

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.563 of 2015

Arising Out of PS.Case No. -195 Year- 2001 Thana -Biharsharif District- Nalanda
(Biharsharif)

=====

Naresh Prasad S/o Bhonu Prasad Resident of Mohalla - Asha
Nagar, P.S. Soh Sarai, District - Nalanda

.... Appellant/s

Versus

The State of Bihar

.... Respondent/s

=====

Appearance:

For the Appellant/s : Mr. Anil Kumar No.1, Adv.

For the Respondent/s : Mr. Sujit Kuamr Singh, APP

=====

CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI

ORAL JUDGMENT

Date: 13-08-2018

Against the judgment of conviction and sentence dated
29.08.2015 recorded by First Additional Sessions Judge-cum-
Special Judge, Nalanda at Biharsharif in Bihar P.S. Case
No.195/2001 convicting the appellant Naresh Prasad for an offence
punishable under Section 47(a) of the Excise Act and sentencing him
to undergo R.I. for one year as well as to pay fine appertaining to
Rs.5000/- in default thereof, to undergo S.I. for three months,
additionally, preferred instant appeal.

2. Ram Raj (PW.4) Officer-in-charge of Sohsarai Police
Station along with police constables while was on night patrolling,
received confidential information from Laheri Mobile to reach at
Aasnagar as, raid is to be conducted. Accordingly, he reached where
he had found training Dy.S.P. Sailesh Kumar Singh along with arms
constable as well as Ravi Jyoti Officer-in-charge of Laheri P.S. along
with arms constable. It has been disclosed that raid has to be
conducted at the house of Naresh Prasad where spurious wine have
been kept and are stealthily sold. In presence of two seizure list



witnesses namely, Tuntun Kumar and Ashok Kumar, after cordoning the house, the house owner was directed to open the door and then thereafter, the police officials gone inside, searched out and during course thereof, found 124 small pouch (200 ml), 9 pouch of 400 ml having sticker of Bihar Excise Countrymade Wine were seized. Furthermore, empty pouch of counting 233, were also seized. 70 liter sprit for preparing countrymade wine was also seized. One pouch sealing machine was also seized. During course of interrogation, Naresh Prasad who was found there, failed to explain the same and in likewise manner, also failed to show license whereupon, he was arrested. Seizure list was prepared and then thereafter, they returned back to the police station along with arrested accused Naresh Prasad as well as seized article. It has further been alleged that during course of interrogation, Naresh Prasad had said that Dinesh and Md. Jahil were actively involved along with him (since acquitted). After registration of Bihar (Soh Sarai) P.S. Case No.195/2001 under Section 47(a) of the Bihar Excise Act and 21 of the NDPS Act investigation commenced and after concluding the same, charge sheet was submitted, facilitating the trial, meeting with the ultimate result, subject matter of instant appeal.

3. Defence case as is evident from mode of cross-examination as well as statement recorded under Section 313 of the Cr.P.C. is that of complete denial. However, nothing has been adduced in defence.

4. Prosecution, in order to prove its case, had produced eight witnesses, namely, Niranjana Paswan PW.1, Nawal Kishore



PW.2, Manju Kumari PW.3, Ram Raj PW.4, Tuntun Kumar PW.5, Ashok Kumar PW.6, Sanjay Kumar Kushwaha PW.7 and Ravi Jyoti Kumar PW.8 as well as had also exhibited Ext.1-Self-statement, Ext.1/1-Endorsement, Ext.1/2-Registration, Ext.2-Formal FIR, Ext.3-Seizure list Ext.4-application to allow examination of the seized article, Ext.5-Report of the Excise Inspector, Ext.6, 6/A Signature of seizure list witness, Ext.7-True copy of Bihar P.S. Case No.238/2001, Ext.8-Charge sheet of Bihar P.S. Case No.238/2001. As stated nothing has been adduced on behalf of defence.

5. Learned counsel for the appellant while assailing the judgment of conviction and sentence has submitted that the finding recorded by the learned lower court is not at all substantiated by the materials available on the record. To justify the same, it has been submitted that material exhibit has not been produced in court. Had there been, then in that circumstance it would have an adverse impact inconsonance with corroborating the existence of search and seizure. Therefore, non-production of the sole alleged seized article happens to be severe lacuna in the prosecution case whereupon, conviction would not survive. In likewise manner, it has also been submitted that PW.6 and PW.7 who stood as seizure list witness did not find favour to the prosecution. If the cumulative effect is considered then in that circumstance recovery has become doubtful.

6. Furthermore, it has also been submitted that the date of occurrence has been shown as 08.06.2001, there happens to be disclosure at the end of the informant PW.4 that they have returned back along with articles, machine but, during course of evidence he had not deposed where those alleged seized articles were kept at



least, to the Malkhana and in likewise manner the Investigating Officer PW.3 also happens to be silent. That has got relevancy in the background of the fact that the Investigating Officer without taking permission from the court had asked for the Excise Inspector to examine and report with regard to the contents kept in two separate bottles on 14.06.2001 and the report also happens to be dated 04.06.2001. The more surprising feature, according to the learned counsel for the appellant is that the application was addressed to Inspector Excise over which, the Inspector Excise has reported that after taking permission from Excise Superintendent, he had examined, the contents of aforesaid two bottles that means to say, the letter was addressed to the junior staff while the order on that very petition was by the superior. Apart from this, there happens to be no disclosure at the end of any of the PW regarding mode of sampling which creates doubt over authenticity of the report.

