

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Appeal (DB) No.33 of 2014

(Against the Judgment of conviction dated 03.10.2013 and Order of sentence dated 21.10.2013, passed by the learned Additional Sessions Judge-I, Bhagalpur in NDPS Case no. 3270 of 2010, arising out of Sahkund Police station Case No. 187 of 2010).

Bikash Yadav S/O Sahdeo Yadav Resident Of Village- Amdaur, P.S- Sabour,
District- Bhagalpur Appellant

With

Criminal Appeal (DB) No. 1076 of 2013

Inamul @ Md. Inamul Son Of Md. Ekram Resident Of Village- Bari Dhankar, P.S.-
Sabour, District- Bhagalpur Appellant

With

Criminal Appeal (DB) No. 1078 of 2013

Md. Salim Son Of Late Md. Raful Resident Of Village - Ujani, Police Station -
Naugachia, District – Bhagalpur Appellant

With

Criminal Appeal (DB) No. 1089 of 2013

Sandeep Kumar Singh S/O Upendra Kumar Singh Resident Of Village- Birnaul,
P.S. Goradih, District- Bhagalpur Appellant

With

Criminal Appeal (DB) No. 1099 of 2013

Md. Farukh Son Of Late Md. Hamid Resident Of Village- Fatehpur, P.S.-
Zeromile, District- Bhagalpur Appellant

With

Criminal Appeal (DB) No. 1102 of 2013

Md. Raja S/O Md. Nizamuddin Resident Of Village Bari Dhankar, Police Station
Sabour, District Bhagalpur Appellant

Versus

The State Of Bihar Respondent

Appearance :

Cr.App. No.33/2014.

For the appellant : Md. Najmul Hoda, Advocate

Cr.App. No.1076/2013.

For the appellant :

Cr.App. No.1078/2013.

For the appellant : Md. Syed Maslehuddin Ashraf, Advocate

Cr.App. No.1078/2013.

For the appellant :
Cr.App. No.1089/2013.
For the appellant :
Cr.App. No. 1099/2013.
For the appellant : Dr. Manoj Kumar, Advocate &
Smt. Sweety Sinha, Advocate
Cr.App. No.1102/2013.
For the appellant :
For the State : Mr. A.K.Sinha, APP and
Mr. Ajai Mishra, 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: 18-11-2016

Against the judgment of conviction and sentence impugned all these appeals have arisen on account thereof have been heard together and are being decided by a common judgment.

2. Appellant Md. Raja (Cr. Appeal (DB) No.1102 of 2013), appellant Md. Salim (Cr. Appeal (DB) No.1078 of 2013), appellant Md.Farukh (Cr. Appeal (DB) No.1099 of 2013), appellant Inamul @ Md. Inamul (Cr. Appeal (DB) No.1076 of 2013), appellant Bikash Yadav (Cr. Appeal (DB) No.33 of 2014) and appellant Sandeep Kumar Singh (Cr. Appeal (DB) No.1089 of 2013) have been found guilty u/s 20 as well as 22 of the N.D.P.S. Act vide judgment of conviction dated 3.10.2013, and each one has been independently sentenced to undergo rigorous imprisonment for 15 years as well as fine of Rs.1 lac, in default thereof to undergo rigorous imprisonment for two years, additionally, under both heads, respectively, with a further direction to run the sentences concurrently, vide order of

sentence dated 21.10.2013 by 1st Additional Sessions Judge cum Special Judge, Bhagalpur in N.D.P.S. Case No.3270 of 2010 arising out of Sahkund Police Station case no. 187 of 2010.

3. On getting confidential information that narcotic substance was to be carried by smugglers, a raiding party was constituted under the leadership of the informant Sanjay Kumar, Officer-in-charge of Shahkund Police Station as well as Sitaram Das, Circle officer of Shahkund block, came to destination Kiranpur More where they waited for arrival of the smugglers. After some time, three motorcycles ridden smugglers were seen who were signalled to stop and during course thereof, two persons having been ridden over a motorcycle succeeded in their escape leaving one bag, while four persons along with motorcycles possessing two bags, one each by the pillion rider were apprehended. Furthermore, on opening of the bag 12 packets of Ganja, weighing 136 kilograms was seized. The apprehended persons disclosed their identity as Md. Raja, Md. Salim, Bikash Yadav and Sandeep Kumar as well as also disclosed identity of their associates who managed to escape as Md. Inamul as well as Md. Farukh.

