

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (DB) No.229 of 2014

Arising Out of PS.Case No. -137 Year- 2010 Thana -RAXAUL District-
EASTCHAMPARAN(MOTIHARI)

=====

Neck Mohammad @ Raj Mohammad @ Nek Mohammad, son of Muslim Mian,
resident of Village- Auraiya, P.S.- Adapur, District- East Champaran

.... Appellant

Versus

The State of Bihar

.... Respondent

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Appearance :

For the Appellant/s : Mr. Vijay Shankar Srivastava, Advocate

For the Respondent/s : Mr. Satya Narayan Prasad, APP

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CORAM: HONOURABLE MR. JUSTICE KISHORE KUMAR MANDAL

and

HONOURABLE MR. JUSTICE VINOD KUMAR SINHA

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE VINOD KUMAR SINHA)

Date: 19-12-2017

Sole appellant stands convicted under Section 18(b) of the Narcotic Drugs and Psychotropic Substance Act (hereinafter referred to as 'the Act'). However, he has been acquitted from the charge under Section 23(c) of the Act. Appellant has been sentenced to undergo rigorous imprisonment for a term of 12 years and a fine of Rs.1,00,000/- with default clause. It is also made clear that one of the co-accused, namely, Ramanand Patel, has been acquitted from the charge after trial.

2. The prosecution case as it appears from the FIR is that the informant (P.W.1), Police Inspector of Raxaul Police Station, received information about a criminal, standing near Manokamana temple, on which he went there along with police party, arrested the criminal and



on search six packets were recovered from him and on opening of the packets it was found that opium was kept in packets. It further appears that seizure list was prepared at the place of arrest itself and the seized articles were taken to the police station.

3. On the basis of the aforesaid self statement of the Police Inspector (Informant-P.W.1), Raxaul P.S.case No. 137 of 2010 has been registered under Sections 15, 17, 18, 21, 22, 23 and 24 of the Act. It further appears that during investigation involvement of one co-accused, Ramanand Patel, was also found and police submitted charge sheet against him.

3. It further appears from perusal of the record that the appellant along with the seizure list was produced before the court of the Chief Judicial Magistrate, East Champaran at Motihari. It also appears from the record that on 28.9.2010 a requisition was made to the Special Judge for authorizing a Magistrate for preparation of sample and also for sending the same to the Forensic Science Laboratory. It also appears that after completion of investigation charge sheet has been submitted.

4. Record further shows that cognizance has been taken and case was numbered as NDPS Case No. 43 of 2010. Similarly, case of Ramanand Patel has been numbered as NDPS Case No. 122 of 2010. Charges were framed against the appellant in NDPS Case No. 43 of 2010 and against co-accused Ramanand Patel in NDPS Case No. 122 of 2010. However, later on both the cases of appellant and the co-



accused Ramanand Patel have been amalgamated and has been disposed of by the common judgment and order.

5. During trial four witnesses have been examined on behalf of the prosecution, they are P.W.1, Sanjay Kumar Singh (Informant-cum-Inspector of Police-cum-Officer-in-Charge, Raxaul Police Station), P.W.2, Baneshwar Kishku (Assistant Sub-Inspector of Police), P.W.3, Lalan Prasad (Sub-Inspector of Police and P.W.4, Uma Shankar Singh (Investigating Officer).

6. Apart from that, following documents have also been produced before the court : Ext.1, seizure list, Ext.2, written report, Ext.3, FIR, Ext.4, confessional statement of the appellant, Ext.5, requisition letter dated 29.8.2010 for chemical examination of the seized articles, Ext.6, forwarding letter dated 29.8.2010 for chemical examination, Ext.7, forwarding of the confessional statement of the appellant and Ext.8, chemical examination report dated 8.9.2011 of Forensic Science Laboratory, Patna.

7. The trial court having considered the evidence adduced on behalf of the prosecution and found the same reliable and also considering the report of FSL, convicted the appellant under Section 18(b) of the Act and sentenced him, as stated above.

