

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.1233 of 2017

Arising Out of PS.Case No. -234 Year- 2011 Thana -DALSINGHSARAI District- SAMASTIPUR

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1. Chhanu Rai S/o late Munak Rai @ Manku Rai Resident of Village-Ballochhak
P.S.-Dalsingsarai Distt.-Samastipur.

.... Appellant/s

Versus

1. The State of Bihar

.... Respondent/s

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Appearance :

For the Appellant/s : Mr. Mukesh Kumar No. 1

For the Respondent/s : Mr. Bipin Kumar, APP

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CORAM: HONOURABLE MR. JUSTICE ASHUTOSH KUMAR

ORAL JUDGMENT

Date: 24-01-2018

Heard the learned Advocates for the appellant and the
State.

2. The appellant, Chhanu Rai, has been convicted under Section 20(b)(II)(C) of the N.D.P.S. Act, 1985 vide judgment dated 18.02.2017 passed by the learned Special Judge, NDPS Act, Samastipur in connection with NDPS Case No. 14/2012, arising out of Dalsingsarai P.S. Case No. 234/2011 and vide order dated 22.02.2017, he has been sentenced to undergo R.I. for ten years, to pay a fine of Rs. 100,000/- and in default of payment of fine, to further suffer imprisonment for six months.

3. The prosecution case is based on the F.I.R. lodged by Satya Prakash Jha (P.W. 1) dated 24.11.2011 alleging that on



secret information having been received by the Officer In-charge of Dalsingsarai Police Station about storage of *Ganja* in the house of the appellant, a team was constituted and a raid was conducted in the house of the appellant. It has been alleged by P.W. 1 in the F.I.R. that the house was found to be locked, but in presence of Rajesh Roy and Ranjit Kumar, who have been examined as P.Ws. 2 and 3 at the trial, the lock was broken open and a search was made. On search, 400kgs. Of *Ganja* (4 quintals) kept in 39 packets and some *Ganja* kept loosely was found. No satisfactory explanation could be given by any person. It has also been alleged by the informant that the appellant and his family members had run away and were not available at the time of raid.

4. On the basis of the aforesaid Fardbeyan/statement, Dalsingsarai P.S. Case No. 234 of 2011 dated 24.11.2011 was instituted for the offence under Sections 20, 21 and 23 of the NDPS Act, 1985.

5. The police after investigation submitted charge-sheet vide charge-sheet no. 324/2012 dated 30.11.2012 sending up the appellant and two others for being tried for the offence alleged. At the trial, 13 prosecution witnesses were examined and one witness was examined on behalf of the defence and the trial court thereafter convicted the appellant and sentenced him as aforesaid.



6. The main contention of the learned counsel for the appellant assailing the impugned judgment and order of conviction is that admittedly the seized narcotic was never sealed at the place of raid nor any sample was drawn on the date of the seizure. The other ground on behalf of the appellant is that an application for drawing the sample was filed by the prosecution only on 17.07.2013, i.e. after lapse of seven months and after the permission by the learned District & Sessions Judge, the sample was drawn only on 22.07.2013. It has been submitted on behalf of the appellant that where was the narcotic kept in the interregnum is not known. There is no record of the same being kept in the Malkhana of the police station. The sample was received in the FSL on 23.07.2013. It has also been canvassed that from the perusal of the report of the FSL, it would clearly appear that the column with regard to the mode in which the parcel was found to be packed on receipt has been left completely blank. Thus, the main argument of the learned counsel for the appellant is that in the absence of drawing of sample at the time of the seizure of the narcotics and there being no evidence with regard to the safe custody of the narcotics for the period after the seizure and before samples were taken, the prosecution version becomes doubtful and it would be unsafe to rely upon any one of the witnesses, almost all of whom are members of the raiding party, for holding the appellant liable.



7. In order to appreciate the prosecution case, it would be first necessary to refer to the relevant part of the depositions of the prosecution witnesses.

