

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Appeal (DB) No.521 of 2014

Arising Out of PS.Case No. -1 Year- 2010 Thana -VAISALI
GRP CASE District- VAISHALI (HAJIPUR)

Arising out of judgment of conviction and sentence dated 11.6.2014 and 16.6.2014, passed in Sonapur (Hajipur) Rail Police Station Case No. 01 of 2010/GR Case No.11 of 2010, by Sri Brajendra Kumar Tewari, Special Judge, NDPS Act, Vaishali at Hajipur).

Pratibha Devi W/o Bhagirath Rai Village Desari, P.S- Desari, District- Vaishali.
..... Appellant

Versus

The State of Bihar
..... Respondent

with

Criminal Appeal (DB) No. 721 of 2014

Arising Out of PS.Case No. -1 Year- 2010 Thana –VAISALI
GRP CASE District- VAISHALI (HAJIPUR)

Md. Anamul Haque S/o Md. Jamal Mistry Resident of Mohalla Paliganj, Near New Masjid, P.S. Paliganj, District Patna
..... Appellant

Versus

The State of Bihar
..... Respondent

Appearance :

(In CR. APP (DB) No.521 of 2014)

For the Appellant : Mr. Yogesh Chandra Verma, Senior Advocate

For the Respondent : Mr. Abhimanyu Sharma, APP

(In CR. APP (DB) No.721 of 2014)

For the Appellant : Mr. Akram Ahmad, Advocate

For the Respondent : Mr. Ashwini kr.Sinha, APP

CORAM: HONOURABLE MR. JUSTICE SAMARENDRA PRATAP SINGH

and

HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI)

Date: 17-11-2016

Cr. Appeal (DB) No.521 of 2014 wherein Pratibha Devi is the appellant and Cr. Appeal (DB) No. 721 of 2014 wherein Md. Anamul Haque is the appellant, commonly originate against the



judgment of conviction dated 11.6.2014, whereby and whereunder both the appellants have been found guilty for an offence punishable under sections 20(b) & (c) of the N.D.P.S. Act and further appellant Md. Anamul Haque has been directed to undergo rigorous imprisonment for 10 years as well as to pay fine appertaining to Rs. 1 lac, in default thereof to undergo rigorous imprisonment for six months additionally, while the appellant Pratibha Devi has been directed to undergo rigorous imprisonment for 15 years as well as to pay fine appertaining to Rs.1.5 lacs, in default thereof to undergo rigorous imprisonment for one year additionally, with a further direction to run the sentences concurrently along with setting of the period of the detention since before in terms of section 428 of the Cr.P.C. vide order dated 16.6.2014 relating to Sonapur (Hajipur) Police Station Case No. 1 of 2010 by the Special judge, N.D.P.S. Act, Vaishali at Hajipur, on account thereof, have been heard together and are being decided by a common judgment.

2. Ramesh Singh (PW 3), S.I. of the R.P.F., on getting confidential information with regard to transportation of narcotic drugs illegally, he along with Akhilesh Singh (PW 2), Santosh Kumar Singh (PW 7), constable Ranjit Kumar Singh (PW 8), after informing the inspector R.P.F. Hajipur, Akhilesh Singh (PW 2) came at Hajipur Railway station where he met with



informer who pointed out one lady and two gents who, at that very moment, were sitting at Platform no.1 beneath a *Peepal* tree. Accordingly, they began to keep watch over them. As soon as the lady got up and lifted a bag along with her associates, they were apprehended and queried. During course thereof, they did not disclose correctly and on account thereof, her bag was checked wherefrom 10 packets *Charas*, each weighing 500 grams, approximately 5 kilograms was seized. They were not at all possessing valid ticket nor could they show any valid document relating to their stay at that very place.

3. Accordingly, PW 3 recorded his statement to this effect, addressed to Akhilesh Singh (PW 2) and tendered the seized articles, the three aforesaid accused, whereupon PW 2 endorsed and further forwarded the same to the local GRP whereupon, Sonapur (Hajipur) Rail Police Station Case No. 1 of 2010 was registered under sections 20/22 of the N.D.P.S.Act. Thereafter, as is evident the investigation was taken up and after concluding the same, charge sheet was submitted whereupon, after taking cognizance, the record was transferred to the court of learned Special judge. The trial court ultimately identifying these two appellants guilty for the offences as indicated above, acquitted co-accused Ranjan Kumar. Hence this appeal.



