-

9. Para 96 of the judgment of this Court in *Noor Aga case* (2008) 16 SCC 417 on which the learned counsel for the State very strongly relies is quoted hereinbelow: (SCC p. 464)

“96. Last but not the least, physical evidence relating to three samples taken from the bulk amount of heroin was also not produced. Even if it is accepted for the sake of argument that the bulk quantity was destroyed, the samples were essential to be produced and proved as primary evidence for the purpose of establishing the fact of recovery of heroin as envisaged under Section 52-A of the Act.”

Thus in para 96 of the judgment in *Noor Aga case* (2008) 16 SCC 417 this Court has held that the prosecution must in any case produce the samples even where the bulk quantity is said to have been destroyed. The observations of this Court in the aforesaid paragraph of the judgment do not say anything about the consequence of non-production of the contraband goods before the court in a prosecution under the NDPS Act.

10. On the other hand, on a reading of this Court's judgment in *Jitendra case* (2004) 10 SCC 562, we find that this Court has taken a view 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. Again, in *Ashok* (2011) 5 SCC 123 this Court found that 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 and this Court held that there was therefore no evidence to connect the forensic report with the substance that was seized from the possession of the appellant.

9. The cumulative effect, on account of persistence of aforesaid deficiencies do not justify the finding recorded by the learned lower court, consequent thereupon the same is set aside. Appellant is on bail. Hence, he is directed to be discharged from the liability of his bail bond.

(Aditya Kumar Trivedi, J)

AnilKrSinha/-

AFR/NAFR	AFR
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