

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.715 of 2015

Arising Out of PS.Case No. -375 Year- 2013 Thana -FATUHA District- PATNA

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Tuntun Gope @ Langra S/o Late Rajendra Gope R/o Village Kalyanpur, P.S.
Fatuha, Distt. Patna.

.... Appellant

Versus

The State of Bihar

.... Respondent

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Appearance:

For the Appellant/s : Mr. Uma Kant Shukla, Advocate.
Mr. Ratnakar Panvel, Advocate.

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

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**CORAM: HONOURABLE MR. JUSTICE PRAKASH CHANDRA
JAISWAL**

ORAL JUDGMENT

Date: 12-09-2017

Heard learned counsel for the appellant as well as
learned APP for the State.

2. This appeal has been preferred against the judgment
and order of conviction dated 10.09.2015 and order of sentence dated
15.09.2015 passed by the Additional Sessions Judge-VI, Patna in
special case No. 83 of 2013 arising out of Fatuha P.S. Case No. 375 of
2013, whereby the learned trial court convicted the accused Tuntun
Gope @ Langra for the offence punishable under Section 20(b)(B)



and 20(b) of the NDPS Act and sentenced him to undergo R.I. for seven years and also slapped him with the fine of Rs. 50,000/- and in case of default of payment of fine, further sentenced him to undergo S.I. for six months.

3. The factual matrix of the case is that Fatuha P.S. Case No. 375 of 2013 was instituted under Sections 20 and 22 of the NDPS Act against the accused persons, namely, Tuntun Gope @ Langra and Suraj Prasad @ Surja on the basis of the written report dated 09.11.2013 of S.I. Satyendra Kumar of Fatuha Police Station with the allegation in succinct that on 09.11.2013 at 5 AM on the occasion of the Chhath Festival, he along with S.I. Ajay Kumar, Hawaldar 243 Ajay Kumar Yadav, Constable 5202 Yogesh Kumar and constable Syed Mumtaz Ali was on patrolling. In course of patrolling, he got tip off about roaming of Tuntun Gope @ Langra at Kataiya Ghat. On the said information, he along with police force arrived at Kataiya Ghat at 6 A.M. On seeing the police force, two persons started hiding themselves near Shiv Temple, but he managed to apprehend one of them with the help of the police force while another managed to escape. On grilling, the apprehended accused disclosed his identity as Tuntun Gope @ Langra and also disclosed the identity of his fleeing accomplice as Suraj Kumar @ Surja. In the meantime, BDO/Fatuha also arrived there. Then in the presence of



two independent witnesses, namely, Sanjay Kumar and Devmuni @ Indradeo Prasad giving the search of the police party, they made search of the person of the apprehended accused and recovered a packet wrapped in a Poly pack kept concealed in his waist. On opening the said packet, black colour solid material was found and on sniffing, the same was found to be charas. It was weighing 500 gm. On grilling the said accused about the said charas, he divulged that he and Suraj Kumar had purchased the Charas in Rs. 10,000/- at Nepal and intended to sell the same at Delhi in Rs. 50,000/- and they were about to rush to Delhi to sell the said charas. Thereafter, aforesaid charas was seized preparing the seizure list in presence of the said witnesses and BDO/Fatuha and a copy of the seizure list was handed over to the accused. Then he took the accused along with the seized charas to the Fatuha Police Station.

4. The aforesaid case was investigated by the police and on conclusion of the investigation and finding the case true, I.O. submitted chargesheet against the accused Tuntun Gope @ Langra under Sections 20 and 22 of the NDPS Act keeping the investigation pending against the accused Suraj Kumar @ Surja.

5. On receiving the chargesheet and the case diary and perusing the same, the learned Sessions Court took cognizance of the offence against the accused Tuntun Gope @ Langra under Sections



20 and 22 of the NDPS Act and on transfer, finally the case came in *seisin* of the Additional Sessions Judge-VI, Patna for trial.

