

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Appeal (SJ) No.300 of 2016

Arising Out of PS.Case No. -40 Year- 2013 Thana -SIKARPUR District-
WESTCHAMPARAN(BETTIAH)

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Zamir Hasan Ansari Son of Islam Ansari resident of Village- Dhoomnagar, Police
Station- Shikarpur, District- West Champaran.

.... Appellant/s

Versus

1. The State of Bihar

.... Respondent/s

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Appearance :

For the Appellant : Mr. Bipin Kumar, Advocate.
Ms. Minakshi Kumari, Advocate.
For the Respondent : Mrs. Abha Sinha, APP.

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CORAM: HONOURABLE MR. JUSTICE ASHUTOSH KUMAR

ORAL JUDGMENT

Date: 08-02-2018

Heard the learned counsel for the appellant and the State.

2. Appellant Zamir Hasan Ansari has been convicted under Sections 20(b)(ii)(c) and 22(c) of the Narcotic Drugs and Psychotropic Substances Act, 1985 by the judgment dated 01.04.2016 passed by the learned Ist Additional Sessions Judge, West Champaran, Bettiah in Trial No. 50 of 2013, N.D.P.S. Case No. 10 of 2013 arising out of Shikarpur P.S. Case No. 40 of 2013 and by order of sentence dated 06.04.2016, he has been sentenced to undergo R.I. for 10 years for both the offences, to pay a fine of Rs. 1 lakh for each of the offences and in default of payment of fine, to further suffer S.I.



for six months. The sentences have been directed to run concurrently.

3. 6 Kilograms of Charas is said to have been recovered from the possession of the appellant.

4. The prosecution case is based on the self-statement of Himanshu Kumar Singh, SHO of Shikarpur Police Station who has been examined as P.W. 6 at the trial. He has alleged that on 03.02.2013, at about 4 O'clock in the morning, he received secret information on telephone that the appellant has brought Charas from Nepal and is likely to go to Delhi to sell the same. On such information having been received by him, a station diary entry was recorded and the house of the appellant was raided by the police team which was constituted for the purpose. It has further been alleged that in presence of Alam Ansari and Nazrul Ansari who have examined as P.W. 1 and 2 respectively, the person of the appellant was searched and 6 kilograms of Charas was recovered from him.

5. From the possession of one Md. Moharram, whose trial has been separated because of his running away from the case, around 400 grams of Charas was recovered. No explanation could be offered by the appellant or Md. Moharram for keeping in possession the aforesaid narcotic drug. A seizure list is said to have been prepared whereafter the appellant was taken in custody.



6. On the basis of the aforesaid self-statement, Shikarpur P.S. Case No. 40 of 2013 dated 03.02.2013 was instituted for the offences under Sections 20, 22, 23, 24 27(a) and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985.

7. The police after investigation submitted charge sheet under Sections 20(b)(ii)(c) and 22(c) of the Narcotic Drugs and Psychotropic Substances Act, 1985 in which Sections cognizance also was taken and charges were framed.

8. The trial court after examining seven witnesses on behalf of the prosecution and two witnesses on behalf of the defence convicted and sentenced the appellant as aforesaid.

9. Learned counsel for the appellant, while assailing the judgment and order of conviction, has submitted that the prosecution witnesses have made discrepant statements in the trial which go counter to the basic prosecution version and hence the entire prosecution case is rendered doubtful. He has further submitted that assuming but not admitting the statement of the informant (P.W. 6) is taken to be true, then there has been a breach of the provisions of Section 50 of the Narcotic Drugs and Psychotropic Substances Act, 1985 inasmuch as the appellant was not given an opportunity of being searched in presence of a Gazetted Officer. He has alternatively



argued that in case the other witnesses are to be believed who have stated that the appellant was arrested while fleeing away from the house along with another but the narcotics were recovered from his house, then there is a breach of the provisions of Section 42 (ii) of the Narcotic Drugs and Psychotropic Substances Act, 1985 which enjoins that any secret information which is received by a police officer, pursuant to which a raid is conducted, such information shall be reduced in writing and would be communicated to the superior police officer before conducting the raid. After the amendment in the Act, the requirement is of giving written information to the superior police officer within 72 hours. It has been submitted on behalf of the appellant that admittedly the information received by P.W. 6 was neither reduced in writing nor sent to any police officer. Even the station diary entry regarding the receipt of the secret information that the appellant is likely to flee to Delhi for selling Charas which he had brought from Nepal has not been recorded. That apart, it has been argued that the sample from the narcotics so seized was not drawn at the time of its seizure. Lastly, it has been argued that the seizure list does not bear the signature of either the appellant or the co-accused Md. Moharram who too allegedly was apprehended by the police party.



