

**IN THE HIGH COURT OF JUDICATURE AT PATNA**  
**Criminal Appeal (SJ) No. 210 of 2013**

Against the judgment of conviction and order of sentence dated 14.02.2013 passed by Sri Diwakar Mishra, learned 1<sup>st</sup> Additional Sessions Judge, Saran at Chapra in connection with N.D.P.S. Case No. 09 of 2010 arising out of Sonapur P.S. Case No. 210 of 2010, G.R. No. 3243 of 2010

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Ramji Das, Son of Late Sadhu Das, Resident of Village - Rampur, Police Station - Fatehpur, District - Vaishali

.... .... Appellant

Versus

The State of Bihar

.... .... Respondent

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**Appearance :**

For the Appellant : Mr. Brij Kishore Mishra, Advocate

For the Respondent : Mr. Z. Hoda, A.P.P.

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**CORAM: HONOURABLE MR. JUSTICE GOPAL PRASAD**

**ORAL JUDGMENT**

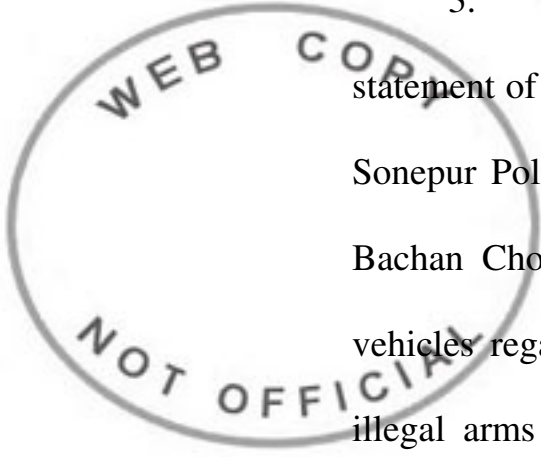
**Date: 05-10-2015**

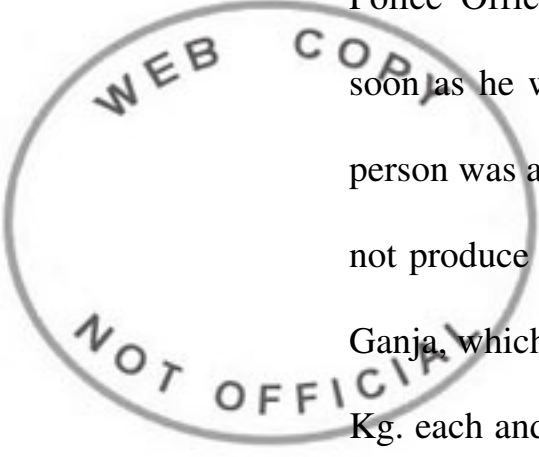
Heard learned counsel for the appellant and learned counsel for the State.

2. The sole appellant has been convicted under Section 20(C) of the Narcotic Drugs and Psychotropic Substances Act (for short the “NDPS Act”) and sentenced to undergo rigorous imprisonment for ten years and to pay a fine of Rs.1,00,000/- and in case of non-payment of fine to undergo rigorous imprisonment for three years. He has further been convicted under Section 21(C) of the NDPS Act and sentenced to undergo rigorous imprisonment for ten years and to pay a fine of Rs.1,00,000/- and in case of non-payment of fine to undergo rigorous imprisonment for two years. He has also been convicted under Section 22(C) of the NDPS Act and sentenced to undergo rigorous imprisonment for ten years and to pay a fine of Rs.1,00,000/- and on non-payment of

fine to undergo rigorous imprisonment for two years.

