

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.218 of 2015

Arising Out of PS.Case No. -471 Year- 2009 Thana -MUZAFFARPUR TOWN District-
MUZAFFARPUR

Indrakant @ Chintu Paswan, son of Suresh Paswan, R/O Village-Lakri
Dhadhi, Chandrapura, PS-Nagar, Distt-Muzaffarpur, Appellant/s
Versus

The State of Bihar

.... Respondent/s

with

Criminal Appeal (SJ) No. 219 of 2015

Arising Out of PS.Case No. -471 Year- 2009 Thana -MUZAFFARPUR TOWN District-
MUZAFFARPUR

1. Chandan Kumar S/o Ashok Sah Resident of Chandwars (Hazam
Toli), P.S. Town, District Muzaffarpur.

.... Appellant/s

Versus

1. The State of Bihar

.... Respondent/s

with

Criminal Appeal (SJ) No. 237 of 2015

Arising Out of PS.Case No. -471 Year- 2009 Thana -MUZAFFARPUR TOWN District-
MUZAFFARPUR

1. Naresh Ram Son of Laxmi Ram Resident of Mohalla - Lakri Dahi,
Chandwara, P.S. Town, District - Muzaffarpur

.... Appellant/s

Versus

1. The State of Bihar

.... Respondent/s

Appearance :

(In CR. APP (SJ) No. 218 of 2015)

For the Appellant/s : Mr. Niraj Kumar @ Sanidh, Advocate

Mr. Rajesh Kumar Sharma, Advocate

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

(In CR. APP (SJ) No. 219 of 2015)

For the Appellant/s : Mr. Diwakar Pd. Karn, Advocate

Mr. Chandra Shekar Anand, Advocate

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

(In CR. APP (SJ) No. 237 of 2015)

For the Appellant/s : Mr. Bindhya Keshari Kumar, Sr. Advocate

Mr. Niraj Kumar @ Sanidh, Advocate

For the Respondent/s : Mr. Sujit Kumar Singh, APP



CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
ORAL JUDGMENT
Date: 20-02-2017

Cr. Appeal No. 218 of 2015 wherein Indrakant @ Chintu Paswan is the appellant, Cr. Appeal No. 219 of 2015 wherein Chandan Kumar is the appellant and Cr. Appeal No. 237 of 2015 wherein Naresh Ram is the appellant commonly originate against the judgment of conviction and order of sentence dated 04.04.2015 passed by Additional Sessions Judge- 4th, Muzaffarpur in Town PS Case No.471/2009, Trial No. 14/2014 holding the appellant, Naresh Ram guilty for an offence punishable under Sections 20(b) (ii) (B) of the NDPS Act and directed to undergo RI for 10 years as well as also slapped with fine of Rs. 1 Lac in default thereof, to undergo SI for two years additionally, appellants, Indrakant @ Chintu Paswan along with Subodh Kumar @ Dablu (not appellant) as well as Chandan Kumar for an offence punishable under Sections 17(a) of the NDPS Act and directed to undergo RI for six months and on account thereof, have been heard together and are being disposed of by a common judgment.

2. PW-1, Ramanand Tiwari recorded his own Fard-e-beyan on 08.01.2009 putting an allegation that on the same day at about 2.30 PM, he was informed by the Dy.S.P. that Naresh Ram along with his associates are engaged in selling of smack and Charas whereupon



