

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.770 of 2013

Arising Out of PS.Case No. -348 Year- 2007 Thana -SAMASTIPUR MUFFASIL District- SAMASTIPUR

Abdul @ Ziya Son of Md. Raja @ Abdul Raza Resident of Village-Hardia, Police Station-Pupri, District-Sitamarhi

.... Appellant/s

Versus

The State of Bihar

.... Respondent/s

With

Criminal Appeal (SJ) No. 612 of 2013

Arising Out of PS.Case No. -348 Year- 2007 Thana -SAMASTIPUR MUFFASIL District- SAMASTIPUR

Shakuntala Devi @ Raushan Khatoon, W/o Late Ganesh Rai, resident of village-Mohanpur, P.S. Samastipur, District- Samastipur.

.... Appellant/s

Versus

The State of Bihar

.... Respondent/s

With

Criminal Appeal (SJ) No. 695 of 2013

Arising Out of PS.Case No. -348 Year- 2007 Thana -SAMASTIPUR MUFFASIL District- SAMASTIPUR

1. Ajit Kumar Son of Late Shivjee Singh Resident of Village- Sabbalpur, P.S.- Sonpur, District- Saran

.... Appellant/s

Versus

The State of Bihar

,.... Respondent/s

Appearance :

(In CR. APP (SJ) No.770 of 2013)

For the Appellant/s : Mrs. Anita Sinha, Advocate

For the Respondent/s : Mr. Binod Bihari Singh, APP

(In CR. APP (SJ) No.612 of 2013)

For the Appellant/s : Mr. S. K. Lal, Advocate

For the Respondent/s : Mr. Binod Bihari Singh, APP

(In CR. APP (SJ) No.695 of 2013)

For the Appellant/s : Mr. Ashok Kumar Mishra, Advocate

Mr. Amit Kumar Mishra, Advocate

For the Respondent/s : Mr. Binod Bihari Singh, APP

CORAM: HONOURABLE MR. JUSTICE ASHWANI KUMAR SINGH
ORAL JUDGMENT

Date: 22-07-2015

These appeals are directed against the judgment of conviction dated 12.08.2013 passed by the learned Special Judge-cum-1st Additional Sessions Judge, Samastipur in NDPS Case No. 8 of 2007 whereby and where-under the appellants Abdul @ Ziya (Cr.Appeal (SJ) No. 700 of 2013), Shakuntala Devi @ Raushan Khatoon (Cr.Appeal (SJ) No. 612 of 2013) and Ajit Kumar (Cr.Appeal (SJ) No. 695 of 2013) have been convicted for the offences under sections 20(b)(ii)(B) and 22(b) of the Narcotic Drugs and Psychotropic Substances Act (for short 'the NDPS Act') and the appellant Shakuntala Devi @ Raushan Khatoon has been further convicted under section 25 of the NDPS Act. These appeals are also directed against the order of sentence dated 16.08.2013 sentencing the three appellants to undergo rigorous imprisonment for 8 years and a fine of Rs.50,000/- and in default of payment of fine, rigorous imprisonment for one year under section 20(b)(ii)(B) of the NDPS Act; and rigorous imprisonment for 8 years and a fine of Rs.50,000/- and in default of payment of fine, rigorous imprisonment for one year under section 22(b) of the NDPS Act and further sentencing the appellant Shakuntala Devi @ Raushan Khatoon to undergo rigorous imprisonment for 8 years and a fine of Rs.50,000/- and in default of payment of fine, rigorous imprisonment for one year under section 25 of the NDPS Act. All the sentences, however, have been directed to

run concurrently.

2. The prosecution case is based on a written report of one Brij Bihari Pandey, SHO of Samastipur Muffasil Police Station (P.W.3) recorded on 03.07.2007 at 14.05 hours at the house of the appellant Shakuntala Devi @ Raushan Khatoon wherein he has stated that he received a confidential information at about 13.00 hours on 03.07.2007 at Muffasil Police Station that the appellant Shakuntala Devi deals with narcotics and two persons have visited her house in connection with the sale and purchase of narcotics, namely, Ganja. After recording such facts in the station diary and after informing the Sub Divisional Police Officer and the Sub Divisional Officer, Sadar, the informant states to have proceeded to the house of the appellant Shakuntala Devi along with the Sub Inspector of Police, Din Bandhu Jha, Sub Inspector of Police, Kumar Brajesh and Sub Inspector of Police, Special Task Force, Hari Shankar Mishra. He states that on the spot, the Sub Divisional Police Officer and the Sub Divisional Officer, Sadar also arrived and in their presence as also in the presence of two independent witnesses, namely, Kamlesh Kumar (P.W.1) and Awadhesh Kumar @ Tinku (P.W.2), the house of the appellant Shakuntala Devi, who is stated to have been residing on the 4th floor of the building, was raided. During the course of raid, from the platform of the staircase quarter to nine kilogram Ganja kept in a



