

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Appeal (SJ) No.216 of 2016

Arising Out of PS. Case No.-106 Year-2013 Thana- CHARPOKHARI District- Bhojpur

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Tanbir Alam, s/o Md. Badruddin, resident of Village- Garhani, P.S.- Char Pokhari, District- Bhojpur.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

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Appearance :

For the Appellant/s	:	Mr. Shri Prakash Srivastava
For the Respondent/s	:	Mr. Z.Hoda(App)

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CORAM: HONOURABLE MR. JUSTICE ASHUTOSH KUMAR
ORAL JUDGMENT

Date : 14-08-2018

Heard learned counsel for the petitioner and the State.

The appellant / Tabnbir Alam has been convicted under Section 20-B(II)-C of the N.D.P.S. Act, 1985 and Section 25 (1-B) (A) of the Arms Act by judgement dated 12.01.2016 passed by the 3rd Additional District & Sessions Judge, Bhojpur at Ara in N.D.P.S. Case No. 9 of 2013 and by order dated 15.01.2016, he has been sentenced to undergo RI for 10 years; to pay a fine of Rs. 1,00,000/- (one lakh); and in default of payment of fine, to undergo further imprisonment of one year for the offence under Section 20-B(II)-C of the N.D.P.S. Act and RI for three years; to pay a fine of Rs. 1,000/- (one thousand); and in default, to further suffer simple



imprisonment for two months for the offence under Section 25 (1-B) (A) of the Arms Act. The sentences have however been ordered to run concurrently.

111 kgs of *ganja* is said to have been recovered from the house of the appellant.

Vijay Kumar Singh, P.W. 2 lodged a self statement on 17.05.2013 alleging precisely therein that on the same day at about 11.30 in the day, he received secret information that *ganja* has been kept in the house of the appellant which is to be sold in the market. The aforesaid information was recorded in the station diary and superior police officer was informed about the same. On the orders of the S.D.P.O., Piro, a raiding team was constituted and the house of the appellant was raided around 12.50 P.M. At the time of raid, one Jagdanand Dubey, Block Development Officer was present as the Magistrate on duty. In his presence, 111 kgs of *ganja*, kept in several packets, was recovered. A firearm weapon was also recovered from the house of the appellant. A seizure list was prepared by the Executive Magistrate which was signed by the witnesses of the seizure. The petitioner and two others were arrested.

On the basis of the aforesaid self-statement, a case vide Charpokhari P. S. Case No. 106 of 2013 dated 17.05.2013 was instituted for investigation for offences



under Section 20 of the N.D.P.S. Act, 1985 and Sections 25 (1-B) A, 26 and 35 of the Arms Act.

The Police after investigation submitted charge-sheet, whereupon cognizance was taken and the case was committed to the Special Court for trial.

The learned trial court, after examining four witnesses on behalf of the prosecution and one on behalf of the defence, convicted and sentenced the appellant as aforesaid. However, the father of the appellant, who too was put on trial, has been acquitted of all charges.

Be it noted that one of the brothers of the appellant also was made accused in this case, but considering his juvenility, his case was bifurcated and was sent to Juvenile Justice Board for trial.

Mr. Ravindra Kumar Singh, learned advocate for the appellant, while assailing the judgement and order of conviction, has argued that the mandatory provision of the N.D.P.S. Act, 1985, namely, Section 42 (2) and 55 of the N.D.P.S. Act, 1985 have not at all been complied with. Since the aforesaid provisions in the Act are mandatory, non-compliance of the same has made the prosecution version suspect in the eyes of law. He further suspects that the sampling of the narcotics was not done at the place of search and seizure, even though the Executive Magistrate was present. The other grounds of assail, raised



by the learned counsel for the appellant, is that there is no evidence of the narcotics being kept in the Malkhana. For how many days was the narcotics kept in Malkhana is also not known. In the absence of the examination of the IO of this case, there was no material before the Court to know as to when was the sample drawn and permission taken from the trial court for sending the sample for forensic examination for ascertaining whether what was recovered / seized was a narcotic. Though, the report of the Forensic Science Laboratory confirms that the sample was *ganja* but the report loses its significance when it is not known when the sample was drawn and whether the sample was drawn from the consignment which was seized from the house of the appellant and whether the seal was the same. Where was the seal put is also not known. The narcotics has not also been produced before the trial court.

On the following grounds, it has been urged by the learned counsel for the appellant that the judgement and order of conviction is not fit to be sustained in the eyes of law, so far as the conviction under the N.D.P.S. Act is concerned.

With respect to the conviction under the Arms Act, it has been argued that though the sanction for prosecution was obtained from the competent authority but the evidence with respect to recovery of the firearm is not



complete and the seizure of the firearm has not been proved.

In order to appreciate the contention of the appellant, it would be necessary to go through the deposition of the witnesses.

Vinay Kumar Sinha, P.W. 1 has deposed that he was posted as Sergeant Major at MMP, Ara on 17.06.2013. He had examined the firearm which was seized in connection with Char Phokari P. S. Case No. 106 of 2013. On examining the weapon, he found the firing pin, trigger and spring to be in working condition. The examination was manual and the weapon was found to be capable of being used. After the examination of the firearm weapon, the same was returned to Ashok Kumar Singh, Inspector of Police, who had brought it. The weapon in question was produced before him under seal and after examination, it was again re-sealed and returned. He has proved the inquiry report (Exhibit-3). In cross-examination he has stated that he did not record the time of examining the firearm weapon.

