

(2002) 05 PAT CK 0082**Patna High Court****Case No:** Criminal Appeal No. 57 of 2001 (S.J.)

Shamshul Mian @ Thag Mian

APPELLANT

Vs

The State of Bihar

RESPONDENT

Date of Decision: May 22, 2002**Final Decision:** Allowed**Judgement**

I.P. Singh, J.

The sole Appellant has been convicted under Sections 20(b) and 23 of the Narcotic Drugs and Psychotropic Substances Act (in short "the Act") and has been sentenced to undergo rigorous imprisonment for five years and also to pay a fine of Rs. 20,000/- u/s 20(b) of the Act, in default to undergo simple imprisonment for 6 months. He has been further sentenced to undergo rigorous imprisonment for 10 years and also to pay a fine of Rs. 1,00,000/- u/s 23 of the Act, in default to undergo simple imprisonment of two years. He has further been convicted u/s 47(A) of Excise Act and has been sentenced to undergo simple imprisonment for one year and a fine of Rs. 5,000/-, in default to undergo simple imprisonment for one month. All the sentences were ordered to run concurrently.

2. The prosecution case, in brief, is that the Officer Incharge got his statement recorded on 5.9.1999 at, 13.00 alleging therein that on the basis of secret information received at 12.30 hours he constituted a raiding party including the other police personnel, Dafadar and Chaukidar of the Area and he proceeded from there and on arrival at Nahar Chowk Sikta Bazar he kept close watch and was vigilant over the persons who were passing towards north and in that course he found one person who was coming having two bags in his both hands. He was stopped by the informant and then a search was made to his person. He found that in one bag there was a plastic jerking containing about 20 litres of illicit country made liquor in another bag about three K.G. of Ganja kept in polythene bag recovered. On the demand from the informant the above accused did not produce any valid licence for possessing the above articles. The aforesaid articles were

recovered in presence of two independent witnesses and seized and a seizure list has been prepared. On the basis of the aforesaid statement Sikta P.S. Case No. 95 dated 5.9.1999 was instituted and a formal F.I.R. was drawn up. After completion of investigations the police submitted charge sheet and the cognizance was taken. Subsequently the trial concluded with the result as indicated above. Hence this appeal.

3. The Appellant pleaded not guilty and has stated that he has been falsely implicated in this case.

4. The prosecution in order to prove its case has examined altogether 13 witnesses. P.W. 1 is Shambhu Prasad. P.W. 2 is Pramod Prasad. P.W. 3 is Dilip Kumai Prasad. P.W.4 is Punna Mukhiya. P.W. 5 is Andab Mian. P.W.6 is Saiyad Mian. P.W. 7 is Baban Singh. P.W.8 is Shivji Yadav. P.W. 9 is Ali Magdi. P.W. 10 is Nurudin Gadi. P.W. 11 is Gokul Gadi. P.W. 12 is Ram Bachan Yadav P.W. 13 is Ram Nandan Prasad Singh.

5. Out of 13 witnesses P.Ws. 3, 8, 11 and 13 have supported the case of the prosecution.

6. P.W. 3 is the informant. He has stated that on 5.9.1999 he was posted as Officer Incharge of Sikta Police Station. On that day he received a confidential information of smuggling from Nepal side and went for checking with the police party at Sikta Nahar Chowk bridge and while in checking he saw a man coming with two bags in their hands and checked him. He has further stated that in one bag there was 20 litres of liquor in a white colour plastic jerking while in another bag that was 3 Kg. of Ganja which he recovered and seized in presence of two independent (sic-witnesses ?). He prepared a seizure list. He has submitted the written report to Sikta police station and on the basis of the written report the F.I.R. was drawn up. The other witnesses i.e. P.Ws. 1, 2, 4, 5, 6, 7, 9, 10 and 12 have been declared hostile.

7. The learned Counsel appearing on behalf of the Appellant has submitted that Section 50 of the Act has not been complied with and the seizure list witnesses have not supported the case of the prosecution. He has further submitted that Section 23 of the Act is not applicable in this case. He has further submitted that Sections 42 and 50 has not been complied with which has vitiated the whole trial. He has further submitted that the seizure list witnesses have not been examined.

8. So far as the submission of the learned Counsel that Section 42 of the Act was not complied with but there is a notification which authorises a police officer not below the rank of Sub Inspector of Police to conduct the search and seizure in the Act. In the present case P.W.3 who was the Officer In-charge of Sikta Police Station certainly not below the rank of Sub Inspector had conducted the search and seizure of the Appellant. As such there is no violation of provision of Section 42 of the Act. As far as the procedure laid down u/s 50 of the Act is concerned i.e. about informing the Appellant his right to be searched before a Gazetted Officer or a Magistrate. In this case the informant has prior information that there was likelihood of narcotic

substance to be smuggled from Nepal and for that purpose he had gone to Nepal border and in that process he detected the Appellant carrying bags in both hands. The informant apprehended him and recovered 3 Kg. Ganja from one bag and 20 litres country made liquor from another bag. It is clear that the informant when apprehended the Appellant should have informed his right to be searched in presence of Gazetted Officer or a Magistrate but he did not choose to do so and to ask him, about the right which he had u/s 50 of the Act.

9. It is well settled in number of cases which has been cited by the learned Counsel reported in P.L.J.R 2000(2)-231 (Suresh Bhagat v. State of Bihar), P.L.J.R. 1998(1)-154 (Prem Chand v. The State of Bihar), AIR 1999 S.C. 2375 (Rajathi v. C. Ganesan) including the decision of the Apex Court reported in [Mohinder Kumar Vs. The State, Panaji, Goa](#), in which it was held that any search without following the provisions of Section 50 of the Act would vitiate the trial since it is a mandatory provision. It is mandatory on the part of the informant to inform the Appellant about his right to be searched before a Gazetted Officer and a Magistrate which has not been complied with. As such the conviction and sentence is not sustainable and he is acquitted of the charge u/s 20(b). That apart for conviction u/s 23 of the Act it is must for the prosecution to prove that the narcotic drugs/psychotropic substance is imported. But in this case the report of Forensic Science Laboratory does not specifically indicate that the Ganja containing T.H.C. was of Nepali origin as such the offence did not attract offence u/s 23 of the Act as well. However, his conviction and sentence u/s 47(A) of the Excise Act is up-held.

10. Accordingly, this appeal is partly allowed.