

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.5632 of 2019**

Arising Out of PS. Case No.-195 Year-2017 Thana- UDWANTNAGAR District- Bhojpur

Banke Bihari Singh @ Sonu Singh Son of Late Krishna Bihari Singh Resident
of Village - Masarh, P.S.- Udwantnagar (Gajrajganj), Distt.- Bhojpur, Ara.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s	:	Mr. Vikram Deo Singh, Advocate Mr. Sada Nand Roy, Advocate
For the Respondent/s	:	Mr. Zeyaul Hoda, SPP

**CORAM: HONOURABLE MR. JUSTICE BIRENDRA KUMAR
CAV JUDGMENT**

Date : 14-12-2021

The sole appellant is one of the accused of Udwantnagar (Gajrajganj) P.S. Case No.195 of 2017. After investigation the police sent up only the appellant for trial vide Exhibit-8 and investigation against other co-accused was kept pending. Accordingly, the appellant faced trial before the learned 4th Additional Sessions Judge-cum-Special Judge Excise Act, Bhojpur at Ara, in N.D.P.S. Case No.25 of 2017. By judgment dated 25.11.2019 the learned trial Judge convicted the appellant for offence under Sections 20(b)(ii)(c) of the N.D.P.S. Act and by order of sentence dated 02.12.2019 ten years rigorous imprisonment along with fine of rupees ten thousand



was awarded. In default of payment of fine six months further imprisonment was ordered. The trial Court judgment and order are under challenge in this appeal.

2. The prosecution case as disclosed in the written report of PW 6 Satyendra Kumar is that on 07.07.2017 at 6:15 AM, the informant was telephonically informed by Sub-Divisional Police Officer, Ara (not examined during trial) that in village Masarh, the house of the appellant is required to be raided as it had been learnt that appellant is involved in business of Ganja. The Sub-Divisional Police Officer informed that he was also to accompany the team of the police officials. Accordingly, a team to conduct raid was constituted of PW 6, the Sub-Inspector of Police, Gajrajganj out post, along with other Officer-in-Charges of different police stations named in the FIR. Then the Block Development Officer, Udwananagar (PW 1) was also telephonically contacted to remain there at the time of raid. The police team raided the house of the appellant and from a room situated at south-western corner of the house 30 Kgs of Ganja was recovered from a box inside the bed. Likewise, 25 Kgs of Ganja was recovered from a Bolero vehicle parked near the house bearing registration No.BR3P 2190 and electronic weighing machine was also recovered. The appellant



was trying to flee away by jumping over on the roof of the neighbour. However, the appellant was apprehended on the spot. The appellant disclosed that his uncle Brij Kishore Singh is also involved in the business of Ganja. Appellant had purchased the Ganja from co-villager Rakesh Singh, which was to be supplied to Dinesh Singh of village Balgojar and to Jitendra Singh as well as to one Pakauri. The narcotic, a Samsung Mobile, the Weighing Machine as well as the Bolero vehicle were seized by the police and a seizure list was prepared and a copy of the seizure-list is Exhibit-5.

3. During trial prosecution examined altogether seven witnesses. PW 1 Md. Sikandar is the local BDO, who was present at the time of search and seizure. The witness besides supporting the factum of search and seizure has identified his signature on the seizure-list. PW 2 Jyotish Paswan, a Hawaldar of Police, PW 3 Suresh Prasad, a constable, PW 4 Sanjay Singh, a local Chaukidar, PW 5 Dina Nath Singh, a local Chaukidar and PW 6 Satyendra Kumar, the informant of the case, all claims to be eyewitnesses of the search and seizure. PW 7 Shankar Pandit is Investigating Officer of the case.

4. Mr. Vikram Deo Singh, learned counsel for the appellant, contends that there is complete lack of evidence that



the informant or the Sub-Divisional Police Officer had complied the requirement of Section 42 of the N.D.P.S. Act which requires that the information gathered by the informant regarding possibility of any narcotic or psychotropic substance at any place to be reduced into writing and immediate information of the same to the superior officer.

