

Harendra Paswan Vs. the Union of India

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Court : Patna

Decided On : Aug-22-2013

Appellant : Harendra Paswan

Respondent : The Union of India

Judgement :

IN THE HIGH COURT OF JUDICATURE AT PATNA Criminal Appeal (SJ)
No.1021 of 2010

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Harendra Paswan, Son of Late Prabhu Paswan, resident of Village- Nomiadih,
P.S.- Raxaul, District- East Champaran. Appellant Versus The Union of
India Respondent/Opposite Party

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Appearance : For the Appellant : Mr. S.K. Tiwary, Advocate For the Respondent :
Mr. Satya Prakash Tripathy, Sr. Standing Counsel, Govt. of India

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CORAM: HONOURABLE MR. JUSTICE AKHILESH CHANDRA C.A.V.

JUDGMENT

Date:

22. 08-2013 The solitary appellant preferred this appeal against his conviction for the offence punishable under Sections 20(b) IIC of the Narcotic Drugs and Psychotropic Substances Act (hereinafter called as the Act) and sentenced to

undergo rigorous imprisonment for 10 years and to pay a fine of Rs. 1,00,000/-, in default, to further suffer simple imprisonment for 1 year, as awarded by 4th Additional Sessions Judge, Muzaffarpur vide judgment of conviction and order of sentence respectively dated 13th & 18th Day of August, 2010 passed in Custom Case No. 147 of 2007 / Trial No. 32 of 2010.

2. The prosecution case in short as reveal from the Patna High Court CR. APP (SJ) No.1021 of 2010 dt.22-08-2013 2/21 complaint petition (Ext.-

3) of P.W.3, Inspector of Custom, is that acting on some secret information at about 11.10 hours at Kanti Road, Muzaffarpur, wherein, the Custom Officers of Muzaffarpur intercepted a Fiat Car bearing Registration No.- B.H.I.-2151 having red cross (+) sign on its front screen, but the driver (appellant) initially tried to accelerate, however, for about 2 kilometers chase it could be intercepted and the driver (appellant) was apprehended and from the Dicky of the car small bundles of Ganja wrapped in polythene sheet was found kept concealed in specifically made false chamber in the Dicky and some of the bundles were also recovered from inside bonnet of the Car kept in same fashion and total number of bundles were 42 and weighed 51 kilograms. Thereafter, the photographs were taken on the spot (not produced as exhibit) and the value of recovered contraband article was worth Rs. 1,02,000/- and the value of recovered Fiat Car was worth Rs. 60,000/- and the driver (appellant) stated that the Car was handed over to him by one Sanjay Yadav and Yogendra, who were also on black colour new splendor motorcycle without registration. In the statement recorded under Section 67 of the Act he further accepted that he was acting as a carrier only by above named two persons, but dined ownership of such articles and he worked only for remuneration of Rs. 200/- and further in compliance of the provisions he was given an opportunity to be examined before a Patna High Court CR. APP (SJ) No.1021 of 2010 dt.22-08-2013 3/21 Gazetted Officer and thereafter it was done as per his choice before the Superintendent and from the personal search only his Driving Licence along with xerox copy of the Voter Identity Card were recovered.

3. Thereafter, one representative sample out of the seized contraband was prepared and sent for examination to Government Opium and Alkaloid Works,

Gajipur (U.P.) vide Office Letter No. 85 dated 26.02.2007 and the report received, vide Report No. 243 dated 14.03.2007, confirmed the seized commodity being Ganja. Subsequently, a complaint was filed which is computer typed bears signature of the complainant, marked as Ext.- 3. After completion of the investigation charge-sheet was also filed, cognizance was taken and altogether 6 prosecution witnesses were produced before charge besides producing the following documentary evidence:- (1.) Ext.- 1 : Seizure memo. (2.) Ext.- 2 : Panchnama. (3.) Ext.- 3 : Complaint. (4.) Ext.- 4 : Chemical examination report. (5.) Ext.- 5 : Self statement of accused Harendra Paswan. (6.) Ext.- 6 : Interrogatory statement of the accused. Thereafter, on 07th July, 2008 trial for the offence punishable under Sections 20(b) IIC of the Act was commenced. Out of total 6 Patna High Court CR. APP (SJ) No.1021 of 2010 dt.22-08-2013 4/21 prosecution witnesses examined only 3 prosecution witnesses i.e. P.Ws.- 1, 3 & 4 were cross-examined by the defence after charge and P.Ws.- 2, 5 & 6 were left unexamined even before charge. In defence, there is neither any oral nor documentary evidence and on consideration of the materials available on the record, the court below convicted and sentenced the appellant in the manner aforementioned.

