

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Appeal (DB) No.832 of 2015

Arising Out of PS. Case No.-46 Year-2012 Thana- RAXAUL District- East Champaran

Shyam Babu Singh @ Shya Babu Singh, S/o Late Sajawal Singh, resident of
Village- Gamhariya, P.S.- Raxaul, District- East Champaran, Bihar.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s : Sri Shri Prakash Tiwari, Advocate
For the Respondent/s : Dr. Mayanand Jha, A.P.P.

CORAM: HONOURABLE MR. JUSTICE RAKESH KUMAR
and
HONOURABLE MR. JUSTICE ARVIND SRIVASTAVA
ORAL JUDGMENT
(Per: HONOURABLE MR. JUSTICE RAKESH KUMAR)

Date : 30-01-2018

The present Appeal under Section 374(2) read with Section 389(1) of the Code of Criminal Procedure, 1973 (hereinafter referred to as the “Cr.P.C.”) was preferred against the judgment of conviction and sentence passed in N.D.P.S. Case No. 29/21 of 2012/2015 (arising out of Raxaul P.S. Case No. 46 of 2012) passed by Shri Krishna Bihari Pandey, learned 3rd Additional Sessions Judge – cum – Special Judge, East Champaran, Motihari (hereinafter referred to as the “trial judge”). By the judgment dated 16.07.2015 the appellant has been convicted for commission of offence under Section 20(b)ii(c) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the



“N.D.P.S. Act”) and by order of sentence dated: 23.07.2015 he has been directed to undergo rigorous imprisonment for twelve years with a fine of Rs. 1,25,000/- and in default of payment of fine amount, he has further been directed to undergo simple imprisonment for six months.

2. Short fact of the prosecution case is that on 06.03.2012 one Shri Ashok Kumar Singh, Probationer Sub Inspector of Police Raxaul Police Station, East Champaran submitted a written report to the Police Inspector –cum- Officer –In-Charge of Raxaul Police Station disclosing therein that on 06.03.2012 while he was in Police Station at about 11.00 A.M. he got secret information that in the village Gamhariya Shyam Babu Singh (appellant) had illegally concealed Ganja and Shyam Babu Singh (appellant) was deeply involved with other 2-3 accused persons and he was trying to sale the said Ganja. To get the said information verified and taking necessary action, he along with probationer Sub Inspector of Police Amitesh (P.W.3), Probationer Sub Inspector of Police Dinesh Kumar Das (P.W.1) and Constable - Md. Bhuto (P.W. 2) proceeded for village Gamhariya through Government vehicle. On arrival in Gamhariya village near the house of Shyam Babu Singh (appellant) in presence of two local independent witnesses namely: Dwarika Sah (not examined) and Birjeet Sah (not



examined) following the procedure of search, searched double storied building of the appellant and in the said search on the ground floor he noticed that illegal Ganja wrapped in 10 big packets and 3 small packets were concealed in straw. He claimed that in presence of the said two independent witnesses he taken weight of the seized Ganja by weighing machine and on weighing it was found that bag of 10 bags were having 20 Kilograms of Ganja each and small bags were containing 10 Kilograms of Ganja each and on weighing total Ganja was about 230 Kilograms. After preparing seizure list in presence of two independent witnesses he obtained the signature of independent witnesses who voluntarily signed and thereafter he handed over one copy of the seizure list to the appellant. The appellant /Shyam Babu Singh was arrested and after arresting accused -Shyam Babu Singh (appellant) he was interrogated. In interrogation he disclosed that along with Farukh Ahmed, Abbas Mian and Suresh Yadav in the morning on the same day had brought illegal Ganja from Nepal which was concealed by him. The informant in its written report further stated that arrested Shyam Babu Singh (appellant) disclosed that other three persons had gone to Gamhariya market with a view to contact merchant for sale of the seized Ganja. On the basis of information provided by the



apprehended person (appellant) the informant with the raiding party went to Gamhariya Bazar where he saw that all the three persons were sitting on Chowk near the temple and after noticing police party they started fleeing away. However, after chase, all the three persons were arrested and on interrogation they disclosed their name as: Farukh Ahmed, Abbas Mian and Suresh Yadav. The informant claimed that all the three apprehended accused persons accepted before him that in the morning with the appellant they had brought the said illegal Ganja from Nepal and it was concealed in the house of the appellant. Thereafter, besides the appellant the aforesaid three persons were also arrested. On the basis of the said written information given by Sri Ashok Kumar Singh, a formal F.I.R. vide Raxaul P.S. Case No. 46 of 2012 was drawn on 06.03.2012 at 15.00 Hours (3.00 P.M.) for the offence under Sections 20/22/23/24 of the N.D.P.S. Act against the four accused persons namely :-

1- Shyam Babu Singh (appellant)

2- Farukh Ahmed (acquitted)

3- Abbas Mian

4- Suresh Yadav (case of both accused 3 & 4 was separated).