steel container covered with plastic was recovered. The kitchen room of appellant Shakuntala Devi was also raided from where quarter to two kilogram Ganja kept in a small steel container covered with plastic was recovered. Two other persons were also found in the house, namely, Ajit Kumar (appellant in Cr.Appeal (SJ) No.695 of 2013) and Abdul @ Ziya (appellant in Cr.Appeal (SJ) No. 770 of 2013). On query, Shakuntala Devi disclosed that the aforesaid two persons had come with the narcotics, which consignment had to be taken out in a day or two for sale. A seizure list was prepared in respect of the articles seized by Sri Vishwanath Thakur Sub Divisional Officer, Sadar (P.W.4) on which the two independent witnesses, namely, Awadhesh Kumar @ Tinku and Kamlesh Kumar put their respective signatures.

3. On the basis of the aforesaid written report, a case vide Samastipur Town (Muffasil) P.S.Case No. 348 of 2007 dated 03.07.2007 was registered at 3 p.m. under sections 20(b), 22 and 25 of the NDPS Act and investigation was handed over to one Srikant Prasad (P.W.9).

4. The seizure list prepared at the spot would indicate that it was prepared at 1.30 p.m. on 03.07.2007.

5. On completion of investigation, the Investigating Officer Srikant Prasad (P.W.9) submitted charge sheet whereupon cognizance

was taken. The trial court framed charges under sections 20(b), 22 and 25 of the NDPS Act against the appellants to which they pleaded not guilty and claimed to be tried. Accordingly, the trial commenced.

6. In order to prove the charges, the prosecution has examined as many as ten witnesses, out of whom P.W.1 Kamlesh Rai and P.W.2 Awadhesh Kumar are witnesses to the seizure. P.W.3 Brij Bihari Pandey is the informant whereas P.W.4 Vishwanath Thakur, P.W.5 Dinbandhu Jha, P.W.6 Sushil Kumar, P.W.7 Vikrant Das and P.W.8 Kumar Brajesh are the material witnesses in support of the prosecution case. P.W. 4 to 8 are said to be present when the alleged search and seizure were conducted. As noted above, P.W.9 Srikant Kumar is the Investigating Officer of the case and P.W.10 Suresh Paswan is the person who has tested the sample of the seized substance in Forensic Science Laboratory and submitted its report.

7. So far as the documentary evidences are concerned, the signature of P.W.1 Kamlesh Rai on seizure list has been marked as Ext.-1, the signature of P.W.2 Awadhesh Kumar has been marked as Ext.-1/1, the signature of P.W.4 Vishwanath Thakur, Sub Divisional Officer, Sadar on the seizure list has been marked as Ext.-1/2, the seizure list itself has been marked as Ext.-2, the signature of the informant Brij Bihari Pandey (P.W.3) on the written report has been marked as Ext.-3, the test report of the Forensic Science Laboratory



has been marked as Ext.-4, the written statement of the informant has been marked as Ext.-5, the formal FIR has been marked as Ext.-6 and the carbon copy of requisition for the test of material exhibit sent to the Forensic Science Laboratory, Muzaffarpur under the signature of the District & Sessions Judge, Muzaffarpur has been marked as Ext.-7.

8. After conclusion of the evidences of the prosecution witnesses, statements of the accused appellants were recorded under section 313 of the Code of Criminal Procedure. In their statements, they have claimed themselves to be innocent. They have stated that there was no recovery of Ganja from their conscious possession.

9. The defence has also examined two witnesses i.e. D.W.1 Vipul Kumar Bharti and D.W.2 Sumant Kumar Thakur, who were the tenants in the house of Shakuntala Devi, who had denied the raid conducted by the police in the house of Shakuntala Devi. These witnesses have also denied recovery of Ganja from the house of Shakuntala Devi. They have stated that the police reached at the house of Shakuntala Devi on 03.07.2007 and took away Ajit Kumar and one another person along with Shakuntala Devi.

10. After completion of the trial, the trial court held all the accused persons guilty of the offences enumerated hereinabove and sentenced them accordingly.

11. I have heard Mrs. Anita Sinha, learned advocate for the appellant Abdul @ Ziya, Mr. Sudhanshu Kumar Lal, learned advocate for the appellant Shakuntala Devi @ Raushan Khatoon, Mr. Ashok Kumar Mishra, learned advocate for the appellant Ajit Kumar, and Mr. Binod Bihari Singh, learned Additional Public Prosecutor for the State.

