

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.255 of 2016

Arising Out of PS. Case No.-73 Year-2014 Thana- SIMRI District- Buxar

Paras Yadav, son of late Hare Ram Yadav, resident of village Dullahpur, P.S.
Simri, District Buxar

... .. Appellant

Versus

The State Of Bihar

... .. Respondent

Appearance :

For the Appellant/s	:	Mr. S.N.P.Sinha, Sr. Adv. Mr. Jitendra Narain Sinha, Adv. Ms. Rashmi Bharti, Adv.
For the Respondent/s	:	Mr. Syed Ashfaque Ahmad, A.P.P.

CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
ORAL JUDGMENT

Date : 06-09-2019

The appellant Paras Yadav vide judgment of conviction dated 11.3.2016 and order of sentence dated 15.3.2016 passed by the Sessions Judge cum Special Judge, Buxar in N.D.P.S.Case No. 6 of 2014/ 6(A) of 2014/ 6(B) of 2014 (conjointly) arising out of Simri P.S.Case No. 73/2014 held guilty for an offence punishable under section 20(b)(ii)(c) of the N.D.P.S.Act and has been sentenced to undergo R.I. for ten years as well as to pay fine appertaining to Rs. 1 lac and in default thereof, to undergo R.I. for two years, additionally.

Daljit Jha (P.W.7) recorded his self statement on 30.4.2014 at about 3 A.M. at Chakraki Darar Sareh, south to village Dullahpur (Niyajipur) alleging, inter alia, that while he alongwith S.I. Raj Kumar, constable Dharmdeo Singh (not



examined), Babulal Singh (not examined), Biswanath Singh (P.W.3), Navratan Ram (P.W.4), Sheonath Ram (not examined), was in night patrolling, received confidential information from the S.P., Buxar at about 8 P.M. with regard to storage of Ganja at the out house of Dilip Yadav, son of Paras Yadav. Accordingly, he contacted with Sub-divisional Magistrate, Dumraon for deputation of an Executive Magistrate whereupon, was directed to contact Deepak Kumar Srivastava, Executive Magistrate, Dumraon, who was in the vicinity and, was requested to arrive at Ashaparhi Chowk. He came to Ashaparhi Chowk where met with Deepak Kumar Srivastava and then, they all reached in village Niyajipur market where, took Ramsurat Yadav, local Chaukidar (not examined) and then have raided the exact place lying adjacent south to pumping set house of Dilip Yadav son of Paras Yadav lying South to village Dullahpur at a distance of 500 meters. There has been one Varandah East to that room where one person was sitting over the cot who seeing the police, tried to flee but was apprehend. On query, he disclosed his identity as Paras Yadav son of Hare Ram Yadav of village Dullahpur (Niyajipur). Further more, they found the room locked whereupon, asked for a key which was handed over by him. After opening the room in presence of local witness whose presence was over the tractor,



namely, Angrahit Yadav as well as Ram Bali Gond, firstly a notice under section 50 of the N.D.P.S. Act was served upon Paras Yadav and then thereafter, they have, after opening the door gone inside the house, made search. During course of search, they had taken out three bags kept concealed beneath straw. All bags were opened and then Ganja was found duly wrapped in a golden plastic packet. After seizing, respective packets were found to be weighing 16.372 Kg, 16.166 Kg. and 16.114 Kg. Approximately 100 grams Ganja was taken out conjointly from all the three packets and then, it was mixed and then sample was prepared approximately weighing 25 grams and all the eventuality that means to say preparation of seizure list, sealing of the samples, sealing of plastic packets were done in presence of all, over which there has been signature of both the witnesses including the Executive Magistrate, the informant and the accused. The sealed packets were marked as A1, A2 and A3. Further more, on interrogation Paras Yadav has confessed that his son Dilip Yadav alongwith Bharat Singh of village Balihar and Hulchul Kamkar @ Santosh Kamkar and others are actively involved in dealing with the Ganja illegally. They used the Ganja concealed at this place which is being watched by him. After recording of the self statement, the accused,



sample Ganja alongwith police personnel the Executive Magistrate, accused returned to the police station.

Simri P.S.Case no. 73/2014 was registered on the basis of the above referred self statement of the informant Daljit Jha followed with an investigation as well as filing of the charge sheet (in part wise) after concluding the same facilitating the trial meeting with the ultimate result, subject matter of the instant appeal.

Defence case as is evident from the mode of cross-examination as well as statement recorded under section 313 Cr.P.C. is that of complete denial. Further more, 5 D.Ws. have been examined in order to controvert the allegation so alleged at the end of the prosecution.

