

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.840 of 2022

Arising Out of PS. Case No.-247 Year-2017 Thana- MAHISHI District- Saharsa

Gopi Sah, Son of Sonelal Sah, R/v- Rajanpur, P.S.- Mahishi, District- Saharsa

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s : Mr. Krishna Prasad Singh, Sr. Advocate
Mrs. Meena Singh, Advocate
For the Respondent/s : Ms. Shashi Bala Verma, APP

CORAM: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH

and

HONOURABLE MR. JUSTICE NAWNEET KUMAR PANDEY

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH)

Date : 03-08-2023

By the impugned judgment and order dated 19.09.2022/23.09.2022 passed by the learned Sessions Judge, Saharsa in connection with Special Case No. 7 of 2017, arising out of Mahishi P.S. Case No. 247 of 2017, the appellant has been convicted and sentenced as under:

Conviction under Section	Sentence		
	Imprisonment	Fine (Rs.)	In default of fine
22(c) of the NDPS Act	RI for 11 years	1,50,000/-	SI for 6 months

2. A self statement of the Station House Officer (SHO) (informant), Mahishi recorded on 27.11.2017, is the basis for



registration of Mahishi P.S. Case No. 247 of 2017 disclosing commission of the offences punishable under Section 20(b)(ii) (C) and Section 22 of the Narcotic Drugs and Psychotropic Substances Act (NDPS Act in short) which finally gave rise to Special Case No. 7 of 2017 in the court of learned Sessions Judge, Saharsa. It is the prosecution's case as disclosed in the said self statement that the informant received a secret information on 26.11.2017 at 8:10 pm from the Sub-Divisional Magistrate, Saharsa that three sons of one Sonelal Sah namely Ram Pravesh Sah, Ramdhan Sah and this appellant were indulging in illegal trade and smuggling of *ganja*. Acting on the said secret information a team was constituted headed by the Sub-Divisional Magistrate, Saharsa, Sub-Divisional Police Officer, Saharsa and other officials and police officials/personnel to conduct a raid. The house of Sonelal Sah was thereafter searched in the said night leading to recovery of 4 quintals 690 grams of *ganja* and a cash of Rs. 1,36,495/-. Two individual witnesses namely Rustam Ali (PW-4) and Md. Haidar Ali (PW-5) were requested to remain present during the course of search and seizure. A seizure list was prepared at the spot on which all the officials and independent witnesses put their signatures. The appellant was arrested on the spot in the house of Sonelal Sah,



according to the prosecution's case. Based on the allegation of the aforesaid effect, the FIR was registered against this appellant, Ram Pravesh Sah and Ramdhan Sah. It was not the prosecution's case that Ram Pravesh Sah and Ramdhan Sah were present in the house at the time of search and seizure of the house. The appellant, according to the prosecution's case was present in the house.

3. We will be dealing with relevant evidence in this regard while considering the depositions of the witnesses. We however, consider it apt to notice at this juncture itself that there is consistent evidence on record to the effect that this appellant resided in a house different from the house where the search was conducted. We also take note of the fact at the outset that we have not seen any evidence as regards the manner in which sample from the recovered articles was drawn for the purpose of the same being sent to Forensic Science Laboratory for chemical examination. Even according to the prosecution's case the sample, in whatever manner drawn, was dispatched to the Forensic Science Laboratories at Patna and Kolkata on 13.02.2018 two and half months after seizure. The sample was received in the FSL Patna eight days thereafter, on 21.02.2018, which was sent through a *chaukidar*, a special messenger,



according to the prosecution's case.

4. Be that as it may, the police upon completion of investigation submitted charge-sheet against this appellant for commission of the offences punishable under Section 20(b)(ii)(C) and Section 22 of the N.D.P.S. Act. Final report was however submitted against two others namely, Ramdhan Sah and Ram Pravesh Sah. The special court took cognizance of the offences punishable under Section Section 20(b)(ii)(C) and Section 22 of the N.D.P.S. Act and proceeded against all the three persons who were named in the FIR. Charges were framed against all the three for commission of offences punishable under Section 22(c) of the N.D.P.S. Act. The appellant and the two co-accused persons denied the charge and claimed to be tried.