12. In sum and substance, the submissions made by the learned counsel for the appellants are as follows :-

- (a) The witnesses examined on behalf of the prosecution have made contradictory statements to each other;
- (b) Recovery of Ganja from possession of the appellants has not been proved by the prosecution by leading reliable and cogent evidence;
- (c) There was no link evidence to prove search and seizure of contraband from possession of the appellants;
- (d) The containers in which Ganja were found from the house of the appellant Shakuntala Devi were neither seized nor sealed in presence of the accused;
- (e) Neither the Ganja found in two containers was packed nor was its gross and net weight taken in presence of the accused appellants;
- (f) The sample of the articles seized was not drawn in presence of the accused appellants;

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- (g) There is inordinate delay in sending the sample of Ganja to the Forensic Science Laboratory for test;
 - (h) The sample sent for analysis and the seized contraband were not one and the same;
 - (i) There is no evidence regarding safe custody of the seized Ganja in Malkhana;
 - (j) There was total non-compliance with the provisions of section 42(2) of the NDPS Act, which vitiates conviction;
 - (k) There was violation of Standing Order No.1 of 1988;
 - (l) The chemical examiner's report is meaningless as there is sufficient evidence to indicate that the sample sent to the Forensic Science Laboratory was neither properly sealed nor there was any identification mark on the basis of which the contents of the sample could be linked with the substances alleged to have been recovered from the house of appellant Shakuntala Devi;
 - (m) The material exhibit produced from the Malkhana before the court was in loose condition and there was no identification mark on the basis of which it could be said that the substance produced before the court was the substance recovered from the house of the appellant Shakuntala Devi;
 - (n) The seizure list prepared by the Sub Divisional Officer Sadar was without jurisdiction;

(o) The witnesses to the seizure list have denied seizure of the contraband in their presence and since they have not been declared hostile, their evidence would be binding on the prosecution.

13. Per contra, learned counsel for the State has made following submissions:-

(a) The witnesses have fully corroborated the prosecution case during trial and the court below has correctly appreciated the evidence on record;

(b) A sample drawn from the substances seized was sent to the Forensic Science Laboratory for test and the chemical examiner's report suggests that the seized substance was Ganja;

(c) It has come in evidence that the sample sent to the Forensic Science Laboratory was properly sealed;

(d) Mere delay in sending the sample of narcotics to the office of the chemical examiner would be of no effect as there is nothing to suggest that the sample was tampered with;

(e) The informant has categorically stated that after receiving confidential information that the appellant Shakuntala Devi deals with narcotics and two persons had visited her house in that regard, he recorded such facts in the station diary and informed the Sub Divisional Police Officer, who was his immediate superior officer, hence, there was substantial compliance of section 42 of the NDPS

Act;

(f) The prosecution has led cogent and reliable evidence before the trial court that the seized Ganja was kept in safe custody in Malkhana of the Police Station;

(g) The seized Ganja was also produced before the trial court during trial;

(h) The guidelines issued vide Standing Instruction No.1 of 1988 is directory in nature and non-compliance of the guidelines would not affect the case of the prosecution.

14. In order to examine the merit or otherwise of the above contention, it is necessary for this Court to discuss the entire gamut of the prosecution case.

15. At this stage, it would be useful to refer to the relevant statement of P.W.3 Brij Bihari Pandey (informant), who is stated to have received secret information, recorded the same in the station diary and proceeded to raid the house of the accused Shakuntala Devi after informing the Sub Divisional Police Officer and Sub Divisional Officer. He has reiterated the prosecution case as narrated in the FIR in his examination-in-chief. He has stated that on the dictation of P.W.4 Vishwanath Thakur, Sub Divisional Officer, Sadar, P.W.5 Din Bandhu Jha had prepared the seizure list on which Vishwanath Thakur had put his initial. He has proved the seizure list and the



written statement, which were marked as Exts.- 2 and 3 respectively by the trial court. In cross-examination, he has admitted that the sample of seized narcotics was not taken at the time of seizure. He also admitted that the house of appellant Shakuntala Devi is multi-storied and three storey of the house have been put on rent. He further admitted that major part of the Ganja said to have been recovered from the house of Shakuntala Devi was recovered from the platform of the staircase below the storey in which she resided. When specifically asked whether or not seized Ganja was sealed, he evasively replied that he does not have remembrance in this regard.

