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(2021) 09 PAT CK 0071

Patna High Court

Case No: Criminal Appeal (SJ) No. 32, 106 Of 2016

Paspat Sahani

APPELLANT

Vs

State Of Bihar

RESPONDENT

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**Date of Decision:** Sept. 15, 2021

**Acts Referred:**

- Constitution of India, 1950 - Article 21
- Narcotic Drugs and Psychotropic Substances Act, 1985 - Section 20(b)(ii)(C), 23(c), 42, 43, 50

**Hon'ble Judges:** Birendra Kumar, J

**Bench:** Single Bench

**Final Decision:** Allowed

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### Judgement

1. The appellants above named have challenged their conviction for offences under Sections 20(b) (ii)(C) and 23(c) of the N.D.P.S. Act by judgment

dated 19.11.2015 passed in N.D.P.S. Case No. 63 of 2012 arising out of Palanwa P.S. Case No. 73 of 2012. The learned trial Judge (Additional

Sessions Judge-I, East Champaran at Motihari) by the impugned order of sentence dated 21.11.2015 awarded 10 years rigorous imprisonment and a

fine of Rs. 1 lac under both the aforesaid heads of the offences. However, the sentences were ordered to run concurrently.

2. The prosecution case as disclosed in the written report of PW-1 Ram Vinay Singh is that he along with his eight helpers put an ambush near Indo

Nepal Border at Piller No. 400, Bridge No. 88. Some people from the Nepal side carrying bundles on their head were entering into the territory of

India at about 11 PM on 16.06.2012. When they were stopped for queries, the people threw their bundles and started fleeing. Three of them namely

the two appellants and one Jado Lal Yadav were apprehended and in presence of Tribhuwan Prasad Yadav (PW-5) and Navin Kumar (PW-6), the

thrown articles were searched and it was noticed that ganja like substance was there. Total weight of the narcotic was 96 Kg.

3. After investigation, the police submitted chargesheet against all the three. Co-accused Jado Lal Yadav claimed to be a juvenile as such his matter

was separated and sent to the Juvenile Justice Board by order dated 06.03.2013.

4. Mr. Dhananjay Kumar No.2, learned counsel for the appellant Paspal Sahani and Mr. Nityanand Tiwary, learned counsel for the appellant Ranjeet

Sahani contends that the so called seizure list witnesses have not supported the factum of search and seizure in their presence and they have not been

declared hostile by the prosecution. Hence the defence can rely on their testimony which creates serious doubt on the prosecution case. Moreover,

there is total non-compliance of the mandates of Sections 43 and 50 of the N.D.P.S. Act which goes to the root of the prosecution case. There is

complete lack of evidence that services of the Magistrate was taken at the time of search or seizure or at the time of taking out samples for test. The

prosecution case is vague as to how many bundles were seized and whether samples were taken from all the bundles or not. The prosecution

witnesses are specific that due to darkness they could not say definitely as to who had thrown the bundle on his head. Further the prosecution

evidence is specific that nothing was recovered from physical possession of the appellants.

5. To contra, Mr. S. A. Ahmad, learned APP in Cr. Appeal (SJ) No. 106 of 2016 and Mr. Binod Bihari Singh, learned APP in Cr. Appeal (SJ) No. 32

of 2016 contends that since recovery was not made from physical possession or from any vessel or the house etc. of the appellants, hence compliance

of Sections 42, 43 or 50 was not required in this case. The informant and other police associates have consistently supported the prosecution case.

The learned trial Judge has considered the aforesaid aspects while recording the judgment of conviction. Hence the same requires no interference.

6. PW-5 Tribhuwan Prasad Yadav is specific that he had signed on the blank papers on the instruction of the informant of this case who was sub-

Inspector posted at BPO Camp, Siswa. He had signed on seizure paper at the camp and no ganja like substance was seized in his presence. Identical

is statement of PW-6 Navin Kumar and other so called seizure list witnesses. None of the aforesaid prosecution witnesses have been declared hostile.

In Raja Ram v. The State of Rajasthan, reported in (2005) 5 SCC 272, the Hon'ble Supreme Court said that if a prosecution 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 same

view was reiterated in Mukhtiar Ahmed Ansari vs. The State (NCT of Delhi, reported in (2005) 5 SCC 258.

7. Moreover, the production cum seizure list (Ext.-9) would show that the seizure was made on 17.06.2012 at 16:00 hours and production was made at

Bhelahi O.P. campus.

Six bundles containing total weight of 96 Kg. Nepali ganja are said to be the seized item. This production-cum-seizure list does not bear signature of

the appellants or any witness. A proforma for seizure memo was also prepared which is Ext.-1. This proforma does not contain the number of bundles

seized. Only total weight of 96 Kg. is mentioned besides cost of the ganja. The aforesaid infirmity in the prosecution evidence goes to the root of the

prosecution case.

8. The law is well settled that total non-compliance of the mandates of N.D.P.S. Act would be fatal for the prosecution case rather delayed

compliance and substantial compliance would not affect the trustworthiness coupled with other facts and circumstances of this case.

