

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Appeal (SJ) No.149 of 2016

Arising Out of PS.Case No. -107 Year- 2010 Thana -
THAKRAHA District- WESTCHAMPARAN(BETTIAH)

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Nandu Khatik son of Motichand Khatik, Resident of Village
Baluarwa, P.S. Bhitaha, District- West Champaran

.... Appellant/s

Versus

The State of Bihar

.... Respondent/s

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Appearance :

For the Appellant/s : Mr. Baxi S.R.P. Sinha, Sr. Advocate
Mr. Arvind Kumar, Advocate

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

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CORAM: HONOURABLE MR. JUSTICE ASHUTOSH KUMAR

ORAL JUDGMENT

Date: 19-06-2018

The appellant/Nandu Khatik has been convicted under Section 22(c) of the Narcotic Drugs & Psychotropic Substances Act, 1985 by judgment dated 9th of February, 2016 by the learned 6th Additional District & Sessions Judge, Bettiah at West Champaran in Trial No. 25 of 2011, arising out of Thakrahan (Bhitahan) P.S. Case No. 107 of 2010 and by order dated 17th of February, 2016, he has been sentenced to undergo rigorous imprisonment for ten years and to pay a fine of Rs. 1,00,000/- and in default of payment of fine, to further suffer rigorous imprisonment for one year.

2. Twenty (20) Kgs of *Ganja* is said to have been recovered from the bamboo roof of the house of the appellant.



3. The case of the prosecution is based on the F.I.R lodged by Zafar Jawed Khan, Sub-Inspector/P.W. 1. He has stated in his self statement recorded on 16.10.2010 that on the same day, he received secret information that the appellant has kept *Ganja* in his house. On such information, he constituted a Police team and raided the house of the appellant. The appellant could manage to run away from his house through the back-door. In the presence of two independent witnesses viz. Budhai Yadav and Gobari Yadav, search was conducted and from above the bamboo roof of the house of the informant, 20 Kgs of *Ganja* was recovered.

4. The seizure list (Ext-1) was prepared on which the aforesaid two witnesses viz. Budhai Yadav and Gobari Yadav appended their left thumb impressions. On the basis of the aforesaid self statement, a case vide Thakrahan (Bhitahan) P.S. Case No. 107 of 2010 was registered for investigation under Sections 20, 22, 23 and 25 of the Narcotic Drugs & Psychotropic Substances Act, 1985.

5. At the trial, six witnesses were examined. The Trial Court, on perusal of the deposition of the witnesses, convicted and sentenced the appellant as aforesaid.

6. Mr. Baxi S.R.P. Sinha, learned senior counsel appearing for the appellant, while assailing the judgment and



order of conviction, has submitted that the mandatory provision of the Narcotic Drugs & Psychotropic Substances Act, 1985 have not been complied with and that the independent persons, before whom the seizure proceeding was conducted, have not been examined during trial. He has further submitted that even the witnesses who have deposed in favour of the prosecution version, have not been consistent with respect to the weight of the narcotics which is said to have been recovered.

7. Lastly, it has been submitted that admittedly the narcotic substance which is said to have been recovered from the house of the appellant was neither weighed nor sealed and it was kept in the *Malkhana* in the same position in which it was seized. Thus, it has been argued that for all practical purposes, there was no evidence whatsoever before the Trial Court which could have justified the return of the verdict of guilt of the appellant.

8. In order to appreciate the contentions raised on behalf of the appellant, it would be necessary to briefly refer to the deposition of the witnesses.

9. Zafar Jawed Khan, the informant of this case has been examined as P.W. 1. In his deposition, he has stated that on secret information on 16.10.2010 at about 4:30 A.M, he along with the Police team raided the house of the appellant.



However, the appellant could manage to escape from his house. He has reiterated his statement made in the F.I.R and has stated that he registered the case on the basis of the recovery of the narcotics. However, in his cross-examination, he has categorically stated that he himself took up the investigation but that did not find favour with the superior Police Officer and therefore, he handed over the investigation to Upendra Prasad Singh/P.W. 5 on 22.12.2010.