8. Learned counsel for the appellant has submitted that in this case that there is non-compliance of the provisions of Section 42 and 50 of the Act as in spite of receiving the report the same has not noted down and no information was given to the Superior Officer, as



provided under Section 42 of the Act and further before search of the appellant, he has not been asked as to whether he desires to be searched before a Magistrate or a Gazetted Officer, as provided under Section 50 of the Act, which are mandatory in nature.

9. However, in the present case, the prosecution case is that on information about a criminal, the police has raided the place and there was no prior information about the opium being kept by the accused appellant. Evidence of P.W.1, informant, also disclosed that on confidential information about presence of a dreaded criminal Nek Mohammad (appellant), he went near Manokamana temple and from near NH 28A, appellant was arrested and on search, six packets were found tied around his waist, which on opening appears to be opium and each packet contains 1/2 kg. opium and altogether 3 kg. opium were found. Evidence of P.W.1 also shows that seizure list (Ext.1) was prepared and signatures of independent witnesses were obtained and a copy of the same was handed over to the appellant and his signature was obtained. All the other witnesses also supported above evidence of P.W.1 so far recovery is concerned.

10. Such an eventuality has already been discussed in several judgments by Hon'ble Apex Court. In the case of **Hamidbhai Azambhai Malik vs. The State of Gujarat :AIR 2009 SC 1378** in paragraph-11 of the Apex Court held as follows :

“11. Coming to the factual background it has to be noted as follows :-

The search was made by the raiding party at about 4.30 p.m. on 15.12.1995. Section 42 will be invocable only if



the search is made by the police officer or the concerned authority, upon the prior information. If such a person has reason to believe from personal knowledge or information given by any person and obliged to take down in writing as such the information about the accused having possessed of and dealing with contraband article like 'charas' came to be appraised of by the concerned PSI Mr. K.D.Pandya, LCB Branch of Bharuch Police Station, in course of his investigation of an offence, registered vide CR No. II- 135 of 1995. Therefore, it is settled proposition of law when such an information or intimation or knowledge comes to the notice of the Investigating Officer in course of the regular patrolling or an investigation of some other offence. It is not necessary to follow in all cases the conditions incorporated in Section 42."

Similarly in the case of Durgo Bai vs. State of Punjab :AIR 2004 SC 4170 the Hon'ble Apex Court has held in paragraphs 7 to 9 of the said decision as follows :

"7. The next contention raised by the learned counsel for the appellants is about the violation of the mandatory requirements of Sections 42 and 50 of the Act. The learned counsel submits that the information about the commission of the offence which was received by BSF Commandant and conveyed to PW 1 was not reduced into writing as required by Section 42(1) of the Act. This argument overlooks the fact that there is nothing in the evidence on record to suggest that prior information as contemplated by Section 42 of the Act was received by the BSF Commandant or the Police Inspectors concerned. P.W.2 merely stated that "Commandant Sharma had not given the naka party the names of the accused. Information was that something is to be smuggled into India." Thus, check was organized not because the Police or the BSF officials had specific information about the offence in question or even that the heroin will be carried or transported by someone from nearby villages. The general information about the smuggling into India which led the Commandant to organize a nakabandi cannot be equated to the receipt of information within the contemplation of Section 42(1) of the Act. In any case, we need not dilate on this aspect further as it is Section 43 that is attracted in the



instant case but not Section 42. It is not a case of entering into or searching any building, conveyance or enclosed place.