8. Satya Prakash Jha/ Informant, who has been examined as P.W. 1, has stated that he had led the raiding party to the house of the appellant and from there huge quantity of narcotics/*Ganja* was recovered. He has further stated that the S.H.O. of Dalsingsarai Police Station got a secret information that some miscreants had concealed *Ganja* in huge quantity in the house of the appellant. On such information, a team was constituted, of which P.W. 1 was made a head, and raid was conducted in which narcotics were recovered. In his deposition before the trial court, he has clearly stated that the packets of *Ganja*, which were found kept in a plastic bag, were not sealed. He has also admitted before the trial court that no samples were drawn from the said 39 packets at the time of the seizure. After the recovery of the narcotics in question, the same was loaded on vehicles and was brought to the police station and thereafter, written information was given to the Officer In-charge of the concerned police station.

9. what is of relevance here is that the Officer In-charge of the concerned P.S. who had received the secret information and had constituted the team, viz. Ramesh Upadhyaya has not been



examined and no explanation has been offered for his non-examination. What is also evident from the deposition of P.W. 1 is that after the seized articles were brought to the P.S., then only the same was weighed. After recording the F.I.R., and preparing the seizure list, the same was sent to the Officer In-charge of the P.S.

10. There is no evidence of the Officer In-charge of the concerned P.S. writing down the information about hoarding of narcotics and sending the report to the superior officer.

11. Thus, there is a complete violation of provisions of Section 42 of the NDPS Act.

12. For the sake of completeness, Section 42 is being extracted:

“42. Power of entry, search, seizure and arrest without warrant or authorization. – (1) Any such officer (being an officer superior in rank to a peon, sepoy or constable) of the departments of central excise, narcotics, customs, revenue intelligence or any other department of the Central Government including para-military forces or armed forces as is empowered in this behalf by general or special order by the Central Government, or any such officer (being an officer superior in rank to a peon, sepoy or constable) of the revenue, drugs control, excise, police or any other department of a State Government as is empowered in this behalf by general or special order of the State Government, if he has reason to believe from personal knowledge or



information given by any person and taken down in writing that any narcotic drug, or psychotropic substance, or controlled substance in respect of which an offence punishable under this Act has been committed or any document or other article which may furnish evidence of the commission of such offence or any illegally acquired property or any document or other article which may furnish evidence of holding any illegality acquired property which is liable for seizure or freezing or forfeiture under Chapter V-A of this Act is kept or concealed in any building, conveyance or enclosed place, may between sunrise and sunset,-

(a) enter into and search any such building, conveyance or place;

(b) in case of resistance, break open any door and remove any obstacle to such entry;

(c) seize such drug or substance and all materials used in the manufacture thereof and any other article and any animal or conveyance which he has reason to believe to be liable to confiscation under this Act and any document or other article which he has reason to believe may furnish evidence of the commission of any offence punishable under this Act or furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter V-A of this Act; and

(d) detain and search, and if he thinks proper, arrest any person whom he has reason to believe to have committed any offence punishable under this Act:

[Provided that in respect of holder of a licence for manufacture of manufactured drugs or psychotropic



substances or controlled substances, granted under this Act or any rule or order made thereunder, such power shall be exercised by an officer not below the rank of sub-inspector:

Provided further that] if such officer has reason to believe that a search warrant or authorisation cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place at any time between sunset and sunrise after recording the grounds of his belief.

(2) Where an officer takes down any information in writing under sub-section (1) or records grounds for his belief under the proviso thereto, he shall within seventy-two hours send a copy thereof to his immediate official superior.”

13. From the deposition of P.W. 1, it also becomes very apparent that the narcotics were never sealed nor any sample was drawn. He has also not stated as to where was the narcotics kept after its seizure. There is no reference of the same being stocked/stored in the Malkhana of the police station.

14. In this context, the depositions of P.Ws. 2 and 3 also assume relevance. Both prosecution witnesses, who are shown as seizure list witnesses, have denied the recovery of any *Ganja* in their presence. Though, they have put their signatures on the seizure list, which have been marked as Exts. 2/1 and 2/2, but have stated that



nothing was recovered in their presence. P.W. 3 has also clearly stated that he had signed on the document at the police station and not at the place from where the *Ganja* was recovered.