7. Furthermore, it has also been submitted that case was registered under Excise Act as well as under NDPS Act, charge was framed under both the enactments, then in that circumstance, the mandatory provisions so prescribed thereunder was to be followed. Because of the fact that appellant has been acquitted under NDPS Act will not exonerate the prosecution in performing the mandate and lapses as visualizing from the record is bound to affect upon the legality of the judgment impugned. Apart from this, it has also been submitted that manner whereunder PW.5 and PW.6, seizure list witnesses, being resident of neighbourhood of the concerned police station have been procured coupled with the deficiency as pointed out hereinabove, did not inspire confidence over the reliability of the



evidence of PW.3, PW.4, PW.7 and PW.8 police officials and that being so, the judgment impugned is fit to be set aside.

8. On the other hand, the learned Additional Public Prosecutor while supporting the finding recorded by the learned lower court, has submitted that on certain lapses as well as on flimsy grounds the finding so recorded by the learned lower court would not be subject to inference more particularly when the witnesses are consistent over the search and seizure and further, with the fact that appellant's presence happens to be over the seizure list. That means to say, accepting the search and seizure. Furthermore, on 09-06-2001 when he was produced before the Judicial Magistrate did not complain over highhandedness of the police, if any. That being so, the judgment of conviction and sentence recorded by the learned lower court is fit to be confirmed.

9. First of all, the evidence of seizure list witnesses PW.5, PW.6 are to be taken note of. PW.5 and PW.6 both have deposed in examination-in-chief that with regard to the seized article, seizure list was prepared over which they signed. In usual phenomena during cross-examination they have stated that nothing was recovered in their presence. Their signature were taken by the police officials over blank paper.

10. PW.4 is the informant. He had deposed that on the alleged date and time of occurrence he along with other police officials were on night patrolling during course of which, they have received information from the mobile of Laheri P.S. whereupon, they came to Aas Nagar where they have found Dy.S.P. Training along with police constable, police officials, constable of Laheri P.S. who



have disclosed regarding carrying of illegal wine business by Naresh Prasad whereupon, they conducted raid in presence of Tuntun Kumar and Ashok Kumar (seizure list witness) and during course thereof, Naresh Prasad was apprehended. Furthermore, the house was searched and during course thereof, 124 pouch of 200 ml countrymade wine having monogram of Bihar Excise, 9 pouch countrymade wine having monogram of Bihar Excise each containing 400 ml, empty pouch 233 having monogram of Bihar Excise, countrymade wine, 70 liter of spirit kept in two jerking and one packing machine were seized for which, seizure list was prepared in presence of seizure list witnesses. A copy thereof was handed over to the accused. Then thereafter, they returned back to police station along with seized article apprehended accused, got FIR registered on the basis of his self-statement. (Exhibited) Then handed over investigation. During cross-examination at para-1 he had stated that he had received confidential information from mobile party of the Laheri Police Station he had further stated that he had not procure sanction concerning NDPS Act.

11. PW.3 is Investigating Officer. During course of examination-in-chief she had stated that on the alleged date and time of occurrence she was present at the Police Station. After registration of the case, Officer-in-charge Ram Raj Das (PW.4) handed over investigation to her (Exhibited relevant documents). Accordingly, she proceeded with the investigation. Gone to the place of occurrence. Inspected the same which happens to be double storied half constructed building of Naresh Prasad lying at mohalla-Aas Nagar. Then had stated that during course of inspection, she



had found space for affixing doors, at main entrance out of which, at one place, door was fixed while at other space was left. She had recorded statement of the witnesses, procured report and after completing investigation, submitted charge sheet. Then there happens to be reference of statement relating to witness PW.2 who was declared hostile at the end of the prosecution. During cross-examination at para-2 she had stated that she had gone to place of occurrence on 10.06.2001 along with the informant. So many persons were present at the place of occurrence who also identified the place of occurrence but she had not recorded names of those persons. In para-3 she had stated that neither glass or any article associated therewith was recovered nor any of the accused was apprehended. In para-4 she had stated that she had not examined the persons of boundary. She had further admitted that the house of PW.5 and PW.6 lies by the side of the Police Station.

12. PW.7 is the Arms Constable who was engaged during course of raid and PW.8 is the officials of Laheri P.S. They both have supported the evidence of the prosecution so far conduction of raid recovery, preparation of seizure list, apprehension of accused are concerned. But, they had not deposed how the seized articles were treated at the end of the informant PW.3, where the seized articles were kept. In similar fashion, PW.1, the police personnel also deposed save and except during course of cross-examination at para-1 he had stated that he had not gone inside the house. Articles were not seized in his presence. In his presence, no seizure list was prepared, while PW.2, another police constable had not supported the case of the prosecution and that being so, was declared hostile.



13. From the evidence available on the record, it is crystal clear that conduction of raid has been substantiated at the end of the prosecution witnesses but, none of them could be able to substantiate where the seized articles were kept after carrying to the Police Station (b) none of the witnesses including the Investigating Officer PW.3 had stated with regard to manner of preparation of sample (c) none of the witnesses have deposed whether articles were destructed after obtaining permission from the court (d) none of the witnesses had stated wherefrom articles were taken for its examination (e) Investigating Officer had not stated that why not she had taken permission from the court for examination of the seized article (f) the seized articles were not at all produced in court. In the facts and circumstance of the case, really there was search and seizure and during course thereof, the spurious wine along with packing machine as alleged was really recovered and on this score, the deficiency as pointed out hereinabove cast doubt irrespective of presence of accused/appellant over the seizure list.

14. Accordingly, the judgment of conviction and sentence recorded by the learned lower court is hereby set aside. Appeal is allowed. Appellant is on bail, hence is discharged from its liability.

(Aditya Kumar Trivedi, J.)

Prakash Narayan

AFR/ NAFR	A.F.R.
CAV DATE	N.A.
Uploading Date	18.08.2018
Transmission Date	18.08.2018

