

(2017) 07 PAT CK 0004

In the Patna High Court

Case No : 494 of 2015 Arising Out of PS Case No -5 Year- 2006 Thana -KURTHA
District- JEHANABAD

Tej Narayan Singh S/o Late Harakh Narain Singh

APPELLANT

Vs

The State of Bihar

RESPONDENT

Date of Decision : 03-07-2017

Acts Referred:

Code of Criminal Procedure, 1973, Section 100, Section 313 - Person in charge of closed place to allow search - Power to examine the accused
Narcotic Drugs and Psychotropic

Citation : (2017) 07 PAT CK 0004

Hon'ble Judges : Aditya Kumar Trivedi

Bench : SINGLE BENCH

Advocate : Arvind Kumar, Rajesh Kumar, S.A. Ahmad

Final Decision : Allowed

Judgement

1. Vide judgment of conviction dated 11.06.015 and order of sentence dated 15.06.2015 passed by the Additional Sessions Judge-1st, Jehanabad in N.D.P.S. Case No.02 of 2006/ 55 of 2014 found the sole appellant, Tej Narayan Singh guilty for an offence punishable under Section 20 of the N.D.P.S. Act and sentenced to undergo rigorous imprisonment for five years as well as to pay fine of Rs.25,000/- and in default thereof, to undergo additional period of imprisonment for one year.

2. PW-2, Umesh Kumar Singh, Officer-in-Charge of Kurtha recorded his own statement on 19.01.2006 at about 6.00 a.m. in the courtyard of appellant, Tej Narayan Singh disclosing therein that being an absconder relating to Kurtha P.S. Case No.136 on account of "Jail Break", a raid was conducted at the house of one Shailendra Singh, which was found closed. Then thereafter, the house of appellant was raided and during course thereof, he was also found absent. His old infirm deaf mother was present. In the courtyard, four Ganja trees were found, which were uprooted, seized and then, carried away. The aforesaid

exercise was done in presence of two seizure list witnesses namely Ashok Singh (PW-3) as well as Rajendra Manjhi (PW-6).

3. Kurtha P.S. Case No.05 of 2006 was registered under Section 20-21 of the N.D.P.S. Act, whereupon investigation commenced and after concluding the same, chargesheet was submitted, ultimately facing the trial, meeting with the result, the subject matter of instant appeal.

4. Defence case as is evident from mode of cross-examination as well as statement recorded under Section 313 of the Cr.P.C. is that of complete denial as well as false implication at the instance of prosecution party, who became frustrated on account of being failed to nab the accused.

5. In order to substantiate its case, prosecution had examined seven PWs, out of whom, PW-1 Binod Singh, Dafadar, PW-2 Umesh Kumar Singh, the informant, PW-3 Ashok Singh, a seizure list witness, PW-4 Bajrangi Singh, I.O. of the case, PW-5 Sita Ram Paswan, one of the member of the raiding party, PW-6 Rajendra Manjhi, another seizure list witness and PW-7 Dinesh Prasad Singh, another member of raiding party. Side by side, also exhibited documents as Exhibit-1 fard-bayan, Exhibit-2 seizure list, Exhibit-3 formal F.I.R., Exhibit-4 signature of seizure list witnesses, Exhibit-5 carbon copy of forwarding letter, Exhibit-6 F.S.L. Report.

6. So far status of seizure list witnesses namely PW-3 Ashok Singh and PW-6 Rajendra Manjhi are concerned, though they admitted their presence over seizure list, but disowned the prosecution version. With regard to remaining witnesses, save and except Exhibit-4 the I.O., they being members of raiding party have substantiated the case of the prosecution with regard to presence of Ganja plant in courtyard of appellant/accused wherefrom it was uprooted, seized and taken away by them in natural way. PW-4, the Investigating Officer had stated that sample was sent to F.S.L. for chemical examination and as per Exhibit-6, the same has been identified to be Ganja.

7. Though, the gist of the oral evidence, as discussed above, inspires confidence that there happens to be recovery of Ganja plant from the courtyard of the appellant, but when their evidences have been minutely gone through, it is apparent that there happens to be some sort of dubious approach of the prosecution. As per Section 51 of the N.D.P.S. Act, the search and seizure is to be carried out in accordance with Section 100 of the Cr.P.C. and as per Sub-section -6 of Section 100 of the Cr.P.C., it is incumbent that a copy of the seizure list is to be served upon the inmates of the house. Admittedly, appellant was not present, but his mother was there (having no disclosure regarding other family members, if any) and so, a copy of seizure list would have been served upon her mother, which none of the witnesses including PW-2, informant, had claimed. That means to say, there happens to be flagrant violation of the mandatory provision of law.