8. The next argument is that Section 50 has been violated inasmuch as search was done without adhering to the conditions laid down in the Section. This is again based on the premise that the police officials concerned must be presumed to have acted on the basis of definite prior information. Once this assumption is held to be wrong, the ratio of the decision in *State of Punjab v. Balbir Singh* [(1994) 3 SCC 299] gets attracted. The legal position has been clarified thus :

.....But when a police officer carrying on the investigation including search, seizure or arrest empowered under the provisions of the Cr. P.C. comes across a person being in possession of the narcotic drugs or psychotropic substances then two aspects will arise. If he happens to be one of those empowered officers under the NDPS Act also then he must follow thereafter the provisions of the NDPS Act and continue the investigation as provided thereunder. If on the other hand, he is not empowered then the obvious thing he should do is that he must inform the empowered officer under the NDPS Act, who should thereafter proceed from that stage in accordance with the provisions of the NDPS Act. But at this stage the question of resorting to Section 50 and informing the accused person that if he so wants, he would be taken to a Gazetted Officer and taking to Gazetted Officer thus would not arise because by then search would have been over. As laid down in Section 50 the steps contemplated thereunder namely informing and taking him to the Gazetted Officer should be done before the search. When the search is already over in the usual course of investigation under the provisions of Cr.P.C. then the question of complying with Section 50 would not arise.”

9. It was noted in the beginning of the same paragraph that in the cases before the Court, the Police Officers did not proceed to act under the provisions of the NDPS Act after having necessary information or after entertaining reasonable belief as envisaged by Section 42. It was again emphasized in paragraph 25 that if there is a chance recovery of narcotic drug or psychotropic substance during a search in exercise of



the power under the provisions of Cr.P.C., the compliance with Section 50 does not arise. However, the empowered officer should, from that stage, proceed to carry out the investigation in accordance with the other provisions of NDPS Act.”

11. Considering the law already settled by Hon’ble Apex Court that in case of chance recovery, having no prior information, compliance of Sections 42 and 50 of the Act does not require.

12. Learned counsel strengthening his above argument has submitted that even if the informant has no prior knowledge but once he came to know about contraband being kept by the appellant, information has to be given to the Superior Officer, which is required under Section 57 of the Act and evidence further shows that seized articles and accused were brought to police station and accused was produced before CJM on next date. Nothing is available to show as to whether seized articles were sealed properly and signature of informant was there or not and if contained the seal and also there is nothing available to show as to where they were kept. There is also nothing available to show as to whether sample has been prepared as per provisions contained in Section 52A of the Act or Standing Orders issued by the Central Government, as such, provisions of Section 52(A) of the Act or Standing Order No. 1 of 1988 or 1 of 1989, issued by the Central Government under Section 52A of the Act have not been complied.

13. Further argument advanced by learned counsel for the appellant is that the Lower Court Record shows that sample has been



prepared on the direction of learned Sessions Judge vide order dated 24.9.2010 but FSL report (Ext.8) shows that the sample has been dispatched to the FSL on 11.10.2010 which was received after 11 days , i.e., on 22.10.2010 in the FSL and the delay in sending the sample to the FSL has not been explained, which adversely affected the genuineness of the sample. It has also been argued that in this case, report has been submitted almost after about a year, i.e., on 8.9.2011 and that also creates doubt about genuineness of the report.

14. Learned counsel has cited a Division decision of this Court in the case of Pratibha Devi vs. State of Bihar : 2017(3) PLJR 694 in which non-compliance of provisions of Section 52A & 57 as well as other provisions of the Act and Standing Order have been considered in the light of the decisions of the Hon'ble Apex Court in the case of State of Punjab vs. Balbir Singh, reported in (1994) 3 SCC 299 and in the case of Noor Aga vs. State of Punjab, reported in AIR 2009 SC 852, and the conviction so held in that case has been set aside on this ground.

15. Learned counsel for the State, on the other hand, has submitted that in this case there is no necessity for compliance of Section 42 or Section 50 of the Act. It is further submitted that the materials on record show that the seized articles were produced before the court for authorizing a Magistrate for sending the seized articles for chemical examination by the FSL. However, he failed to point out as to where the seized articles were kept before producing it before the



court and also failed to explain the delay in sending the articles to the FSL.