4. The defence case as is evident from the mode of cross examination as well as statement having been recorded under section 313 of the Cr.P.C. is of complete denial as well as of false and malicious prosecution. However, neither any DW nor any kind of document has been exhibited on behalf of the accused.

5. While assailing the judgment of conviction and sentence, the learned counsel for both the appellants have conjointly submitted that the prosecution case is found full of infirmities on account thereof, the judgment impugned did not justify its prevalence. To substantiate the same, it has been submitted that perusal of the evidence of the PWs, it is apparent that mandatory provisions, so prescribed under the N.D.P.S. Act, have not been complied with and that being so, apart from having deficiency in the oral as well as documentary evidence, the judgment would not sustain.

6. Now coming to the evidence, it has been submitted that all the material, independent witnesses have not supported the case of the prosecution whereupon they were declared hostile. The only witness who stood to test, happens to be police officials. Their evidences, in the background of the informant being a police officer, should be seen with suspicious eye, apart from the fact that while making proper scrutiny of these evidences, it speaks out serious



lapses at the end of PW 3, the informant as well as the I.O. PW 15. Furthermore, the inconsistency prevailing amongst these PWs adversely affect the reliability of remaining evidences whereupon, it could be safely drawn that the prosecution has failed to substantiate its case. That being so, the judgment of conviction and sentence, as recorded by the learned lower court, is found fit to be annulled.

7. The learned A.P.P. refuting the submissions having made on behalf of appellants has submitted that from the judgment impugned it is apparent that the learned lower court had minutely analyzed the evidence adduced on behalf of prosecution whereupon the judgment impugned need not attract any sort of interference. It has further been submitted that recovery of *Charas* from the possession of appellant Pratibha Devi is conclusively proved. Any kind of lapse at the end of officials on account of non compliance of relevant provisions of Act will not vitiate the finding. Hence, the submissions having been made at the end of appellants have not been dealt at all.

8. So far trial under the N.D.P.S. Act is concerned, as stringent punishment is found thereunder coupled with presumption against the accused whereupon, consistently it has been observed by the Hon'ble Apex Court in case of State of Punjab Vs. Balbir Singh,



reported in **(1994)3 Supreme Court Cases 299 Noor Aga Vs. State of Punjab**, as well as reiterated in case of **Noor Aga Vs. State of Punjab**, reported in **AIR 2009 SC 852 (Supplementary)** that the mandatory provisions should properly be complied with failing which, irrespective of nature of evidence available on record, the accused will be entitled for acquittal. Not only this, in case of **Karnail singh Vs. State of Haryana**, reported in **(2009) 8SCC 539**, the Constitution bench of the Hon'ble Apex Court held that delayed compliance of section 42(3) of the N.D.P.S. Act could be condoned but non compliance thereof will certainly axe upon the prosecution case ultimately giving an entitlement to the accused to be acquitted.

9. So far facts of the present case is concerned, it is evident that search and seizure as alleged happens to be from public place, being Platform of Hajipur Railway station, and on account thereof, there would be application of section 43 of the Act. In **Directorate, Revenue and Another Vs. Mohammad Nisar Holia**, reported in **(2008)2 SCC 370**, the Hon'ble Apex court minutely distinguished, discussed and explained niceties relating to Sections 41, 42 and 43 of the N.D.P.S. Act, and held as follows:-