From the deposition of P.W. 1, it stands proved that the firearm weapon which was recovered from the house of the appellant was capable of being fired from, as all the components were in proper condition.



Vijay Kumar Singh, P.W. 2 is the informant of this case. He has reiterated the prosecution version and has deposed that during the raid in the house of the appellant, 111 kgs of ganja was recovered. He also found a firearm weapon, two pairs of weighing balance and weights of different denominations. Cash amount of Rs. 23,000/- (twenty three thousand) was also recovered from the house of the appellant. Seizure list was prepared in front of the witnesses, which has been proved as Exhibit-1. In his cross-examination, he has stated that he took the team around 15 minutes to search the house of the appellant. The recovery was made from two rooms of the aforesaid house. However, he has not stated the details of the recovery of the narcotics from each of the rooms. After opening the bags, it was found that *ganja* was kept in them. A composite seizure list was prepared. The pistol, which was recovered, was empty and not loaded. He has further stated in his cross-examination that all the seized articles / narcotics were kept in Malkhana of Charpokhari Police Station. Before keeping it in the Malkhana, the number of the Malkhana Register was also noted. From the deposition of P.W. 2, however, it does not appear that the information about receiving of secret knowledge, subsequent constitution of raiding team under the orders of SDPO and recovery of narcotics and firearm weapon



from the house of the appellant, was reduced in writing and sent to the superior police officer within 76 hours, as mandated under Section 42 (2) of the N.D.P.S. Act, 1985.

Though, no question has been put to the aforesaid witness, but from his deposition as well as records of the case, it is apparent that such requirements under the N.D.P.S. Act, 1985 has not at all been fulfilled.

The Apex Court as well as this Court has, times without number, held that the observance of the requirement under Section 42 (2) is mandatory and since serious consequences follow, non-compliance of the same has rendered the prosecution case doubtful.

From the evidence of P.W. 2 also, it does not appear that any sampling was done at the time of seizure, even though an Executive Magistrate was present. When was the consignment taken to Malkhana and when were the samples drawn is not known.

True it is that the Investigating Officer of this case has not been examined because of his death in a road accident, nonetheless, in the absence of any material on record or evidence, one can only make a guess work that the narcotics was kept in the Malkhana without any marking and it remains in the realm of doubt as to when the samples were drawn and in whose presence. The prosecution has not brought on record the permission to



send the sample of the narcotics to the Forensic Science Laboratory. The only material before this Court, therefore, is the forensic report (Exhibit-2), dated 26.08.2013. The report does not state, when were the samples received and when the examination was held. Though, the report discloses that the facsimile of the seal was affixed on the sealed remnant of the sample, but when was that seal put on the sample is not known. In the absence of any disclosure about the date on which the sample was taken and sent to the Forensic Science Laboratory, the contents of the report cannot be taken into account, for it is not known as to which sample was tested. It is precisely for this reason that the manner of drawing sample has been set out in Section 55 of the N.D.P.S. Act, 1985.

The two seizure list witnesses have not been examined and no explanation has been offered for their non-examination. In the absence of the formal proof of the seizure list, the prosecution case has been further weakened.

Narendra Kumar, P.W. 3 was part of the raiding team. In his cross-examination, he has stated that the seized items were brought to the police station on a vehicle but it was not sealed there. He also did not remember whether the narcotics was weighed at the place where the same has recovered.



Ram Tapasya Pandey, P.W. 4, however, has stated that the narcotics was weighed in front of the Executive Magistrate. The weighing balance which was available in the house of the appellant was used for the aforesaid purpose. But he also in his cross-examination has expressed that he did not remember whether the narcotics was sealed before being kept in the Malkhana.

Thus, from conspectus of the evidence on record, it is not proved that what was recovered from the house of the appellant was only sent for chemical examination.

This Court is at a loss to understand as to what benefit can the appellant get from the deposition of the defence witness. In fact, the deposition of the defence witness further confirms the fact that the raid was conducted in the house of the appellant. D.W. 1 has testified to the fact that she has two houses and one of the houses has been taken on rent by the appellant.

In any view of the matter, the evidence with respect to the offence under the N.D.P.S. Act, 1985 is lacking in all material particulars.

However, there is nothing on record to doubt the recovery of the firearm from the house of the appellant. The firearm was found to be working and proper condition. The necessary sanction was also obtained from the



competent authority for prosecuting the appellant under the provisions of the Arms Act.

The judgement of conviction and order of sentence of the appellant under 20-B(II)-C of the N.D.P.S. Act, being without evidence, is set aside. The appellant is acquitted of the charges under the N.D.P.S. Act, 1985.

However, the conviction and sentence under Section 25(1-B) A of the Arms Act is affirmed and upheld.

The appeal is thus partially allowed.

The appellant is in custody for more than five years. He has been slapped with the sentence of three years under the Arms Act.

Thus, he is directed to be released on bail forthwith from jail, if not required in any other case.

A copy of the judgement be transmitted to the Superintendent of the concerned Jail for information, compliance and records.

(Ashutosh Kumar, J)

skm/-

AFR/NAFR	N.A.F.R.
CAV DATE	
Uploading Date	20.08.2018
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