

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.973 of 2016

Arising Out of PS.Case No. -426 Year- 2012 Thana -BARACHATTI District- GAYA

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Jagdeo Singh Bhokta Son of Late Sambhodi Singh Bhokta, Resident of Village-
Bighi, Police Station- Barachatty, District- Gaya.

.... Appellant/s

Versus

1. The State of Bihar

.... Respondent/s

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Appearance :

For the Appellant : Mr. Praveen Kumar, Advocate.
Mr. Uday Pratap Singh, Advocate.
For the Respondent : Mr. Binod Bihari Singh, APP.

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CORAM: HONOURABLE MR. JUSTICE ASHUTOSH KUMAR

CAV JUDGMENT

Date: 31-01-2018

Heard.

2. Jagdeo Singh Bhokta/appellant has been convicted under Section 18(c) of the Narcotic Drugs and Psychotropic Substances Act, 1985 by judgment dated 14.09.2016 passed by the learned Additional Sessions Judge 1st-cum-Special Judge, N.D.P.S. Act, Gaya in N.D.P.S. Case No. 2 of 2013, arising out of Barachatti P.S. Case No. 426 of 2012 and by order dated 17.09.2016 the appellant has been directed to undergo R.I. for seven years, to pay a fine of Rs. 5000/- and in default of payment of fine to further suffer R.I. for two years.

3. From the house of the appellant, five quintals of Poppy Straw was recovered on 07.10.2012.



4. The case of the prosecution is that the officer-in-charge of Barachatti police station viz. Krishna Kumar who has been examined as P.W. 2 had lodged his self-statement on 07.10.2012 alleging that he received secret information that in village Bighi about five quintals of poppy straw has been kept in the house of one Sambodhi Singh Bhokta. On such secret information, the house of Sambodhi Singh Bhokta was raided. Seeing the police party, the female folks of the house ran away. The appellant was found to be sleeping on a cot in the house. On being asked, he did not have any explanation to offer. The poppy straw was kept in bags numbering about 25-26 and each bag containing 20 kilograms of straw. The raid was conducted and seizure effected in front of two witnesses viz. Sunil Raj and Raju Lal Keshri who have been examined as P.Ws. 3 and 4 respectively. The appellant was arrested and the police party along with P.W. 2 proceeded for the police station along with the seized narcotic.

5. On the basis of the aforesaid self-statement, Barachatti P.S. Case No. 426 of 2012 dated 07.10.2012 was registered for investigation under Section 18 of the N.D.P.S. Act, 1985. The police, after investigation, submitted charge sheet whereupon cognizance was taken against the appellant.

6. At the trial, five witnesses on behalf of the



prosecution were examined and the trial court thereafter convicted and sentenced the appellant as aforesaid.

7. The learned counsel for the appellant has assailed the judgment and order of conviction on the ground that the mandatory requirement under the N.D.P.S. Act of reducing the information about suspicion in writing and sending it to the superior police officer as mandated under Section 42 (2) of the Act has not at all been complied with and that there has been irregularity in drawing the samples and after an inexplicable delay, the sample was sent for chemical examination.

8. Be it noted that the report of the FSL (Ext. 4) is that the sample contained Morphine along with other Alkaloids of Opium and hence narcotics.

9. In order to appreciate the contention of the appellant, it is of utmost importance to see the deposition of Krishna Kumar, the informant of this case who has been examined as P.W. 2. Though he has supported the version given by him in the FIR but has given a vague assessment of the quantity of the narcotic recovered from the house. In his cross-examination he has stated that one part of the seized article was weighed whereas with respect to the rest of the consignment, he made a guess work and then wrote it in the seizure list. He has also admitted that he has not written anything about



weighing the consignment. He has further admitted that he did not record anything in the investigation papers regarding drawing of the sample and sealing the same.

10. From the deposition of P.W. 2, it does not appear that the information which he had received prior to the raid and seizure was reduced in writing and sent to a superior police officer.

11. Section 42 of the N.D.P.S. Act reads as hereunder:

42. Power of entry, search, seizure and arrest without warrant or authorization. – (1) Any such officer (being an officer superior in rank to a peon, sepoy or constable) of the departments of central excise, narcotics, customs, revenue intelligence or any other department of the Central Government including para-military forces or armed forces as is empowered in this behalf by general or special order by the Central Government, or any such officer (being an officer superior in rank to a peon, sepoy or constable) of the revenue, drugs control, excise, police or any other department of a State Government as is empowered in this behalf by general or special order of the State Government, if he has reason to believe from personal knowledge or information given by any person and taken down in writing that any narcotic drug, or psychotropic substance, or controlled substance in respect of which an offence punishable under this Act has been committed or any document or other article which may furnish evidence of the commission of such offence or any illegally acquired property or any document or other article which may furnish evidence of holding any illegality acquired property which is liable for seizure or freezing or forfeiture under Chapter V-A of this Act is kept or concealed in any building, conveyance or enclosed place, may between sunrise and



sunset,-

(a) enter into and search any such building, conveyance or place;

(b) in case of resistance, break open any door and remove any obstacle to such entry;

(c) seize such drug or substance and all materials used in the manufacture thereof and any other article and any animal or conveyance which he has reason to believe to be liable to confiscation under this Act and any document or other article which he has reason to believe may furnish evidence of the commission of any offence punishable under this Act or furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter V-A of this Act; and

(d) detain and search, and if he thinks proper, arrest any person whom he has reason to believe to have committed any offence punishable under this Act:

[Provided that in respect of holder of a licence for manufacture of manufactured drugs or psychotropic substances or controlled substances, granted under this Act or any rule or order made thereunder, such power shall be exercised by an officer not below the rank of sub-inspector:

Provided further that] if such officer has reason to believe that a search warrant or authorisation cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place at any time between sunset and sunrise after recording the grounds of his belief.