16. On close scrutiny of the evidence it appears that P.W.1 has stated that seizure list was prepared at the spot and he has brought accused with seized articles to the Police Station, registered FIR and handed over the investigation to the S.I., Ramashankar Singh. Lower Court record shows that the accused appellant was produced in court on the next day, i.e., 26.8.2010. However, there is nothing on record to show as to where the seized articles were kept. It appears from the evidence of I.O.(P.W.4) that he sent the seized articles for examination by FSL and he has proved forwarding report containing his signature and signature of Special Judge on forwarding (Ext.6) and receipt of FSL is Ext.7. However, on perusal of the records it appears that the requisition was made on 24.9.2010 for authorization of a Magistrate for sending the seized articles to the FSL. On the other hand, Ext.5 is a letter under signature of I.O. (P.W.4) addressed to the Special Judge dated 29.8.2010 for chemical examination of seized articles from the FSL. Ext.6 is the letter issued by the I.O. (P.W.4) to the FSL dated 29.8.2010 for chemical examination, appended with certificate of Special Judge dated 24.9.2010. Ext. 8 is the FSL report which shows that the articles were dispatched on 11.10.2010 and were received on 22.10.2010 in the FSL. The above facts clearly do not show as to where the seized article was kept since 25.8.2010 till it was sent on 24.9.2010. Not only that, it further appears that the same has been



dispatched on 11.10.2010, even though order has been obtained on 24.9.2010 and the same has been received on 22.10.2010 before the FSL and there is no explanation as to where it was kept for about a month. The above discrepancies create doubt on the genuineness of the articles sent for chemical examination as the possibility of being tampered during that period cannot be ruled out. Further it appears that though articles were received on 22.10.2010, however, report was prepared on 8.9.2011, i.e., almost after a year, which also creates a serious suspicion about the report and about the genuineness of the findings.

17. The provision of NDPS Act is quite stringent. There is conviction of more than 10 years and a fine of Rs. 1 lac and stringent provision is there regarding grant of bail. In such a situation, Legislature has provided for certain safeguard so that the same cannot be misused and false implication can be avoided and, as such, provisions of Section 42, 50, 55 & 57 have been incorporated in the Act itself. Apart from those sections there is provision of Section 52A of the Act, wherein detail regarding disposal and preparation of sample has been provided. Further for disposal of seized articles storage, sampling, Standing Order No. 1 of 1988 and 1 of 1989 have been issued and clause 2.1 & 2.2 of Standing Order No. 1 of 1989 deals with sampling, classification and drawl of sample, which are as follows :

“2.1 All drugs shall be properly classified, carefully, weighed and samples on the spot of



seizure.

2.2 All the packages/containers shall be serially numbered and kept in lots for Sampling. Samples from the narcotic drugs and psychotropic substances seized, shall be drawn on the spot of recovery, in duplicate, in the presence of search witnesses (Panchas) and the person from whose possession the drug is recovered, and a mention to this effect should invariably be made in the panchnama drawn on the spot.”

18. In the present case there is absolutely nothing is available to show as to whether direction issued vide Standing Order No. 1 of 1989 or provisions of Section 52A of the Act have been complied or not. The only evidence available that the Investigating Officer has made requisition for sending the articles to the FSL to the Special Judge but as to how and where, it was prepared, before whom it was prepared and signature of seizure witnesses and accused have been taken or not, there is no evidence at all on the record. Further there is nothing available to show as how much quantity was taken from each packet and as whether it was properly sealed prior to sending it to the FSL.

19. No doubt, in the present case, the informant has no prior information regarding the contraband to be kept by the accused appellant. In such a situation, there is no requirement for compliance of Sections 42 and 50 of Act. However, at the same time, once he came to know about having contraband in possession of the accused, he ought to have informed the superior officer about the same and he ought to have proceeded in accordance with the provisions under the



NDPS Act but neither he has informed the superior officer as provided under Section 57 of the Act nor he has followed the provisions of Section 55 regarding taking charge of articles seized and delivered nor there is compliance of provisions of Section 52A of the Act or the Standing Orders issued under the aforesaid Act.