3. The prosecution case, as alleged in the self written statement of the informant (P.W. 6) Om Prakash, Station House Officer, Sonapur Police Station recorded on 04.09.2010 at 15.20 hours at Shiv Bachan Chouk N.H.-19, is that on 04.09.2010, he was checking the vehicles regarding catching hold of the criminals and recovery of the illegal arms at about 11:00 A.M. along with Assistant Sub-Inspector Surya Deo Yadav, Havildar Punreet Paswan, Constable Krishna Sah, Contable Keshav Jee Yadav and Constable Shailendra Kumar Yadav. At about 14:40 hour a tempo was coming from Hazipur and the police asked to stop the tempo. When the tempo stopped, the passengers were asked to get down, then the informant along with police personnel saw that a young boy who is sitting on the rear seat of the tempo frightened and trying to remove his airbag kept in his lap then a doubt was created. Then in presence of Tinku Paswan, the tempo driver and one of the passengers Vinod Kumar Singh, the police personnel searched the airbag complying with the provisions of the procedure and on search from the airbag of dark brown colour, Ganja was found wrapped in orange colour polythene kept in the airbag and further one red and brown colour airbag was also found under the leg of the said boy and after opening the said airbag Ganja was also found wrapped in orange polythene pack. The informant immediately informed the Sub-Divisional Police Officer,

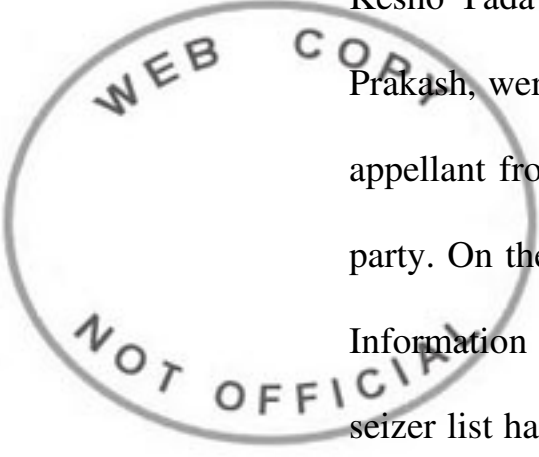




Sonepur, Sri Birendra Prasad Razak on telephone and the Sub-Divisional Police Officer, Sonepur, immediately responded that he was coming soon as he was also on mobile checking of the vehicle. Thereafter the person was apprehended and he disclosed his name as Ramji Das but did not produce any licence or paper with regard to the articles seized. The Ganja, which was found in two packets, was weighed and found to be 14 Kg. each and hence, in all 28 Kgs. of Ganja were seized from two bags. The further case is that 100 grams Ganja were taken as a sample from each packet separately and were sealed. The seizure list of seized Ganja was prepared before the Sub-Divisional Police Officer, Sonepur and the informant signed it. One copy of the said seizure list was also handed over to the appellant after taking his Left Thumb Impression and thereafter the appellant was arrested.

4. On the basis of the written report of the informant (P.W. 6) the First Information Report was lodged and the informant handed over the investigation to Sumari Prasas Mandal, Assistant Sub-Inspector and after investigation submitted charge-sheet. Consequently cognizance was taken and after taking cognizance charges were framed against the sole appellant under Sections 20(ii)(C), 21(C) and 22(C) of the NDPS Act.

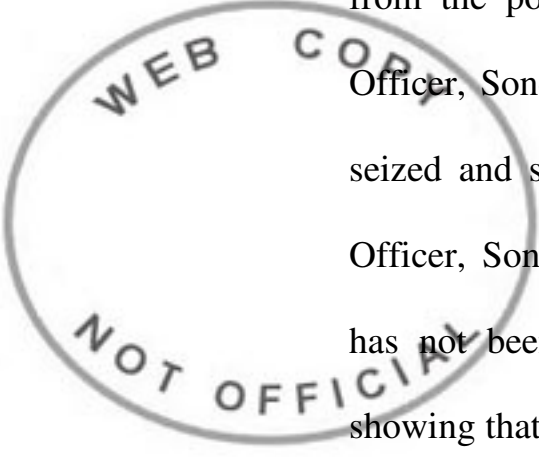
5. During trial, eight witnesses were examined by the prosecution. However, no witness had been adduced on behalf of the defence. P.W. 1 Krishna Sah, P.W. 2 Suryadeo Yadav, Assistant Sub-