In order to substantiate its case, the prosecution has examined altogether 11 P.Ws. who are P.W.1 Raj Kumar, P.W.2 Deepak Kumar Srivastava, P.W.3 Vishwanath Singh, P.W.4 Navratan Ram, P.W.5 Ram Bali Gond, P.W.6 Shiv Prasann Upadhyay, P.W.7 Daljeet Jha, P.W.8 Rajesh Soren, P.W.9 Ram Uday Ram, P.W.10 Anugrahit Yadav and P.W.11 Parth Banerjee as well as also exhibited Ext. 1, confessional statement of Paras Yadav, Ext. 2 series signature of respective witnesses over the seizure list, seal of samples, sample, specimen seal, Ext.3 self



statement, Ext.4 formal F.I.R., Ext.5 endorsement over the self statement, Ext.6 seizure list, Ext.7 notice under section 50 of the N.D.P.S.Act, Ext.8 seal of sample, Ext.9 entry No. 7/14 relating to Malkhana register, Ext.10 FSL report. Prosecution has also exhibited material Ext.M.O.1 sealed box marked A3, material Ext. M.O.2 sealed box marked A2, material Ext. M.O.3 to M.O.5 sealed Ganja packet in three jute packets. On the other hand, defence has also examined, D.W.1 Jitendra Rai @ Mohan Rai, D.W.2 Dadan Yadav, D.W.3 Santosh Ram, D.W.4 Arvind Yadav, D.W.5 Bachan Ram. The Defence has also exhibited Ext.A letter No. 1853 dated 19.11.2014 sent by the S.D.P.O., Dumraon to S.P., Buxar, Ext.B original registration certificate of Dilip Yadav as 'C' grade contractor.

It has been submitted at the end of learned counsel for the appellant that his family has been implicated in the background of differences having cropped up in between the prosecution party with his son Dilip Yadav during the course of construction of a building as, the son Dilip Yadav happens to be a Contractor and the informant tried to have some sort of extraneous consideration from him. Further more, it has been submitted that there happens to be inherent flaw in the prosecution case which, taken to consideration would nullify not only the finding rather would also



expose false participation of the appellant. In order to support his plea, learned counsel for the appellant has submitted that the material exhibit has been produced at the end of the P.W.7 but, after going through the evidence of P.W.7 but it is evident that the malkhana register did not contain remark that Ganja was taken to court. In likewise manner, from the deposition of P.W.7, it is evident that the learned P.O. had not mentioned the fact that Ganja was actually shown in court after removing seal rather, the P.O. had simply noted down that there happens to be a packet having golden wrapper. What was inside the same, is not at all mentioned which ought to have been in order to justify whether the packets which have been produced was carrying Ganja nor there happens to be such finding in the judgment impugned. The aforesaid fact has got relevancy in the background of the fact that when the evidence of P.W.9 Ram Uday Ram who exhibited Malkhana register is to be taken into consideration, there happens to be no entry in the Malkhana register that the articles was taken out from the Malkhana in order to produce before the court during course of examination on 2.1.2016 and whether, the material exhibits were again deposited or remained at Court. Further more, there happens to be no entry in the aforesaid Malkhana register on which date it was deposited and futher, there happens to be no reference with



regard to deposit of the sample. That means to say, by such activity, though the police had taken extraordinary precaution in order to implicate the appellant but, their activity found exposed and further, by such activity it has also been exposed with regard to retention of sample away from Malkhana. That means to say in worst case under personal possession, but whom again a mysterious event, as the main I.O. P.W.8 and the part I.O. P.W.6 have not stated that P.W.7 informant had handed over the sample for them. P.W.6 is the person who got the sample sent to FSL for examination but, he had not disclosed wherefrom he had procured the same and the gap in between, that means to say the date of occurrence as alleged 29.4.2014 while the sample was sent on 10.6.2014 after covering such long interval without explanation is another circumstance to cast doubt over genuineness of the prosecution case.

It has also been submitted that although, recovery happens to be from the house and so, Section 50 could not be applicable. There happens to be specific disclosure in the self statement of the informant, P.W.7 as well as during the course of evidence, P.W.7 has also disclosed that he got some sort of confidential information at the end of the S.P., Buxar but to justify the same nothing has been adduced. That has got a bearing as,



there happens to be violation at the end of P.W.7 with regard to Section 42(2) of the N.D.P.S.Act as well Section 57 of the N.D.P.s.Act. Though, Section 57 has been found to be directive in nature but, Section 42(2) of the N.D.P.S.Act is mandatory in nature. Therefore, non-compliance of the mandatory provision of law is a circumstance going adverse of the prosecution.