16. P.W.5 Din Bandhu Jha though corroborated the prosecution case as narrated in the FIR in chief, he stated that the seizure list was scribed by the Officer-in-Charge of Muffasil Police Station (P.W.3). In cross-examination, he has admitted that quarter to nine kilo Ganja was recovered from the platform of the staircase below the storey in which Shakuntala Devi resided. He has stated that the seized Ganja was weighed in the house of Shakuntala Devi but he could not disclose who brought the weighing equipment (Taraju) at her house. He further admitted that his opinion that the articles seized from the house of the appellant Shakuntala Devi were Ganja was based on guesswork.

17. P.W.1 Kamlesh Rai and P.W.2 Awadhesh Kumar, the



two independent seizure list witnesses have not supported the prosecution version. They have stated in their deposition that though nothing was seized in their presence, their respective signatures were obtained by the Officer-in-Charge of the Police Station on the seizure list. Though both independent seizure list witnesses have not supported the case of the prosecution, the Public Prosecutor made no request to the court for declaring them as hostile.

18. P.W.4 Vishwanath Thakur has stated in his deposition that on 3rd July, 2007 he had gone along with the informant, Sub Divisional Police Officer and other members of the raiding party to conduct raid in the house of Shakuntala Devi. He has corroborated the prosecution case as narrated in the FIR in examination-in-chief. He has proved his initial on the seizure list, which has been marked as Ext.-1/2. In cross-examination, he has stated that the substances recovered from the house of Shakuntala Devi were properly seized and sealed at the place of seizure itself. However, he denied remembering as to whether or not the sample was drawn at the place of seizure.

19. P.W.6 Sushil Kumar, Sub Divisional Police Officer, Samastipur was also a member of the raiding party. He too corroborated the prosecution case as narrated in the FIR in examination-in-chief. In cross-examination, he has stated that the

seized articles were sealed and taken to the Police Station. He has stated that a sample from the seized article was drawn. However, he has not given any detail as to when and by whom the sample from the seized narcotics was drawn.

20. P.W.8 Kumar Brajesh, another Sub Inspector of Police was also a member of the raiding party. He too corroborated the prosecution case as narrated in the FIR.

21. P.W.9 Srikant Prasad, Investigating Officer of the case, has proved the written statement and formal FIR, which have been marked as Exts.-5 and 6 respectively. He recorded the statement of the witnesses, conducted the investigation and submitted charge sheet. He has proved carbon copy of requisition sent to the Forensic Science Laboratory on which the District & Sessions Judge, Samastipur had put his signature, which has been marked as Ext.-7. In cross-examination, he has stated that the seized articles were kept in Malkhana and were never handed over to him. He has further stated that the seized articles were sealed but he could not disclose whose seal was put on it.

22. P.W.7 Vikrant Das, Sub Inspector of Police Muffasil Police Station-cum-Incharge Malkhana had produced a gunny bag before the trial court, which was marked as material Ext.-1. He has also proved the Forensic Science Laboratory report, which has been



marked as Ext.-4. In cross-examination, he admitted that the alleged seizure of Ganja was not made in his presence. He further admitted that he never worked with Suresh Paswan who had examined the sample of the seized article in the Forensic Science Laboratory. He admitted that the material exhibit produced by him was in a loose condition and had been kept in a gunny bag, which was neither sealed nor the article kept in the gunny bag was having any mark of identification to show that they were seized in connection with the case on hand.

23. P.W.10 Suresh Paswan had examined the sample sent to the office of the Director, Forensic Science Laboratory, Bihar, Patna. He has proved his signature and seal on the report dated 01.10.2008, which has been marked as Ext.-8. He has stated that a parcel relating to Samastipur Town (Muffasil) P.S.Case No. 348 of 2007 dated 03.07.2007 was received in the Regional Forensic Science Laboratory, Muzaffarpur through special messenger Hawaldar Lagandeo Rai on 06.09.2007. The said parcel consisted of a tin dabba enclosed within cloth. It was sent to the Forensic Science Laboratory, Patna from Forensic Science Laboratory, Muzaffarpur. The tin dabba contained some dry brown flowering and fruiting vegetable substances. On chemical examination, the dry brown flowering and fruiting vegetable substances contained in tin *dabba* was found to be

Ganja containing Tetra Hydro Cannabis (THC) as its chief intoxicating ingredients.

24. In cross-examination, P.W.10 stated as under: "It is not mentioned in the report as to when the parcel was delivered in the office of the Director, Forensic Science Laboratory, Patna".

25. He further stated as under: "The weight of the narcotics sent for test is not mentioned in the report."

26. He further stated as under: "It is not disclosed in the report that by which method the chemical analysis of the narcotics sent for test was done".

