

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.570 of 2016

Arising Out of PS.Case No. -216 Year- 2007 Thana -BHABHUA District- BHABHUA (KAIMUR)

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1. Intiyaz Sai @ Mallu Sai @ Mallu son of Kayum Sai resident of Mohalla
Stuarganj, Mohania, P.S. - Mohania, District - Kaimur.

.... Appellant/s

Versus

1. The State of Bihar.
2. The Union of India through the Intelligence Officer, Narcotics Control Bureau,
Patna.

.... Respondent/s

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Appearance :

For the Appellant/s : Mr. Vikram Deo Singh
Mr. Manoj Kumar

For the Respondent/s : Mr. Syed Ashfaque Ahmad

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**CORAM: HONOURABLE MR. JUSTICE HEMANT KUMAR
SRIVASTAVA
ORAL JUDGMENT
Date: 02-02-2018**

1. This criminal Appeal has been preferred against the judgment of conviction and sentence order dated 25.06.2016 and 29.06.2016 respectively passed by the learned Sessions Judge cum Special Judge, Kaimur in G.R.No. 881 of 2007/N.D.P.S. Trial no. 22 of 2010 by which and whereunder he convicted the sole appellant for the offences punishable under sections 20(b) and 20(b) (ii) (A) the Narcotic Drugs and Psychotropic Substances Act 1985 and, accordingly, sentenced him to undergo rigorous



imprisonment for six months and Rs. 5000/- as fine for the offence punishable under sections 20(b) (ii) (A) and to undergo rigorous imprisonment of six years and fine of Rs. 50000/- for committing offence under section 20(b) of the N.D.P.S. Act.

2. Learned Sessions Judge also observed that in default of depositing fine of Rs. 5000/- and Rs. 50,000/- the convicted appellant shall further undergo rigorous imprisonment of one month as well as rigorous imprisonment for five months respectively. However, he directed that both the above stated sentences shall run concurrently. The three co-accused, namely, Parwej Ansari, Feroze Khan and Doman Mian were acquitted of the charges by the same impugned judgment.

3. PW-6 Manju Singh, the then S.I of Bhabhua Police Station recorded her self statement on 23.06.2007 at 9 a.m near Balwatia Pond to this effect that on the same day at 7.45.a.m she got a confidential information that one person wearing black paint and black shirt was coming by a jeep



from Mohania to Bhabhua and he was sitting on front seat of the jeep. Having got confidential information, she made Sanha entry and gave information to her higher officials including S.D.P.O, Bhabhua and also requested to depute a Magistrate. On her request, Mr. Jai Prakash Yadav, the then Block Agriculture Officer, Bhabhua came at police station at 8 a.m and, thereafter, she along with PW-1 Baliram Uraon, the then, A.S.I of Bhabhua Police Station, PW-2 Vijendra Prasad Singh A.S.I, PW 3 Sunil Tiwary, Seizure list witness PW-4 Yashwant Singh Police Driver, PW.5 Bharat Kumar Ram Home Guard and Sankata Yadav Chaukidar proceeded for verification of above stated information. She along with her team reached near Balwatia Pond and noticed that one jeep was coming from Mohania side, she stooped the jeep and, thereafter, she saw one person sitting on the front seat of the aforesaid jeep. The aforesaid person made attempt to flee from there but he was apprehended by the police party. The aforesaid person disclosed his name as Imteyaz Sain @ Mallu Sain son of Kayam Sai, Mohalla- Stuarganj, Mohania,



Dist- Kaimur. She informed him that a Magistrate was present and in presence of Magistrate his body would be searched and, thereafter, the aforesaid apprehended person became ready to be searched by PW-6. She searched the body of the aforesaid person in presence of above stated Magistrate and the members of raiding party and in course of search, two Colgate powder containers tucked in his waist of his trousers were found and in the aforesaid two containers Ganja was found. Similarly, two containers one of the Nycel powder kept in his left pocket and another is Lal Dant Manjan kept in right pocket were recovered and from each containing 10 and 9 purias of Heroin. On query, the above stated apprehended person admitted that seized articles Ganja and Heroin were carried by him. She arranged Weighing Machine and testing Kit from the market and, on weight, the seized Ganja was found 150 grams and Heroin was found 150 grams. She seized the recovered Ganja and Heroin and prepared seizure list in presence of Magistrate and other witnesses, who put their signatures on the seizure



list. She seized the articles in presence of the above stated persons. The apprehended person disclosed that one Issamuddin shah had given the seized articles to him and, as a matter of fact, the seized articles belonged to Issamuddin Shah, Doman Mian, Alim Mian and Tengar Mian and the seized articles were to be handed over to one Feroze Mian, who was in jail custody at the relevant time.

4. On the basis of self statement of PW-6 Bhabhua P.S.Case No. 218 of 2007 was registered and accordingly, formal F.I.R for the offences under section 20(b), 21, 22, 25, 27A of the N.D.P.S. Act was drawn up. PW-7 took charge of investigation. In course of investigation, he visited the place of occurrence, recorded the statement of witnesses and sent the sample of seized articles for chemical examination and, subsequently, submitted charge sheet against the appellant and others. Cognizance of offence was taken in usual course and, accordingly, the appellant along with accused Parwej Ansari, Feroze Mian and Doman Mian were put on trial. However,



in course of trial, prosecution examined altogether seven witnesses and also got Exhibited signature of PW-3 on seizure list as Exhibit 1, seizure list as Exhibit -2, written statement of PW-6 informant and FSL report as Exhibit -4. Apart from this, a letter sent by the police showing this fact that the seized articles had been kept in Malkhana was also exhibited as material exhibits M series. The statement of appellant and others were recorded under section 313 of the Cr.P.C in which they denied the prosecution story and claimed their false implication. No evidence was adduced by the appellant or other accused persons in support of their defence.