Learned counsel contends that there is complete lack of evidence that the seized narcotics were sealed at the place of recovery and the same was kept in a safe custody in the police Malkhana etc. Further there is complete lack of evidence that in whose presence or at what place or by what person the samples of the seized narcotics were taken out. Narcotics were seized from two places and only one sample was prepared. Hence, it is difficult to ascertain that the sample was from which of the seized substance. Moreover, PW 4 and PW 5, who are not only local Chaukidars; rather seizure-list witnesses also have clearly deposed that 55 Kgs of Ganja was recovered from the vehicle. These witnesses are not hostile witnesses. They contradicts the testimony of other witnesses that 30 Kgs Ganja was recovered from inside the room and 25 Kgs from the vehicle.

Learned counsel submits that it has come in



evidence that the house is made of three floors and each floor is occupied by the family members. The police is not specific that all the three floors were in occupation of the appellant or the appellant was in occupation of an individual floor and other floors were in possession of the uncle of the appellant or other brothers of the appellant. The Sub-Divisional Police Officer, who had set the police in motion, was an important witness but he has not turned up before the Court. All the aforesaid infirmities create serious doubt on the trustworthiness of the prosecution case.

Learned counsel submits that the appellant in his statement under Section 313 Cr.P.C. has specifically stated that he is sarpanch of the village and has been falsely implicated because Darogaji (Sub-Inspector of Police) asked him to act as informer of the police. The appellant refused; rather suggested to get the information of any crime through the local Chaukidar. The aforesaid refusal of the appellant led to the false implication in this case.

5. Mr. Zeyaul Hoda, learned Additional Public Prosecutor appearing for the State, contends that the appellant was apprehended at the time of search and seizure of Ganja and there is no evidence of enmity with the police. Therefore, for



trivial infirmity or non-compliance, the prosecution case cannot be disbelieved.

6. Article 21 of the Constitution of India guarantees a right of fair trial to an accused. Fair trial includes fair investigation. Onus lies on the prosecution to demonstrate that the investigation was fair enough to not to cause any prejudice to the accused.

7. In the case on hand; the following serious infirmities are noteworthy in the prosecution case and evidence:

(a) This is a case of total non-compliance of mandate of sub-section (1) and sub-section (2) of Section 42 of the N.D.P.S. Act. In **Karnail Singh V. 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 Section 42 of the N.D.P.S. Act is impermissible; rather would adversely affect the prosecution case. There is nothing on the record to depict that the informant police officer or the Sub-Divisional Police Officer who had communicated about the chances of availability of Ganja with the appellant did not reduce the information into writing and communicated to his immediate superior officer. Such communication and writing might have been in the physical form or electronic mode, but



nothing was brought on the record nor any prosecution witness has whispered about compliance of mandate of Section 42 of the N.D.P.S. Act. This lapse, on the part of the prosecution, alone is sufficient to disbelieve and discard the prosecution case.

(b) PW 4 Sanjay Singh, the local Chaukidar, and PW 5 Dina Nath Singh, another Chaukidar, both of village Masarh (P.O. village) have deposed that recovery of 55 Kgs of Ganja was made from the Bolero vehicle of Banke Bihari Singh, the appellant. He had signed on the blank papers at the police station. 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 said 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 testimony of these witnesses contradicts the statement of other witnesses in material particular to the extent that the alleged recovery was partially made from inside the house and partially from the Bolero vehicle, as claimed in the First Information Report. The said vehicle was of the appellant has not been established by the prosecution evidence. The aforesaid infirmity creates serious doubt on the factum of search



and seizure.

(c) There is complete lack of evidence as to whether the seized substances were sealed at all muchless in presence of responsible person. The local Block Development Officer, who acted as a Magistrate, at the time of so-called search and seizure, has not deposed anything about sealing of seized substances. Moreover, there is no evidence as to who and when took out samples from how many packets of seized substances. The seizure was made on 07.07.2017. The order of the Court was obtained for sending the sample to Forensic Science Laboratory on 24.07.2017. The substance was sent on 10.08.2017 to Forensic Science Laboratory, Kolkata, where it was received on 23.08.2017. But there is complete lack of evidence that where the seized substances were kept in custody and in whose custody they were kept. Who took out the sample and in whose presence it was done. The aforesaid infirmity creates serious doubt on the sanctity of the sample which was sent to the Forensic Science Laboratory for scientific examination.

8. For the aforesaid infirmities, which was not considered by the learned trial Judge, the prosecution case is bound to fail. Hence, the conviction of the appellant is not



sustainable on the facts and in law. Accordingly, the impugned judgment of conviction and order of sentence are hereby set aside and this appeal is allowed.

Let the appellant be set free at once.

(Birendra Kumar, J)

Mkr./-

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