10. In order to appreciate the contention of the appellant, it would be necessary to first examine the deposition of P.Ws. 1 and 2 who are said to be independent witnesses to the search and seizure.

11. Alam Ansari (P.W. 1) has admitted his signature on the seizure list (Ext. 1) but has clearly stated that nothing was recovered in his presence and his signature was obtained by the officer-in-charge of the concerned police station at his residence. Similar, statement has been made by Nazrul Ansari, (P.W. 2) who has also testified to the fact that nothing was recovered or seized in his presence. Though both the witnesses have signed on the seizure list but have not supported the prosecution version of the seizure having been effected in their presence and they have also not been declared hostile.

12. Learned counsel for the appellant in this connection submits that in the absence of any independent witness to the seizure, the entire prosecution version is rendered doubtful. More so, when the seizure list does not bear the signature of the appellant or Md. Moharram who also was arrested along with the appellant.

13. Anil Kumar Yadav, Mukesh Kumar Singh and Pramod Kumar Singh who are members of the raiding team have been examined as P.Ws. 3, 4 and 5. The aforesaid three witnesses have a



different story to narrate. All the aforesaid three witnesses have categorically stated that they were part of the raiding team but they did not enter the house of the appellant. They have also stated that senior officers of the team had entered in the house of the appellant and had recovered and seized the narcotics. They have not supported the prosecution case of Charas having been recovered from the person of the appellant while fleeing away.

14. The aforesaid witnesses have also stated that the narcotic recovered was weighed at the place of occurrence but have completely shown their ignorance about procuring of weighing scale or the weights. Since they were part of the raiding team, it has been argued, they ought to have known that the weighing scale and the weights were carried by the police party or was brought from neighbourhood or was requisitioned from the police station. Their not coming forward before the trial court to say about those details only makes their presence at the time of the raid doubtful. It has further been argued that the aforesaid three witnesses have testified to the fact that no sample was drawn at the spot. They have also not stated anything to suggest as to where the seized narcotic was kept.

15. Learned counsel for the appellant, therefore, with reference to the deposition of P.Ws. 3, 4 and 5 has stated that their not



coming forward with the details about the weightment of the narcotics only renders the prosecution version completely unreliable. This argument has been advanced primarily on the strength of the fact that those witnesses had deposed about the narcotics having been recovered from the house of the appellant and not from his person.

16. The informant (P.W. 6) has stated that he did not record the information received by him about the appellant being in possession of narcotics in the station diary and he also did not reduce the such information into writing and send it to the superior police officer. He has only stated about his having given telephonic information to the superior police officer. In the cross-examination, P.W. 6 has categorically stated that no Gazetted Officer or a Magistrate was called at the place of occurrence or at the time of search of the appellant and another. He has, however, also admitted that the narcotics was recovered from the thatched house of the appellant.

17. Learned counsel for the appellant, therefore, has submitted that the deposition of P.W. 4 is not in consonance with his self-statement where he had alleged that while fleeing away, the appellant was apprehended with the narcotic and it was recovered from the search of his person. The P.W. 6 has also clearly stated that



no sample was drawn at the place of occurrence/seizure. On the day when the P.W. 6 deposed before the trial court, the seized Charas was not brought to the court. From the deposition of P.W. 6, another anomaly which comes to the fore is that the seized narcotic was neither marked for identification or any seal was put over the same by him.

18. Jitendra Kumar is the I.O. of this case and he has been examined as P.W. 7. He is said to have investigated the case and submitted charge sheet. In his examination-in-chief, he has stated that the seized narcotic was kept in the Malkhana of the police station. However, in the same breadth, he has stated that on 24.06.2013, he received permission from the District & Sessions Judge, Bettiah for drawing of the sample and sending the same to the CFSL for examination/ascertainment whether the seized article was a narcotic. The sample was sent to the CFSL on 26.06.2013.