4. It is contended on behalf of the appellant that he has falsely been implicated and neither the alleged secret information was taken down nor the concerned authorities were duly informed and also the mandatory requirements of law has not been complied with, which causes serious prejudice to him. Further, neither there is proper sampling of alleged contraband article nor any inventory, as required, was prepared or examined by the Magistrate or even produced before the court during trial. There is nothing to establish as to whether the alleged recovered article was sent for chemical examination or anything else. On the other hand, learned counsel appearing on behalf of the respondent tried to support the findings of the court below on the grounds mentioned therein. But, at the same time, he was hesitant while opposing the submissions of non-compliance of the mandatory requirements in its true letters and spirit.

5. P.W.- 1, S.N. Prasad, is Custom Superintendent and in the same capacity on the relevant day he was posted at Muzzafarpur Patna High Court CR. APP (SJ)

No.1021 of 2010 dt.22-08-2013 5/21 and participated in the raid organized on getting secret information, has come to say about recovery of contraband article from the Dicky of the vehicle (Car) and on being weighed in the Office it was found 51 kilograms. He tried to support the prosecution version as narrated in the complaint petition but, for the reasons best known, he is silent about any search or recovery from inside bonnet of the Car. He has proved Exts.- 1 to 6 and further said about recording of statement of the appellant under Section 67 of the Act and also identified the appellant in court. In paragraph- 9 of the cross-examination, he says that independent witnesses, Kishore Kumar and Ravi Kumar, were taken by the raiding party from the originating place. Further, in paragraph- 11, he says that the seized packets were marked but is unable to say in what manner and it was not before him at the time of his examination in court.

6. P.W.- 3, Chandra Kishore, is Inspector of Custom and complainant, likewise P.W.- 1, also says about recovery of Ganja from the Dicky of the vehicle and further in addition to the complaint version he explains that since there was increasing gathering of the public they brought everything to Office at Muzaffarpur where all required formalities were completed and two samples of 25 grams each were prepared from the seized article. In cross-examination in paragraph- 4, he admits that in the morning itself he had received Patna High Court CR. APP (SJ) No.1021 of 2010 dt.22-08-2013 6/21 secret information and arrived at 9.00 a.m. at Kanti, whereas, at around 11.15 a.m. vehicle was seen and inspected, but in spite of having sufficient time he is silent about taking down the secret information and intimating his superiors in writing. Further, contrary to his superior P.W.- 1, in paragraph- 5 of the cross-examination, he says that two independent witnesses, Kishore Kumar and Ravi Kumar, arrived at the place of inspection and thereafter they were taken to the Office for witness and, in paragraph- 6, he further confirms that seizure list etc. were not prepared at the place where it was seized and at about 11.30 a.m. they were at the Office where everything was done. In paragraph- 8, he admits that the seized Ganja may be produced before court but nothing of the kind was done. In paragraph- 9, he says that the statement of the appellant under Section 67 of the Act was recorded in his presence after giving due warning that it may be used against him. He further states that the appellant asserted that vehicle was provided to him by one Sanjay Yadav and Yogendra, but

in spite of verification nothing could be done and, in paragraph- 12, he says that he is not in a position to say as to whether he informed the works done by him to his superiors orally or in writing. However, he further says that the paper through which his superiors were informed he may produce but nothing of the kind could be done. Patna High Court CR. APP (SJ) No.1021 of 2010 dt.22-08-2013 7/21 7. P.W.- 4, Ram Bharose Ram, is another Custom Superintendent at the relevant time, likewise P.Ws.- 1 & 3, also has kept him confined about recovery of contraband article from the Dicky of the vehicle and, like P.W.- 1, brings the witnesses from the site to the Office where everything was done. In cross-examination suddenly he converted the said Fiat Car into Truck to be intercepted and search and further states that the driver of the vehicle intimated about he simply carrying the vehicle in lieu of Rs. 200/-. Further, he admits about keeping of contraband article in his Office which is not before him during his statement in court.

