

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.494 of 2003

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Shrawan Prasad, Son of Ramdeo Prasad, Resident of Postal Park, P.S. –
Kankarbagh, District – Patna.

.... Appellant/s

Versus

State of Bihar

.... Respondent/s

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Appearance :

For the Appellant/s : Mr. Ajay Kumar Thakur Adv.
Mr. Ritwaz Raman, Adv.
Ms. Swati Sinha, Adv.

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

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CORAM: HONOURABLE MR. JUSTICE VINOD KUMAR SINHA

ORAL JUDGMENT

Date: 09-03-2018

By way of the present appeal, appellant seeks to challenge the judgment of conviction and order of sentence dated 30.09.2003, passed by Shri Bharat Prasad Yadav, the then Additional Sessions Judge-III Patna, in Special Case No. 58 of 2001, by which the sole appellant stood convicted under Section 20(b)(i) of N.D.P.S. Act and was sentenced to undergo R.I. for two year and six months with a fine of Rs. 10,000/- and in default of payment of fine, further R.I. for one year.

2. Prosecution case as per the self statement of P.W. 3, Rajdeep



Prasad Yadav, the then Excise Inspector, in short is that a raiding party were conducting search on 20.09.2001 and when they reached near Agamkuan on main Road, they saw a person with scooter in a suspicious condition. On search being made, from the dickey of the scooter bearing registration no. BR 1C -8, illegal ganja weighing 5 k.g. was recovered. Thereafter, seizure list was prepared and a copy of the same was handed over to the accused – appellant and the accused – appellant was arrested. After investigation, the case was found to be true and accordingly, prosecution report was submitted and cognizance of the offence was taken and the accused was put on trial.

3. Charge was framed under Section 20(b)(i) of N.D.P.S. Act

4. In order to substantiate the charges, prosecution has examined altogether six witnesses, they are; P.W. 1 – Bharat Singh, P.W. 2 – Ramanand Dwivedi, P.W. 3 – Rajdeev Prasad Yadav, P.W. 4 – Madan Mohan Prasad, P.W. 5 – Bhupendra Kumar and P.W. 6 – Anil Kumar Azad.

5. On behalf of the defence, one forwarding report has been filed as Ext. A and certified copy of the complaint petition was marked as Ext. X, in order to show that the accused – appellant has filed a complaint petition against the Excise officials including P.W. 6, earlier.

6. Post trial, learned Trial Court convicted the appellant under



Section 20(b)(i) of the N.D.P.S. Act and sentenced him in the manner as stated above.

7. Being aggrieved, the appellant preferred the present appeal.

8. Contention of learned counsel for the appellant is that as per prosecution case, occurrence took place at 8. P.M., which will appear from the prosecution report as well as the evidence of P.W. 3, who is the informant in this case and seizure list also disclosed that seizure was made at 8 P.M., however, the evidence of other witnesses viz. P.W. 4 and P.W.5 shows that the scooter of the appellant was intercepted and seizure was made at 8 O'Clock in the morning and in spite of cross-examination on this point, these witnesses have stated that occurrence is of 8 O'Clock morning and the record also shows that the accused was produced before the Sessions Judge on 20.09.2001 forenoon, that creates a serious doubt about the prosecution story with regard to seizure of *ganja* from the dickey of scooter of the appellant. It has also been submitted that P.W. 3, in his cross examination has also stated that on 20.09.2001, he was on patrolling in the evening and further stated about the constitution of team and recovery of *ganja*. Though learned Trial Court has tried to justify that the occurrence is of 8 O'clock in the morning but by mistake, it has been written as 8. P.M., however, he failed to appreciate the fact that in seizure list also, the time was mentioned at 8. P.M. and there is consistent evidence of P.W. 3 that the occurrence