5. At the trial the prosecution got examined altogether seven witnesses including the seizure list witnesses Rustam Ali (PW-4), Md. Haidar Ali (PW-5). Informant of the case, Anil Kumar Singh deposed as PW-1 and the I.O. Hareshwar Prasad Singh deposed as (PW-6). The Block Supply Officer namely Braj Kishor Sada (PW-2), Abhishek Kumar (PW-3) and Amrendra Kumar Amar (PW-7) all of whom had participated in conduct of raid also deposed at the trial for the prosecution. In



addition to the oral evidence of the witnesses the prosecution also adduced following documentary evidence:-

1. Seizure list- Exhibit-1
2. Self written statement of the informant-Exhibit-2
3. Signature on the self written statement- Exhibit-2/1
4. Formal FIR-Exhibit-3

6. After closure of the prosecution's evidence, the persons facing trial were questioned under Section 313 of the CrPC so as to give them an opportunity to explain the circumstances emerging against them based on the prosecution's evidence adduced at the trial. They answered in negative claiming their innocence. They also got examined two defense witnesses, namely, Bipin Bhagat (DW-1) Lalan Prasad Singh (DW-2) and brought on record two documentary evidence by way of Exhibits D1 and D2.

7. The trial court, after having appreciated the evidence adduced at the trial, has come to a conclusion by its impugned judgment that Ramdhan Sah and Ram Pravesh Sah deserved to be given benefit of doubt and accordingly acquitted them of the charge which they were facing. As regards this appellant, the trial court, concluded that the prosecution has been able to establish recovery of huge quantity of contraband articles from the house of Sonelal Sah and presence of the



appellant in the house of the Sonelal Sah when the search and seizure was conducted. The trial court while convicting the appellant opined in paragraph 31 as under:-

"So far as involvement of accused Gopi Sah in the offence is concerned, I have discussed in foregoing paragraphs that there are evidence and materials available against him regarding his presence on the date of occurrence in his village and he was arrested at the place of occurrence. His house as claimed being situated beside the house of his father, which is the place, of occurrence does not absolve his liability from the offence. I have also opined above that there is every possibility that taking advantage of absence of his father he would have been using that home for his malicious activity of trading of Narcotic Drugs. The defense has also failed to prove conclusively that this accused was not involved in the offence beyond all reasonable doubts. Accordingly, I find and hold accused Gopi Sah guilty for the offence committed under Section 22(c) of the Narcotic Drugs and Psychotropic Substances Act. He is already in custody and hence he is sent back to District Jail Saharsa to be produced on 23.09.2022 for hearing on the point of sentence."

8. Learned counsel appearing on behalf of the appellant has argued that it is apparent from the impugned judgment of the trial court that the prosecution's case that the appellant was present in the house when search was conducted and seizure was made, is the only basis for the appellant's conviction. She has drawn our attention to the evidence of PW-5



wherein he has clearly deposed in paragraph 5 that at the time of seizure the appellant was at his shop. She has submitted that PW-2, Block Supply Officer, himself deposed at the trial that all the three accused persons had separate houses. PW-4, a seizure list witness also deposed that sons of Sonelal Sah had separate houses and Sonelal Sah used to live in Delhi after his second marriage and had given on rent his house to someone dealing in scraps. She further submits that the prosecution is silent on the point as to how the sampling of the seized article was done and in any case the prosecution has not been able to establish that the samples were drawn in the presence of the Magistrate as ordained under Section 52A(2)(b) of the NDPS Act. She further submits that the material exhibits were not produced at the trial and no evidence was led at the trial that the contraband seized from the house of Sonelal Shah were destroyed. The delay of more than two and a half months in dispatching the sample from the date of seizure and delivering the sample in the Forensic Science Laboratories, 7-8 days after the same was sent to be delivered through special messenger renders the entire case of the prosecution completely doubtful, she contends. She has further argued that it was impermissible for the officials to have conducted search of the house after the sunset and before



sunrise without following the procedure prescribed under Section 42 of the NDPS Act. She further argues that the provisions under Section 42 of the NDPS Act has been blatantly breached in the present case.

9. Learned Additional Public Prosecutor representing the State, while defending the finding recorded by the trial court, has submitted that the prosecution proved at the trial the appellant's presence in the house of his father Sonelal Sah at the time of search and seizure from where huge quantity of *ganja* came to be recovered in the presence of the senior officials and two independent witnesses. As the presence of the appellant in the house from where the recovery was made has been established, the prosecution was able to establish that he was in conscious possession of *ganja* and, therefore, the conviction recorded by the trial court is fully justified.

10. We have perused the impugned judgment and order of the trial court as well as the lower court's records. We have given our thoughtful consideration to the rival and submissions made on behalf of the appellant and the State. We are satisfied on perusal of the evidence, both oral and documentary, available on record that there has been complete violation of Section 42 of the NDPS Act by the informant and



other officials by entering and searching the house/building of Sonelal Sah in the night of 26.11.2017 without following the procedure prescribed therefor. Section 42 of the NDPS Act reads thus:-

"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 persons 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 VA 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 VA 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."