27. On appreciation of evidence on record, I find that the witnesses examined during trial on behalf of the prosecution are not consistent. They have contradicted each other on material particulars. According to the FIR, Ganja in question was seized by P.W.4 Vishwanath Thakur, Sadar S.D.O., Sitamarhi. However, when the informant Brij Bihari Pandey (P.W.3) deposed before the court, he has stated that on the dictation of P.W.4 Vishwanath Thakur, P.W.5 Din Bandhu Jha had prepared seizure list on which Vishwanath Thakur had put his initial, whereas P.W.5 Din Bandhu Jha deposed before the court that the seizure list was scribed by the informant Brij Bihari Pandey. P.W.4 Vishwanath Thakur has stated in his deposition that the seizure list was prepared by a Police Officer on which he had

simply put his initial. Further, the informant has stated in his deposition that the seized narcotics were not sealed at the place of seizure but P.W.6 Sushil Kumar, Sub Divisional Police Officer; Samastipur has stated in his deposition that the seized Ganja was sealed at the place of seizure itself.

28. Apart from lot many contradictions in deposition of witnesses examined on behalf of the prosecution, I find that P.W.1 Kamlesh Rai and P.W.2 Awadhesh Kumar have categorically stated in chief that no narcotics were ever recovered in their presence. The seizure list witnesses turning hostile may not be very significant, as it is not an uncommon phenomenon in criminal trial particularly in cases relating to NDPS Act. However, what is surprising in the present case is the fact that for the reasons best known to the learned Public Prosecutor conducting the trial, no request was made to the court for declaring them as hostile. It appears that the learned Public Prosecutor was perhaps either blissfully unaware of the real position of law or was oblivious of such a right or was grossly insensitive to the proceedings of the case. Whatever may be the case, but the fact remains that the two independent seizure list witnesses have given evidence on behalf of the prosecution on oath and they have not been declared hostile. Their evidence remains as it is. Under the circumstances, whatever has been stated by them cannot be discarded

or erased. Since the two witnesses examined on behalf of the prosecution have categorically denied recovery of narcotics from possession of either of the appellants, the case of the prosecution becomes highly doubtful.

29. In order to prove a charge under the NDPS Act, it is important that representative samples are drawn from the seized substances and are sent to such experts in designated laboratory for chemical analysis and report confirming the presence of narcotic drugs or psychotropic substances in the seized substances. It is also important that the seized substances and samples are handled properly and in prescribed manner.

30. Standing Instruction No.1/88 dated 15.03.1988 of Narcotics Control Bureau, Government of India prescribes detailed procedure for sampling, sealing and dispatching the seized samples to the laboratory for test.

31. Clauses 1.4, 1.5, 1.6 and 1.9 of Standing Instruction No.1/88 dated 15.03.1988 read as under :-

“1.4 If the drugs seized are found in packages/containers, the same should be serially numbered for purposes of identification. In case the drugs are found in loose form, the same should be arranged to be packed in unit containers of uniform size and serial numbers should be assigned to each package/ container. Besides the serial numbers, the gross and net weight, particular of the drug and the date of seizure should invariably be indicated on the packages. In case sufficient space is not available for recording the above information on the package, a

Card Board label, should be affixed with a seal of the seizing officer and on this Card Board label, the above details should be recorded.

1.5 Place and time of drawal of sample

Samples from the Narcotic Drugs and Psychotropic Substances seized must be drawn on the spot of recovery, in duplicate, in the presence of search (Panch) witnesses and the person from whose possession the drug has been recovered, and mention to this effect should invariably be made in the panch nama drawn on the spot.

1.6 Quantity of different drugs required in the sample

The Quantity to be drawn in each sample for chemical test should be 5 grams in respect of all narcotic drugs and psychotropic substances except in the cases of Opium, Ganja and Charas/Hashish where a quantity of 24 grams in each case is required for chemical test. The same quantities should be taken for the duplicate sample also. The seized drugs in the packages/containers should be well mixed to make it homogeneous and representative before the sample in duplicate is drawn.

1.9 It needs no emphasis that all samples must be drawn and sealed; in the presence of the accused, Panchnama witnesses and seizing officer and all of them shall be required to put their signatures on each sample. The official seal of the seizing officer should also be affixed. If the person, from whose custody the drugs have been recovered, wants to put his own seal on the sample, the same may be allowed on both the original and the duplicate of each of the samples.”

32. There is nothing on record to show that the seizing officer sealed the seized articles at the place of seizure or at any time

even thereafter. There is no evidence to show that any sample from the seized articles was drawn on the spot of the recovery in presence of the accused. Non-collection of sample at the initial stage of seizure was a defect, which could not have been cured later on.