Inspector, Amnor, P.W. 3 Shailenddar Kumar Yadav, Constable, P.W. 4 Kesho Yadav, Constable, P.W. 5 Pulkeet Paswan, Havildar. P.W. 6 Om Prakash, were the members of the raiding party, who caught hold of the appellant from the tempo. P.Ws. 1 to 6 are the members of the raiding party. On the basis of the written report of the informant (P.W. 6) First Information Report was lodged and seizure list was prepared. The said seizure list has been marked as Ext. 1, the self statement of the informant (P.W. 6) has been marked as Ext. 2, the endorsement on the self statement has been marked as Ext. 3 and the formal First Information Report has been marked as Ext. 4. P.W. 7 Sumari Prasad Mandal is the Investigating Officer of the case, who after taking permission from the Court, sent the sample to the Forensic Science Laboratory for its examination on 21.12.2010 and after completing the investigation, submitted the charge-sheet. P.W. 8 Tinku Paswan is the tempo driver and came to support about recovery of 14 Kg. Ganja from each of the two packets for which seizure list had been prepared.

6. The trial Court, taking into consideration the evidence of the witnesses both oral and documentary and the submission made by the prosecution, convicted and sentenced the appellant as mentioned above.

7. Learned counsel for the appellant, however, contended that there is violation of Sections 42 and 50 of the NDPS Act. The



prosecution case is that after search contraband articles were recovered from the possession of the appellant then the Sub-Divisional Police Officer, Sonapur was informed and thereafter contraband articles were seized and seizure list was prepared before the Sub-Divisional Police Officer, Sonapur, but the said Sub-Divisional Police Officer, Sonapur has not been examined nor the Malkhana register has been proved showing that the seized contraband articles were kept in the Malkhana. It has further been contended that though the sample was taken on 21.12.2010 by the informant but there is no evidence as to where the samples taken were kept from 04.09.2010 to 21.12.2010. It has further been contended that it has come in evidence of the Investigating Officer that the sample was sent on 21.12.2010 but there is no evidence as to where he took the sample and the receipt of sending the Ganja has not been on the record. The letter for permission for sending Ganja dated 30.11.2010 by the Investigating Officer is on the record which does not contain that there is any explanation as to where the Ganja was kept from 04.09.2010 till the date of sending the same on 21.12.2010.

8. Learned counsel for the State, however, contended that the Ganja was seized before the police personnel including the Sub-Divisional Police Officer, Sonapur and thereafter seizure list had been prepared. The seized Ganja was kept in the Malkhana of the Police Station and the same was produced before the Court on the date of his

examination by the Investigating Officer, Om Prakash (P.W. 6) and the same has been marked as material Exts. I and II and hence, contended that the prosecution has been able to prove the charges beyond reasonable doubt.

9. However, taking into consideration the respective submissions, in the light of the evidence, adduced by the prosecution, it is apparent that the prosecution case is that while the police was checking the vehicles to apprehend the criminals and illegal arms then the appellant was apprehended and two bags of Ganja, each containing 14 Kgs. had been recovered from the possession of the appellant. However, the matter was informed to the Sub-Divisional Police Officer, Sonapur, he came and the said Ganja was seized. Seizure list was prepared and no explanation was given by the appellant with regard to the seized Ganja. However, P.Ws. 1, 2, 3, 4 and 5 have supported the prosecution case before whom the alleged Ganja was seized, seizure list was prepared and they have supported the prosecution case regarding the search and seizure of the Ganja and preparation of the seizure list and recovery of Ganja. P.W. 6 has also supported the prosecution case as alleged in the First Information Report and also proved Ext. 1 the seizure list, Ext. 2 the statement on the basis of which endorsement was made for lodging the First Information Report and the First Information Report lodged, the formal First Information Report has been marked as Ext. 4

and the informant entrusted the investigation to Sri Sumari Prasad Mandal (P.W. 7), the Investigating Officer of the case.