10. P.W. 1 has further stated that he never sealed the narcotic which was recovered and in the same position, he got it placed in the *Malkhana*. He did not send any sample to the Forensic Science Laboratory; though he had given an application for the same before the learned District & Sessions Judge on 20.12.2010 i.e. after delay of about two months. Because of the absence of anyone in the house of the appellant, the seizure list (Ext-1) was not signed by anyone of the family members or residents of the house from where recovery was made.

11. From the perusal of the deposition of P.W. 1, it becomes very clear that the provisions contained in Section 42 of the Narcotic Drugs & Psychotropic Substances Act, 1985 has not been complied with. Section 42 of the Narcotic Drugs & Psychotropic Substances Act, 1985 reads as follows :-

"42. Power of entry, search, seizure and arrest without warrant or authorisation.-(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 illegally 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 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. There is nothing on record to prove that the secret information which was received by P.W. 1 was recorded in writing and was transmitted to the superior Police Officer. The aforesaid requirement of law is mandatory in nature and non-fulfillment of the same makes the prosecution case highly



doubtful.

13. That apart, no sample was drawn at the time of recovery. Even the seized article was not sealed and without numbering or marking the same, it was kept in the *Malkhana*. Under which circumstance was it kept in the *Malkhana* is also not known. Surprisingly, the *Malkhana* In-charge has not been examined in this case.

14. Brahamdeo Sharma/P.W. 1, Gurmail Singh/P.W. 3, Om Prakash Singh/P.W. 4 and Kedar Yadav/P.W. 6 were members of the raiding team who had accompanied P.W. 1 to the house of the appellant. Though they have stated about the recovery of 20 Kgs of *Ganja* from the house of the appellant but have not stated as to how they came to the conclusion that the recovered article weighed 20 Kgs. There is no statement by them that any equipment for the weighment of the narcotics was taken by them or was obtained at the time of search for recording the weight of the narcotics. No Field Testing Kit was brought along with the Police Party to decide *prima facie* that the recovered article was *Ganja*.

15. Under such circumstances, if the seized article was kept in the *Malkhana* without numbering it, it leaves no certainty in the mind of anybody that samples were drawn from the same stock of article which was recovered from the house of the



appellant.

16. Upendra Prasad Singh is the second I.O. of the case who took charge of investigation from P.W. 1 on 22.12.2010. He had sent the sample of the seized *Ganja* to the Forensic Science Laboratory and had obtained the report and only thereafter had submitted charge-sheet.

17. The Forensic Science Laboratory report (Ext-4) reveals that the samples were received in the C.F.S.L. on 29.12.2010. The column with respect to the mode in which the parcel was found to be carried on receipt and description of the seal has been left completely blank.

18. Since there was no explanation for delay in drawing the sample and sending the same to the Forensic Science Laboratory, the report loses all its significance. Though the report describes the sample of the seized article as *Ganja* but the same cannot be accepted in view of the fact that there is no evidence that there was proper sampling and sealing of the seized drug.

19. Thus, for all practical purposes, the Trial Court did not have any idea as to how and when the sample was drawn and sent to the Forensic Science Laboratory. It is also not certain as to what had happened in the interregnum period when the seized drug was kept in the *Malkhana* without the same being



numbered or marked.

20. Thus, the judgment and order of conviction and sentence of the appellant cannot be sustained in view of complete breach of the mandatory provision of Narcotic Drugs & Psychotropic Substances Act, 1985.

21. Perforce, the judgment and order of conviction and sentence dated 09.02.2016 and 17.02.2016 respectively passed by the learned Additional District & Sessions Judge-VI, Bettiah at West Champaran, in Trial No. 25 of 2011, arising out of Thakrahan (Bhitahan) P.S. Case No. 107 of 2010 is set aside

22. The appeal succeeds.

23. The appellant is in custody. He is directed to be released forthwith, if not required in any other case.

24. A copy of the judgment be transmitted to the Superintendent of the concerned Jail for information, record and compliance.

(Ashutosh Kumar, J)

Shageer/-

AFR/NAFR	NAFR
CAV DATE	NA
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