33. This aspect of the matter has been considered by the Supreme Court in ***Kuldip Singh Vs. State of Punjab [(2010) 10SCC 219]***. It observed in paragraph 11 and 12 as under :-

“11. Having considered the submissions made on behalf of the parties, while we are willing to accept the propositions advanced on behalf of the State of Punjab as far as substantial compliance with Section 42 of the NDPS Act, 1985 is concerned, we are unable to accept the latter part of the submissions relating to collection of samples at the police station from the seized goods which had been sealed by PW 3 Malkiat Singh. Non-collection of samples at the initial stage of seizure was a defect, which could not have been cured in the manner in which it was done by opening the bags which had been sealed by Malkiat Singh and mixing the contents thereof.

12. Accordingly, as indicated hereinabove, since the provisions of the aforesaid Act have to be construed strictly, we have no other option but to hold that the seizure and collection of samples was not in accordance with the provisions of Section 42 of the Act and the entire procedure stood vitiated as a result thereof.”

34. Coming back to the question as to whether or not non-compliance of the guidelines issued vide aforesaid Standing Instruction No.1 of 1988 would vitiate the trial, it is to be noted that Standing Instruction No.1/88 dated 15.03.1988 do not have the force

of law and they are directory in nature and intended to guide the officers and to see that a fair procedure is adopted by the investigating agency of a case during investigation. However, complete non-compliance with the guidelines issued under the aforesaid Instruction creates grave suspicion on the reliability of the prosecution case.

35. This issue has been examined by the Supreme Court in ***Khet Singh Vs. Union of India [AIR 2002 SC 1450]***, wherein it has been observed in paragraph 10 as under:-

“10. The instructions issued by the Narcotics 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 a later stage as and when the facilities are available, provided there are justifiable and reasonable grounds to do so. In 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.”

36. In *Noor Aga Vs. State of Punjab [(2008) 16 SCC 417]*, the Supreme Court after giving thoughtful consideration to the guidelines issued under the NDPS Act in the Standing Order, observed in paragraphs 89 to 91 as under :-

“89. Guidelines issued should not only be substantially complied, but also in a case involving penal proceedings, vis-à-vis a departmental proceeding, rigours of such guidelines may be insisted upon. Another important factor which must be borne in mind is as to whether such directions have been issued in terms of the provisions of the statute or not. When directions are issued by an authority having the legal sanction granted therefor, it becomes obligatory on the part of the subordinate authorities to comply therewith.

90. Recently, this Court in *State of Kerala & Ors. v. Kurian Abraham (P) Ltd. & Anr. [(2008) 3 SCC 582]*, following the earlier decision of this Court in *Union of India v. Azadi Bachao Andolan [(2004) 10 SCC 1]* held that statutory instructions are mandatory in nature.

91. The logical corollary of these discussions is that the guidelines such as those present in the Standing Order cannot be blatantly flouted and substantial compliance therewith must be insisted upon for so that sanctity of physical evidence in such cases remains intact. Clearly, there has been no substantial compliance of these guidelines by the

investigating authority which leads to drawing of an adverse inference against them to the effect that had such evidence been produced, the same would have gone against the prosecution.”

37. In *Union of India Vs. Bal Mukund & Ors. [(2009) 12 SCC 161]*, the Supreme Court observed in paragraph 36 as under :-

“36. There is another aspect of the matter which cannot also be lost sight of. Standing Instruction 1/88 which has been issued under the Act, lays down the procedure of taking samples. The High Court has noticed that P.W.7 had taken samples of 25 gm each from all the five bags and then mixed them and then sent to the laboratory. There is nothing to show that adequate quantity from each bag had been taken. It was a requirement of law.”

38. Keeping the aforesaid decisions in mind when I look to the facts of the present case, I find that in the report of the Forensic Science Laboratory, as contained in Ext.-4, the columns made for recording *the mode in which the parcel was found to be packed on receipt and description of seal* have been left blank.

39. Further, though P.W.10 Suresh Paswan has stated that the tin dabba enclosed within cloth was sealed, he admitted in cross-examination that the report does not disclose the identity of the person who had affixed the seal on the sample sent to the Forensic Science Laboratory.

40. I find that there is no evidence to show that the sample sent to the Forensic Science Laboratory was drawn from the articles said to have been seized from two steel containers from the house of

appellant Shakuntala Devi. The prosecution has not even produced the steel containers alleged to have been recovered from the house of the appellant Shakuntala Devi.

41. I further find that there is no positive evidence to show that the articles found in the two steel containers were numbered for the purpose of identification. The gross or net weight of the substances alleged to have been recovered was also not taken by the investigating agency at the place of seizure.