10. However, it has come in evidence that the said Ganja was seized on 04.09.2010 but there is no mention that where the sample was kept though it is apparent from the evidence of P.Ws. 1 to 6 that the two packets of Ganja were seized from two different bags wrapped in polythene and after search and seizure 100 grams sample were taken out from each of the seized packets and two representative samples were prepared. There is evidence that the seized Ganja was kept in Malkhana but there is no mention where the representative samples were kept. P.W. 6 though has proved Exts. 1, 2, 3, 4 and has also proved the two packets of Ganja, which were seized and kept in Malkhana, which have been marked as material Ext. I and material Ext. II, but there is no evidence as to what he did with the two representative samples prepared at the spot.

11. Learned counsel for the State also could not explain as to where the representative samples were kept.

12. However, P.W. 7 in his evidence stated that he took the statement of the witnesses and took the order from the Court for sending the Ganja to the Forensic Science Laboratory for its examination and the said forwarding has been marked as Ext. 5.

13. However, there is no date mentioned in the this Exhibit

though it is submitted by the learned counsel for the appellant that a petition was given on 30.11.2010 to the District and Sessions Judge, Saran, Chapra though the order-sheet dated 30.11.2011 shows that a petition has been filed for permission to send two sealed Dabba of the samples of the seized articles and both sealed Dabba after his signature be handed over to the Investigating Officer. However, the said Dabba was given on 30.11.2010 and the same was sent on 21.12.2010 as per the evidence of the Investigating Officer. However, the Forensic Science Laboratory report has been marked as Ext. 6. the said Forensic Science Laboratory report suggests that D.R. No. 2205/10, dated NIL a parcel by special messenger S. K. Tiwari has been received in the office on 22.12.2010 and thereafter the report dated 06.08.2010 was sent and received on 28.08.2012.

14. Hence, the fact that the articles were seized on 04.09.2010, thereafter seizure list was prepared but there is no evidence where the sample was kept. The sample was taken by the informant but the sample was sent by the Investigating Officer on 21.12.2010. However, there is nothing in evidence of the Investigating Officer as to where the sample was kept from 04.09.2010 to 31.11.2010 and where the sample taken by the informant was sent by the Investigating Officer. From the order dated 30.11.2010, it is apparent that the said samples were sealed.

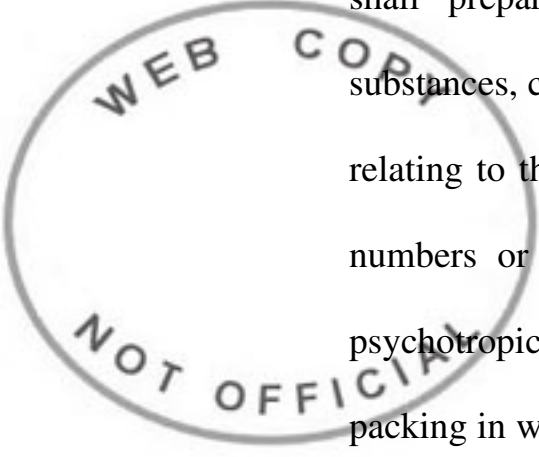
15. However, the seizure is on 04.09.2010 and the seizure was

made before the Sub-Divisional Police Officer, Sonapur but the Sub-Divisional Police Officer, Sonapur was not examined to establish that the sample was the same taken at the time of its seizure and this is the missing link.

16. The contention of the learned counsel for the appellant is that there is non-compliance of Section 42 of the NDPS Act. However, the search was made in public place and the recovery was made while the vehicle was in transit and hence, Section 42 of the NDPS Act is not applicable as in the facts and circumstances of the case Section 43 of the NDPS Act comes into force.

17. The further contention of the learned counsel for the appellant is that there is violation of Section 50 of the NDPS Act. However, it is well settled that Section 50 of the NDPS Act is applicable in the personal search and not with regard to the recovery made from the bags. Having regard to the fact that the raid was made not on the search of his person but the search was made of the bags in the lap or under the leg of the appellant and hence, Section 50 of the NPDS Act is not applicable.