6. Charge against the accused was framed under Section 20(b)(B) and 22 (b) of the NDPS Act. Charge was read over and explained to him to which he pleaded not guilty and claimed to be tried.

7. To substantiate its case in ocular evidence, the prosecution has examined altogether seven witnesses namely, Indradeo Prasad @ Devmuni (PW-1), Sanjay Kumar Rai (PW-2), the informant Satyendra Kumar (PW-3), Md. Anisul Haque (PW-4), S.I. Ajay Kumar (PW-5), S.I. Sachin Kumar (PW-6) and Hawaldar Ajay Kumar Yadav (PW-7). In documentary evidence, the prosecution has also filed and proved several documents including the FSL report marked as Exhibit-5.

8. The statement of the accused was recorded under Section 313 of the Code of Criminal procedure. The case of the defence is complete denial of the occurrence claiming himself to be innocent. In buttress of its case in ocular evidence, the defence examined only one witness, namely, Santosh Kumar as DW-1.

9. After hearing the parties and perusing the record, the learned lower court passed the impugned judgment and order of conviction and sentence as detailed in the earlier paragraph.



10. Being aggrieved and dissatisfied with the aforesaid judgment and order of conviction and sentence, the convict Tuntun Gope @ Langra has preferred this appeal.

11. The point for consideration in this case is, as to whether the prosecution has been able to bring home the charge levelled against the appellant beyond all reasonable doubts or not.

12. It is submitted by learned counsel for the appellant that the seizure list witnesses turned hostile and not supported the factum of search and seizure of the contraband before them. Thus, the search and seizure of the contraband from the possession of the appellant does not stand established by the prosecution. It is further submitted that the prosecution has failed to substantiate the sealing of the seized contraband and taking out the sample from the same and sealing the sample either at the place of occurrence or at the Police Station. It has also failed to substantiate by adducing cogent and trustworthy evidence as to whether the sample sent to the FSL for its chemical examination was taken out from the contraband allegedly seized from the possession of the appellant. It is also submitted that the seized contraband was not produced before the court in utter violation of the mandatory provision of law. Due to non-production of the seized material before the trial court, the prosecution has failed to establish that actually charas was seized from the possession of the



appellant and the same was sent to FSL for its chemical examination. It is further submitted that the mandatory provision of Section 50 of the NDPS Act has not been complied by the prosecution. Though BDO/Fatuha is said to be present at the place of occurrence, but the appellant was not made aware of the presence of the said BDO at the place of occurrence and he was also not imparted knowledge about his entitlement to be searched before the Magistrate or the Gazetted Officer and mere noting down the agreement of the appellant for taking search before the Police Officer is not sufficient. It appears to be in violation of Section 50 of the NDPS Act. It is also submitted that the seized contraband was not kept in safe custody in Malkhana and Malkhana in-charge and Malkhana register has not been produced before the Court in substantiation thereof. Thus, the prosecution has utterly and miserably failed to substantiate the prosecution case and the appellant is entitled to get benefit of doubt and be acquitted from the charge levelled against him.

13. On the other hand, learned APP for the State advocating the correctness and validity of the impugned judgment and order of conviction and sentence has submitted that the witnesses adduced by the prosecution have supported the prosecution case *in toto*. Prosecution case also stands substantiated by the documentary evidence. The seized contraband was also found to be charas on its



chemical examination as reported by FSL. Prosecution has succeeded to substantiate its case by adducing consistent ocular as well as documentary evidence in the case and the learned lower court correctly appreciating the facts and evidence available on record has passed the impugned judgment and order of conviction and sentence which is liable to be sustained. This appeal has no substance in it and is liable to be dismissed.