42. Thus, it is seen that in the present case there is total non-compliance with the guidelines issued in the Standing Instruction No.1/88 dated 15.03.1988 in respect of sampling, sealing and dispatching the seized sample to the Forensic Science Laboratory for test, which makes the entire prosecution case doubtful.

43. In the light of the above, it is found in the instant case, that the sample sent to the Forensic Science Laboratory for chemical analysis was not as per requirement of law.

44. I further find that no seal was sent along the sample of seized articles to the Forensic Science Laboratory for the purpose of comparing the seal appearing on the sample sent for chemical examination.

45. From the deposition of P.W.10 Suresh Paswan, it would appear the sample of seized articles was sent to the Regional Forensic



Science Laboratory, Muzaffarpur through special messenger Hawaldar Lagandeo Rai on 06.09.2007. The said Hawaldar Lagandeo Rai has not been examined during trial. It would further appear that there is no evidence on record to show as to who carried the sample from Muzaffarpur to Patna. There is no evidence as to when the sample reached at the office of the Director Forensic Science Laboratory, Bihar, Patna. However, it would appear from the FSL report that the report was prepared on 1st October, 2008. As noted above, the narcotics were seized on 03.07.2007, an order to send the sample for test was obtained by the Investigating Officer on 21.07.2007 and the parcel was received in the office of the Regional Director, Muzaffarpur on 06.09.2007. It is not known as to when and under whose order the parcel was sent to the office of the Director, Forensic Science Laboratory at Patna. From the time of seizure of the narcotics till examination of the contents of the sample, it is not clear how many persons handled the same and in what way. There are lot many missing links which are totally unexplained. In such circumstance, the chemical examiner's report loses all its importance.

46. So far as the materials exhibit i.e. Ganja is concerned, it was the duty of the Officer-in-Charge of the Police Station to have kept the articles seized in safe custody. He ought to have put his seal



on the seized articles. There is no evidence that the articles were sealed either by the Officer-in-Charge of the Police Station or by any other member of the raiding party or any other officer. It would appear that the case property remained lying in Malkhana. The chit carrying the contents of case property was not available on the gunny bag in which the case property is alleged to have been kept. When the Malkhana Incharge produced a gunny bag before the trial court which was marked as material Ext.-1, the articles kept therein were in loose condition. When there is no evidence to show that the seized articles were properly sealed and kept in proper custody in the Police Station, producing the material exhibit before the court is also meaningless in the eye of law.

47. Further, though the seized articles are said to have been kept in Malkhana, the Malkhana register was not produced before the trial court. It is not known as to when the seized articles were kept in the Malkhana.

48. So far as the submissions of the learned counsel for the appellants that there was total non-compliance of section 42 of the NDPS Act is concerned, I must refer to section 42 of the NDPS Act at this stage, which reads as under :-

“42. Power of entry, search, seizure and arrest without warrant or authorization.-

(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 persons 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 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 authorization 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 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 subsection (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.”

49. Section 42 can be divided into two different parts; first is the power of entry, search, seizure and arrest without power and authorization as contemplated under sub-section (1) of the said section; and second is reporting of the information reduced to writing to a higher officer in consonance with sub-section (2) of that section. Section 42(2) of the NDPS Act mandates that where an officer takes down any information in writing under sub-section (1) of section 42 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.

50. ***In Abdul Rashid Ibrahim Mansuri Vs. State of Gujarat [(2000) 2 SCC 513]***, a three-Judge Bench of the Supreme Court held that the compliance of section 42 of the NDPS Act is mandatory and failure to take down information in writing and forthwith transmitting

the report to immediate superior officer would cause prejudice to the accused.

51. In *Sajan Abraham Vs. State of Kerala [(2001) 6 SCC 692]*, a three-Judge Bench of the Supreme Court held that section 42 of the NDPS Act was not mandatory and substantial compliance was sufficient.

52. In view of the conflicting opinion regarding scope and applicability of section 42 of the NDPS Act, the matter was referred to the Constitution Bench of the Supreme Court in the case of *Karnail Singh Vs. State of Haryana [(2009) 8 SCC 539]*. The Supreme Court held that if there is total non-compliance of requirement of sub-sections (1) and (2) of Section 42 of the NDPS Act, the same would be impermissible. However, delayed compliance with satisfactory explanation about the delay will be acceptable compliance of Section 42 of the NDPS Act. The Supreme Court in paragraph 35 of the judgment held as under :-

“35. In conclusion, what is to be noticed is Abdul Rashid [Abdul Rashid Ibrahim Mansuri v. State of Gujarat, (2000)2 SCC 513] did not require literal compliance with the requirements of Sections 42(1) and 42(2) nor did Sajan Abraham [Sajan Abraham Vs. State of Kerala (2001) 6 SCC 692] hold that the requirements of Section 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 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 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 decided in each case. The above position got strengthened with the amendment to section 42 by Act 9 of 2001.