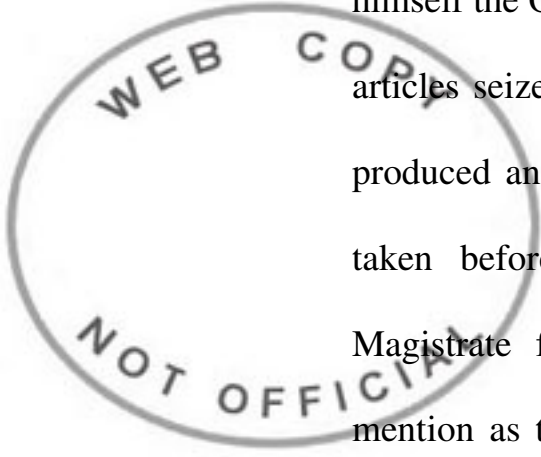
18. However, Section 52A(2) of the NDPS Act provides that where any narcotic drugs, psychotropic substances, controlled substances or conveyances have been seized and forwarded to the officer-in-charge of the nearest police station or to the officer



empowered under section 53, the officer referred to in sub-section (1) shall prepare an inventory of such narcotic drugs, psychotropic substances, controlled substances or conveyances containing such details relating to their description, quality, quantity, mode of packing, marks, numbers or such other identifying particulars of the narcotic drugs, psychotropic substances, controlled substances or conveyances 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 of the narcotic drugs, psychotropic substances, controlled substances or conveyances 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, substances or conveyances 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.

19. However, from the facts and circumstances of the case, it is apparent that there is violation of the provision that the representative samples have not been taken before the Magistrate nor the articles seized have been produced before the Magistrate. However, it has come in evidence that the articles seized were taken in the Malkhana. However,

the Malkhana register has not been proved though the informant who is himself the Officer-in-Charge of the Police Station stated that he kept the articles seized in the Malkhana but the Malkhana register has not been produced and proved. However, so far the samples taken were neither taken before the Magistrate nor were they produced before the Magistrate from 04.09.2010 till 30.11.2010. However, there is no mention as to where the samples, taken from the seized articles, were kept which fact has not come in evidence. However, it is stated that on 30.11.2010 it was produced before the Court and a sample was taken on sealed cover from 30.11.2010. There is no mention where the sample was kept till 22.12.2010 when the sample is alleged to have been sent to the Forensic Science Laboratory dated NIL. However, where the samples were kept from 04.09.2010 to 30.11.2010 and further from 30.11.2010 to 22.12.2010, no explanation has been given where the articles were kept. The Forensic Science Laboratory report also suggests that they received the sample but the forwarding does not bear the date as to when it was sent and hence, this casts a serious doubt where the sample was taken from the seized articles and the samples taken were not as provided under Section 52A(2) of the NDPS Act. Neither the seized article nor the sample was taken before the Magistrate and the order-sheet dated 30.11.2010 shows that the sample was brought in two dabba and hence, from the evidence, it is apparent that the sample was



not taken from the seized articles before the Court which itself casts a serious doubt and hence, having regard to the fact and circumstances of the case, the appellant is entitled to benefit of doubt. Hence, giving the appellant benefit of doubt, I hold that the prosecution has not been able to prove the charge beyond all reasonable doubts and the judgment of conviction and order of sentence dated 14.02.2013 passed by Sri Diwakar Mishra, learned 1<sup>st</sup> Additional Sessions Judge, Saran at Chapra in connection with N.D.P.S. Case No. 09 of 2010 arising out of Sonepur P.S. Case No. 210 of 2010, G.R. No. 3243 of 2010 are hereby set aside and the appeal is allowed. Appellant, namely, Ramji Das who is in custody, be released forthwith if not wanted in any other case.

**(Gopal Prasad, J)**

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