

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Appeal (SJ) No.386 of 2015

Arising Out of PS.Case No. -33 Year- 2013 Thana -GAUNAHA District-
WESTCHAMPARAN(BETTIAH)

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Dhananjay Kumar, Son of Sikandar Verma, Resident of Village - Gaunaha, P.S. -
Gaunaha, District - West Champaran.

.... Appellant/s

Versus

The State of Bihar

.... Respondent/s

with

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Criminal Appeal (SJ) No. 482 of 2015

Arising Out of PS.Case No. -33 Year- 2013 Thana -GAUNAHA District-
WESTCHAMPARAN(BETTIAH)

=====

Sk. Munna Mistry @ Sk. Jahangir, S/o Sk. Nurul Hoda of vill.- Bijayipur, P.S.-
Gaunaha, Dist.- West Champaran

.... Appellant/s

Versus

The State of Bihar

.... Respondent/s

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Appearance :

(In CR. APP (SJ) No.386 of 2015)

For the Appellant/s : Mr. Ram Adya Singh, Adv.

For the Respondent/s : Mrs. Abha Singh, APP

(In CR. APP (SJ) No.482 of 2015)

For the Appellant/s : Mr. Yogesh Chandra Verma, Sr. Adv.

Mr. Sangeet Deokuliar, Adv.

For the Respondent/s : Mr. Abhay Kumar, APP.

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
ORAL JUDGMENT

Date: 06-03-2017

Criminal Appeal (SJ) No.386 of 2015 wherein

Dhananjay Kumar is the appellant and Criminal Appeal (SJ) No.482

of 2015 wherein Sk. Munna Mistry @ Sk. Jahangir is the appellant,

commonly originate against the judgment of conviction dated

12.06.2015 and order of sentence dated 16.06.2015, passed by learned

5th Additional District & Sessions Judge-cum-Special Judge, NDPS,



West Champaran at Bettiah in NDPS Case No.23 of 2013, Trial No.61 of 2013, arising out of Gaunaha P.S. Case No.33 of 2013, whereby and whereunder both the appellants have been found guilty for the offence punishable under Section 20(b) (11) (c) NDPS Act and sentenced to undergo RI for ten years as well as fined of Rs.1,00,000/- and in default thereof to undergo imprisonment for one year additionally, under Section 22(c) of the NDPS Act and directed to undergo RI for ten years as well as fined of Rs.1,00,000/- and in default thereof, to undergo additional imprisonment for one year with a further direction to run the sentences concurrently, with a further direction of set off regarding the period undergone during trial on account thereof, have been heard together and are being disposed of by a common judgment.

2. PW-3, Kiran Shankar, O/C of Gaunaha police station recorded his self-statement on 01.06.2013 at about 3.00 pm disclosing therein that on the same day at about 2.15 pm after getting confidential information regarding transportation of Narcotic Drugs (Charas), station diary entry was made and then thereafter, constituting a raiding party, they came near Pipariya chowk. At about 2.35 pm, three persons over a motorcycle were seen, who were intercepted and further, a bag was found over the motorcycle wherein 8 packets of Charas weighing four kilograms were seized and for that, seizure list was prepared. The occupants disclosed their identity as



Dhananjay Kumar, Sk.Munna Mistry @ Sk.Jahangir and Sajjad Alam.

3. On the basis of the aforesaid self-statement, Gaunaha P.S. Case No.33 of 2013 was registered under Sections 20, 22, 23, 24, 27(A) and 29 of the NDPS Act and investigation was taken up. After completing the same, charge-sheet was submitted which ultimately facilitated trial which ended in a manner, subject matter of instant appeal.

4. The defence case, as is evident from the mode of cross-examination as well as statement having been recorded under Section 313 Cr.P.C., is complete denial of recovery. There happens to be specific defence taken up by the appellant Sk. Munna Mistry @ Sk. Jahangir that he happens to be a motorcycle mechanic and the police officials got their motorcycle repaired without paying a single farthing and on account of protest having been made by him, he has falsely been implicated.

5. From the evidence of PW-3 and PW-7 both the police officials, it is apparent that both claimed to have fully acquainted with intricacies of the NDPS Act. However, after perusal of the L.C. Records, it is apparent that not even a single procedure has been followed. Having some sort of exception regarding Central agencies at whose end, there happens to be search and seizure, all other prosecution having been launched by different agencies are only meant for acquittal on account of non-performance of mandatory



provision over which, there happens to be consistent view of the Hon'ble Apex Court that laches at end of the prosecution should not be taken in casual manner as, being a special law prescribing stringent punishment, the non-follow of the mandatory procedure causes inherent prejudice to the interest of the accused as held in Noor Aga Vs. State of Punjab, reported in AIR 2009 SC 852 (Supplementary).

6. Apart from this, two relevant provisions are there which are bound to act against interest of the accused and that happens to be Section 35 of the Act wherein there happens to be presumption against culpable mental state of an accused while Section 54 of the Act deals with regarding presumption against possession of the Narcotic Drugs as well as Psychotropic Substance. That means to show, whenever there happens to be presumption though rebuttable leaning against the accused, then in that event, it should be seen that prosecution on its face not only been able to substantiate its case rather there should have been compliance of the mandatory provisions of the law, so that there should not be any scope left for malicious prosecution.

