

IN THE HIGH COURT OF JUDICATURE AT PATNA**Criminal Appeal (SJ) No.46 of 2015**

Arising Out of PS.Case No. -3 Year- 2009 Thana -WEST CHAMPARAN GRP CASE District-
WESTCHAMPARAN(BETTIAH)

=====

1. **Sanjay Sah**, S/o Late Shivji Sah, resident of Village- Majhala Pawsara, P.O-
Majhaura, P.S.- Lalkotih, District-Begusarai(Bihar)

.... Appellant/s

Versus

1. The State of Bihar

.... Respondent/s

Appearance :

For the Appellant/s : Mr. Sanjeev Kumar-Advocate

For the Respondent/s : Mr. Abhay Kumar-A.P.P.

=====

CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
ORAL JUDGMENT

Date: 30-01-2017

Sole appellant, Sanjay Sah, has been found guilty for the offences punishable under Sections 20(b) (ii)(B), 22b and 23b of the N.D.P.S. Act and further, been directed to undergo rigorous imprisonment for six years as well as slapped with fine appertaining to Rs.50,000/- in default thereof, to undergo simple imprisonment for six months additionally under each count with a further direction to run the sentences concurrently vide judgment of conviction and sentence dated 22.12.2014 delivered by the 3rd Additional Sessions Judge, West Champaran at Bettiah in Trial No.14 of 2009 arising out of Narkatiaganj Rail P. S. Case No.03 of 2009.

2. As per written report submitted by Nasib Singh (PW-2) on 25.02.2009 before Officer-in-Charge Rail, Police Station



Narkatiaganj divulging the fact that he happens to be Company Commander of 27th Battalion of S.S.B.(E.) Company. On 25.02.2009 at about 2.00 a.m. while he was at Sikta Railway Station after establishing a *Naka*, at that very moment, a train coming from Sitamarhi to Narkatiaganj halted, one person was found along with a bag, who was signalled to stop and then thereafter, searched out. During course thereof, *Ganja* was found kept concealing inside a bag weighing 15 k.g. duly wrapped in three independent packets. Furthermore, the accused disclosed his identity as Sanjay Sah, S/o Shivji Sah of village-Majhaura Pawsara, P.O.-Majhaura, P.S.-Lalkotih, District-Begusarai. It is further evident that prosecution had produced the articles whereupon production-cum-seizure list was prepared.

3. On the basis of the aforesaid written report, Narkatiaganj Rail P. S. Case No.03 of 2009 under Sections 20, 22 and 23 of the N.D.P.S. Act was registered whereupon investigation commenced and after concluding the same, chargesheet was submitted leading to trial which concluded in a manner, the subject matter of instant appeal.

4. Defence case, as is evident from cross-examination as well as statement recorded under Section 313 of the Cr.P.C. is that of complete denial as well as false implication. Further, neither any DW



nor any kind of documentary evidence has been produced.

5. In order to substantiate its case, prosecution had examined altogether five PWs, out of whom, PW-1 is Kushal Kumar, PW-2 is Nasib Singh, PW-3 is Ramashish Paswan, PW-4 is Nabajyoti Nath and PW-5 is Jan Devri. Side by side, had also exhibited the document as Exhibit-1 written report, Exhibit-2 series of signature over production-cum-seizure list, Exhibit-3 confessional statement of accused and Exhibit-4 F.S.L. Report.

6. Before coming to merit of the case, it is evident that during course of trial, the F.S.L. Report has been received by the learned lower Court. None of the witnesses had exhibited the same, however, being a public document and is properly identified under Section 293 of the Cr.P.C. and on account thereof, the same has been made an exhibit which, as stated above happens to be legally recognizable. That being so, the contents of the report identifying the sample to be that of *Ganja* is found duly proved by the prosecution.

7. Now, coming to the evidences of the PWs, it is apparent that cross-examination of each and every witnesses has not been conducted in fair manner in order to expose their inefficiency in having proper compliance of mandate of law which, the successive judicial pronouncement suggest strict compliance.

8. Before coming to the evidence of PW-3, the I.O. and



further, to perceive it whether it satisfies the mandate of law whereunder he is found properly entrusted with to perform certain kinds of obligation and for that, Section 55 of the N.D.P.S. Act is to be taken note of. For better appreciation, the same is quoted below:-

“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.”