Thereafter, the case was investigated and on finding the case true against all the F.I.R. named accused persons, on 30.04.2012



charge -sheet was submitted and thereafter, the appellant with other three accused persons were put on trial. In the case on 10.03.2013 charge under Sections 20(b)ii(c) and 23(c) of the N.D.P.S. Act was framed against the appellant and to prove the case on behalf of the prosecution altogether five witnesses were examined. P.W. 1 (Dinesh Kumar Das, Sub Inspector of Police Raxaul), P.W. 2 (Md. Bhuto, Constable) ; and P.W. 3 (Amitesh, A.S.I.) were members of the raiding party with informant Ashok Kumar Singh / P.W. 4 whereas, Sri Madhav Singh (investigating officer) was examined as P.W. 5 .

3. Sri Shri Prakash Tiwari, learned counsel for the appellant after placing entire evidences i.e. both oral and documentary evidences has argued that the learned trial judge though after noticing the fact that in the case the prosecution had not examined seizure list witnesses, who were independent witnesses, has proceeded on the basis of evidence of only the official witnesses and has passed the judgment of conviction. It has been argued that during evidence the then investigating officer /P.W. 5 has admitted that he had not taken sample from the seized Ganja and it was case of violation of Section 42 as well as Section 52A of the N.D.P.S. Act , however, the learned trial judge ignoring all those infirmities has passed order of conviction and sentence, which is



required to be interfered with. It has been argued that the appellant due to the reasons best known to the prosecution was falsely implicated in the present case showing as if the appellant had concealed huge quantity of Ganja to the tune of 230 Kilograms, however, during trial the prosecution has not produced the seized Ganja which was fatal for the prosecution case. Shri Tiwari, learned counsel for the appellant has placed heavy reliance on a recent judgment of the Hon'ble Supreme Court reported in 2017 SCC OnLine SC 1505 (Gorakh Nath Prasad vs. State of Bihar). He has specifically referred to paragraph nos. 6 and 7 of the said judgment of the Supreme Court and it has been argued that the judgment of conviction and sentence may be set aside.

4. Dr. Mayanand Jha, learned Additional Public Prosecutor has tried to support the prosecution case particularly by way of referring to the evidence of P.W. 4 / the informant and also by way of referring to the application, which was filed before the court below for deputation of Magistrate submits that prosecution has established its case, and as such, according to learned Additional Public Prosecutor the Appeal is fit to be rejected.

5. Besides hearing learned counsel for the parties, we have also perused the entire evidences i.e. oral and documentary evidences available on record. It is a peculiar case that the



informant, who was Probationer Sub Inspector of Police in the written report submitted before the Officer-In-Charge of the Police Station had stated that he got secret information regarding concealment of huge quantity of Ganja by the appellant, however, he did not bother to make any station diary entry to this effect and *suo motu* only with P.W. 1, P.W. 2 and P.W. 3 proceeded to the village of the appellant and it was shown as if the informant started search in presence of two independent witnesses, however, no reason has been assigned by the prosecution as to why the so-called two seizure list witnesses were not examined by the prosecution. The informant overlooking the statutory provisions contained in Section 42 of the N.D.P.S. Act *suo motu* without giving any information to superior Officers intruded into the house of the appellant and came out with a case as if huge quantity of Ganja to the tune of 230 Kilograms were concealed on the ground floor of the house of the appellant. It was not the end of the matter but the appellant was apprehended and from his mouth disclosure was recorded as if other three persons were also involved, and thereafter, the raiding party proceeded to the market area and apprehended other three accused persons. Of-course, in the evidence of the raiding party itself there is apparent contradiction regarding finding of those persons at a particular



place. One of the raiding party witness has stated that after getting information regarding involvement of three persons they proceeded and near a canal three persons were seen and they were apprehended after chase, whereas, other raiding party witness as well as informant in its written report has stated as if three other accused persons were sitting near the Chowk which was near to a temple. P.W. 1 (Dinesh Kumar Das, Sub Inspector of Police, Raxaul) had stated that Police Jeep was being driven by one Lal babu Singh, however the driver of the vehicle was also withheld by the prosecution and he was not examined to support as if the raiding party had actually visited the place of occurrence or not. P.W. 1 had stated that being a member of the raiding party he conducted raid and found Ganja concealed in the ground floor of the house of the appellant, whereas P.W. 2 (Md. Bhuto) who was a Police Constable in paragraph no. 3 has stated that the the said Ganja was seized from open verandah and in paragraph no. 4 of his evidence he stated that he had seen other three accused persons who were sitting near the canal. P.W. 3 (Amitesh) yet another member of the raiding party and Assistant Sub Inspector of Police while supporting the prosecution case has said that he had noticed the Ganja concealed in the premises of the appellant. In paragraph no. 4 of his evidence he stated that he had seen other