11. Sub-section (1) of Section 42 permits an empowered officer to enter into and search any building and in case of resistance break open any door and remove any obstacle to search entry between sunrise and sunset if he has reason to believe from personnel knowledge or information given by any person upon taking down in writing that any Narcotics Drugs and Psychotropic Substance, or controlled substance in respect of which an offence punishable under this Act has been



committed or any document or other articles which may furnish evidence of the commission of such offence or any illegally acquired property or any document or other articles which may furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of the NDPS Act is kept or concealed in such building. The said provisions authorises the empowered officers to seize such drug or substances and all materials used in manufacture thereof and detain and search and arrest any person whom he has reason to believe to have committed any offence punishable under the NDPS Act. On plain reading, we are of the view that following essential condition precedents for exercise power of entry, search, seizure and arrest as contemplated under sub-section (1) of Section 42 of the Act excluding the second proviso thereof:-

(i) Such power can be exercised between sunrise and sunset.

(ii) He must have 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 offence punishable under this act has been committed.



Or

Any document or other article which may furnish evidence of 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 VA of this Act, is kept or concealed in any building, conveyance or enclosed place.

12. The second proviso to sub-section (1) of Section 42 is an exception to the prescription under Section 42(1) of the NDPS Act and states that if an empowered officer has reason to believe that a search warrant or authorization cannot be obtained without affording any opportunity for concealment of evidence or facility for the escape of the 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.

13. On close reading of sub-section (1) of Section 42 it can be easily culled out that it is imperative for an empowered officer while exercising power under sub-section (1) of Section 42 that he must take down in writing his personal knowledge or information received by him which is the reason for him to



believe that the conditions stipulated for exercise of such power exist. In the present case, we do not see any evidence that the empowered officer, before conducting search had taken down in writing the information or his personal knowledge.

14. Secondly, the officials entered into the building after sunset and before sunrise without recording the grounds of his belief that a search warrant or authorization could not be obtained for causing search in the night without affording opportunity for concealment of evidence or facility for escape of the offender; a condition precedent under the second proviso to sub-section (1) of Section 42 of the Act. Apparently, keeping in mind the stringent provisions of the NDPS Act and serious consequences sub-section (2) of Section 42 prescribes yet another safeguard and lays down that 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 72 hours send copy thereof to his immediate official superior. We do not find compliance of sub-section (2) of Section 42 in the present case.

15. Thirdly, there is no evidence at all as to how the sample was drawn. It is evident from the prosecution's case that the sample was not drawn at the time of seizure. There is no



clue as to when was the sample drawn. It can, however, be definitely said based on the evidence available on record that the sample was not drawn in the presence of a Magistrate as contemplated under Section 52A(2)(b) of the NDPS Act.

16. Further, we find substance in submission advanced on behalf of the appellant that dispatch of sample on 13.02.2018 to the Forensic Science Laboratory of the articles seized on 26.11.2017, adversely affects the entire case of the prosecution. Where was the contraband kept, why was there so much of delay in sending the sample for chemical examination, are few questions which have completely remained unanswered. The failure on the part of the prosecution to produce the seized articles as material exhibit at the trial in the absence of any certification of its disposal, gives another blow to the prosecution's case.

17. Further, we cannot loose sight of the fact that PW-5, who is a prosecution witness and has not been declared hostile, clearly deposed at the trial that this appellant was not present in the house when the search was conducted. He rather deposed that the house was locked from outside and the lock was broken open by the officials.

18. If all the aspects discussed above are taken



together, we are of the view that the prosecution miserably failed to prove the charge against the appellant at the trial. We do not find it safe to uphold the finding of conviction based wholly on the evidence of the informant, the IO and other officials who were party to the search and seizure.

19. In the result, the appellant stands acquitted of the charge of offence punishable under section 22(c) of the NDPS Act by giving him benefit of doubt.

20. Accordingly, the impugned judgment of conviction and order of sentence dated 19.09.2022/23.09.2022 passed by the learned Sessions Judge, Saharsa in connection with Special Case No. 7 of 2017, arising out of Mahishi P.S. Case No. 247 of 2017 are set aside.

21. This appeal is allowed accordingly.

22. The appellant is in jail custody. Let him be released forthwith, if he is not required in any other case.

(Chakradhari Sharan Singh, J)

(Nawneet Kumar Pandey, J)

Rajesh/Sudha

AFR/NAFR	NAFR
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