8. Apart from these three witnesses, who have been tested through cross-examination by defence, P.W.- 2, Harishchandra Jha, is another Custom Superintendent and member of raiding party, has state on the point of raid, recovery of contraband article from special chamber prepared in the Dicky (silent about bonnet) of the Fiat Car bringing everything to Office, weighing and preparation of seizure list etc. besides sampling and its transmission for test, but he was not cross-examined before charge. Likewise, P.W.- 5, Sanjay Ranjan, Inspector of Custom, almost narrated what P.W.- 2 has said. Almost similar is the position of P.W.- 6, Baidyanath Pd. Yadav, Constable, withdrawing himself from any procedure except intercepting of Fiat Car and recovery of contraband article from its Patna High Court CR. APP (SJ) No.1021 of 2010 dt.22-08-2013 8/21 Dicky.

9. Here it is important to mention that after examination of all the 6 witnesses, charge was framed and explained against the appellant on 07.07.2008 and at no point of time in compliance of provisions as contemplated under Section 246 Sub-Clause 4 & 5 of the Code of Criminal Procedure, which reads as such:-

246. Procedure where accused is not discharged.- (1) . (2) . (3) . (4) If the accused refuses to plead, or does not plead or claims to be tried or if the accused is not convicted under sub-section (3) he shall be required to state, at the commencement of the next hearing of the case or, if the Magistrate for reasons to be recorded in writing so thinks fit, forthwith whether he wishes to cross-examine any, and if so, which, of the witnesses for the prosecution whose evidence has been taken. (5) If he says he does so wish, the witnesses named by him shall be recalled and, after cross-examination and re-examination (if any), they shall be discharged. (6) . no prayer was made to recall any of the witnesses produced on behalf Patna High Court CR. APP (SJ) No.1021 of 2010 dt.22-08-2013 9/21 of the prosecution. However, one by one P.Ws.- 3, 4 & 1 were produced by the prosecution voluntarily for cross-examination after charge respectively on 12.08.2008, 03.09.2008 and 01.12.2008, but for remaining three witnesses, no request was made on behalf of the defence to produce them for cross-examination. Though, there appears some routine orders of the court directing Special Public Prosecutor to produce the witnesses and ultimately prosecution case was closed on 04.01.2010 and the statement of the appellant under Section 313 of the Code of Criminal Procedure was recorded on 12.03.2010 and thereafter giving some adjournments for defence witnesses it was closed and after hearing the parties, the judgment of conviction and order of sentence was passed.

10. It is the prosecution case that after intercepting the Fiat Car and finding Ganja kept in its Dicky beneath bonnet, recovery and seizure etc. were made at the Custom Office at Muzaffarpur, a place away from interception, but in the complaint petition complete silence is maintained about the reason behind departure from the guidelines issued by the department and established principle of law to complete all such formalities at the site itself. P.W.- 3, the complainant in addition to complaint version has given a vivid explanation in paragraph- 2 of examination-in-chief that WAHA KAFI BHID LAGNEY LAGI TAB HUM LOG WAHA SE SWATANTRA Patna High Court CR. APP (SJ) No.1021 of 2010 dt.22-08-2013 10/21 GAWAHO KO LEKAR KARYALAYA CHALE AAYE. But all other witnesses examined on behalf of the prosecution are completely silent on the point. Thus, the explanation given for the first time during trial cannot be held satisfactory. The Honble Apex Court in a case of Khet Singh Vs. Union of India reported in

200. (4) Supreme Court Cases 380, of course, in a case of N.D.P.S. Act has held in paragraph- 10 of the judgment as such:-

10. The instructions issued by the Narcotic Control Bureau, New Delhi are to be followed by the officer-in-charge of the investigation of the crimes coming within the purview of the NDPS Act, even though these instructions do not have the force of law. They are intended to guide the officers and to see that a fair procedure is adopted by the officer-in-charge of the investigation. It is true that when a contraband article is seized during investigation or search, a seizure mahazar should be prepared at the spot in accordance with law. There may, however, be circumstances in which it would not have been possible for the officer to prepare the mahazar at the spot, as it may be a chance recovery and the officer may not have the facility to prepare a seizure mahazar at the spot itself. If the seizure is effected at the place where there are no witnesses and there is no facility for weighing the contraband article or other requisite facilities are lacking, the officer can prepare the seizure mahazar at the later stage as and when the facilities are available, provided there are justifiable and reasonable grounds to do so. In Patna High Court CR. APP (SJ) No.1021 of 2010 dt.22-08-2013 11/21 that event, where the seizure mahazar is prepared at a later stage, the officer should indicate his reasons as to why he had not prepared the mahazar at the spot of recovery. If there is any inordinate delay in preparing the seizure mahazar, that may give an opportunity to tamper with the contraband article allegedly seized from the accused. There may also be allegations that the article seized was by itself substituted and some other items were planted to falsely implicate the accused. To avoid these suspicious circumstances and to have a fair procedure in respect of search and seizure, it is always desirable to prepare the seizure mahazar at the spot itself from where the contraband articles were taken into custody. But as stated, no explanation is offered which gives room to submit that the entire prosecution version is not free from doubt.

