

**IN THE HIGH COURT OF JUDICATURE AT PATNA****Criminal Appeal (SJ) No.172 of 2004**

Special case no. 7/1999 arising out of Forbesganj (Simraha) P.S.  
case no.36/1999 District- ARRARIA

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1. Durganand Mandal Son of Antlal Mandal resident of village Tegachhiya P.S.  
Tarabari District Araria

.... .... Appellant/s

Versus

State of Bihar

.... .... Respondent/s

**Appearance :**

For the Appellant/s : Mr. Pramod Kumar, Advocate

For the Respondent/s : Mr. Parmeshwar Mehta, APP

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**CORAM: HONOURABLE MR. JUSTICE HEMANT KUMAR  
SRIVASTAVA**

**ORAL JUDGMENT**

**Date: 26-03-2018**

1. The present appeal has been filed by the above stated sole appellant against the judgment of conviction and sentence order dated 22.1.2004 passed by the Addl. Sessions Judge I-cum- Special Judge, Araria in Special case no. 7/1999 arising out of Forbesganj (Simraha) P.S. case no.36/1999 by which and whereunder the above stated appellant was convicted for the offence punishable under section 20 (b) (1) of the N.D.P.S. Act, 1985 and accordingly, was sentenced to undergo rigorous imprisonment for five years and also fine of Rs 50,000/- and in default of payment of fine, he was further ordered to undergo rigorous imprisonment for three years.

2. PW6, Arvind Kumar got recorded his self



statement on 25.1.1999 to this effect that on the same day he got confidential information that a person was carrying ganja on his bicycle and having made sanha entry, he proceeded to railway Gumti, Simraha along with Chaukidar and other constables. He reached near railway gumti and saw a person carrying a bag on his bicycle. He stopped the aforesaid person and made search in presence of his companions as well as PW1 and PW2 and recovered 2 1/2 kg ganja from the above stated bag. He prepared seizure list in presence of PW1 and PW2 and forwarded his self statement to Forbesganj police station for institution of the FIR and accordingly, formal FIR was drawn up on the same day. PW6 handed over charge of investigation to the Investigating officer of this case who, in his turn, having completed investigation submitted charge sheet against the appellant. The cognizance of the offence was taken and the appellant was put on trial and appellant stood charged for the offence punishable under section 20 (b) (1) of the N.D.P.S. Act, 1985 which was denied by him.

3. In course of trial, prosecution examined, altogether, six witnesses and also got exhibited signatures of PW1 and PW2 as exhibit 1 series, seizure list as exhibit 2, fardbeyan as exhibit 3, forwarding report as exhibit 4 and



endorsement on fardbeyan as exhibit 5. The statement of the appellant was recorded under section 313 of the Code of Criminal Procedure in which he, again, denied the prosecution story. No evidence was adduced by the appellant in support of his defence but from perusal of trends of cross-examination of the prosecution witnesses, it appears that the defence of the appellant was total denial of the prosecution story.

4. The learned court below, having relied upon the testimony of PW6, convicted and sentenced the appellant in the manner as stated above.

5. Learned counsel appearing for the appellant while challenging the impugned judgment argued that the learned trial court failed to take notice of this fact that the prosecution miserably failed to prove that the seized article was ganja as the prosecution could not bring FSL report on record. He, further, argued that PW6 failed to comply the mandatory provision of NDPS Act and moreover, PW6 admitted in his deposition that he had kept the seized ganja in **Malkhana** but failed to state as to whether he had sealed seized ganja or not and, therefore, possibility of replacement of seized article could not be ruled out. He, further, submitted that the



Investigating officer has not been examined in this case and non-examination of the Investigating officer was fatal to the prosecution case but the learned court below failed to take notice of the aforesaid fact and committed illegality in convicting and sentencing the appellant.

6. On the other hand, learned Additional Public Prosecutor appearing for the State supported the impugned judgment of conviction and sentence order arguing that PW6 has proved the recovery of ganja from the possession of the appellant and, therefore, the learned trial court rightly convicted the appellant.

7. Having heard the contentions of both parties, I went through the record. I find that except PW6 not a single prosecution witness has supported the factum of recovery. No doubt, PW1 and PW2 identified their signatures on the seizure list but they, specifically, stated that PW6 had taken their respective signatures on seizure list and nothing had been recovered in their presence. Furthermore, I find that seized article had not been sent for chemical examination because no FSL report has been brought on record. Therefore, it is clear that prosecution could not succeed to prove that the seized article was ganja. Deposition of PW6 goes to show



that after seizure, he kept the seized article in Malkhana but he failed to state that seized article had properly been sealed by him. Moreover, in absence of deposition of the Investigating officer, in my view, serious prejudice has been caused to the appellant and, therefore, the impugned judgment of conviction and sentence order can not sustain in the eye of law.

8. On the basis of the aforesaid discussions, this criminal appeal is allowed and the impugned judgment of conviction and sentence order are, hereby, set aside. Appellant is on bail. He is discharged from the liability of bail bonds.

**(Hemant Kumar Srivastava, J)**

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