4. Self statement of the Officer-in-charge Sanjay Kumar (PW 3) was recorded to this effect whereupon Sahkund Police Station Case No. 187 of 2010 was registered under sections 20 and 22 of the N.D.P.S. Act. Furthermore, as is evident, that the bags were deposited

before the I.O., Ranjan Kumar by the informant, whereupon investigation commenced and completing the same, charge sheet was submitted, whereupon the trial concluded in a manner which is subject matter of the instant appeal.

5. The defence, as is evident from the mode of cross examination of the witnesses as well as statement recorded under section 313 of the Cr.P.C. is that of complete denial of occurrence. Furthermore, there happens to be substantive disclosure that appellants were falsely implicated and to substantiate the same, apart from the documentary evidence altogether 10 DWs have also been examined.

6. In order to substantiate its case, the prosecution had examined altogether 10 PWs. out of whom PW 1 is Krishna Deo Paswan, PW 2 is Md. Rinku, PW 3 is Sanjay Kumar, PW 4 is Sitaram Das, PW 5 is Lakhindra Prasad Singh, PW 6 is Kaushal Kumar, PW 7 is Rajesh Sah, PW 8 is Shanker Paswan, PW 9 is Ranjan Kumar and PW 10 is Suresh Paswan. Side by side it has also exhibited Ext.1 which is a signature of Krishna Deo Paswan on the seizure list, Ext. 1/1 is the signature of Md. Rinku on seizure list, Ext. 1/2 is writing and signature of Sanjay Kumar, Ext.2 is self statement, Ext.3 is formal FIR, Ext. 4 is seizure list and Ext. 5 is the FSL report. The material exhibit of 12 packets of Ganja has been marked as material exhibit no. I, II and I/II and two motorcycles have been marked as material-I, exhibit-II.

7. Accused Sandeep Kumar Singh, adduced six defence witnesses on his behalf out of whom Binay Kumar Singh is DW 1, Umesh Prasad Singh is DW 2, Pintu Kumar Singh is DW 3, Shambhu Saran Singh is DW 4, Udai Kumar Singh is DW 5 and Upendra Kumar Singh is DW 6, whereas on behalf of accused Md. Raja, four defence witnesses have been examined out of whom Md. Zalil is DW 7, Jai Prakash Paswan is DW 8, Sanjay Yadav is DW 9 and Ajay Yadav is DW 10. Side by side it has also exhibited a petition of one Manju Devi filed before the I.G. Bhagalpur, Ext. A/2 a petition filed by Manju Devi, photo copy sent to DIG, Bhagalpur and Ext. A/3 a petition filed by Manju Devi, photo copy to the S.S.P., Bhagalpur.

8. The record shows that neither the prosecution party nor the investigating authority happens to be competent enough to perceive the technicality of the N.D.P.S. Act and that happens to be the reason behind that, since inspection of the case there happens to be flaw in a manner that mandatory provisions which, at least the investigating officer is expected to comply with, are also being ignored.

9. 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 cases of **State of Punjab Vs. Balbir Singh**, reported in (1994)3 Supreme Court Cases 299 as well as **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 the 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(2) 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.

10. So far facts of the present case is concerned, it is evident that search and seizure as alleged, was from road 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 a 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.”

11. From the evidence, it is apparent that the informant was well aware of the fact that smugglers were to pass along with Ganja, on account thereof, information received at their end would have been recorded, which none of the prosecution witness had disclosed. Nor from the evidence it is traceable that they ever informed their superior officer in terms of section 57 of the N.D.P.S. Act regarding apprehension of accused as well as recovery of Ganja at their end.

In Krishnchand Vs. State of Haryana, reported in (2013) 2 SCC 502, while dealing with compliance of sections 42, 50 and 57, it has been observed as follows:-

“21. When there is total and definite non-compliance of such statutory provisions, the question of prejudice loses its significance. It will per se amount to prejudice. These are indefeasible, protective rights vested in a suspect and are incapable of being shadowed on the strength of substantial compliance.

22. The purpose of these provisions is to provide due protection to a suspect against false implication and ensure that these provisions are strictly complied with to further the legislative mandate of fair investigation and trial. It will be opposed to the very essence of criminal jurisprudence, if upon apparent and admitted non-compliance of these provisions in their entirety, the Court has to examine the element of prejudice. The element of prejudice is of some significance where provisions are directory or are of the nature admitting substantial compliance. Where the duty is absolute, the element of prejudice would be of least relevancy. Absolute duty coupled with strict compliance would rule out the element of prejudice where there is total non-compliance of the provision.