(Underlining mine)

53. In *Rajinder Singh Vs. State of Haryana [(2011) 8 SCC 130]*, the appellant was convicted by the trial court for having been found in possession of 14 kg of Heroin. His appeal before the High Court was also dismissed and the trial court order had been confirmed in appeal. In that case, according to the FIR, while the Police Inspector Kuldip Singh was present at the bus-adda of village Bhuna in connection with the investigation of a case, he had received secret information that the appellant Rajinder Singh was an opium addict and also dealing in its sale and that he had kept some opium in the shed used for storing fodder in his farmhouse, and if raid was organized, the opium could be recovered. On the basis of the aforesaid information, a formal FIR was drawn for an offence punishable under section 18 of the NDPS Act. A wireless message was also sent to the DSP, Fatehabad to reach the spot. A challenge was made before the Supreme Court that there was non-compliance with the provisions of sub-sections (1) and (2) of Section 42 of the

NDPS Act. After having considered the facts and the law involved in the case, in paragraph 11 of the said judgment, the Supreme Court observed as under :-

“11. It is therefore clear that the total non-compliance with the provisions sub-section (1) and (2) of Section 42 is impermissible but delayed compliance with a satisfactory explanation for the delay can, however, be countenanced.. We have gone through the evidence of PW-6 Kuldip Singh. He clearly admitted in his cross-examination that he had not prepared any record about the secret information received by him in writing and had not sent any such information to the higher authorities. Likewise, PW-5 DSP Charanjit Singh did not utter a single word about the receipt of any written information from his junior officer Inspector Kuldip Singh. It is, therefore, clear that there has been complete non-compliance with the provisions of Section 42(2) of the Act which vitiates the conviction.”

54. Now coming to the question of compliance of requirements of section 42 of the NDPS Act in the present case, I find from the evidence on record that the informant proceeded to the house of the appellant Shakuntala Devi along with the police party after receiving confidential information that the appellant Shakuntala Devi deals with narcotics and two persons had visited in her house in connection with sale and purchase of narcotics. The informant has stated that before leaving the Police Station, he had recorded such facts in the station diary. The station diary entry was never produced before the trial court. It is true that the Sub Divisional Police Officer



had joined the police party at the time of raid but there is nothing on record to suggest that the written information was ever communicated to any superior officer by the informant either before proceeding to conduct raid or even after the search and seizure was effected. In deposition, the Sub Divisional Police Officer has not uttered a word to suggest that the informant ever transmitted a copy of the station diary entry to him. Similarly, the informant has also not stated that he ever sent the secret information received by him in writing to any of his superior officer.

55. Thus, it is apparent that the station diary entry said to have been made by the Officer-in-Charge of the Police Station after receiving secret information was never communicated in writing to the official superior. In that view of the matter, I am of the opinion that there is total non-compliance with the mandatory requirements of section 42 of the NDPS Act and in view of the Constitution Bench judgment of the Supreme Court in the case of Karnail Singh (Supra) and Rajinder Singh (Supra), conviction of the appellants would clearly be unsustainable on this ground alone.

56. In my opinion, in the trial, it was necessary for the prosecution to establish by cogent and reliable evidence that the alleged articles seized from the possession of the accused appellants were Ganja. Mere oral evidence of the police officials and production

of seizure list does not discharge the heavy burden which lies on the prosecution, particularly where the offence is punishable for the stringent sentence as under the NDPS Act.

57. Thus, for the reasons indicated above, I am of the view that the prosecution has failed to prove its case beyond reasonable doubt against the appellants. Hence, the appellants are entitled to an order of acquittal and, accordingly, the judgment and order of conviction and sentence dated 12.08.2013 and 16.08.2013 respectively passed by the learned Special Judge-cum-1st Additional Sessions Judge, Samastipur in NDPS Case No. 8 of 2007 arising out of Samastipur Town (Muffasil) P.S. Case No. 348 of 2007 are set aside. The appellant Abdul @ Ziya, who is in custody, is directed to be set at liberty forthwith, if not required in any other case. The appellants, namely, Shakuntala Devi @ Raushan Khatoon and Ajit Kumar, who are on bail, are discharged from the liability of the bail bonds.

58. In the result, these appeals succeed and are, accordingly allowed.

(Ashwani Kumar Singh, J)

Pradeep/-

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