11. The prosecution has further given a go-by to the statements as contained in complaint petition about recovery of Ganja from inside bonnet of the Car. All the witnesses including the complainant are confined about the alleged recovery from the Dicky of the Car. Neither in the complaint petition nor in their statements there

is anything mentioned about the number of packets recovered from both the places and separate weight of all such packets rather accumulative weight of 42 packets allegedly recovered from two Patna High Court CR. APP (SJ) No.1021 of 2010 dt.22-08-2013 12/21 different places though of one car is 51 kilograms. The prosecution is also not clear as from how much packets sample was taken, which also darken cloud against the prosecution version.

12. As per Section 42 of the Act, which reads as such:-

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 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 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 V-A of this Patna High Court CR. APP (SJ) No.1021 of 2010 dt.22-08-2013 13/21 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 V-A 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 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 Patna High Court CR. APP (SJ) No.1021 of 2010 dt.22-08-2013 14/21 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., it is incumbent upon to the person having any secret information to take down the same in writing and immediately intimate his superiors before coming into action.

13. The Honble Apex Court in a case of Karnail Singh vs. State of Haryana reported in (2009)8 SCC 53.[:

2009. 4) PLJR (SC) 128] after examining two earlier decisions in the cases between Abdul Rashid Ibrahim Mansuri vs. State of Gujarat reported in (2000)2 SCC 513 and Sajan Abraham vs. State of Kerala reported in (2001)6 SCC 692 in paragraph- 35 of the judgment has clearly held:-

35. In conclusion, what is to be noticed is Abdul Rashid did not require literal compliance with the requirements of Sections 42(1) and 42(2) nor did Sajan Abraham hold that the requirements of Sections 42(1) and 42(2) need not be fulfilled at all. The effect of the two decisions was as follows:- (a) The officer on receiving the information [of the nature referred to in sub-section (1) of Section 42] from any person had to record it in writing in the concerned Register and Patna High Court CR. APP (SJ) No.1021 of 2010 dt.22-08-2013 15/21 forthwith send a copy to his immediate official superior, before proceeding to take action in terms of clauses (a) to (d) of Section 42(1). (b) But if the information was received when the officer was not in the police station, but while he was on the move either on patrol duty or otherwise, either by mobile phone, or other means, and the information

calls for immediate action and any delay would have resulted in the goods or evidence being removed or destroyed, it would not be feasible or practical to take down in writing the information given to him, in such a situation, he could take action as per clauses (a) to (d) of Section 42(1) and thereafter, as soon as it is practical, record the information in writing and forthwith inform the same to the official superior. (c) In other words, the compliance with the requirements of Sections 42(1) and 42(2) in regard to writing down the information received and sending a copy thereof to the superior officer, should normally precede the entry, search and seizure by the officer. But in special circumstances involving emergent situations, the recording of the information in writing and sending a copy thereof to the official superior may get postponed by a reasonable period, that is after the search, entry Patna High Court CR. APP (SJ) No.1021 of 2010 dt.22-08-2013 16/21 and seizure. The question is one of urgency and expediency. (d) While total non-compliance of requirements of sub-sections (1) and (2) of Section 42 is impermissible, delayed compliance with satisfactory explanation about the delay will be acceptable compliance of Section 42. To illustrate, if any delay may result in the accused escaping or the goods or evidence being destroyed or removed, not recording in writing the information received, before initiating action, or non-sending a copy of such information to the official superior forthwith, may not be treated as violation of Section 42. But if the information was received when the police officer was in the police station with sufficient time to take action, and if the police officer fails to record in writing the information received, or fails to send a copy thereof, to the official superior, then it will be a suspicious circumstance being a clear violation of Section 42 of the Act. Similarly, where the police officer does not record the information at all, and does not inform the official superior at all, then also it will be a clear violation of Section 42 of the Act. Whether there is adequate or substantial compliance with Section 42 or not is a question of fact to be Patna High Court CR. APP (SJ) No.1021 of 2010 dt.22-08-2013 17/21 decided in each case. The above position got strengthened with the amendment to Section 42 by Act 9 of 2001.

