

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.592 of 2015

Arising Out of PS.Case No. -96 Year- 2012 Thana -PALANWA District-
EASTCHAMPARAN(MOTIHARI)

=====

SHAMBHU SAH S/O JAGAT NARAYAN SAH RESIDENT OF VILLAGE -
PAKHNAHIYA, P.S. PALANWA, DISTT. - EAST CHAMPARAN.

.... APPELLANT/S

VERSUS

THE STATE OF BIHAR

.... RESPONDENT/S

=====

Appearance:

For the Appellant/s : Mr. Prakash Tewari, Adv.

Mr. Mahesh Kumar, Adv.

Mr. Anand Tiwari, Adv.

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

=====

CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI

ORAL JUDGMENT

Date: 19-05-2017

Appellant, Shambhu Sao has been found guilty for an offence punishable under Section 20(b)(ii)(c) of the NDPS Act vide judgment of conviction dated 07.07.2015 and sentenced to undergo S.I. for 10 years as well as to pay fine of Rs.1,00,000/- in default thereof, to under go imprisonment of six months, additionally vide order of sentence dated 13.07.2015 passed by Third Additional Sessions Judge-cum-Special Judge, East Champaran at Motihari in NDPS Case No.94 of 2012 / 35 of 2015.

2. PW.1, Ashok Kumar, S.I. along with other police personnel while were on patrolling in the night of 19/20-08-2012, got confidential information with regard to storage of Nepali Ganja by a smuggler in his house at village-Paknahiya whereupon the house was corden and in presence of local inhabitants, namely, Arvind Kumar Shrivastava,



husband of local Surpanch as well as Navin Kumar, they knock the door and after opening of the same by the inmate of the house, they gone inside, searched the house and during course thereof, 28 packets of Ganja found kept inside plastic bag in a room. The local chowkidar, Bharat Rai brought balance whereupon, the seized Ganja has been weight to be 34 Kg. and for that, seizure list was prepared in presence of Navin Kumar as well as Arvind Kumar Shrivastava and a copy thereof, has also been served upon the accused Shambhu Sah who was apprehended at that very time. Then thereafter, informant along with police left the scene having Ganja as well as accused.

3. On account of written report of informant, Ashok Kumar, Palnawa P.S. Case No.96 of 2012 was registered whereupon, investigation commenced and after concluding the same, charge sheet was submitted. Furthermore, as is evident after concluding the trial appellant has been found guilty and accordingly, sentenced.

4. The defense case as is evident from mode of cross-examination as well as statement recorded under Section 313 of the Cr.P.C. is that of complete denial of the occurrence. Furthermore, there happens to be specific plea that nothing was recovered and seized from his house and to substantiate the same, two DWs have been examined.

5. In order to substantiate its case, prosecution had examined altogether five PWs out of which PW.1 is Ashok Kumar, informant, PW.2 Hari Lal Raut, PW.3 Bharat Rai, PW.4 Hare Ram Yadav and PW.5



Amitesh. Side-by-side had also exhibited Ext.-1, Seizure List, Ext.2- Written report, Ext.3-Application filed by the Investigating Officer dated 04.09.2012 addressed to the Special Judge for preparation of sample as well as permitting him to get the same duly examined by FSL, Ext.3/1- Carbon copy of forwarding application, Ext.3/2-Carbon copy of application in format transmitted to FSL, Ext.4-Under the formal FIR, Ext.5-Test memo, Ext.5/1-Fainted fax copy of FSL report, and Ext.5/2- Original copy of FSL report.

6. Because of the fact that stringent punishment has been prescribed under the NDPS Act on account thereof, certain provisions have been prescribed in order to guard the interest of the accused so that he should be prevented from victimization. Furthermore, it has been held repeatedly that non-performance of those mandatory provision will dent upon the prosecution case. Therefore, during course of prosecution of a case under the NDPS Act, the prosecuting agency is to be sensitive towards adoption of mandatory provisions of law simultaneously, the courts are also expected to minutely observe the same. The aforesaid theme should not be considered mere literally rather it has to be strictly followed up in its true sense.