is of evening of 20.09.2001. Further contention of learned counsel for the appellant is that in this case provisions of Section 42, 50, 52(A) and 57 of N.D.P.S. Act has not been complied as no information was given to higher officer about the seizure of contraband and further sampling of the seized *ganja* has not been done as per standing orders issued under Section 52(A) of the N.D.P.S. Act and there is also non compliance of section 57 in this case. It has also been submitted that there is nothing available on record to show as to where the seized articles were kept, though the I.O. has stated that it was kept in *Malkhana* but no register of *Malkhana* has been produced nor it has been disclosed that in whose custody the seized *ganja* was kept rather the evidence of I.O. shows that he kept the seized articles for one day and further there is delay in sending the sample of the recovered *ganja* to the forensic laboratory for its examination. Further submission is that as held by Hon'ble Apex Court in its catena of decisions that where the informant himself is an investigating officer, the investigation might get prejudiced, it is more likely, in the present case, when the defence has come with a case that he had earlier lodged a complaint against the excise officials and the Trial Court, without considering all these infirmities has convicted the appellant under Section 20 (b)(i) of the N.D.P.S. Act, which is out and out perverse and not sustainable in the eye of law.

9. On the other hand, learned counsel, appearing on behalf of



respondent – State has supported the finding of guilt recorded by the trial court and submitted that in this case, there is recovery from the dickey of petitioner's scooter and sample was prepared and seized contraband was sent for chemical examination, in chemical examination, the seized contraband was found to be *ganja* and, therefore, there is no infirmity in the impugned judgment of trial court and conviction of appellant under Section 20 (b)(i) of the N.D.P.S. Act is just and proper.

10. Considered the submissions of both the parties. From perusal of the evidence, it appears that P.W. 3 is the informant in this case and he has stated in his evidence that on 20.09.01, he was posted in the Excise Department and along with forces, he was on patrolling and reached at 8 P.M. five yards from Zero Mile and found a person going on scooter on suspicious condition and on being searched, from dickey of the appellant's scooter, 5 K.g of *ganja* was recovered. On his direction, seizure list and written report were prepared, on which he put his signature and he proved the seizure list as Ext. 2. It appears that according to informant, the *ganja* was seized at 8. 'O' Clock in the night on 20.09.01 from Scooter bearing No. was B.R. 1C -8. His evidence also disclosed that he sent a small quantity of *ganja* for its chemical examination. However, his evidence does not disclose as to whether he complied the provisions contained under Section 52 (A) of N.D.P.S Act, while preparing sample. His evidence also disclosed



that after investigation, he submitted the prosecution report and he proved the prosecution report also. His evidence further disclosed that he has sealed the seized articles and produced the same in the Court. In his cross-examination in para -6, he has stated that on 20.09.01, there was a patrolling in the evening at 5 'O' clock. His evidence in para – 9 also shows that he is the informant and he has prepared the seizure list and investigated the case. Evidence of this witness further shows that he has not disclosed the appellant as to whether, he desires to be searched by a Magistrate or a Gazetted Officer. His evidence in para -13 also shows that he submitted the material exhibits in Excise *Malkhana* but he does not know as to who was the incharge of the said *Malkhana* on 21.09.91. According to this witness accused was arrested and recovery was made at 8. P.M. on 20.09.01. Even in the statement under Section 313 Criminal Procedure Code, question was put to the appellant regarding seizure at 8 P.M. on 20.09.2001.

11. P.W. 1 was the constable of Excise Department in relevant time and is a seizure list witness. His evidence shows that when he reached at the place of occurrence, the person was already arrested and search was already made. He has been cross-examined in para - 5 and he has stated that Prabhat Kumar Mundu and Anil Kumar Azad are S.I. in Excise Department but he has no knowledge that the accused has filed a case against them before the filing of this case.

12. It is relevant to mention here that the accused has brought a



complaint petition, though it is certified copy and marked as Ext. X that he has lodged a case against the excise officials earlier.

13. P.W. 2 is also a constable of Excise Department and he has stated that except, he came to know that the appellant –accused was arrested, he does not know anything and nothing was recovered in his presence.