three accused persons near the Chowk. P.W. 2 (Md. Bhuto) had made categorical statement that he did not enter the house, however, P.W. 3 (Amitesh) in paragraph no. 5 of his evidence has stated that P.W. 2 had entered into the house of the appellant however, in paragraph no. 8 of his evidence he has categorically stated that none of the seized bags were opened in his presence. P.W. 4 (Ashok Kumar Singh) who is the informant and Sub Inspector of Police in his evidence had stated that he had received secret information regarding concealment of Ganja in the house of the appellant and thereafter he with raiding party proceeded to the village of the appellant and conducted raid and found Ganja. However, he in paragraph no. 6 of his evidence has stated that regarding such secret information he had not made entry in the station diary. In his evidence he has not at all stated as to whether after getting such secret information even though he had not recorded any station diary entry regarding such fact, whether he informed any superior officer or he tried to obtain search warrant. He has not stated that he was having reasons to believe that if he proceeds for obtaining search warrant or obtaining permission from senior officer there was possibility of removal of the contraband. Those facts were not stated by the informant /P.W. 4 This itself reflects violation of statutory provisions particularly the



provision contained in Section 42 of the N.D.P.S. Act. In paragraph no. 9 of his evidence he has further accepted that the seized Ganja was neither sealed nor signature was obtained. He simply said that Ganja was kept in Malkhana. Again the statutory provision contained in Section 52A of the N.D.P.S. Act was not followed. It has not been indicated as to whether in Malkhana register any entry was made for keeping such huge quantity of Ganja or not. However, the investigating officer /P.W. 5 (Madhav Singh) in paragraph no. 7 of his evidence has stated that the seized articles were kept in open place in the police station. P.W. 4 (Ashok Kumar Singh) had proved the seizure list, which was marked as Exhibit -1. Written report (Exhibit -2) and formal F.I.R., which was marked as Exhibit -3. P.W. 5 (Madhav Singh) /the investigating officer in his evidence had only stated that he had filed application for deputation of Magistrate and said application was marked as Exhibit- 5. On perusal of Exhibit -5 it is evident that said application was prepared on 22.3.2012 whereas in the present case alleged search and seizure was made on 06.03.2012. We are of the opinion that after lapse of several days from the date of seizure there was no reason for filing such application for deputation of Magistrate. Even in entire evidence it has not been established as to whether sampling was made from



the bags recovered from the premises of the appellant or not. On the contrary, the investigating officer /P.W. 5 in paragraph no. 11 has accepted that he had not taken sample nor he had obtained seal or signature. He has further stated in paragraph no. 12 of his evidence that no numbering was made on the seized packets. In paragraph no. 6 he accepts that when he received seized articles it was not sealed. In paragraph no. 10 he has accepted that during investigation he had not recorded statement of any of the villagers or neighbourers of the appellant. Meaning thereby, that perfunctory investigation was done by P.W. 5. Of -course during his evidence he had stated that seized materials were sent to Forensic Science Laboratory, Patna and Kolkata, once the prosecution itself has not established the case of collecting sample from the seized material, there is no relevancy to look into the F.S.L. report. It is also not in dispute that seized articles were never produced before the trial court. In this context the court is in agreement with the submission of learned counsel for the appellant that judgment of conviction passed by the learned trial judge is contrary to the law laid down by the Apex Court particularly in Gorakh Nath Prasad Case (Supra). It would be better to quote paragraph nos. 6 and 7 of the said judgment of the Hon'ble Apex



Court in Gorakh Nath Prasad Case (Supra) , which is quoted as follows:-

“6. The NDPS Act provides for a reverse burden of proof upon the accused, contrary to the normal rule of criminal jurisprudence for presumption of innocence unless proved guilty. This shall not dispense with the requirement of the prosecution to having first establish a prima facie case, only whereafter the burden will shift to the accused. The mere registration of a case under the Act will not ipso facto shift the burden on to the accused from the very inception. Compliance with statutory requirements and procedures shall have to be strict and the scrutiny stringent. If there is any iota of doubt the benefit shall have to be given to the accused.

7. In the facts of the present case, the independent witnesses with regard to the search and seizure , PW – 2 and PW -3 , having turned hostile deposing that their signatures were obtained on blank paper at the police station, the mere fact of a FSL Report (Exhibit 8), being available is no confirmation either of the seizure or that what was seized was Ganja, in absence of the production of the seized item in Court as an exhibit. The non-production of the seized material is therefore considered fatal to the prosecution case. The issue whether there has been compliance with Sections 42 and 50 of the NDPS Act loses its relevance in the facts of the case.”

6. In view of observation of Hon’ble Apex Court as quoted hereinabove as well as evidences in the case which we have noticed, we are of considered opinion that the prosecution has completely violated the statutory provisions of the N.D.P.S. Act and it has not proved its case beyond all reasonable doubt, and as



such, the judgment of conviction and sentence is liable to be set aside. Accordingly, judgment of conviction dated 16.07.2015 and sentence dated 23.07.2015 passed in N.D.P.S. Case No. 29 / 21 of 2012 / 2015 (arising out of Raxaul P.S. Case No. 46 of 2012) by Shri Krishna Bihari Pandey, learned 3rd Additional Sessions Judge – cum – Special Judge, East Champaran, Motihari is set aside and the Appeal is allowed. Since the appellant is in custody and judgment of his conviction and sentence has been set aside, it is hereby directed to release the appellant forthwith, if not required in any other case.

(Rakesh Kumar, J)

(Arvind Srivastava, J)

praful/-

AFR/NAFR	AFR
CAV DATE	NA
Uploading Date	07 -02-2018
Transmission Date	07 -02-2018