(2) Where an officer takes down any information in writing under sub-section (1) or records grounds for his belief under the proviso thereto, he shall within seventy-two hours send a copy thereof to his immediate official superior.



12. The Supreme Court in case of *Karnail Singh vs. State of Haryana (2009) 8 SCC 539* has held as follows:

In conclusion, what is to be noticed is that Abdul Rashid did not require literal compliance with the requirements of Sections 42(1) and 42(2) nor did Sajan Abraham hold that the requirements of Sections 42(1) and 42(2) need not be fulfilled at all. The effect of the two decisions was as follows:

(a) The officer on receiving the information [of the nature referred to in sub-section (1) of Section 42] from any person had to record it in writing in the register concerned and forthwith send a copy to his immediate official superior, before proceeding to take action in terms of clauses (a) to (d) of Section 42(1).

(b) But if the information was received when the officer was not in the police station, but while he was on the move either on patrol duty or otherwise, either by mobile phone, or other means, and the information calls for immediate action and any delay would have resulted in the goods or evidence being removed or destroyed, it would not be feasible or practical to take down in writing the information given to him, in such a situation, he could take action as per clauses (a) to (d) of Section 42(1) and thereafter, as soon as it is practical, record the information in writing and forthwith inform the same to the official superior.

(c) In other words, the compliance with the requirements of Sections 42 (1) and 42 (2) in regard to writing down the information received and sending a copy thereof to the superior officer, should normally precede the entry, search and seizure by the officer. But in special circumstances involving emergent situations, the recording of the information in writing and sending a copy thereof to



the official superior may get postponed by a reasonable period, that is, after the search, entry and seizure. The question is one of urgency and expediency.

(d) While total non-compliance with requirements of sub-sections (1) and (2) of Section 42 is impermissible, delayed compliance with satisfactory explanation about the delay will be acceptable compliance with Section 42. To illustrate, if any delay may result in the accused escaping or the goods or evidence being destroyed or removed, not recording in writing the information received, before initiating action, or non-sending of a copy of such information to the official superior forthwith, may not be treated as violation of Section 42. But if the information was received when the police officer was in the police station with sufficient time to take action, and if the police officer fails to record in writing the information received, or fails to send a copy thereof, to the official superior, then it will be a suspicious circumstance being a clear violation of Section 42 of the Act. Similarly, where the police officer does not record the information at all, and does not inform the official superior at all, then also it will be a clear violation of Section 42 of the Act. Whether there is adequate or substantial compliance with Section 42 or not is a question of fact to be decided in each case. The above position got strengthened with the amendment to Section 42 by Act 9 of 2001.

13. The sample does not appear to have been drawn on the spot and no explanation also seems to have been offered at the trial.

14. The seizure list witnesses viz. P.Ws. 3 and 4 have not supported the prosecution version and have been declared hostile.



15. The I.O. of this case viz. Dinesh Prasad Singh has been examined as P.W. 5. He has deposed before the trial court that after he took over the charge of investigation, he recorded the further statement of the informant (P.W. 2) and thereafter the evidence of the other members of the police party. The house of the appellant was found to be of mud and tiles. He also claims to have recorded the statement of the seizure list witnesses.

16. What is of importance to note is that on 09.10.2012 he produced the appellant in court and also received permission from the District and Sessions Judge to send the seized article for chemical examination to FSL. However the sample was sent to the CFSL on 23.12.2012 i.e. after about two months after the permission taken by the District and Sessions Judge for sending the same to the CFSL. He has stated that from 11.12.2012 till 23.12.2012, the sample was kept in the Malkhana.

Thus it is found that neither the mandatory requirement of Section 42 of the Act was complied with nor sample was taken at the time of seizure and there has been an unusual delay in sending the sample to the CFSL. The two witnesses before whom seizure is said to have been effected have also not supported the prosecution version and have been declared hostile. Rest all other witnesses are members of the police team whose deposition have only to be scrutinized with



greater care and circuminspection. Which material exhibit was brought before the court and what was seized therefore, remains unknown. It also is in doubt as to whether any sealing and marking was done on the seized article which was kept in the Malkhana. In such a situation, the report of the CFSL regarding the sample being poppy straw and thus a narcotic, cannot be relied upon.

17. The prosecution has miserably failed to substantiate its case beyond all reasonable doubts. As a result, this appeal succeeds and the judgment and order of conviction dated 14.09.2016 in N.D.P.S. Case No. 2 of 2013, arising out of Barachatti P.S. Case No. 426 of 2012 and the order of sentence dated 17.09.2016 are set aside.

18. The appellant is directed to be released from jail if not wanted in any other case.

19. A copy of the judgment be communicated to the superintendent of the concerned jail for information, compliance and record.

(Ashutosh Kumar, J)

KKSINHA/-

AFR/NAFR	AFR
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