

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.2487 of 2017

Arising Out of PS. Case No.-336 Year-2015 Thana- BRAHMPUR District- Buxar

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Rana Singh Son of Late Raghuvansh Singh, Resident of Village- Visheshwar
Dera Chakki, P.S.- Brahampur, P.O.- Chakki, District- Buxar.

... .. Appellant/s

Versus

The State Of Bihar

... .. Respondent/s

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Appearance :

For the Appellant/s	:	Mr. Vikramdeo Singh, Advocate Mr. Shankar Kumar, Advocate
For the Respondent/s	:	Mr. Zeyaul Hoda, APP

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CORAM: HONOURABLE MR. JUSTICE BIRENDRA KUMAR
CAV JUDGMENT
Date : 25-03-2021

This is an appeal against the judgment of conviction. The sole appellant has been convicted for offences under Sections 20(b)(ii)(C) of the N.D.P.S. Act in connection with N.D.P.S. Case No.8 of 2015, arising out of Brahampur (Chakki O.P.) P.S. Case No.336 of 2015, by learned Sessions Judge-cum-Special Judge, Buxar. By the same judgment the appellant was acquitted of the charges under Sections 27(a) and 29 of the N.D.P.S. Act. The learned trial Judge has sentenced the appellant to undergo rigorous imprisonment of ten years and to



pay a fine of rupees one lac. In default of payment of fine the appellant would undergo further two years rigorous imprisonment. The judgment of conviction dated 08.06.2017 and order of sentence dated 12.06.2017 are under challenge in this appeal.

2. The prosecution case, as disclosed in the self-statement of Sub-Inspector Narad Muni Singh (PW 1), is that on 24.11.2015, in the morning, the informant got confidential information that in village Visheshwar Dera illegal Ganja has come in the house of the appellant for commercial purpose. Sanha entry was made of the information and the senior officers were informed. The informant along with the police team consisting of PW 4 Naresh Yadav, PW 6 Shashi Prakash, PW 7 Harendra Kumar and PW 8 Amit Kumar all constables proceeded to verify the correctness of the information. As soon as the police team reached village Visheshwar Dera near the house of the appellant at 8:00 AM, one person coming out from the house started fleeing, when he saw the police party. However, he was apprehended by the police. In the meantime, the people nearby assembled and in presence of witness Teja Paswan (PW 9) and Vijmal Paswan (PW 10) the appellant was informed that police has information that huge quantity of Ganja



is in his house. The appellant was further informed whether he was willing to be searched in presence of a Magistrate. On willingness of the appellant, services of PW 2 Yogendra Paswan, B.D.O., was taken as Magistrate. In presence of the witnesses and the Magistrate house of the appellant was searched and from a room a black coloured bag and a greenish black coloured bag was noticed. From the black coloured bag in a rapped polythene 20 Kgs 600 Gms and from greenish brown coloured bag 21 Kg 200 gms of Ganja was recovered. From both the packets a small quantity of 25 gm was taken out for forensic examination and three samples were made of that which were sealed in two small plastic box (dabba) and one small box (dabba meant for keeping Jarda). After sealing the recovered narcotics and samples and taking signature of the witnesses and Magistrate on that, the informant also signed, took the appellant into custody and proceeded for police station. After investigation the police submitted charge sheet and accordingly the appellant faced the trial.

3. During course of trial, the prosecution examined altogether 12 witnesses. The seizure list is on the record as Exhibit-1, the self-statement of the informant as Exhibit-2, the formal FIR as Exhibit-3, arrest memo of the appellant as



Exhibit-4, written consent of the appellant to be searched in presence of Magistrate as Exhibit-5 and samples taken for forensic examination as Exhibit-6. Exhibit-7 series are signatures of different persons on different documents and Exhibit-8 is the forensic report.

4. Mr. Vikram Deo Singh, learned counsel for the appellant, contends that the prosecution case suffers from serious infirmities which have been ignored by the learned trial Judge. The prosecution has failed to establish compliance of the requirement of Section 42(1) and 42(2) of the N.D.P.S. Act as nothing was brought on the record to substantiate that the informant got the confidential information reduced to writing and the writing was communicated to the immediate superior officer. Learned counsel submits that in the case of **Karnail Singh V. State of Haryana** reported in **(2009) 8 SCC 539**, the Constitution Bench of the Hon'ble Supreme Court held that it is a question of fact to be decided in each case as to whether there is adequate or substantial compliance with the requirement of Section 42 or not. While total non-compliance with the requirement of Section 42(1) and 42(2) is impermissible, the delayed compliance with satisfactory explanation about the delay will be acceptable compliance with Section 42 of the Act.



Learned counsel next contends that PW 9 and PW 10 the so called seizure witnesses have not supported the factum of search and seizure in their presence. They are not hostile witnesses. Therefore, their testimony is reliable. Moreover, there is material contradiction in the testimony of the prosecution witnesses of search and seizure, which shrouds the trustworthiness of the prosecution case with cloud. Learned counsel for the appellant contends that PW 5 Sima Patel, the scientist, who had examined the sample sent to the Forensic Science Laboratory has stated that she had received only one sample. Even PW 1 said that samples from both the bags were taken out and they were mixed and thereafter three packets were made which shows that the prosecution did not take care to take separate sample from both the bags to establish that both were containing Ganja. Learned counsel contends that the prosecution evidence is shaky that the recovered Ganja was of the petitioner.