24. Reliance placed by the learned counsel appearing for the State on the case of Sajan Abraham (supra) is entirely misplaced, firstly in view of the Constitution Bench judgment of this Court in the case of Karnail Singh (supra). Secondly, in that case the Court was also dealing with the application of the provisions of [Section 57](#) of the Act which are worded differently and have different requirements, as opposed to [Sections 42](#) and [50](#) of the Act. It is not a case where any reason has come in evidence as to why the secret information was not reduced to writing and sent to the higher officer, which is the requirement to be adhered to ‘pre-search’. The question of sending it immediately thereafter does not arise in the present case, as it is an admitted position that there is total non-compliance of [Section 42](#) of the Act. The sending of report as required under [Section 57](#) of the Act on 20th July, 2000 will be no compliance, factually and/or in the eyes of law to the provisions of [Section 42](#) of the Act. These are separate rights and protections available to an accused and their compliance has to be done in accordance with the provisions of [Sections 42, 50 and 57](#) of the Act. They are neither inter-linked nor inter-dependent so as to dispense compliance of one with the compliance of another. In fact, they operate in different fields and at different stages. That distinction has to be kept in mind by the courts while deciding such cases”.

12. It is apparent that prosecution failed to disclose that after seizure of the *Ganja*, sampling was made either in terms of Standing order no. 1 of 88 or 1 of 89. 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.”

13. Now, coming to mode of sampling. According to **Standing Order No.1/88** issued by Narcotic Control Bureau, Government of India, the following procedure has been prescribed:-

“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.”

“1.7 Number of samples to be drawn in each seizure case.

(a) *In the case of seizure of single package/container one sample in duplicate is to be drawn. Normally it is advisable to draw one sample in duplicate from each package/container in case of seizure of more than one package/container.*

(b) *However, when the package/ container seized together are of identical size and weight, bearing identical markings and the contents of each package give identical results on colour test by U.N. kit, conclusively indicating that the packages are identical in all respect/ the packages/ container may be carefully bunched in lots of 10 packages/ containers may be bunched in lots of 40 such packages such packages/ containers. For each such lot of packages/ containers, one sample in duplicate may be drawn.*

(c) Where after making such lots, in the case of Hashish and Ganja, less than 20 packages/containers remains, and in case of other drugs less than 5 packages/containers remain, no bunching would be necessary and no samples need be drawn.

(d) If it is 5 or more in case of other drugs and substances and 20 or more in case of Ganja and Hashish, one more sample in duplicate may be drawn for such remainder package/containers.

(e) While drawing one sample in duplicate from a particular lot, it must be ensured that representative drug in equal quantity is taken from each package/ container of that lot and mixed together to make a composite whole from which the samples are drawn for that lot.”

14. Now coming to the status of the PWs., it is evident that PW 3 Sanjay Kumar, PW 4 Sitaram Das and PW 9 Ranjan Kumar are the witnesses of vital importance and their evidences, as it appear speak of being paramount consideration.

15. From the evidence of PW 3 Sanjay Kumar, it is evident that seizure of three bags containing 12 packets of Ganja along with two motorcycles and 4 persons have been substantiated during course of examination-in-chief, but mandatory provisions, as indicated above, that happens to be completely absent. He had not mentioned that the aforesaid eventuality was ever informed to the superior officer in terms of section 57 of the N.D.P.S. Act in the background of the fact that recovery as alleged, at the public place in terms of section 43 of the N.D.P.S. Act, appears to be of great importance.

16. Now coming to other aspect, it is evident from paragraph 4 of the examination-in- chief of PW 3 that he had sealed the *Ganja* bag after preparing seizure list. He further stated in paragraph 11 of his cross-examination that the seized articles were sealed but he is not



remembering whether aforesaid event has been incorporated in his self statement as well as in his further statement. He has further stated that the seized articles were deposited in the *Malkhana*. In paragraph 13 he had stated that he is not remembering whether the bags were opened at the place of occurrence. However, he again controverted the same and submitted that he came to know with regard to presence of four packets in the bag at Kiranpur More itself. In paragraph 14 he has stated that at Kiranpur More bags were opened but packets were not opened. He further stated that he along with the Circle officer put seal over the seized article. The accused persons have also put their signature. He has handed over sealed packet to the I.O. In paragraph 16 he has stated that the samples were not taken out at the spot. Samples were sent by the I.O. for chemical examination. Packets were not opened. He had not put signature over the packet but signed over seal. However, during production of so alleged material exhibits, the court had not given any remark on that score.