8. Appellant was not present at the time of conduction of raid. None of the

witnesses had deposed with regard to age of the plant, height of the plant. Nay the witnesses had stated the exact date when Jail break was done. In the aforesaid background, there happens to be complete lacking of the evidence with regard to the fact that Ganja shrubs were planted by the appellant, and further, with regard to his presence during intervening period. Moreover, the prosecution also failed to prove exclusive possession, or it happens to be theme of joint possession. Had there been actual physical presence of prosecution party at the house of appellant, such infirmities would not have visualized.

9. From the evidence available on the record, it is evident that none of the prosecution witnesses have stated that they had informed the Superior Officials in terms of Section 42(2) of the N.D.P.S. Act, nor in terms of Section 57 of the N.D.P.S. Act. That has got relevancy in the present facts and circumstances of the case as, being an accused of Jehanabad Jail Break episode and was running absconder probability of being victimized could not be ruled out and so, non-compliance of aforesaid mandatory provisions could be fatal to the prosecution case.

10. The informant, PW-2 and in likewise manner, PW-1, PW-5, PW-6 and PW-7 had spoken with regard to preparation of sample at the spot, sealing of seized article at the spot. The I.O., PW-4 had deposed the contrary over manner of sampling. At present juncture, it looks pertinent to incorporate the relevant fact visualizing from Exhibit-6, F.S.L. Report wherefrom it is evident that vide requisition dated 26.04.2006, the sealed sample was sent to F.S.L., which was received at the Office on 08.05.2006, regarding which, prosecution happens to be completely silent, so much so that intermediary possession is found mischievously wrapped.

11. Furthermore, during course of trial, these PW-2 as well as PW-4 had stated that Ganja was kept at Malkhana, but no Malkhana Register has been brought up in order to substantiate such oral evidence nor the material exhibit has been produced before the Court. In likewise manner, sample also could not be produced in order to corroborate oral evidence.

12. In the case of Vijay Jain v. State of Madhya Pradesh as reported in (2013) 14 SCC 527, the Hon"ble Apex Court had occasion to see the impact of non production of material exhibit during course of trial and has dealt with in following way:- "9. Para 96 of the judgment of this Court in Noor Aga case (2008) 16 SCC 417 on which the learned counsel for the State very strongly relies is quoted hereinbelow: (SCC p. 464)

"96. Last but not the least, physical evidence relating to three samples taken from the bulk amount of heroin was also not produced. Even if it is accepted for the sake of argument that the bulk quantity was destroyed, the samples were essential to be produced and proved as primary evidence for the purpose of establishing the fact of recovery of heroin as envisaged under Section 52-A of the Act." Thus in para 96 of the judgment in Noor Aga case (2008) 16 SCC 417

this Court has held that the prosecution must in any case produce the samples even where the bulk quantity is said to have been destroyed. The observations of this Court in the aforesaid paragraph of the judgment do not say anything about the consequence of non-production of the contraband goods before the court in a prosecution under the NDPS Act.

10. On the other hand, on a reading of this Court's judgment in Jitendra case (2004)10 SCC 562), we find that this Court has taken a view that in the trial for an offence under the NDPS Act, it was necessary for the prosecution to establish by cogent evidence that the alleged quantities of the contraband goods were seized from the possession of the accused and the best evidence to prove this fact is to produce during the trial, the seized materials as material objects and where the contraband materials alleged to have been seized are not produced and there is no explanation for the failure to produce the contraband materials by the prosecution, mere oral evidence that the materials were seized from the accused would not be sufficient to make out an offence under the NDPS Act particularly when the panch witnesses have turned hostile. Again, in Ashok (2011) 5 SCC 123 this Court found that the alleged narcotic powder seized from the possession of the accused was not produced before the trial court as material exhibit and there was no explanation for its non-production and this Court held that there was therefore no evidence to connect the forensic report with the substance that was seized from the possession of the appellant. 11.....

12. We are thus of the view that as the prosecution has not produced the brown sugar before the Court and has also not offered any explanation for non-production of the brown sugar alleged to have been seized from the appellants and as the evidence of the witnesses (PW 2 and PW 3) to the seizure of the materials does not establish the seizure of the brown sugar from the possession of the appellants, the judgment of the trial court convicting the appellants and the judgment of the High Court maintaining the conviction are not sustainable."

13. Giving anxious thought over the prosecution version in consonance with the deficiency on account of non-performance of the mandatory provisions of law, it looks highly unsafe to admit the prosecution version whereupon the judgment of conviction and sentence recorded by the learned lower Court is set aside. Appeal is allowed. Appellant is on bail. Hence, is discharged from its liability.