5. Mr. Zeyaul Hoda, learned Additional Public Prosecution for the State-respondent, submits that the allegation is very serious of recovery of 41.80 Kgs of Ganja from the house of the petitioner. The forensic examination report at Exhibit-8 and evidence of PW 5 the expert would reveal that the



recovered substance was Ganja containing tetra hydro cannabinol as their chief intoxicating ingredient. He further contends that the seizure list witnesses have admitted their signature on search and seizure list and evidence of other witnesses of search and seizure, who have no reason to depose against the appellant, cannot be overlooked considering the object of the legislation to curb the menace of this social evil which is not only affecting the economy; rather is responsible for health-hazard of the community at large. There is no evidence that the police was biased against the appellant. Hence, for some minor technical flows the trustworthiness of the prosecution evidence cannot be thrown away.

FINDINGS

6. In **Karnail Singh V. The State of Haryana** reported in **(2009) 8 SCC 539**, a constitution Bench of the Hon'ble Supreme Court held that total non-compliance of the requirement of sub-sections (1) and (2) of Section 42 of the N.D.P.S. Act is impermissible. The total non-compliance would adversely affect the prosecution case.

There is nothing on the record to substantiate that the informant police officer got the confidential information received by him reduced into writing and communicated to his



immediate superior officer. Such writing might have been in physical form or electronic mode but nothing was brought on the record that the mandate of Section 42 of the N.D.P.S. Act was complied. For this lapse alone the prosecution case is fit to be disbelieved and discarded.

7. Fair trial is a constitutional guaranty to an accused under Article 21 of the Constitution of India. Fair trial includes fair investigation. Onus lies on the prosecution to demonstrate that the investigation was fair enough to not cause any prejudice to the accused.

8. In the case on hand, the following discrepancies in the prosecution evidence are worth consideration:

(a) The so-called seizure witnesses, PW 9 and PW 10, have specifically deposed that no search or seizure was made in their presence; rather their signature was taken on blank paper in Bhariyar Bazar. The police pressurized for signature on the blank paper. These witnesses are not hostile witnesses.

In **Raja Ram V. The State of Rajasthan** reported in **(2005) 5 SCC 272**, the Hon'ble Supreme Court held that if a witness is not declared hostile by the prosecution the defence can rely upon the evidence of such witness and it would be binding on the prosecution. The aforesaid view was reiterated in



Mukhtiar Ahmed Ansari V. the State NCT of Delhi reported in **2005 (5) SCC 258**.

(b) There is no evidence as to who identified the house of the appellant; rather the prosecution evidence is that the appellant was not known to the police party. According to PW 1 (para-25) at the time of search two brothers of the appellant Bipin Singh and another name not known were inside the house. No female or children were there. According to PW 2 (para-5) in the house of the appellant besides brothers, mother, wife and children were there. According to PW 4 (para-6), at the time of search Bipin Kumar Singh and Bhagwan Singh brothers of the appellant were in the house. No female or children were there. According to PW 6 (para-2), only an old lady was there in the house at the time of search. PW 7 and PW 8 who were also members of the search party are specific that there was no one at the house of appellant at the time of search and seizure. According to PW 1 (para-22), constable Shashi Prakash had taken out the narcotics from the room. PW 6 Shashi Prakash says that he was unable to say who had taken out the two bags containing Ganja from the room. The aforesaid conflicting evidence creates doubt on the trustworthiness of these witnesses to have participated in the search of the house of the appellant.



(c) According to some of the prosecution witnesses, who claims to be part of the search, only one room of the house was searched whereas according to PW 6, a member of the search party, all the six rooms in the house were searched. PW 1 says that the seized narcotics and samples were sealed in white coloured clothes and no time and place of sealing is mentioned thereon; whereas PW 2 the deputed Magistrate said that the seized items were sealed after wrapping with a blue coloured clothes. According to PW 2, the sealing was made after stitching the wrapper whereas according to PW 1 only knots of the seized materials were tied and not stitched.

(d) PW 2 the deputed Magistrate is specific in para-8 that no article of the appellant was found in the room from where Ganja was recovered including any document of identity proof of the appellant. The prosecution witnesses were cross-examined whether they tried to verify any document including electric bill etc. to establish that the house belongs to the appellant but they have failed to substantiate the same.

(e) The informant (PW 1) says that the seized narcotics and samples were kept in Malkhana of the police station. The investigating officer (PW 11) deposed that the seized articles were handed over to him and he had kept the



same in the Malkhana. The Malkhana register was not produced to the Court to ensure that the seized materials were kept in the custody of some person other than the informant nor the in-charge Malkhana was examined to substantiate the aforesaid fact. PW 1 has admitted in the cross-examination vide para-39 that the sealed narcotics produced in the Court were in such a condition that anything can be put in or taken out from the bag wherein the narcotic was there.

9. On careful scrutiny of the prosecution evidence, it is evident that there is total non-compliance of mandate of Section 42 of the N.D.P.S. Act. The prosecution evidence is shaky and suspicious as to whether the prosecution witnesses have really participated in any actual search and seizure. The independent witnesses of seizure have not supported the factum of seizure in their presence. The sampling of the seized articles was not properly done as small quantity taken from each of the bags were mixed and, thereafter, three samples were made as per PW 1 and only one packet of sample was sent for forensic examination as per PW 5. The prosecution has failed to prove that the place of recovery is of the appellant and the appellant was solely responsible for the recovered Ganja especially when other family members were there inside the house and the



appellant was arrested from outside the house. The prosecution failed to prove that sanctity in the matter of sealing the seized narcotics was maintained besides sanctity in the matter of preserving it in the possession and condition which leaves no room to doubt about the chances of tampering.

10. Therefore, in my view, this is a case wherein the prosecution has failed to prove the charge against the appellant beyond all reasonable doubt.

11. Hence, this appeal succeeds. The impugned judgment and order of sentence are hereby set aside. The appellant, who is serving out the sentence, is directed to be set free at once.

(Birendra Kumar, J)

Mkr./-

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