7. As, from the prosecution case, it is manifest that seizure was made over a road near Pipariya Chowk, a public place on account thereof, Section 43 of the Act is found to be applicable and so, the rigour so prescribed under Section 42 (2) of the Act, is not at all found available to the appellants/accused. However, Section 57 of



the Act is found duly protecting their interest wherein, the apprehension of the accused along with Narcotic Drugs is to be reported to just superior officials within 48 hours. From the evidence, as indicated above, PW-3, Officer In-charge and PW-7 (SI) one of the members of the raiding party as well as I.O. failed to divulge that there was any kind of compliance at their end in accordance with Section 57 of the Act.

8. Apart from this, as per Standing Order No.1 of 88, certain guidelines have been prescribed for the purpose of preparation of sample. For better appreciation those guidelines are being incorporated 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.”

“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.”

9. When the evidence of PW-3 as well PW-7 have been gone through, it is apparent that none of them have testified themselves on that very score. Though, no cross-examination is there at the end of the appellants, but the fact remains that the prosecution has to follow the mandatory provisions as prescribed under law. In the aforesaid background, on account of non-compliance of the aforesaid direction having been given under Standing Order No.1/88 and further, having vagueness in the evidence of PW-7 on that very score with regard to mode of sampling and in likewise manner, keeping mum at the end of PW-3 speak a lot with regard to activity of the prosecution.



10. From the L.C. Record, it transpires that in order to substantiate its case, the prosecution has examined altogether 7 PWs. Out of whom, PWs 1 and 2 namely Ramagya Chaudhary and Sukan Devan are seizure list witnesses, who did not support the factum of search and seizure. PW-3, as stated above, happens to be informant Kiran Shankar. PW-4 Mahendra Yadav, PW-5 Bhadai Paswan and PW-6 Gajadhar Ram are three chowkidars, who claimed themselves to be members of the raiding party but, from their evidence, it is apparent that they have not spoken a word about preparation of sample at the spot. PW-7 is the I.O. as well as one of the members of the raiding party in whose handwriting the seizure list happens to be prepared.

11. The prosecution has also exhibited Exhibit-1 signature of the witness over the seizure list, Exhibit-2 seizure list, Exhibit-3 self-statement of informant, Exhibit -4 formal FIR, Exhibit-3A endorsement over fardbeyan and Exhibit-5, the FSL report.

12. From the FSL report (Exhibit-5), it is evident that Narcotic which was tested happens to be Hashish. Although, no cross-examination made on behalf of the appellants to the I.O. PW 7, but from the report it is evident that it was dispatched on 06.06.2013 through special messenger P.T.C.-214, Angad Singh which was received at the office of the Director, Forensic Science Laboratory on 19.06.2013 and during intervening period, in whose custody the



sample was that part is fully unexplained. Furthermore, from the evidence of PW-3 Para 34, he had stated that while entrusting investigation to the I.O. he had handed over FIR, seizure list and seized article while PW-7 at paragraph 17 had stated that investigation was entrusted to him by the O/C at the police station and at that very time, nothing was handed over to him. PW-3 at Para 23 had stated that seized articles were sealed at the place of occurrence itself by his personal seal. In Para 30 he had stated that seized articles were kept in Thana Malkhana. PW-7 during his examination-in-chief had not stated from where he took custody over the seized articles rather, he falsified the assertion of PW-3 under Para 15 by stating that seized articles were not sealed at the place of occurrence and no sampling was done at the place of occurrence. In Para 23 he had stated that seized articles were sent to Malkhana. He had further stated that seized articles were not even sealed at the police station though had stated that on an order of the District Judge seized articles were sent to FSL.

13. Having inconsistency amongst the evidence of PWs more particularly PW-3 as well as PW-7, the relevancy of compliance of Section 55 has arisen. To ward off such controversial aspect, the prosecution ought to have produced the relevant register relating to Malkhana to suggest that seized articles were kept at Malkhana in sealed condition. In spite of the fact that there happens to be no



disclosure at the end of prosecution that seized articles were destroyed in terms of Section 52A of the Act, even then seized articles have not been produced in court. In the background inconsistent version of the prosecution witnesses coupled with the status of both seizure list witnesses so examined as PW-1 and PW-2, the non-production of the seized articles in court is to be considered as a serious lacuna. In similar kind of eventuality, the Hon'ble Apex Court 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.

14. Giving anxious consideration to the facts and circumstances of the present case, it is apparent that on account of deficiency persisting in the prosecution case coupled with non-performance of mandatory provisions of law has made the judgment of conviction and sentence redundant and, as such, would not justify its sustenance. That being so, the same is set aside. Consequent thereupon both the appeals are allowed. Both the appellants are under custody. Hence are directed to be released forthwith, if not wanted in any other case.

Arvind/-

(Aditya Kumar Trivedi, J)

AFR/NAFR	A.F.R.
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