20. In this case it further appears that neither the recovered seized articles nor the samples and remaining of the samples sent back by the FSL has been produced before the court nor there is anything to show that it has been kept in Malkhana and there is also nothing on the record in support of the same, neither Malkhana register has been produced nor Malkhala In-charge has been examined in the present case, which appears to be essential in this case. As such, physical evidence of this nature being property of the court which appears to be sacrosanct, is completely lacking. There is provision to draw adverse inference against the prosecution under Section 114 G of the Evidence Act on the ground of non-production of seized articles. Hon'ble Supreme Court in the case of **Jitendra Kumar vs. State of U.P. : (2004) 10 SCC 562** and also in the case of **Ashok @ Dangra vs. State of U.P. : (2011) 5 SCC 123** has considered above aspect of the matter as in those cases also neither material exhibits nor the samples have been produced in court nor Malkhana register nor Malkhana In-charge has been examined and the Hon'ble Apex Court has come to the conclusion that in view of non-production of seized articles or samples in court, nor Malkhana register were produced, conviction of



the appellant is vitiated, particularly where the offence is punishable with a stringent sentence under the NDPS Act. Nor compliance of provisions of Section 52A, 55, 57 and Standing Orders issued under the Act along with provision of Sections 42 and 50 of the Act has also been considered by a Division Bench of this Court in the case of *Pratibha Devi vs. State of Bihar* and after considering the entire aspects of the matter this Court was of the view that on account of non-compliance of the mandatory provisions of law, the prosecution case was found adequately dented and set aside the conviction and sentence.

21. We are not entering into the details, as to whether provisions of Sections 52A, 55, 57 and compliance of Standing Orders are mandatory in nature or not, but when there is stringent punishment under the Act, prudence demands that procedure prescribed under the Act, be followed, and there should even be a substantial compliance of those provisions, specially when Act provides for reverse burden on accused, i.e., presumption under Sections 35 and 54 of the Act. Aforesaid question has also been considered in a case of **Noor Aga vs. State of Punjab** as well as in the case of **(2008) 16 SCC 417** and on going through the entire judgments we gather that the ratio decided in those judgments is that only when recovery has been made as per procedure established by law, particularly as per provisions under the Act, doctrine of reverse burden shall apply. Hon'ble Apex Court also after considering all the



aspects of the matter, including effect of non-production of seized articles and samples in the judgment of Noor Aga's case and come the following findings : **(1) procedure requirements laid down therein are stringently complied with (2) when there are large number of discrepancies in treatment and disposal of physical evidence, non-examination of independent witnesses and there are several other discrepancies may not be fatal to the case of prosecution but if cumulative view of the same is taken the prosecution case must be held to be lacking in credibility (3) The fact of recovery has not been proved beyond all reasonable doubt which is required to be established before the doctrine of reverse burden is applied. Recovery has not been made as per the procedure established by law.**

22. Discussions made above clearly established that presumption shall be applied in this case only when (i) recovery has been made as per established principle of law (ii) compliance of various provisions of law has been followed, (iii) Material exhibit has been produced in the court which is sacrosanct to be produced, being court property.

23. Apart from that, opinion of FSL (Ext.8) is not free from suspicion and there is nothing available on record as to where the seized articles were kept, so as avoid any possibility of tampering.

24. It appears that the trial court has not considered the aforesaid aspect of the matter and only being swayed by evidence of



the police officers, coupled with the fact that recovery of opium and the opinion recorded he had convicted the appellant under Section 18(b) of the Act. Hence, we find that the impugned judgment of conviction suffers from several inconsistencies, discrepancies and cumulative effect of the above discrepancies and infirmities certainly dented the finding of guilt recorded in the impugned judgment of conviction. Hence it does not appear to be sustainable in the eye of law.

25. Accordingly, this appeal is allowed and the judgment of conviction and the order of sentence of the appellant are set aside. As the appellant is in custody, he is directed to be released forthwith, if not required in any other case.

(Vinod Kumar Sinha, J)

spa/-

(Kishore Kumar Mandal, J)

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