Apart from the fact that the prosecution could not be able to explain custody of the sample during such long interval, it is further evident from Ext.5 that it was sent to F.S.L. on 10.6.2014 through Special Messenger, but received at the end of the F.S.L. on 17.6.2014 and again there happens to be silence at the end of the prosecution with regard to custody during the intervening period. The most devastating feature is that the alleged sample was received at the end of the F.S.L. on 17.6.2014 but the report happens to be of dated 18.5.2015 and for that, the Senior Scientific Officer, who has been examined as P.W.11 failed to explain. That means to say, the cumulative effect did not justify the finding recorded by the learned lower court. Consequent upon the same, the same is fit to be set aside.

On the other hand, learned Addl. P.P. converted the submission having made on behalf of learned counsel for the appellant and has submitted that from the evidence available on



record, it is apparent that the prosecution has substantiated its case beyond all reasonable doubt whereupon, the finding so recorded by the learned lower court is fit to be confirmed.

It is needless to say that consistently it has been observed at the end of the Apex Court that having stringent punishment coupled with the presumption adverse to the accused in accordance with Section 35 read with Section 54 of the N.D.P.S. Act, the prosecution has been put under stress to follow the mandate of law strictly and any flaw at the end of the prosecution is to be seen adverse to the prosecution case.

From the evidence as tendered on behalf of prosecution, it is evident that the recovery is from a room, allegedly belonging to the appellant. There happens to be no evidence at the end of the prosecution that the said room was accessible to the public, though it has been disclosed at the end of prosecution that the informant received information from the S.P. but that appears to be unauthentic in the background of the fact that the accusation so made by the informant to the SDM has not been brought up on record to justify nor source of information. That being so, Section 42(1) would be applicable. In **Sk. Raju @ Abdul Haque @ Jagga v. State of West Bengal**, reported in 2018(4) PLJR 89 (SC) it has been held:



“7. An empowered officer under Section 42(1) is obligated to reduce to writing the information received by him, only when an offence punishable under the Act has been committed in any building, conveyance or an enclosed place, or when a document or an article is concealed in a building, conveyance or an enclosed place. Compliance with Section 42, including recording of information received by the empowered officer, is not mandatory, when an offence punishable under the Act was not committed in a building, conveyance or an enclosed place. Section 43 is attracted in situations where the seizure and arrest are conducted in a public area, which includes any public conveyance, hotel, shop, or other place intended for use by, or accessible to, the public.”

Apart from the fact that controversy with regard to proper application of section 42 still survives, as the informant had not stated that he had noted down the information though had stated that permission for deputation of Magistrate was made on that very basis.

Furthermore, presence of Magistrate at the spot is not at all found relating to the facts of the case, as no personal search is alleged. That means to say, there being deficient on that very score of noting down the information, is a circumstance which goes against the prosecution, and in the aforesaid background



application of Section 42(2) of the Act will certainly be a death knell to the prosecution.

In **Karnail Singh v. State of Haryana**, reported in (2009)8 SCC 539, the Constitution Bench held that non-compliance of Section 42 would not be allowed.

Now coming to the facts of the case, it is evident that the evidence of P.W.7, the informant happens to be of prime importance and on account thereof, the same is taken up on priority basis. During his examination-in-chief, he has stated that in the evening of 29.4.2014 while he alongwith ASI Raj Kumar and Homeguard Constable Babu Lal Singh, Dharmdeo Singh, Bishwanath Singh, Sheonath Ram and Navratan Ram was on patrolling, received information from the S.P. to the effect that in a room by the side of the pumping set room of Dilip Yadav of village Dullahpur Niyajipur, Ganja has been stacked whereupon he contacted with the S.D.M., Dumraon and requested to depute an Executive Magistrate for the purpose of conducting raid, recovery, seizure. As directed, he met with Deepak Kumar Srivastava, an Executive Magistrate at Ashaparari Chowk and then, all of them came to Dullahpur village where took local Chowkidar Ram Surat Yadav and then they have gone to the exact place lying by the side of the pumping set room of Dilip Yadav, which happens to be at a



