

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.97 of 2015

Arising Out of PS.Case No. -16 Year- 2011 Thana -WEST CHAMPARAN GRP CASE District-
WESTCHAMPARAN(BETTIAH)

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1. Kusum Devi @ Suman Devi Wife of Krishna Mahto, Resident of Village - Rani
Pakadi, P.S. - Bettiah Muffasil, District - West Champaran, At Present Village -
Lalu Nagar, Purbi Kargahiya, P.S. - Bettiah Muffasil, District - West Champaran.

.... Appellant/s

Versus

1. The State of Bihar

.... Respondent/s

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Appearance :

For the Appellant/s : Mr. Umesh Chandra Verma, Advocate

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

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI

ORAL JUDGMENT

Date: 14-02-2017

Appellant, Kusum Devi @ Suman Davi has been found
guilty vide judgment of conviction dated 07.01.2015 for an offence
punishable under Sections 20(B) (ii) C, 22C of the NDPS Act and has
been directed to undergo RI for 10 years as well as fined of Rs. 1 Lac
and in default thereof, to undergo imprisonment for one year
additionally under both counts independently with a further direction
to run the sentences concurrently and further, the period of judicial
custody having spent during course of trial be adjusted in terms of
Section 428 of the CrPC vide order of sentence dated 09.01.2015
passed by 5th Additional Sessions Judge, West Champaran at Bettiah
in connection with Trial No. 58/2011 (NDPS Case No 40/2011)
arising out of Narkatiaganj Rail PS Case No. 16/2011.

2. PW-1, Birendra Kumar Paswan had recorded his own



statement on 19.04.2011 (Ext-2) divulging the fact that on the same day at about 2.10 PM, a rumour floated with regard to falling of an unknown woman from a train bearing No. 12557 UP (Saptkranti Express) ahead of outer signal of Bhairoganj Station which was entered under Station Diary Entry No. 596 dated 19.04.2011 and then proceeded toward the place of occurrence along with a female Constable- 464, Hasbun Nisa. He arrived at the place of occurrence at 4:00 PM. After arrival at the place of occurrence, he directed the female Constable to search the injured female who was unconscious and during course thereof, two packets of opium weighing ½ kg each was found tied with her waist. One purse was found containing Rs. 220, a ticket, SIM of AIRCELL, passport size five photographs, sheet of papers containing several mobile numbers kept in a Jhola along with petticoat and blouse for which seizure list was prepared. Then thereafter, victim was taken to hospital where injury report was prepared by him.

3. On account of recovery of Narcotic Substance, Narkatiyaganj Rail PS Case No. 16/2011 was registered under different Sections of NDPS Act followed with investigation and after concluding the same, charge-sheet was submitted which ultimately led to the trial with ultimate conclusion, the subject matter of instant appeal.



4. The defence case as is evident from the mode of cross-examination as well as statement recorded under Section 313 Cr.P.C. is that of complete denial. However, neither any DW nor any paper has been exhibited on behalf of defence.

5. In order to substantiate its case, prosecution had examined altogether six PWs out of whom, PW-1 is Birendra Kumar Paswan, PW-2 is Binod Kumar, PW-3 is Hasbun Nisa, Constable PW-4 is Mohan Pandey, Seizure list witness, PW-5 is Brajesh Sah, another seizure list witness and PW-6 is Nageshwar Rai, Railway Gateman. Prosecution had also exhibited Ext-1, seizure list, Ext-2, Written report, Ext-3, Formal First Information Report, Ext-4, Charge-sheet, Ext-5, application filed before Special Judge (District & Sessions Judge) by the I.O. and Ext-6, FSL report.

6. Now coming to the status of witness, it is evident that PWs-4 and 5 have not supported the factum of recovery whereupon they were declared hostile. PW-6 is the Railway Gateman who had not deposed on the factum of recovery and so, his evidence is found worthless on the point of recovery. He had simply stated that after coming to know about the accident, he informed the Station Master for necessary action.

7. Now the case rests upon the evidence of PWs-1, 2 and 3. PW-3 is Hasbun Nisa, a female Constable who had simply stated that



on the alleged date and time of occurrence, she had gone to the place of occurrence along with Birendra Kumar Paswan, SI and on his instruction, she had searched body of the woman who was unconscious and on search, two packets of opium each containing ½ kg was taken out having tied with her waist. Apart from this, one purse, one SIM, ticket, photograph, small sheet of paper, petticoat, blouse etc. were also found which Birendra Kumar Paswan had seized and for that, seizure list was prepared. Then thereafter, the injured was sent to hospital. During cross-examination, at para-6, she had stated that, seizure list was prepared at the PS. She had further stated that the seizure list was not prepared in her presence at the Police Station. She is unable to say as to whether copy of seizure list was handed over to the lady concerned.

8. PW-1, Birendra Kumar Paswan is the informant who had stated that on the alleged date and time of occurrence, he received a rumour regarding sustaining of injury by a woman on account of falling down from a running train whereupon he proceeded towards the place of occurrence along with a female Constable after having Station Diary Entry. After reaching at the place of occurrence, he directed the female Constable to make search and during course thereof, two packets of opium each containing ½ kg was recovered having been tied with the waist of the female. Other items were also



recovered for which seizure list was prepared. Then thereafter, the injured female who was unconscious was sent to the hospital for treatment. He had further stated that seizure list was prepared at the place of occurrence itself and exhibited the seizure list as well as written report. Identified the accused in the dock. During cross-examination at para-4, he had stated that packet was sealed since before. He had not opened the same. In para-5, he had stated that seizure list was prepared at the place of occurrence. In para-6, he had stated that when he reached at place of occurrence, the lady was unconscious being in an injured condition. In para-7, he had stated that both the packets of opium were kept in a Jhola. One had come out of Jhola while another was inside it. Jhola was red in colour. One diary was also there.