5. The learned trial court after analyzing the evidence available on the record convicted and sentenced the appellant in the manner as stated above whereas rest accused were acquitted of the charges.

6. Learned counsel appearing for the appellant assailed the impugned judgment of conviction and sentence order arguing that the learned court below wrongly held in



the impugned judgment that the compliance of section 50 of N.D.P.S Act was done in the present case, particularly, in the circumstance, when PW-6 stated before the court that the appellant was only informed about the presence of Magistrate at the time of his search. He further submitted that as a matter of fact, the provision of Section 50 of N.D.P.S Act has not been complied with in the present case because presence of the Magistrate at the time of search is not sufficient for compliance of provision of Section 50 of the N.D.P.S Act unless the accused is made aware of his right to be searched in presence of Gazetted Officer or Magistrate but in the present case, there is nothing on the entire evidence to show that the appellant was made aware of his above stated valuable right prior to his search and, therefore, it is obvious that the mandatory provision of Section 50 of the N.D.P.S. Act has not been complied with in the present case. He further submitted that sealing of the seized articles was also not done in accordance with law and seized materials were never produced before the court by the



prosecution nor it was called for by the trial court. He further submitted that the Investigating Officer (PW-7) admitted in his cross- examination that he sent the seized articles to Forensic Science Laboratory after 25-26 days of seizure and, therefore, it is obvious that there was every possibility to replace the seized articles as none of the prosecution witnesses stated that the sealing of seized articles was made in accordance with law.

7. On the other hand, learned Public Prosecutor appearing for the State supported the impugned judgment of conviction and sentence order arguing that the prosecution witnesses proved the recovery from possession of the appellant beyond all reasonable doubts and PW-6 very clearly stated that the recovery was made in the presence of a Magistrate and prior to search of the appellant, an option was given to the appellant to be searched before the Magistrate and the appellant agreed to be searched by the informant and, therefore, it cannot be said that the informant (PW-6) violated the mandatory provision of Section 50 of the



N.D.P.S Act. He also submitted that the witnesses specifically stated that the seized articles were sealed and subsequently, sent to Forensic Science Laboratory for examination and moreover, Exhibit 4 establishes this fact that Heroin and Ganja had been recovered from conscious possession of the appellant and, therefore, there is no scope to interfere into the impugned judgment of conviction and sentence order.

7. As I have already stated that, altogether, seven prosecution witnesses have been examined in this case. Out of them PW-1 Balram Uaon, PW-2 Vijyendra Prasad Singh, PW-4 and 5 were members of raiding party. PW-1, PW-2, PW-4 and PW-5 stated the factum of recovery from possession of the appellant and all the aforesaid witnesses stated that one Magistrate was present at the time of search of the appellant and the search was made in the presence of the said Magistrate but the aforesaid witnesses, nowhere, stated that the appellant was asked to be searched in presence of a Magistrate or a Gazetted Officer. PW-6,



Manju Singh is informant of the present case, she states that on her request, Block Agriculture Officer, namely, Jai Prakash Yadav came at police station along with members of raiding party. She went near Belwatia Pond and apprehended the appellant, who was found sitting on the front seat of the Jeep. PW-6 stated that the appellant disclosed his name as Imteyaz Sain @ Mallu Sain and, thereafter, he was informed that the search could be taken by the Magistrate and, thereafter, in presence of Magistrate, the aforesaid apprehended person was searched and from his possession Ganja and Heroin kept in the containers were recovered.

8. It would appear from perusal of the statement of PW-6 that PW-6 did not apprise the appellant about his legal right to be searched in presence of a Magistrate or Gazetted Officer. PW-6 only disclosed before the appellant that a Magistrate was present and in presence of Magistrate, the search would be made. Section 50 of the N.D.P.S. Act has been inserted in the N.D.P.S Act with an object to save the innocent person from false implication.



Section 50 of the N.D.P.S. Act is not a formality rather it is a mandatory provision and searching officer is bound to comply with the mandatory provision of Section 50 of the N.D.P.S. Act before search. Furthermore, the searching officer is duty bound to give option to the accused to be searched in presence of Magistrate or Gazetted Officer before the search and not only this but it is imperative on the part of searching officer to apprise the person intended to be searched of his right under section 50 of N.D.P.S Act, to be searched before a Gazetted Officer or a Magistrate and if the searching officer failed to comply with the above stated mandatory provision of Section 50 of the N.D.P.S. Act, the entire prosecution shall be vitiated due to non compliance of Section 50 of the N.D.P.S. Act. In the present case, the PW-6 had only informed to the appellant about the presence of a Magistrate and she did not give any option to the appellant to be searched either before a Magistrate or before a Gazetted Officer. Therefore, it is apparent that PW-6 violated the mandatory provision of Section 50 of N.D.P.S. Act and in



view of the law laid down in State of Rajasthan v/s Ram Chandra reported in A.I.R 2005 SC 2221, I am of the opinion that the entire prosecution of the appellant was vitiated. Apart from this, the evidence available on the record goes to show that the sealing of seized articles had not been done in accordance with law nor the seized articles were sent to Forensic science Laboratory for chemical examination in time. Therefore, in my view, the impugned judgment of conviction and sentence order cannot sustain in the eye of law.

9. On the basis of aforesaid discussion, this Criminal Appeal is allowed and the impugned judgment, is hereby, set aside. The appellant is acquitted of the charges. The appellant is in jail custody and, therefore, he is ordered to be released forthwith, if not wanted in any other case.

(Hemant Kumar Srivastava, J)

N.K/-

AFR/NAFR	AFR
CAV DATE	
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