distance of 500 meter West to Dullahpur popularly known as Chakraki Dareh Sareh. They have found the iron door locked. There was Varandah where one person was sitting over a cot. Seeing the police, he unsuccessfully attempted to flee but was apprehended and then, interrogated. He disclosed his identity as Paras Yadav, father of Dilip Yadav. He was in possession of a key. The persons who were sleeping over a tractor parked nearby, woken upon and then, in their presence (Ram Bali Gond and Anugrahi Yadav) firstly tendered information before Paras Yadav in accordance with Section 50 of the N.D.P.S. Act, followed with search of a room in presence of a Magistrate and found three plastic bags concealed beneath the straw which was taken out. After opening of the respective bags, there was packets inside duly wrapped with golden coloured plastic sheet. Smell of Ganja was coming out. They have asked for relevant document with regard to possession of the Ganja but Paras Yadav failed. Then, electronic weighing tool was managed by the Chowkidar and then respective bags were weighted being 16.375 Kgs., 16.166 Kgs. And 16.117. Then thereafter, from all the three bags Ganja was taken out in certain quantity seized. Then two samples each of 25 grams and one sample of 15 grams was prepared which was marked as A1, A2 and A3. All the bags were marked as A. Then all the samples,



bags were sealed having signature of the accused, Executive Magistrate, witnesses and he himself. During course of interrogation Paras Yadav also disclosed that his son Dilip Yadav is actively involved alongwith one Bharat Singh. He has further stated that certain bags were already sold while remaining has been seized by them. Then, thereafter he was apprehended. All of them returned to the police station. Exhibited the seizure list, notice purported to be under section 50 of the N.D.P.S. Act, specimen seal, M.R.No. 6/14 relating to A3, M.R.No. 6/14 relating to A2. Also produced the material exhibit as, disclosed by him which happens to be jute bag in sealed condition containing his signature as well as signature of the witness Anugrahit Yadav as well as accused Paras Yadav. Further more, the aforesaid exhibit also contained initial of the Special Judge. M.O.No.5 is also in sealed condition and in likewise manner, he has exhibited the same. Then has disclosed that three bags over which, there happens to be no seal, there happens to be Ganja having plastic cover whereupon there happens to be signature of the Executive Magistrate, respective witnesses, accused and has been material exhibit. Identified the accused.

During the cross-examination at para-16 he has stated that he had not mentioned the fact in his self statement where he



was at the time of receipt of information. In para 17 he has further admitted that he had not mentioned the fact in his self statement that the Executive Magistrate was one of the member of the raiding party. In para 22 he has further admitted that he had not mentioned the fact that the key was returned back to Paras Yadav. He had not mentioned the aforesaid thing in the arrest memo. In para 23 he has further stated that he had not taken statement of anybody who could have identified the room belonging to Dilip Yadav or Paras Yadav. In para 24 he has admitted that there happens to be no seal over all the three plastic bags. He has further admitted that the bags are torn whereupon, the articles could be thrust inside early. In para 25 he has admitted that he is unable to say why A2 was not sent to FSL Kolkata.

P.W.8 is the first I.O. who during his examination-in-chief has disclosed that he was entrusted with the investigation on 30.4.2014 of the registration of case. During course of investigation, he had copied the self statement of S.I. Daljit Jha, seizure list, confessional statement of the accused, arrest memo after receiving the same. He has further stated that he had recorded further statement of the informant, statement of the witnesses. He had transmitted the accused to judicial custody. In para 4 he has inspected the P.O. lying South to village Miyajipur which happens



to be the room adjacent to boring lying in the field of Paras Yadav wherefrom it has been said that Ganja was recovered, identified the boundary of the P.O. as North field of Paras Yadav, South field of Paras Yadav, East field of Dashrath Rajak and West field of Sanjay Pathak. He has also examined Angrahit Yadav, Ram Balo Gond and Arbind Kumar Yadav who substantiated with regard to recovery of Ganja from that place. Received supervision note and then, as has been transferred handed over the charge on 8.6.2014. During cross-examination at para 8 he has stated that he had not mentioned what items were received by him. He had not mentioned with regard to lock and key. He had seen the place of occurrence as pointed out by the informant, He had not seen the Darwaza affixed at the place of occurrence neither of the wooden nor of iron. There was no pumping set. He himself had visited the place of occurrence. He had not sent the seized articles to F.S.L.

P.W.6 is the another I.O. who received the charge from P.W.9. He, during the examination-in-chief, has stated that after entrusted with the investigation, he perused documents with regard to Narcotics so seized, and then filed an application before the court below whereupon procured an order from the court, transmitted the same to F.S.L., Patna. He has submitted charge sheet against the accused Paras Yadav, keeping the investigation



pending against the remaining against whom he submitted charge sheet later on. There happens to be no cross examination relevant to the appellant's part.