14. From perusal of the record, it appears that 500 gm of charas is said to have been recovered and seized from the possession of the appellant on the search of the person of the appellant at Kataiya Ghat in presence of BDO/Fatuha. The said BDO examined by the prosecution in this case as PW-4 has stated in Para-1 of his examination-in-chief that he arrived at the place of occurrence on getting information given by S.H.O. On arriving there, the S.H.O. divulged and displayed him that the material wrapped in the coloured polythene pack has been recovered. He displayed him the said material while he was preparing the seizure list and weighed the same before him, it was found to be 500 gm and it was black colour charas. The aforesaid statement of the BDO indicates that the said contraband was not recovered and seized from the possession of the appellant before him rather he has arrived at the place of occurrence later to the alleged seizure and the seized contraband was



displayed to him by the SHO. But in quite contradiction to the earlier statement given by him in the said Para, he has also stated that the person of the accused was searched in his presence and that charas was recovered from his possession. Thus, the statement of the aforesaid witness appears to be quite contradictory inter se and creates serious doubt about his presence at the place of occurrence and recovery and seizure of the said contraband before him.

15. Though the informant examined in this case as PW-3 has stated in Para-1 of his examination-in-chief that during the course of grilling the accused, the BDO/Fatuha engaged in law and order arrived there and the accused Tuntun Gope @ Langra was asked for search of his person whereupon he conceded to take his search and also agreed to take his search before the Magistrate. Then in the presence of the two independent witnesses, his person was searched. But from perusal of the written report of the informant, it appears that the informant has not even whispered about the asking the accused for taking his search and giving consent by the accused for taking his search before the Magistrate. There is nothing on record to indicate that the informant made the accused aware that BDO/Fatuha is present before him and his search might be made before him. There is also nothing on record to indicate that the informant imparted the appellant knowledge about his entitlement to



give his search before the Gazetted Officer or the Magistrate. In Para-9 of his cross-examination, the informant has stated that he has not mentioned in his written report about asking the accused that he might give his search before the Magistrate. Mere giving statement by the informant for the first time in the court regarding asking the accused for his search and giving consent by the accused to take search before the Magistrate, in my considered opinion, is not sufficient. Moreover, Md. Anisul Haque (PW-4), the then BDO/Fatuha, S.I. Ajay Kumar (PW-5), S.I. Sachin Kumar (PW-6) and Hawaldar Ajay Kumar Yadav (PW-7) who were the members of the raiding party had not corroborated the aforesaid statement of the informant regarding asking the accused to take his search and giving consent by the accused to take his search before the Magistrate. Thus, the aforesaid statement of the informant remains uncorroborated by the said prosecution witnesses. Hence, I find that there is utter violation of mandatory provision of Section 50 of the NDPS Act.

16. Hon'ble Apex Court in 2013 (1) PLJR 309 (SC) has been pleased to rule that it is imperative on the part of the officer to apprise the person intended to be searched before a gazetted officer or the magistrate. There is an obligation on the part of the empowered officer to inform, the accused or the suspect of the existence of such right, if so required by him and this mandatory



provision requires strict compliance. Only if suspect does not chose to exercise the right in spite of apprising him of his right, the empowered officer could conduct the search on the body of the person. In this case, officer only informed the accused that he could be searched before any Magistrate or Gazetted Officer if he so wished and the fact that the accused has right for the same was not made known to him. Non-compliance of the mandatory provision vitiated the entire proceeding and conviction set aside. Hon'ble Apex Court in **2002 (2) East Criminal Cases 219 (SC)** has been pleased to rule that under Section 50 of the NDPS Act, the duty cast upon the prosecution to strictly follow its provision. In asking the accused whether he should search him in presence of senior officer or gazetted officer. The accused was required to be apprised of his right conferred under Section 50 giving him the option to search being made in presence of the gazetted officer or the magistrate. The accused is not shown to have been apprised to his right nor any option offered to him for search being conducted in presence of the Magistrate. There is violation of mandatory provision of NDPS Act and the appellant is entitled to be acquitted. Hon'ble Apex Court in the case of **Kalayath Nassar v. State of Kerala** reported in **AIR 2000 SC 733** has been pleased to rule that if the accused is not acknowledged of his right to be searched before the Gazetted Officer



or the Magistrate, there is non-compliance of the provision of Section 50 of the NDPS Act and the prejudice is caused to the accused and the search stands vitiated. Merely for the reason that the accused did not make a request to the searching officer on his own that the search should be conducted in the presence of such officer it cannot be held that there was no need to inform him of that right.