9. PW-2 is Investigating Officer. He had deposed that after registration of the case, investigation was entrusted to him. Accordingly, he proceeded with the investigation and during course thereof, he took further statement of the informant and inspected the place of occurrence (detailed thereof). Also recorded statement of other witnesses. Recorded inculpatory extra-judicial confessional statement of the appellant/accused. He had sent the seized articles for chemical examination and for that, he had filed petition before the learned Sessions Judge (exhibited). He had further stated that during



course of inculpatory extra-judicial confessional statement, the female had disclosed that one male was also accompanying her but during course of investigation, that person was not traced out. During cross-examination, it is evident that this PW has not been cross-examined on any material point.

10. There happens to be consistent judicial pronouncement that having stringent punishment prescribed under the NDPS Act, on account thereof, the prosecution is bound to follow each and every procedure so prescribed under the Act. Apart from inconsistency having in between Ext-1, the seizure list inconsonance with the written report (Ext-2) as well as of PW-1, informant in the background of the fact that seizure list does not speak with regard to the recovery of contraband goods from the possession of the appellant, it is apparent that PW-1 had not stated that after preparation of the seizure list as well as having possession of contraband goods where it was kept. PW-1 is totally silent on the score whether the seized contraband goods were deposited in the Maalkhana or it was handed over to PW-2, the Investigating Officer. In likewise manner, PW-2 is also silent with regard to presence of contraband goods and further, as to how he got possession thereof. True it is, that from Ext-6, FSL report, it is evident that seized articles happen to be opium (Charas) but from the perusal of the same, it is evident that seized



articles were transmitted to him on 15.07.2011. Therefore, the prosecution was under obligation to explain that during intervening period that means to say, right from 20.04.2011 to 15.07.2011, in whose possession the articles were?

11. Apart from this, from perusal of the report, it is evident that one sealed sample weighing 84.4 gms was received at the end of FSL but it does not denote whether the aforesaid sampling was from one packet or from both. Apart from this, the prosecution is also lacking over mode of sampling whether it was prepared at the spot or it was prepared somewhere else.

12. Not only this, after going through the evidence of the material witness, that means to say, PW-1 and 2, it is evident that they have not spoken a word with regard to intimation to the Superior Police Official over arrest of the accused/appellant inconsonance with the information regarding recovery of contraband goods from her physical possession. Furthermore, during course of trial the material exhibit also not been produced nor there happens to be evidence at the end of prosecution that the same was destroyed in terms of Section 52A of the NDPS Act retaining the sample which ought to have been placed before the Court, nay any kind of order has been tendered on that very score.

13. The aforesaid eventualities happen to be mandate of



law. In terms of Section 55 of the NDPS Act, Officer Incharge is to take possession of the contraband goods and will keep the same in safe custody pending orders of the Magistrate with regard to sampling/destruction. Apart from this, Section 57 of the Act which happens to in addition to Section 42(2) of the NDPS Act whereunder the officials are under obligation to inform his superior regarding arrest as well as recovery of contraband goods within 48 hours next.

14. As discussed above, having lapses on the part of the prosecution on that very score coupled with non production of the contraband in Court speaks a lot with regard to genuineness of the prosecution version. In **Vijay Jain v. State of Madhya Pradesh** reported in (2013) 14 SCC 527, it has been held:-

9. Para 96 of the judgment of this Court in *Noor Aga Case* on which the learned counsel for the State very strongly relies is quoted hereinbelow: (SCC p. 464)

“96. Last but not the least, physical evidence relating to three samples taken from the bulk amount of heroin was also not produced. Even if it is accepted for the sake of argument that the bulk quantity was destroyed, the samples were essential to be produced and proved as primary evidence for the purpose of establishing the fact of recovery of heroin as envisaged under Section 52-A of the Act.”.

Thus, in para 96 of the judgment in *Noor Aga Case* this Court has held that the prosecution must in any case produce the samples even where the bulk quantity is said to have been destroyed. The observations of this Court in the aforesaid paragraph of the judgment do not say anything about the consequence of non-production of the contraband goods before the court in a prosecution under the NDPS Act.

10. On the other hand, on a reading of this Court's



judgment in *Jitendra Case*, we find that this Court has taken a view that in the trial for an offence under the NDPS Act, it was necessary for the prosecution to establish by cogent evidence that the alleged quantities of the contraband goods were seized from the possession of the accused and the best evidence to prove this fact is to produce during the trial, the seized materials as material objects and where the contraband materials alleged to have been seized are not produced and there is no explanation for the failure to produced the contraband materials by the prosecution, mere oral evidence that the materials were seized from the accused would not be sufficient to make out an offence under the NDPS Act particularly when the panch witnesses have turned hostile. Again, in *Ashok* this Court found that the alleged narcotic powder seized from the possession of the accused was not produced before the trial court as material exhibit and there was no explanation for its non production and this Court held that there was therefore, no evidence to connect the forensic report with the substance that was seized from the possession of the appellant.

15. Giving anxious consideration to the facts and circumstances of the case coupled with non compliance of the mandatory provisions of law, it looks unsafe to concur with the findings having been recorded by the learned trial court. That being so, the judgment of conviction and order of sentence is set aside. Appeal is allowed.

16. Appellant is under custody, if not wanted in any other case, will be released forthwith.

(Aditya Kumar Trivedi, J)

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