P.W.1, P.W.3, P.W.4 have corroborated the same by way of claiming themselves to be member of the raiding party and during that course, gone to the place of occurrence and there has been recovery followed with apprehension of an accused, but during cross-examination, they did not become sceptical.

P.W.2 is the Executive Magistrate who during course of his examination-in-chief has admitted his presence over the relevant documents. Then he has stated that while he was at Simri block, he received information on his mobile by the S.D.O. Dumraon to come at Dumraon Police Station where some illegal articles have been seized and then, explained Ganja. When he reached at Padari More, a Police Officer alongwith police party met and then, he was taken to the place having a boring wherefrom the articles having in three bags were seized and then taken over the jeep. They all returned back to the police station. Sample was taken out, relevant papers were prepared whereupon he had also put his signature. He had also put his signature over the seal affixed over the bag and then, thereafter, he returned back to his residence. He was unable to disclose whether any arrest was made



or not. During cross-examination at para 6 he has stated that he had gone to the place of occurrence alongwith the raiding party. They have disclosed that the Ganja is kept at a boring. He is unable to disclose the details of place of occurrence. In para 7 he has stated that no notice was given by Daljit Jha to Paras Yadav in his presence. He is unable to say whether boring happens to be in village Niyajipur or Dullahpur. He is unable to disclose the distance from Niyajipur, Dullahpur to the place wherefrom recovery of Ganja was. In para 8 he has stated that he has put his signature at the police station

The seizure list witness P.W.5 and P.W.10, shown their character as usual whereunder they have not substantiated the case of the prosecution. P.W.9 is the person who had brought the Malkhana register and exhibited the same having entry of deposit of the alleged seized articles having endorsement of P.S. case number as well as at the instance of the S.I. Daljit Jha. During cross-examination at para 3 he has stated that there happens to be no certification over the said register. There happens to be no disclosure that it happens to be Malkhana register belonging to Simri Police Station. He has also stated that there happens to be overwriting at the relevant entry. At para 4 he has stated that there happens to be no signature of any police officials.



Irrespective of the fact that the FSL report happens to be admissible in accordance with Section 293 of the Cr.P.C., in spite of the same the Senior Scientific Officer has been examined as P.W.11. However, he was not cross-examined with regard to delay caused during the course of examination.

From the evidence available on record, it is crystal clear that there happens to be in consistency in between the informant and other members of the raiding party in consonance with the evidence of P.W.9 the I.O. There happens to be specific disclosure at the end of the members of the raiding party in consonance with P.W.7 that the room had got iron gate and it was closed when they arrived, lock was hanging, key was taken from Paras Yadav, it was opened and then beneath straw three bags were taken out while P.W.8 I.O. who visited the place of occurrence has not found door what to talk about iron wooden door and further, he had not found straw having kept inside. So, recovery of contraband happens to be from the same place which was inspected by the I.O. is one circumstance. Further more, it is evident that neither P.W.6 nor P.W.8 had stated that the samples were handed over to them. Then in that circumstance, it was obligatory on the part of the prosecution to have explained with regard to custody of the sample, more particularly when the aforesaid activity has become



suspicious as from the Malkhana register apart from deficiency over its authenticity, it contains only keeping of three bags which were not sealed as is evident from the evidence of P.W.7 and not of sample. So, possession during the intervening period of the sample should have been explained. Further more, when the case in totality is seen, apart from having serious doubt over proper identification of the place of occurrence none of the local Chowkidar has been examined is another circumstance which casts doubt over the proper identification of the place of occurrence coupled with evidence of P.W.2 the Executive Magistrate who failed to disclose whether any person was apprehended or not. The Executive Magistrate has also not disclosed that there was iron door, it was locked, key was taken from Paras then it was opened and then beneath straw three bags were taken out having Ganja inside.

It is also evident that although P.W.7 during the course of his evidence has stated that he received confidential information from the S.P. with regard to storage of Ganja but, how he was informed, the source has not been disclosed and in likewise manner, there also happens to be silence with regard to recording thereof, as well as over proper compliance of Section 42(2) of the



N.D.P.S.Act or in alternative Section 57 of the N.D.P.S.Act, and non-compliance thereof could be death knell to the prosecution.

Cumulative effect did not justify finding so recorded by the learned lower court. Consequent thereupon, the judgment of conviction and order of sentence recorded by the learned lower court is annulled.

The appeal is allowed. The appellant is in custody and hence, he is directed to be released forthwith, if not wanted in any case.

(Aditya Kumar Trivedi, J)

Surendra/-

AFR/NAFR	NAFR
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