7. After hearing the respective parties as well as going through the lower court record, it is apparent that there happens to be flagrant violation on the part of the prosecution over which, though the appellant had not cross-examined the witnesses in proper way even then, the non-



compliance of mandatory provision of law will have an adverse impact, which will be dealt with at an appropriate stage. From the column of the charge sheet, it is evident that seizure list witnesses have not be cited as a charge sheet witness and the reasons best known to the prosecution, no explanation has been offered at their end. When seizure list witnesses have not been cited as a charge sheet witness by the prosecution themselves then, in that event, the story of search and seizure became doubtful. That means to say really at the time of alleged search and seizure, the witnesses were present, that means to say there happens to be complete violation of Section 100 of the Cr.P.C. which is to be followed at the time of the search and seizure which Section 51 of the Act prescribes. Therefore, non-citation of seizure list witness as a charge sheet witness speaks a lot over genuineness of the version of the prosecution with regard to search and seizure apart from the fact that such lapses had given an opportunity to the appellant to examine those seizure list witnesses in his defence as DW.1 as well as PW.2 who disowned the search and seizure and that being so, the prosecution could not be able to challenge.

8. From the written report, it is evident that there happens to be complete silence with regard to preparation of sample at the spot. Nor there happens to be a disclosure that the seized ganja weighing 34 kg. kept in 28 packets were ever sealed. On that very score oral evidence of witnesses are be considered out whom, PW.1, the informant and the



second one, Investigating Officer PW.5 are relevant. From the evidence of PW.1, it is evident that he had elaborately detailed how, on getting confidential information during patrolling, proceeded towards destination and in presence of local inhabitants made search, recovered ganja weighing 34 kg for that, seizure list was prepared, written report was prepared and then, handed over the seized article, the accused, seizure list, written report to the Officer-in-charge but failed to speak with regard to preparation of sample as well as sealing of the alleged seized article. He rightly, handed over custody to the Officer-in-charge who himself became Investigating Officer of the case, PW.5 and on account thereof, was unable to say where the articles were kept, but the I.O. PW.5 during his evidence failed to reiterate and corroborate testimony of PW.1, informant on the score that accused, seized article, seizure list, written report were handed over to him contrary to it, had deposed that at the morning hour of 20.08.2012 he received written report prepared by S.I., Ashok Kumar whereupon he registered a case and took up investigation. He had entered the written report as well as seizure list in the case diary. He visited the place of occurrence, recorded statement of the witnesses, received supervision note of SDPO, for examination of the sample by FSL made requisition before the District & Sessions Judge and after getting permission therefrom, transmitted the same forwarding letter with sepoy Ramanand Singh. He had not deposed on the score that seized articles were produced before him, accused was produced before him, seized



article was sealed by him or was sealed before, it was kept at Malkhana in sealed condition, was produced before the learned Sessions Judge in sealed condition, sample was prepared in presence of District & Sessions Judge or before any Magistrates, so entrusted containing his signature. At the present moment it looks appropriate to acknowledge the activity of a Officer-in-charge and for that, it looks desirable to quote section 55 of the NDPS 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.”

9. At the present juncture another lapses having at the end of the prosecution has been noticed. None of the witnesses including the Investigating Officer had deposed that seized articles were destroyed after getting permission from the Sessions Judge in terms of Section 52(A) of the Act. Even in absence thereof, neither the Malkhana registered has been produced and made an exhibit to expose that the seized article was kept at Malkhana having its entry at particular place nor the Investigating Officer during course of evidence had stated that the articles were kept at Malkhana. Seized article has not been produced during course of trial. So,



in the background of nature of evidence of the concerned police officials who were responsible for whole activities that means to say PW.1 as well as PW.5, it is apparent that the factum of seizure, sampling became suspicious and on account thereof, it has become doubtful with regard to authenticity of the FSL report whether it relates with the article allegedly shown to be seized relating to the present case.