15. However, the other prosecution witnesses, viz. Nagina Prasad (P.W. 4), Johnshan Barua (P.W. 5), Md. Sajid Hussain (P.W. 6) and Parmanand Lal Karn (P.W. 7) have supported the prosecution version, in as much as they have deposed that a raid was conducted in the house of the appellant and huge quantity of *Ganja* was recovered. But, none of the aforesaid witnesses have talked of sealing of the recovered narcotics and of drawing of samples. In fact, P.W. 4 has deposed that it was only at the time of raid that it was learnt that other co-accused persons, viz. Lal Babu Roy and Ram Babu Roy are the brothers of the appellant and the house of Lal Babu Roy was also searched.

16. Thus, the standing instructions of NCB regarding sampling of the seized article, mandating sampling at the spot, has also been violated.

17. Pradeep Kumar, the second I.O. of this case, has been examined as P.W. 12. He has deposed that he had taken over the charge of investigation on 16.02.2012 and had filed a requisition before the learned District & Sessions Judge seeking his permission to take sample of *Ganja*. The sample of the seized *Ganja* was taken on



22.07.2013 and was sent to Forensic Science Laboratory, Patna for examination on 23.07.2013. The examination report is of 13.08.2013 and he had filed the charge-sheet against the appellant and two others for the offence under Sections 20, 21 and 23 of the NDPS Act.

18. From the depositions of the aforesaid witnesses what strikes the Court is that even the ownership of the house from where *Ganja* was recovered could not be ascertained. P.W. 1 in his deposition has stated that he had no personal knowledge about the ownership of the house from where *Ganja* was recovered. Similarly, confusing statements have been made by P.Ws. 4 and 6 which creates doubt as to whether the appellant is the owner of the house from where the narcotics was recovered. P.W. 4 has deposed before the trial court that when the team arrived at the house of the co-accused Lal Babu Ray, the team entered and conducted the search. Similarly, P.W. 6 has talked about the breaking open of the lock of the houses of Lal Babu Roy and Ram Babu Roy and search having being made inside the house, where *Ganja* was recovered. If the aforesaid two accused persons who were put on trial along with the appellant and they were found to be the brothers of the appellant, then it was of utmost importance for the prosecution to establish that the appellant had the exclusive possession of the house, to the exclusion of the other accused persons.



19. P.Ws. 9, 10, 11 and 12 have not supported the prosecution version and like P.Ws. 2 and 3 have been declared hostile.

20. Thus, from the conspectus of the evidence on record, it appears that no sealing and sampling was done by P.W. 1 and there has been delay of almost seven months before the samples were drawn.

21. This Court also is at complete loss to know as to where were the seized article kept before the samples were drawn. In the absence of any evidence indicating the place where it was kept, it would be difficult to rely upon the prosecution version of recovery of narcotics from the house of the appellant. The mandatory provisions of Sections 42 and 52 of the NDPS Act have been completely breached.

22. Thus, finding that the provisions of Section 42 of the NDPS Act has not been complied with and the sampling was not done in accordance with law, this Court is of the view that no reliance could be placed on the deposition of witnesses about the recovery of the narcotics from the house of the appellant. The provisions of NDPS Act are mandatory in nature and have to be construed strictly. This Court has no other option but to hold that the seizure and collection of samples were not in accordance with the provisions of the NDPS Act and the entire procedure stood vitiated as a result thereof.



23. For the reasons aforesaid, the judgment and order of conviction of the appellant is set aside and the appeal is allowed.

24. The appellant is in custody since 12.10.2012. He is directed to be released forthwith from jail, if not wanted in any other case.

25. A copy of the judgment be sent to the Superintendent of the concerned jail for information, compliance and record.

(Ashutosh Kumar, J.)

Rakhi

AFR/NAFR	
CAV DATE	N. A.
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