17. From perusal of the record, it appears that the aforesaid seizure of the contraband is said to have made before two independent witnesses, namely, Indradeo Prasad @ Deomuni and Sanjay Kumar. The aforesaid witnesses have been examined by the prosecution as PW-1 and PW-2 respectively, but the said witnesses have turned hostile. PW-1 and PW-2 have not supported the factum of search, recovery and seizure of the contraband from the possession of the appellant as PW-1 in his examination-in-chief has vented his ignorance of the occurrence and has denied the recovery of any article from the possession of the accused in his presence by the S.I. Likewise PW-2 in his examination-in-chief has also vented his ignorance of the occurrence. Though the said witnesses have identified their signature on the seizure list marked as Exhibit-1 and Exhibit-1/1 respectively. But in his cross-examination by the defence, PW-1 has stated that S.I. had arrived at Kabir Math on 11.11.2013 and obtained his signature on blank paper. Likewise,



PW-2 has stated in his cross-examination by the defence that on 11.11.2013 at 10 AM, police had arrived at his house and had obtained his signature on blank paper. Thus the search, recovery and seizure of the alleged contraband from the possession of the appellant does not stand established by the prosecution and the seizure list does not stand proved by the seizure list witnesses. So in view of the aforesaid facts and circumstances, the said seizure list is nothing but a document prepared by the concerned police officer.

18. From perusal of the written report of the informant, it appears that the informant in the said written report has not whispered about the sealing of the seized contraband by him at the place of occurrence before the witnesses, BDO and the accused and preparation of the sample from the seized contraband and sealing of the sample before the aforesaid persons. Though the informant in Para-1 of his examination-in-chief has stated that sample from the seized contraband was taken out for its chemical examination, but he has not stated that the said sample was sealed by him at the place of occurrence. Moreover, the informant (PW-3) in Para-10 of his cross-examination has stated that no material exhibit was sealed before him and no sample was taken out. Neither the BDO nor any member of the raiding party examined in this case has also whispered about the sealing of the seized contraband and taking out the sample and



sealing the same by the informant at the place of occurrence before the witnesses and the accused. Hawaldar Ajay Kumar Yadav (PW-7) who was also the member of the raiding party has stated in Para-2 of his cross-examination that search of the appellant Tuntun Gope @ Langra was taken at police station. The I.O. of the case examined in this case as PW-6 has stated in Para-3 of his cross-examination that it is not clear either in the written report or in the case diary that on which date, where and by whom the sample of seized material was taken out and there is no indication either in case diary or in seizure list that as to on which date the material exhibit was handed over to him and whether it was handed over in sealed condition or not. In view of the aforesaid evidence of the prosecution and the facts and circumstances of the case, I find and hold that neither the seized contraband was sealed at the place of occurrence nor any sample was taken out from the seized contraband and was sealed at the place of occurrence before the witnesses and the accused. As per the statement of the informant, the seized contraband and the accused was taken to the police station but there is nothing on record to indicate that the said contraband was sealed at the police station by the SHO and the sample was taken from the said seized contraband and was sealed by the SHO at the Police Station. So, the aforesaid aspect of the case creates serious doubt about the seizure of the



aforesaid contraband from the possession of the appellant, its quantity and taking sample of the same and sending it to the FSL for its chemical examination.

