

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.1479 of 2019**

Arising Out of PS. Case No.-76 Year-2014 Thana- BRAHMPUR District- Buxar

Sanjay Kamkar @ Sanjay Kumar, Son of Sri Vishwanath Kamkar, Resident of Village and Post - Nimej, P.S.- Brahampur, Distt - Buxar.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s : Mr. Sada Nand Roy, Advocate.

For the Respondent/s : Mr. Zeyaul Hoda, APP.

CORAM: HONOURABLE MR. JUSTICE BIRENDRA KUMAR

C.A.V JUDGMENT

Date : 09-02-2021

The sole appellant Sanjay Kamkar @ Sanjay Kumar faced trial along with co-convict Ganesh Prasad in N.D.P.S. Case No. 04 of 2014 arising out of Brahampur P.S. Case No. 76 of 2014. The appellant above named was found guilty for offences under Section 20(b)(ii)(C) and under Section 27 (A) of the Narcotic Drugs and Psychotropic Substances Act, 1985. The learned trial Judge awarded 10 years rigorous imprisonment along with fine of Rs. 1 lac under both the heads aforesaid and in default of payment of fine simple imprisonment of three months was awarded. The sentences were ordered to run concurrently. The Judgment of conviction and order of sentence dated 22.02.2019 is under challenge in this appeal.

2. The prosecution case as disclosed in self statement of Mr. Sarvesh Kumar Singh (PW-11), the Inspector



of Police (Brahmpur Police Station) is that on 27.03.2014 at about 09:15 A.M., confidential information was received that the appellant, resident of village - Nimej under the same police station is engaged in purchase and sale of ganja (opium) and is hiding ganja in his house. The informant lodged station diary entry no. 688 of 2014 and as per direction of his senior Police Officer took the services of the Circle Officer, Brahampur in the capacity of a Magistrate and proceeded along with other police personnel for village – Nimej. Local chaukidar Rajendra Paswan (PW-4) also accompanied with the informant and police party. They reached at the house of the appellant at 10:15 A.M. The house of the appellant was seized by the police personnel. The villagers assembled there and in presence of two witnesses Babloo Ojha (PW-1) and Ashok Yadav (PW-2), the appellant who was found there disclosed his name. Two others found there were Shatrughan Kumar and co-convict Ganesh Prasad. The appellant was informed that the police has to search the house as the police has information that ganja is kept there. The appellant was also informed about his right to be searched in presence of the Magistrate as contemplated under Section 50 of the Act. Thereafter, in presence of Mr. Shushil Kumar Upadhyay, the Circle Officer and the two independent



witnesses, the person of the three accused named above was searched. From possession of the appellant, a mobile phone was recovered, from possession of co-convict Ganesh Prasad, a mobile phone and 100 grams of ganja was recovered and from possession of co-accused Shatrughan (who was found juvenile and his matter was sent to the Juvenile Justice Board), a mobile and 100 grams of ganja was recovered. Besides aforesaid, from the house of the appellant, 29.500 Kg of ganja was recovered. Samples from all the packets of recovery was taken out and sealed in three envelopes. Thereafter, the seized narcotics were also sealed. The witnesses above named and the available Magistrate signed on the seized articles and sample packets. Since the appellant had no valid license for keeping ganja in commercial quantity, the appellant and others were booked in the case.

3. After investigation, the police submitted chargesheet and accordingly the appellant faced trial along with co-convict Ganesh Prasad for the offences stated above and were found guilty.

4. Learned counsel for the appellant contends that the seizure list witnesses and independent witnesses i.e. PW-1 Babloo Ojha, PW-2 Ashok Yadav and PW-3 Basant Jaiswal



have not supported the prosecution case. The prosecution has failed to establish that the place of recovery belongs to the appellant and in absence of any evidence that the appellant is owner of the place of recovery, it cannot be alleged that the recovered narcotic was of the appellant. Reliance has been placed on the judgment of the Hon'ble Supreme Court in **Mohd. Alam Khan V. Narcotics Control Bureau and Another** reported in **1996 CRI. L. J. 2001**. Learned counsel for the appellant next contends that there is complete non-compliance of the requirement of Section 42(1) and 42(2) of the N.D.P.S. Act. Nothing has been brought on the record to substantiate that the informant got the confidential information and took down it in writing and the writing was communicated to the immediate superior officer. Learned counsel contends that in the case of **Karnail Singh Vs. State of Haryana** reported in **(2009) 8 SCC 539**, the Constitution Bench of the Hon'ble Supreme Court held that whether there is adequate or substantial compliance with Section 42 or not is a question of fact to be decided in each case. While total non-compliance with the requirement of Sections 42(1) and 42(2) is impermissible, the delayed compliance with satisfactory explanation about the delay will be acceptable compliance with Section 42.



In the present case, there is no evidence on the record that the requirement of Section 42 of the Act was complied.