14. P.W. 4, Madan Mohan Prasad has supported the case of prosecution, however, according to him the raid was conducted in the morning at 8. A.M.. Similarly, P.W. 5 and P.W. 6 have also stated in their evidence that the raid was conducted in the morning at 8 A.M.

15. Defence has brought Ext. A to show that the accused – appellant was produced in court in the forenoon of 20.09.01. As such, if the Ext. A and evidences of P.W. 4 to 6 are believed, that demolishes initial prosecution story lodged by P.W. 3 and caste a serious doubt on the prosecution story. The learned trial court has tried to justify the same, explaining that it is a mistake due to long gap between the seizure and the evidence but the learned trial court has failed to appreciate the fact that seizure list also shows that time of raid as 8. P.M. in spite of cross-examination, evidence of P.W. 3 discloses that he had gone on patrolling in the evening of 20.09.2001, the aforesaid discrepancy is fatal and goes to the root of the case.

16. On the other hand the appellant has also come with a case that he had lodged a complaint against some of the excise officials and



due to which, he has falsely been made accused in the instant case and a certified copy of complaint petition has also been brought on record but the same has been marked for identification, as such, the same cannot be relied upon. However, suggestion has been given to the prosecution witness.

17. Apart from the above facts, there is nothing available on record to show that search & seizure was made in front of any Gazetted Officer or a Magistrate and even sampling has not been done as per the standing order of 1/88/ or 1/89, issued under the provisions of Section 52(A) of the N.D.P.S. Act. Further it appears that there is violation of Section 57 of the N.D.P.S. Act. No doubt, are not mandatory, however, if they are considered in totality that creates a serious doubt about the prosecution case as violation of those provisions would not *ipso facto*, violate the whole proceeding, but at the same time, I.O. cannot overlook these provisions and such violation will have a bearing on appreciation of evidence regarding arrest of accused or seizure of articles.

18. Apart from that in this case, it appears that seizure was made on 20.09.01 and from the chemical report of the seized articles, it appears that the same has been sent for its examination to the chemist vide letter dated 15.10.01 i.e. after about a month and there is nothing available on record to show as to where the seized article was kept as no *Malkhana* register has been produced nor *Malkhana* in charge has



been examined in this case. Besides that there is nothing available on record to show that sample, which has been taken out from the seized articles has been sent for examination as the sample has not been prepared according to standing order No. 01/88 / 01/89 issued under Section 52(A) of the N.D.P.S. Act. Further the report also does not show as to how much quantity was sent for examination and as there is clear

19. Provision under the N.D.P.S. Act, provides for stringent punishment as such legislator has framed certain restrictions and provisions, which has to be complied so that the provisions of the Act cannot be misused. However, in the present case, there is violation of Section 52(A) and 57 of the N.D.P.S. and there is also nothing to show that the report of the seizure was communicated to higher officers and the seizure was also not made before any Gazetted officer or a Magistrate and further there is apparent contradiction with regard to time of search & seizure in the evidence of P.W. 4, P.W. 5 and P.W. 6 with evidence of P.W. 3, the informant and the accused appellant was produced in the court in forenoon on the same day i.e. on 20.09.01, that also casts a serious doubt on prosecution case.

20. Further it appears that in this case informant himself is the investigating officer of this case and as held by Hon'ble Apex Court in the case of Megha Singh v. State of Harayana (1996) 11 SCC 709 that *Such practice, to say the least, should not be resorted to so that*



there may not be any occasion to suspect fair and impartial investigation.

21. However, it appears that the Trial Court has failed to consider the above infirmities and inconsistencies, while convicting the appellant under Section 20(i)(b) of N.D.P.S. Act.

22. Resultantly, this appeal is allowed. Judgment of conviction and order of sentence dated 30.09.2003, passed by Shri Bharat Prasad Yadav, the then Additional Sessions Judge-III Patna, in Special Case No. 58 of 2001, is set aside.

23. As the appellant is on bail, he is discharged from liability of bail bond.

(Vinod Kumar Sinha, J)

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