17. PW 4 Sita Ram Das, the Circle officer, during his examination-in-chief had not disclosed the event of sealing of seized article, rather he had spoken presence of seizure of three bags, each containing four packets of Ganja, totalling 1 quintal 36 kilograms. He had further stated that the seizure list was prepared by him. During cross-examination he had completely discredited evidence of PW 3 Sanjay Kumar as is evident from paragraph 6 wherein he had stated



that all the packets were opened and intermixed. Packets were prepared since before. For the purpose of FSL examination, no sample was prepared. Then thereafter they took packets to the Police Station. In paragraph 13 he had stated that he had not put signature over the packets. None other had signed in his presence. All the packets were handed over to the informant at the Kiranpur More itself. In paragraph 17 he had stated that he is unable to say whether Ganja was seized or not. All the articles were kept at Police Station. Thus he had stated that all the packets were sealed at the Police Station. He had not signed over the seal. He is unable to say whether signature happens to be on the seal. He also failed to say the name of persons, who will have signed on the seal.

18. PW 9 Ranjan Kumar is the I.O. He had stated that on 29.11.2010 he was entrusted with the investigation of this case and accordingly, visited the place of occurrence, took statement of witnesses and produced Ganja before the court. He had stated in paragraph 2 of his examination-in-chief that he took sample before a magistrate as directed by the learned District and Sessions Judge. He took sample from all the 12 packets independently, then kept the sample at *Malkhana*. Later on, same was sent to FSL. During cross-examination at paragraph 6 he had stated that he had not mentioned the fact in the case diary whether the bags have been produced before him were sealed. Then he stated that it was not sealed rather stamped.



He had further stated that he had not mentioned the fact in the case diary that the seized articles were kept in the *Malkhana*. In paragraph 7 he had stated that samples were seized before the Magistrate on 21.12.2010 that means to say nearby a month after the alleged seizure. Samples were taken out independently counting 12 in numbers. However, he had not affixed the serial no. over the same. He had not mentioned the fact that how much quantity has been taken out for that purpose. In paragraph 11 he had stated that he had not mentioned the fact with regard to possession of samples in between 21.12.2010 to 24.12.2010, and by whom.

19. The prosecution witnesses PW 1 Krishna Deo Paswan and PW 2 Md. Rinku speak over their status as seizure list witness without supporting the case of the prosecution on the factum of recovery. PW 5 Lakhindra Prasad Singh is the part I.O. who has after receiving FSL report, submitted charge sheet. PW 6 Kaushal Kumar is the one of the persons of the raiding party who also happens to be silent over the factum of sealing, sampling. PW 8 Shanker Paswan has been declared hostile. While PW 7 Rajesh Sah did not support the case of the prosecution. PW 10 Suresh Paswan happens to be the Assistant Director of the FSL, who exhibited his report relating to sample being Ganja.

20. After having analytical scrutiny of the materials having produced on behalf of the prosecution, it is apparent that apart from



the inconsistency amongst the evidence of PW over the manner of seizure as well as sealing of the seized article, there happens to be gross error having been committed by them during course of investigation, as is evident from the evidence of at least PW 9, wherefrom it is evident that the prosecution could not substantiate conclusively that after seizure of the articles, it was actually kept in *Malkhana* in terms of section 55 of the N.D.P.S. Act. Therefore, having the articles kept according to choice of the prosecution having free access, is another circumstance which shakes the reliability of the prosecution version. Furthermore, the manner of sampling in the aforesaid background though, claimed to be before the learned Magistrate, could not give legality during performance of paraphernalia while preparing sample for want of necessary precaution, which the prosecution failed to adopt after alleged search and seizure. Apart from this, it is also evident that prosecution failed to follow mandatory provisions of law, which *per se* caused prejudice to the appellants. So, the cumulative effect thereof, did not improve and brighten the fate of the prosecution in spite of having the FSL report through PW 10 regarding seized article to be that of Ganja.

21. Consequent thereupon, all the six appeals are allowed and the Judgment of conviction and order of sentence impugned, passed by the learned Additional Sessions Judge-I, Bhagalpur in N.D.P.S. Case no. 3270 of 2010 is set aside. The appellants namely, (1) Bikash

Yadav, (2) Inamul @ Md. Inamul, (3) Md. Salim, (4) Sandeep Kumar Singh, (5) Md. Farukh and (6) Md. Raja are under custody. Hence they are directed to be released forthwith, if not wanted in any other case.

(Samarendra Pratap Singh, J)

(Aditya Kumar Trivedi, J)

Shashi.

AFR/NAFR	
CAV DATE	NA
Uploading Date	
Transmission Date	