“14. [Section 43](#), on plain reading of the Act, may not attract the rigours of [Section 42](#) thereof. That means that even subjective satisfaction on the part of the authority, as is required under sub-section (1) of [Section 42](#), need not be



complied with, only because the place whereat search is to be made is a public place. If Section 43 is to be treated as an exception to Section 42, it is required to be strictly complied with. An interpretation which strikes a balance between the enforcement of law and protection of the valuable human right of an accused must be resorted to. A declaration to the effect that the minimum requirement, namely, compliance of Section 165 of the Code of Criminal Procedure would serve the purpose may not suffice as non-compliance of the said provision would not render the search a nullity. A distinction therefore must be borne in mind that a search conducted on the basis of prior information and a case where the authority comes across a case of commission of an offence under the Act accidentally or per chance. It is also possible to hold that rigours of the law need not be complied with in a case where the purpose for making search and seizure would be defeated, if strict compliance thereof is insisted upon. It is also possible to contend that where a search is required to be made at a public place which is open to the general public, Section 42 would have no application but it may be another thing to contend that search is being made on prior information and there would be enough time for compliance of reducing the information to writing, informing the same to the superior officer and obtain his permission as also recording the reasons therefore coupled with the fact that the place which is required to be searched is not open to public although situated in a public place as, for example, room of a hotel, whereas hotel is a public place, a room occupied by a guest may not be. He is entitled to his right of privacy. Nobody, even the staff of the hotel, can walk into his room without his permission. Subject to the ordinary activities in regard to maintenance and/or house keeping of the room, the guest is entitled to maintain his privacy. The very fact that the Act contemplated different measures to be taken in respect of search to be conducted between sunrise and sunset, between sunset and sunrise as also the private place and public place is of some significance. An authority cannot be given an untrammelled power to infringe the right of privacy of any person. Even if a statute confers such power upon an authority to make search and seizure of a person at all hours and at all places, the same may be held to be ultra vires unless the restrictions imposed are reasonable ones. What would be reasonable restrictions would depend upon the nature of the statute and the extent of the right sought to



be protected. Although a statutory power to make a search and seizure by itself may not offend the right of privacy but in a case of this nature, the least that a court can do is to see that such a right is not unnecessarily infringed. Right of privacy deals with persons and not places.”

10. Now coming to the facts of the case in consonance with the activity of the prosecution having taken up during course of investigation, it is evident that on account of arrest/seizure of narcotic substance over Platform no.1, being identified as public place attracting section 43 of the N.D.P.S. Act would, for a moment would render nugatory applicability of section 42(2) of the N.D.P.S. Act but the aforesaid relaxation would not spare the prosecution to act in terms of another mandatory provision so envisaged under section 57 of the N.D.P.S. Act whereunder the prosecution is under obligation, particularly the informant, to inform his immediate superior official with regard to arrest/seizure. From the written report, it is evident that the informant along with Inspector, RPF, Akhilesh Singh (PW 2) led the raiding team, on account thereof, an intimation with regard to apprehension of culprits along with *Charas* would have been given immediately to superior officer by PW 2, which provision has not been satisfied. Thus from the consistent evidence of PW 2 himself along with informant PW 3, it is evident that they utterly failed to inform superior officer within 48 hours as prescribed under section 57 of the N.D.P.S. Act.



11. While going through the evidence of PW 2 as well as the evidence of PW 3, it is apparent that they failed to disclose that after seizure of the *Charas* sampling was made either in terms of Standing order no. 1 of 88 or 1 of 89. Virtually PW 2 as well as PW 3 are silent on that very score. They have not even deposed that sampling was made by them at the spot in presence of seizure list witnesses and during said course, the signature/LTI of the respective accused were taken. For better appreciation, clause 1.5 of Standing order no.1 of 88 is quoted herein below:-

“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 is recovered, and mention to this effect should invariably be made in the panchnama drawn on the spot.”

12. Thus, as stated above PW 2 as well as PW 3 failed to discharge their due duty in complying with the directions issued under Circular no. 1/88, and on account thereof, the narration of recovery of *Charas* from a bag possessed by appellant Pratibha Devi become duly afflicted.

13. PW 15, I.O., during course of his evidence had not spoken that as soon as the articles produced before him, sample was taken out with proper sealing. Virtually, he had not spoken a single



word with regard to his activity having carried out after production of the seized article. For better appreciation of the lapses having at the end of the prosecution, it looks better to quote section 55 of the N.D.P.S. Act.