19. Learned counsel for the appellant has, in this context, submitted that there has been an unusual delay in sending the seized sample to the CFSL and such delay not only creates doubt in the prosecution version but also renders the appellant completely at a loss to know as to where the sample was kept and in what condition and how many people may have handled the aforesaid seized packet



before being sent to the CFSL for chemical examination and expert opinion.

20. In this context it would be necessary to see the report of the CFSL which is Ext. 5. The report inter alia states that the dark greenish brown coloured solid cylindrical substances contained in both the tin containers marked as 'A' and 'B' were found to be Charas containing Tetra Hydro Cannabinol (THC) as their intoxicating ingredient. The report further reveals that Charas is also known as Hashish which is the resinous exudates of the flowering and fruiting tops of the female plant of cannabis sativa. However what is evident from the record is that the column which describes the mode in which parcel was found to be packed on receipt and description of the seal, has been left completely blank.

21. When were the samples marked as 'A' and 'B' and what seal were put on the same before it was sent to the CFSL is not known. The evidence with regard to the keeping of the seized narcotic in Malkhana viz. the evidence of the Moharrir is also missing. The evidence after the so-called seizure of the narcotic is absolutely blurred and nothing follows thereafter. In that event, learned counsel for the appellant has argued that the report of the CFSL cannot be relied upon.



22. Two witnesses on behalf of the defence have deposed before the trial court that they only came to learn later that the appellant was falsely implicated in the present case and was taken to jail by the officer-in-charge of the concerned police station.

23. Section 42 of the N.D.P.S. Act is being extracted here for the sake of completeness.

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.

24. From a perusal of the provisions of Section 42, it would appear that the requirement of reducing the information regarding search and seizure, into writing and sending it to the superior police officer is a mandatory requirement which has been introduced in the aforesaid provision of the N.D.P.S. Act to prevent



any whimsical action by the police authority and false implication of an accused. This not having been complied with, the prosecution case appears to be absolutely vitiated.

25. Learned counsel for the appellant is justified in raising this contention that if according to the FIR, the appellant was arrested and was found to be in possession of the narcotics, he should have been given the option of being searched before a Gazetted Officer in accordance with the provisions of Section 50 of the N.D.P.S. Act. The FIR does not reveal that the appellant was made known about his rights being searched before a Gazetted Officer. The members of the raiding team have also not got their persons searched before searching the appellant or his house.

26. Learned counsel for the appellant has also drawn the attention of this Court to a Division Bench judgment of Patna High Court reported in 2017 (3) PLJR 694 *Pratibha Devi vs. State of Bihar* where the delay of 20 days in sending the sample to the FSL was held to be sufficient to vitiate the entire prosecution case and in the aforesaid matter that delay led to the setting aside of the conviction.

27. The Supreme Court, successively in the *State of Punjab vs. Balbir Singh* 1994 (3) SCC 299, *Saiyad Mohammad Saiyad Umar Saiyad and Others vs. State of Gujarat* 1995 (3) SCC



610 and other cases has held that the object of N.D.P.S. Act is to provide for stringent provisions for control and regulation of operations relating to those drugs and substances and at the same time to avoid harm to the innocent persons and to avoid abuse of the provisions by the officers. Precisely for this reason, safeguards have been provided which have to be strictly adhered to and if there is any breach of the said provisions, the entire trial stands vitiated.

28. From the conspectus of the records, it appears that the mandatory provisions of the N.D.P.S. Act have been completely breached. To tie the strings together; the deposition of the witnesses are discrepant with respect to search and seizure, the seizure list does not contain the signature of the appellant and there has been an unusual delay of four months in sending the sample of the seized narcotic to the CFSL without there being any plausible explanation.

29. For the aforesaid facts, it is difficult to sustain the conviction of the appellant. The conviction and sentence of the appellant in Trial No. 50 of 2013, N.D.P.S. Case No. 10 of 2013 arising out of Shikarpur P.S. Case No. 40 of 2013, therefore, is set aside. The appellant is acquitted of the charges and his appeal succeeds.

30. Since the appellant is in jail, he is directed to be



released forthwith from jail if not wanted in any other case.

31. 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
CAV DATE	NA
Uploading Date	
Transmission Date	