In the case on hand, the search was made on a public place and seizure and arrest was also affected at the public place. Hence the requirement of

Section 43 of the N.D.P.S. Act was to be followed. Since the case of the prosecution is that the accused persons had thrown the bundles on their

head and they were apprehended soon along with the recovery of thrown bundles, it is a case of recovery from possession of a person. Hence it

cannot be argued that the mandate of the N.D.P.S. Act contained in Sections 43 and 50 was not required to be followed. There is total lack of

evidence that the appellants were informed of their right to be searched in presence of the Magistrate nor the informant or anyone attempted to take

services of the Magistrate either at the spot or at the police station where they took the appellants along with the seized narcotics before opening its

seal.

In Saiyad Mohd. @ Saiyad Umar Saiyad and Others v. The State of Gujarat reported in (1995) 3 SCC 610, the Hon'ble Supreme Court said that

the requirement on the part of the officer conducting the search to inform the accused of his right to choose to be searched in the presence of a

Gazetted Officer or a Magistrate is mandatory. The prosecution must prove that the accused was made aware of his right but he did not choose to be

searched before a Gazetted Officer or a Magistrate. If no evidence to this effect is brought on the record, the Court must assume that the accused

was not informed of his right and must find that the possession of the illicit articles was not established.

There is no evidence that the appellants were informed of their right to be searched before a Gazetted Officer nor there is any evidence that search

was made in presence of any Magistrate. Hence it is doubtful that the recovery was made from the possession of the appellants.

9. Five prosecution witnesses claim to be there at the time of search, seizure and arrest. They are PW-1 Ram Vinay Singh, the informant of this case,

PW-2 constable Sunil Kumar, PW-3 constable Desh Pal Singh, PW-4 constable Dharmendra Kumar Paswan and PW-7 Constable Gobin Narjinari.

PW-1 deposed that 8-10 persons were coming from Nepal to India. All were carrying a packet at their head. When the informant attempted to catch

them, they threw their packet. Then the police party chased and three of them were apprehended and rest fled away. The apprehended persons are

the two appellants and one Jado Lal Yadav. The thrown packets were seized and it was suspected that the same were containing ganja like

substance. Hence they were weighed and total 96 Kg was found. Thereafter, along with the seized packets and the appellants all came to the police

camp. The witness has admitted that he had confidential information received at 21:00 hours that some narcotics are coming from Nepal side. The

witness deposes that he could not remember how many packets were seized nor he had written so in his first written report to the police. All the

packets were weighed jointly and none of the packets were weighed separately. No signature or LTI of the accused were taken on any of the

packets. The packets were not opened at the place of recovery. Nothing was recovered from physical possession of the appellants.

According to PW-2, he saw that some people are entering into Indian side from Nepal carrying packets on their head. One packet was opened and

drug like substance was noticed. The total weight was 96 Kg. Nothing was recovered from physical possession of the appellants.

PW-3 Desh Pal Singh deposed that some people carrying packets at their head were coming towards Indian side from Nepal. Three of them were

apprehended when they were fleeing after throwing out their packets. In the cross-examination, the witness is specific that 10-12 persons were there.

Nothing was there with the appellants at the time of their arrest.

PW-4 says that only the three apprehended accused were there carrying bundles on their head wherein ganja was found. The Nepal border is an open

border and anyone from Nepal or India can move freely within the territory of others. The people residing on the Border even crosses the border for

marketing purposes and for their livelihood.

According to PW-7, he saw that three persons were coming from Nepal side and when they saw the police party, they threw their packets. However,

all the three were apprehended. The witness is specific that each one was carrying one bundle.

The investigating officer of the case was examined as court witness. Though he has deposed that he had given application to the Court for taking out

samples and sending them for forensic examination, but the evidence does not show that services of any Magistrate was taken for completion of the

aforesaid exercise. The witness deposed that he was handed over six packets. However, no one informed him that which packet was being carried by

which of the appellant. The witness is specific that he has not mentioned as to in whose presence the samples were taken out and from which bundles

the samples were taken out. The samples were kept in the police station Malkhana, however it is not mentioned in the case diary. The appellants do

not bear any criminal antecedent.

Thus, the prosecution evidence is that 8-10 persons were coming from Nepal side and all threw their bundles on their head, however only six bundles

were recovered. Therefore, it cannot be safely relied that the recovered bundles were thrown by the appellants, especially in the absence of specific

evidence on the point.

10. Fair trial is a constitutional guarantee 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 cause no prejudice to the accused.

In the case on hand, total non-compliance of the mandate of law, especially in the matter of search and seizure and taking out samples for forensic

examination leaves a lot of room to doubt the fairness of the investigation. The Malkhana register or the person who was manning the Malkhana were

not produced before the Court to clear any reasonable doubt regarding fairness adopted in taking out the samples or keeping the seized narcotics in

safe custody.

11. For the aforesaid infirmities, it cannot be said that the prosecution has successfully proved the charges against the appellants. Hence, the impugned

judgment and sentence are hereby set aside and these appeals are allowed.

Appellant Ranjeet Sahani is already on bail, he is exonerated from the liability of bail bond. Appellant Paspal Sahani is in jail, let him be set free at once.