10. The aforesaid finding is not in isolation. From Ext.3, a prayer made by the Investigating Officer on 04.09.2012 before the District & Sessions Judge for appointment of a Magistrate to facilitate preparation of sample, it is evident that no subsequent action is found on the record contrary to it Ext.3/1 which happens to be the forwarding letter addressed to Regional Director, FSL by Sessions Judge cum special Judge, NDPS, the column no.2 which contains description regarding sample, it has been incorporated twenty-eight packets weighing 34 kg. It did not speak the number of samples as well as its weight. Another petition Ext.3/2 shows description of sampling weighing 100 gm. When the same is taken together with Ext.5, the test memo, it is evident that the sample weight 30 gm at the end of authority. The latter part of the aforesaid Ext.5 which has been filled up by the FSL Laboratory details, the weight of the sample as 53 gm. This inconsistency is another circumstance which decorticate the truthfulness of the prosecution version that too in the background of the fact that 37.1 gm of unused sample was returned back.

11. Whenever an accused is apprehended under the NDPS Act



by an official, two kinds of obligation is found attached therewith. Whenever an officer exercises his power in token of Section 42 of the Act making search and seizure in public place, then in that event, the officer has to inform in writing or the copy of the documents is to be placed before the superior officials in accordance with Section 42(2) of the NDPS Act, within 72 hours. As stated above, neither PW.1 nor PW.5 have led stress on that very score. Another section is section 57 of the act whereunder the officials, after arrest as well as seizure of the contraband articles with full particulars has to report to just superior officials within 48 hours. Again, the prosecution kept mum. The aforesaid activities is to be taken note of in light of Section 52 of the NDPS Act whereunder, after arrest of the accused along with seizure of the article is to be produced before the Officer-in-charge without any delay and sub-section (4) authorizes the said official or the Officer-in-charge to take such measure as may be necessary in accordance with law. That means to say, in terms of sub-section (4) of Section 52 of the Act, PW.5 the Officer-in-charge was to activate himself and would have taken all sorts of precaution in getting the seized article properly kept under proper seal in terms of Section 55 of the Act at Malkhana with proper entry and further, in terms thereof, would have allowed in presence of a Magistrate.

12. As state above, the seizure happens to be in between the night of 19/20-08-2012 and in absence of positive evidence that the seized article was kept at Malkhana in proper sealed condition, then in that event



a question, arose whether those articles remained and suspicion drew more and more when seized article has not been produced in court nor there happens to be any explanation on that very score. Furthermore, as per Ext.3/2 the forwarding of the District & Sessions Judge cum Special Judge was made on 07.09.2012 while the article received at the laboratory of FSL on 29.09.2012 is another circumstances which puts mark of interrogation about genuineness of the prosecution version.

13. In *Vijay Jain v. State of Madhya Pradesh* reported in (2013) 14 SCC 527, it has been held by the Hon'ble Court as:

“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 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 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. That being so, the whole prosecution suffers from ambiguity as well as illegality on account thereof, the judgment of conviction and sentence recorded by the learned lower court could not subsist. Accordingly, 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.

15. Times without number, the court had perceived inefficiency of the Investigating Officer on account of lacking of proper knowledge regarding conduction of investigation of the cases falling under NDPS Act, whereupon the authorities concerned have been reminded because, such inefficiency ultimately cost the country as, the delinquent are bent upon to spoil not only the social fabric, economic condition, rather future of the nation allowing the youth to be prone to addict. So, once again a copy of the judgment is directed to be served upon the learned Advocate



General so that, it be transmitted to the authorities concerned in order to suggest that special session be conducted to properly equip the police officials regarding niceties of the technical offences more particularly, NDPS Act so that offenders should not escape.

(Aditya Kumar Trivedi, J.)

Prakash Narayan

AFR/NAFR	NAFR
CAV DATE	N.A.
Uploading Date	25.05.2017
Transmission Date	25.05.2017