14. In the instance case there is nothing on the record to show as to whether any such secret information received to the prosecution were taken down in writing. The witnesses, specially P.W.- 3, are also silent about its communication to his

superior. However, taking into consideration, his superiors P.Ws.- 1, 2 & 4, the Superintendents of Custom also joined in raid conducted, it may be assumed that P.W.- 3 informed his superiors, but it is nothing, but inadequate compliance of mandatory requirements under Section 42 of the Act. It is not a case that the prosecution side had no time available to take down such information in writing since as stated by the witnesses, the information was received in the morning and they arrived at the site around 9.00 a.m. and roughly two hours thereafter the vehicle in question was allegedly intercepted. This clearly indicates that the prosecution has not properly comply the mandatory requirements and, at the same time, offered no explanation for such negligence. The Honble Apex in a case of Abdul Rashid Ibrahim Mansuri (Supra) in paragraph- 18-19 has held:- 18-19. . A criminal Court cannot normally afford to be ignorant of such a valuable information. . Patna High Court CR. APP (SJ) No.1021 of 2010 dt.22-08-2013 18/21 15. The prosecution has committed another lapse by non-observing the mandatory requirements as contemplated under Section 52-A of the Act, which reads as such:- [52-A. Disposal of seized narcotic drugs and psychotropic substances.- (1) The Central Government may, having regard to the hazardous nature of any narcotic drugs or psychotropic substances, their vulnerability to theft, substitution, constraints of proper storage space or any other relevant considerations, by notification published in the Official Gazette, specify such narcotic drugs or psychotropic substances or class of narcotic drugs or class of psychotropic substances which shall, as soon as may be after their seizure, be disposed of by such officer and in such manner as that Government may, from time to time, determine after following the procedure hereinafter specified. (2) Where any narcotic drug or psychotropic substances has been seized and forwarded to the officer-in-charge of the nearest police station or to the officer empowered under section 53, the officer referred to in sub-section (1) shall prepare an inventory of such narcotic drugs or psychotropic substances containing such details relating to their description, quality, quantity, mode of packing, marks, numbers or such other identifying particulars of the narcotic drugs or psychotropic substances or the packing in which they are packed, country of origin and other particulars as the officer referred to in sub- section (1) may consider relevant to the identity Patna High Court CR. APP (SJ) No.1021 of 2010 dt.22-08-2013 19/21 of the narcotic

drugs or psychotropic substances in any proceedings under this Act and make an application, to any Magistrate for the purpose of- (a) certifying the correctness of the inventory so prepared; or (b) taking, in the presence of such Magistrate, photographs of such drugs or substances and certifying such photographs as true; or (c) allowing to draw representative samples of such drugs or substances, in the presence of such Magistrate and certifying the correctness of any list of samples so drawn. (3) Where an application is made under sub- section (2), the Magistrate shall, as soon as may be, allow the application. (4) Notwithstanding anything contained in the Indian Evidence Act, 1872 (1 of 1872) or the Code of Criminal Procedure, 1973 (2 of 1974), every Court trying an offence under this Act, shall treat the inventory, the photographs of narcotic drugs or psychotropic substances and any list of samples drawn under sub-section (2) and certified by the Magistrate, as primary evidence in respect of such offence.] And in the instant case also the alleged contraband article was not forwarded to the nearest police station, but it was kept in the Custom Office itself. No doubt, it can be done, but at the same time what is stated in sub-clause (2) onwards of Section 52-A of the Act, the Patna High Court CR. APP (SJ) No.1021 of 2010 dt.22-08-2013 20/21 details relating to the recovered articles and inventory, so prepared, is to be verified by a Magistrate and even sampling etc. was to be done in his presence, but neither any such thing appears from the complaint petition nor from the version of even one single prosecution witness nor there is any document produced showing such observations by the competent authority or any ever being made to do so. The recovered Ganja was also not produced in court in spite of assertion of P.W.- 3, which also creates a doubt against alleged recovery as held by this Court in a case of Pramod Sah vs. The State of Bihar reported in 2007(1) PLJR 587

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