Learned counsel would submit that the informant of the case is Investigating Officer and on closure scrutiny of the evidence of the informant (PW-11) and lapses committed during investigation would make it abundantly clear that chances of bias on the part of the Investigating Officer cannot be completely ruled out. According to learned counsel, for the aforesaid infirmity, the conviction of the appellant is vitiated in law as the prosecution case leaves abundance of doubts.

5. Learned counsel for the respondent submits that the evidence on the record would reveal that there is substantial compliance of the mandate of law. The seized narcotic was found as ganja containing Tetra Hydro Cannabinol as their chief intoxicating ingredient vide FSL report at Exhibit-9. He further contends that the seizure list witnesses have admitted their signature on search cum seizure list vide Annexure-6, on notice under Section 50 of the Act vide annexure-7 and on sampling of the seized narcotics vide annexure-8. Besides the aforesaid, other police personnel namely PW-5 Shubhash Chandra Prasad, PW-6 Arbind Kumar, PW-7 Shashikant Kumar, PW-8 Vinod



Prasad, PW-9 Sanjeet Yadav and PW-10 Devshanker Kumar have supported the prosecution case that they were also members of the raiding party and from the house of the appellant, ganja was seized by the officials accompanying them. The seized articles was sampled there at for forensic examination and thereafter sample and other items were sealed in presence of the Magistrate. No bias has been shown to be there with the aforesaid witnesses against the appellant. Hence, for some minor technical flaws, the trustworthy prosecution evidence cannot be thrown away.

6. PW-1 Babloo Ojha has stated in his evidence that house of the appellant was not searched in his presence. He was called at the police station and asked to sign on the plain papers. The sample of the seized article was also not prepared in his presence. He had made protest that he would not sign on blank papers, but threatened to be sent to jail. The witness clearly stated that he had no personal knowledge of the case. PW-2 Ashok Yadav also stated that house of the appellant was not searched in his presence nor anything was recovered in his presence. At the police station, he was asked to sign on plain papers. PW-3 Basant Jaiswal deposed that no ganja was seized in his presence from the house of the appellant nor any sampling



was made in his presence rather he had put his signature on the blank papers. These witnesses are not hostile witnesses.

7. In **Raja Ram V. The State of Rajasthan** reported in (2005) 5 SCC 272, the Hon'ble Supreme Court held 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.

8. The aforesaid view was reiterated in **Mukhtiar Ahmed Ansari V. The State (NCT of Delhi)** reported in (2005) 5 SCC 258. Paragraphs 29 to 31 of the judgment are being reproduced below:

“29. The learned counsel for the appellant also urged that it was the case of the prosecution that the police had requisitioned a Maruti car from Ved Prakash Goel. Ved Prakash Goel had been examined as a prosecution witness in this case as PW 1. He, however, did not support the prosecution. The prosecution never declared PW 1 “hostile”. His evidence did not support the prosecution. Instead, it supported the defence. The accused hence



can rely on that evidence.

30. *A similar question came up for consideration before this Court in **Raja Ram V. State of Rajasthan** (supra). In that case, the evidence of the doctor who was examined as a prosecution witness showed that the deceased was being told by one K that she should implicate the accused or else she might have to face prosecution. The doctor was not declared “hostile”. The High Court, however, convicted the accused. This Court held that it was open to the defence to rely on the evidence of the doctor and it was binding on the prosecution.*

31. *In the present case, evidence of PW 1 Ved Prakash Goel destroyed the genesis of the prosecution that he had given his Maruti car to the police in which the police had gone to Bahai Temple and apprehended the accused. When Goel did not support that case, the accused can rely on that evidence.”*



9. Besides non-support of the prosecution case by the aforesaid prosecution witnesses, non-examination of the Anchaladhikari who was accompanying the police team as Magistrate seriously tells upon the prosecution case as the foundation of the case has not been proved and substantiated beyond reasonable doubt. The claim of the informant that he searched the house of the appellant and recovered ganja as well as his claim that he sampled and sealed the same finds confrontation from the testimony of the prosecution witnesses no. 1, 2 and 3. Thus the whole prosecution case is fit to be disbelieved on the aforesaid score only.

10. PW-11, the informant cum Investigating Officer, in para-12 stated that he has not mentioned who disclosed about the identity of the house of the appellant. He further stated that he along with the Circle Officer and two independent witnesses had entered into the house of the appellant and the rest remained outside. In Para-16, the witness stated that how many members are there in the family of the appellant is not mentioned nor any document of the ownership of the house was seen by him.