9. On that very score, there happens to be complete lacking of the evidence of other PWs. However, the prosecution have, through PW-3, the I.O., unsuccessfully attempted to patch up whereunder he had stated at Para-1 that he took out sample from 15 k.g., seized *Ganja* and further, after sealing the same by the order of



the Court had sent to F.S.L. Patna for examination. Neither date has been specified by him, on which date the *Ganja* was produced before him, on which date he kept it in the *Maalkhana*, on which date he took out sample, on which date it was sealed, more particularly, when he had stated on his own that on the written report of informant, Narkatiaganj P. S. Case No.03 of 2009 was registered and the case was entrusted to him for investigation. In course of investigation, he had prepared production-cum-seizure list of the seized article having produced by the informant. Apart from this, he had not stated that sample was taken out from each of the packet. That being so, there happens to be non-compliance of Section 55 of the Act that means to say, the articles were not at all before the Officer-in-Charge of a Police Station nor the Officer-in-Charge took possession thereof, nay kept it under his seal at *Maalkhana* and further, at the time of sampling, the Officer-in-Charge had not put his seal. In likewise manner, with regard to process of sampling, he happens to be deficient one. Therefore, prosecution is completely silent in explaining under whose custody the seized *Ganja* remained right from the date of so alleged seizure at least the date, preparation of sample. Virtually that happens to be reason behind that during course of trial, the seized article as well as sample were not at all produced before the Court nor during course of investigation or up to trial, there happens



to be prayer at the end of the prosecution in terms of Section 52A of the N.D.P.S. Act and in the aforesaid background, the activity of the prosecution is found not at all duly coverage of protection.

10. In ***Vijay Jain vs. State of M.P. with Nilesch Suryakant Shah vs. 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's case (2008)16 SCC 417 on which learned Counsel for the State very strongly relies is quoted herein below :-

"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 hulk 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 paragraph 96 of the judgment in Noor Aga's case (2008)16 SCC 417, 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 Narcotic Drugs And Psychotropic Substances Act.

10. On the other hand, on a reading of this Court's judgment in Jitendra's case (2004)10 SCC 562, we find that this Court has taken a view that in the trial for an offence under the Narcotic Drugs And Psychotropic Substances 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 produce 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 Narcotic Drugs And Psychotropic Substances Act particularly when the panch witnesses have turned hostile. Again, in the case of Ashok (2011)5 SCC 123, 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.”

11. It is settled principle of law that having prescription of stringent punishment, the more heavy is the burden upon the prosecution to identify culpability of an accused during commission of the crime and having lacunae persisting thereupon will certainly annul the finding of guilt.

12. Now, coming to the remaining witnesses, it is evident that none had spoken regarding source of light available at the relevant time, which could have enable the prosecution to perceive one person having a bag at such deadly night and further, non-presence of railway officials during the whole activity is an another circumstance to be taken note of. The aforesaid event is to be seen in the background as PW-4 had stated in Para-5 that he had caught hold the accused while PW-5 had stated in Para-5 that he had caught hold the accused.

13. Furthermore, though during course of cross-examination, the point has not been highlighted and so, the witnesses have got no opportunity to explain, but from the initial version of the



prosecution, it is evident that PW-2, informant had stated in the written report that accused along with recovered articles were produced by him while from Exhibit-2, production-cum-seizure list at Para-5, it is evident that the same was produced by Nabajyoti Nath, the PW-4. PW-2, during course of evidence at Para-1 had stated that he produced the accused along with written report before Narkatiaganj Rail P.S. and for that, production-cum-seizure list was prepared at the Police Station. PW-3, the I.O. had stated that during course of investigation, informant had produced the articles for which production-cum-seizure list was prepared. PW-4 had not claimed that he independently produced seized articles before the I.O. which, as stated above, is found inconsistent with Exhibit-2, the production-cum-seizure list. The aforesaid infirmities would not be cared on the basis of the inculpatory extra-judicial confessional statement (Exhibit-3) of the appellant as it was prosecution, who has been entrusted with an obligation to prove its case, which in the facts and circumstances is found not at all substantiated as the same was not confronted during statement recorded under Section 313 Cr.P.C.

14. In the facts and circumstances of the case, it is apparent that prosecution is suffering from inherent lacunae whereupon the finding of guilt so recorded by the learned lower Court would not justify its precedence. That being so, the same is set aside.



Appeal is allowed. Appellant is under custody, hence is directed to be released forthwith if not wanted in any other case.

(Aditya Kumar Trivedi, J)

Vikash/-

AFR/NAFR	A.F.R.
CAV DATE	N.A.
Uploading Date	31.01.2017
Transmission Date	31.01.2017