“55. Police to take charge of articles seized and delivered.-An officer-in-charge of a police station shall take charge of and keep in safe custody, pending the orders of the Magistrate, all articles seized under this Act within the local area of that police station and which may be delivered to him, and shall allow any officer who may accompany such articles to the police station or who may be deputed for the purpose, to affix his seal to such articles or to take samples of and from them and all samples so taken shall also be sealed with a seal of the officer-in-charge of the police station.”

14. As stated above, neither PW 2 and PW 3 have deposed that while presenting the alleged seized articles, they have had put their seal, nor PW 15, I.O., had stated with regard to his activities after production of alleged seized *Charas*. He happens to be so sterile towards his duty that he even failed to disclose how samples were prepared and further, whether the same was sent to FSL after obtaining permission from Special Judge.

15. Apart from this, from exhibit 5, the FSL report, it is evident that the sample was sent through Havildar Shvji Yadav under Memo no. 542 of 2010 dated 3.2.2010 which was received in the office of the Director, FSL, Patna on 16.2.2010. None of the prosecution witness including PW 15, the I.O., though not been



cross examined at the hand of the appellants, however failed to divulge the reason behind the delay and perhaps during intermediary period, the sample was in whole possession. In the background of the aforesaid activity of the prosecution, the delay as is duly exposed is found prejudicial to the interest of the prosecution.

16. On account of lapses on the part of the prosecution due to which the whole activity of the prosecution fallen under shroud, whereupon it lost its reliability.

17. In order to substantiate its case, as is evident from the Lower court records altogether 16 PWs have been examined out of whom PW 4, PW 5, PW 6, PW 9, PW 10 and PW 11 have gone *volte face* to the prosecution whereupon they were declared hostile. The evidence of PW 14 Ambalika Tripathi is relevant to the extent that after examination of the articles he found the same to be *Charas*. Now coming to the remaining witnesses, it is evident that PW 1 Raj Kumar, PW 2 Akhilesh Singh, PW 3 Ramash Sigh, PW 7 Santosh Kumar Singh and PW 8 Ranjit Kumar Singh were the members of the raiding party. Having deposed that on apprehension from a bag possessed by accused Pratibha Devi, 10 packets of *Charas*, each weighing 500 grams totaling 5 kilograms were seized, but as stated above, they have not spoken with regard to preparation of sample at the spot with regard to compliance of mandatory



provisions of law.

18. PW 16 is Narad Ram who brought the material exhibit and had deposed that as per direction he had brought up this case property from *Malkhana* and those articles have been made an exhibit. He has further identified the seized property to be the case property on the basis of the chit having affixed thereupon which, during the course of cross examination at paragraph 4 has been demolished as, he has stated that the aforesaid chit was affixed in court during course of exhibit.

19. Considering the evidence in its totality in consonance with the deficiency persisting on the record, we are of the view that on account of non compliance of the mandatory provisions of law, the prosecution case is found adequately dented. As a result of which, judgment of conviction and sentence dated 11.6.2014 and 16.6.2014, passed in Sonapur (Hajipur) Rail Police Station Case No. 01 of 2010/GR Case No.11 of 2010, by Sri Brajendra Kumar Tewari, Special Judge, N.D.P.S. Act, Vaishali at Hajipur) would not survive. As such, the same is set aside. Consequent thereupon the appeal is allowed. Both the appellants are under custody. Hence are directed to be released forthwith, if not wanted in any other case.

20. At the present moment, we are constrained to hold that in spite of directions having been given at different occasions giving



tips to the prosecuting authority to equip the officials concerned with the niceties of the act along with manner whereunder the investigation is to be carried out, mode of search and seizure, preparation of sample, but had remained sheer a paper work and the ultimate sufferer happens to be the prosecution itself, who by such lapses allow the culprits to remain escort free which, may give an additional opportunity to them to indulge in similar kind of activity spoiling the whole generation. Therefore, we are of the view that a copy of the judgment should be given to the APP who would endeavor to transmit it to the head of the prosecution, so that the lapses which are being carried out by the investigating authority in dealing with N.D.P.S. Act would not recur.

(Samarendra Pratap Singh, J)

(Aditya Kumar Trivedi, J)

Shashi.

AFR/NAFR	
CAV DATE	NA
Transmission Date	8.12.2016