11. PW-9 Constable Sanjeet Yadav stated that the Chaukidar (PW-4) had identified the house of the appellant.



PW-4 Chaukidar Rajendra Prasad stated that he had heard that ganja was recovered from the house of the appellant. Though PW-4 has been declared hostile by the prosecution and he has been confronted to his statement before the police, but the attention of PW-11, the Investigating Officer was not drawn by the prosecution to the aforesaid contradiction. Therefore, there is no value in the eyes of law of the hostility of this witness. However one thing is clear that PW-4 does not support the claim of PW-9 that this PW-4 had identified the house of the appellant to the police. The informant said that the appellant also disclosed that the house belongs to the appellant. Admission of accused during the course of his interrogation cannot be made admissible in evidence. There is no other evidence on the identification of the place of search.

12. In Md. Alam Khan (Supra), the same issue was considered and the Hon'ble Supreme Court held in Para-10 as under:-

“..... As pointed out earlier that nobody has identified the flat in question as belonging to the appellant and in the absence of corroborating evidence, one cannot



come to a confirmed conclusion regarding ownership and possession on the basis of the retracted statement of the appellant alone”.

Consequently conviction of the appellant was set aside.

13. On consideration of the evidence on the record, I am of the view that the prosecution has failed to establish that the place of seizure was of the appellant, especially when the defence witnesses stated that the appellant was arrested from his “Shubham Fancy Dresses” shop at Brahmpur and not from the place as alleged by the prosecution.

14. In **Karnail Singh Vs. The State of Haryana** reported in **(2009) 8 SCC 539**, the Constitution Bench of the Hon’ble Supreme Court held that total non-compliance with the requirement of sub-sections 1 and 2 of Section 42 of the N.D.P.S. Act is impermissible. The non-compliance would adversely affect the prosecution case.

There is nothing on the record brought during the course of trial that the informant police officer got the confidential information received by him reduced into writing and communicated it to his immediate official superior. Such



writing might have been in physical form or electronic mode, but nothing was brought on the record that the mandates of Section 42 of the NDPS Act was complied. For this reason also, the charge against the appellant cannot be treated as proved.

15. Fair trial is a constitutional guarantee to an accused under Article 21. 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 parties, especially the accused.

In this case the informant police officer is investigating officer of the case. The chances of tacit bias in getting the desired result of his own complaint cannot be ruled out. Further if the complainant is himself investigating officer, the accused as well as the prosecution are deprived of their valuable right of contradicting and corroborating with the previous statement of the informant recorded under Section 154 Cr.P.C. or of the witnesses recorded under Section 161 Cr.P.C. as enjoined in Sections 145 and 157 of the Evidence Act.

In the instant case, the informant / investigating officer did not comply the mandate of Section 42 of the NDPS Act. The investigating officer failed to ascertain and prove that the place of recovery was the house of the appellant and of none



else.

16. The entire investigation process was almost complete on the same day when search, seizure and sampling was made i.e. on the date of occurrence dated 27.03.2014 itself. Therefore, there was no reason for delayed prayer to the court on 05.05.2014 to send the sample for forensic examination. Even after grant of the permission on the date of prayer itself i.e. 05.05.2014, there was no reason as to why the samples were sent on 22.05.2014 to the forensic science laboratory. The delay of everyday diminishes the quality of the seized narcotics and chances of fair report gets mitigated.

The investigating officer (PW-11) did not substantiate as to where the seized ganja was kept at the police station. During cross-examination, he admitted that he had not mentioned so in the case diary as to where it was kept. The Malkhana register was not produced to the court to ensure that on the date of seizure the seized articles were kept in the custody of some person other than the informant nor any incharge of police Malkhana was examined to substantiate the aforesaid fact. In the aforesaid situation, the chances of tampering of the seized material by the investigating officer cannot be ruled out.



For the aforesaid lapses, it is evident that there was no fair investigation of the case as the informant was himself an investigating officer.

17. Conviction of the appellant under Section 27A of the NDPS Act is otherwise also bad in law because it is not the prosecution case or evidence that the appellant was indulged in financing any of the activities mentioned in sub clause (i) to (v) of Clause (viii) of Section 2 of the Act nor there is any evidence that the appellant was indulged in harbouring any person engaged in the aforementioned activities.

18. To conclude, the prosecution case suffers from the following infirmities:

(a) The claim of the informant that he made search and seizure and recovery of ganja from the house of the appellant is not corroborated by any reliable evidence rather it is confronted by the prosecution evidence of PW-1 to PW-3. Non-examination of the Magistrate as prosecution witness in whose presence so called search and seizure was made adds to the aforesaid infirmity to disbelieve the whole prosecution case.



(b) The prosecution case completely fails due to lack of evidence of compliance of the mandate of Section 42 of the N.D.P.S. Act.

(c) The biased investigation made by the informant of the case as noticed above is additional infirmity in the prosecution case.

19. In the result, it appears that the prosecution has failed to prove the charges against the appellant. The learned trial Judge has not considered the aforesaid infirmities while recording the judgment of conviction.

20. Accordingly, the impugned judgment and order is hereby set aside and this appeal is allowed.

21. The appellant is in jail. Let him be set free at once.

(Birendra Kumar, J)

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AFR/NAFR	A.F.R.
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