19. In cases relating to the NDPS, law has provided very stern punishment and therefore, stringent provision has been provided. So, there may not be chances of false implication. In such view of the matter the compliance of the provision which are mandatory in nature has to be considered seriously and non-compliance of such requirement will give rise to grave doubt. The very basic and mandatory requirement of the sealing of the article in view of the provisions of Section 55 of the Act, has not been proved nor the sealing of the sample has been proved. These are mandatory requirements as provided under Section 55 of the Act. Since sealing of seized contraband and preparation and sealing of the sample from the seized article has not been proved at the time of its seizure nor by the SHO at the Police Station and nor the exact time and date has been proved in taking of the sample by the officer in-charge, a grave doubt is entertained over the matter that actual article which was seized has been the subject matter of the act of taking sample and the examination by the FSL. Hence, the appellant is entitled to benefit of doubt.

20. The record indicates that the seized contraband was



not kept in safe custody in Malkhana as neither any Malkhana register has been brought on record about keeping of the said contraband in Malkhana nor Malkhana in-charge has been examined by the prosecution in substantiation of the said case. I.O. S.I. Sachin Kumar (PW-6) in Para-2 of his cross-examination has stated that Malkhana number for depositing the seized material in the Malkhana is not mentioned in the case diary.

21. From perusal of the receipt of receiving of the contraband in the FSL and the FSL report marked as Exhibit-4 and 5 respectively, it appears that the aforesaid contraband was sent to FSL for its chemical examination on 16.11.2013 while the same was allegedly seized from the possession of the appellant on 09.11.2013. So the question arises as to whether the said contraband was kept for a long span of time of seven days. This aspect of the case goes to create serious doubt about sending of the sample of the contraband allegedly seized from the possession of the appellant to the FSL which was found to be charas in its examination.

22. Section 57 of the NDPS Act makes it mandatory that whenever any person makes any arrest or seizure under this Act, he shall, within forty-eight hours next after such arrest or seizure, make a full report of all the particulars of such arrest or seizure to his immediate official superior. From perusal of the record, it appears



that the informant apprehended the appellant from Kataiya Ghat on a tip-off and recovered and seized 500 gm of charas from his possession, but he has not reported the alleged seizure and arrest to his senior police official within forty-eight hours. Thus, there appears to be utter violation of terms and conditions of Section 57 of the NDPS Act.

23. From perusal of the record, it appears that the seized contraband was also not produced before the trial court as material exhibit and no explanation has been assigned by the prosecution for its non-production. Hon'ble Apex Court in the case of **Jitendra v. State of M.P.** reported in **2004 SCC (Cri) 2028** has been pleased to rule 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. Hon'ble



Apex Court in the case of **Ashok v. State of M.P.** reported in (2011) **5 SCC 123** has been pleased to rule 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. Hon'ble Apex Court in the case of **Vijay Jain v. State of M.P.** reported in (2013) **14 SCC 527** has also been pleased to rule that the prosecution has not produced the brown sugar before the Court and has also not offered any explanation for non-production of the brown sugar alleged to have been seized from the appellants and as the evidence of the witnesses (PW2 and PW3) to the seizure of the materials does not establish the seizure of the brown sugar from the possession of the appellant, the judgment of the trial court convicting the appellants and the judgment of the High Court maintaining the conviction are not sustainable.

24. In view of the aforesaid facts and circumstances of the case, I find and hold that the prosecution has utterly and miserably failed to substantiate the prosecution case and the charge levelled against the appellant beyond all reasonable doubts by adducing consistent, trustworthy, reliable and worth credence ocular



and documentary evidence. Hence, the appellant is entitled to get benefit of doubt. Accordingly, the impugned judgment and order of conviction and sentence passed by learned lower court is set aside and the appellant is acquitted from the charge levelled against him. As the appellant is in custody, he is directed to be released forthwith from custody, if not wanted in any other case. Accordingly, this appeal is allowed.

(Prakash Chandra Jaiswal, J)

Mishra/-

AFR/NAFR	A.F.R.
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