under the leadership of Dy. S.P., they proceeded and conducted a raid at the house of Naresh Ram lying at Mohalla- Lakri Dhadhi in presence two seizure list witnesses, Rajiv Paswan and Raghunath Ram. As soon as the raid was conducted, Naresh Ram and his associates tried to ditch the raiding party, however, during course thereof, five persons were apprehended while remaining managed to escape. The apprehended persons disclosed their identity as Naresh Ram, Subodh Kumar @ Dabbu, Indrakant @ Chintu Paswan, Ravi Kumar and Chandan Kumar who were searched in presence of seizure list witnesses one by one and during course thereof, from the physical possession of Naresh Ram, 500 Gms of Charas, 2 *Purias* of smack, was found and seized, from the possession of Subodh Kumar @ Dabbu, 2 *Purias* of smack, from the possession of Indrakant @ Chintu Paswa, 2 *Purias* of smack, from the possession of Ravi Kumar, 2 *Purias* of smack and also form the possession of Chandan Kumar, 2 *Purias* of smack were found and seized for which seizure lists were prepared. They also failed to explain the possession. They also disclosed the identity of their accomplice as Arshad as well as Aslam@Tinku. Accused were apprehended.

3. On the basis of the aforesaid self statement of PW-1, Ramanand Tiwari, Town PS Case No. 471/2009 was registered under Sections 20/22 of the NDPS Act followed with an investigation and



after completing the same, charge-sheet was submitted. After taking of cognizance of respective offences, the trial commenced and concluded in a manner, subject matter of the instant appeal.

4. Defence case, as is evident from the mode of cross-examination as well as statement recorded under Section 313 CrPC is of complete denial and of false implication. However, neither any DW nor any kind of document has been adduced on their behalf.

5. In order to substantiate its case, the prosecution had examined altogether four witnesses out of whom PW-1 is Ramanand Tiwari, PW-2 is Umesh Kumar, PW-3 is Rajiv Paswan and PW-4 is Anil Kumar Srivastava. Side by side, had also exhibited Ext-1, seizure list, Ext-2, written report, Ext-3, Formal FIR and Ext-4, FSL report.

6. After hearing learned Senior Counsel appearing in Cr. Appeal No. 237/2015 as well as learned counsel Sri Niraj Kumar @ Sanidh in Cr. Appeal Nos. 218 and 219 of 2015 inconsonance with the materials having been produced by the prosecution, it is apparent that prosecution had sailed with instant trial in a most casual manner on account of non compliance of mandatory provisions of law which, has been found adverse to the interest of prosecution by consistent, conclusive judicial pronouncements. Wherever there happens to be stringent punishment coupled with some sort of presumption leaning in favour of prosecution, then in that event, the prosecution is under



obligation to follow up the mandate of law in its strict sense so that there should not survive any loopholes which could be traced out as prejudicial to the interest of the accused. So far this particular case is concerned, if the prosecution version is accepted, then in that event, 10 *Purias* having no disclosure with regard to its weight along with 500 gms of Charas have been shown to have recovered from all the accused, however, neither from the self statement of the PW-1, the informant nor from the evidence of PW-4, the Investigating Officer, it is evident that sampling was ever made either at the spot or anywhere from all the seized packets.

7. FSL report though speaks that 2 *Purias* green, 2 *Purias* white along with one piece of block in brown colour rectangular slab were seen but the FSL report also suffers from illegality, more particularly, in contravention of Standing Orders 1/88 as well as 1/89 whereunder specific quantity of seized article has to be made available for preparation of sample. Apart from this, there happens to be complete silence at the end of the prosecution, how the sample was prepared.

However, For better appreciation, the same are quoted hereinbelow:-

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.”

8. Furthermore, the informant PW-1 had not stated in his examination-in-chief that the seized article was ever deposited in Malkhana. However, PW-4, the Investigating Officer had stated



during cross-examination at para-5 that he took control of accused as well as seized article and further, the seized articles were deposited in the Malkhana but in para-6, he had categorically admitted that there is no such mention in the case diary. That creates doubt, more particularly, in the background of the fact that the alleged recovery had been shown on 08.10.2009 while from the FSL report, Ext-4, it is apparent that the same was transmitted on 19.07.2010. The prosecution is silent over retention of the so alleged seized article and further, where it was kept.

9. In the aforesaid background, there happens to be utter violation of Section 55 of the NDPS Act which speaks not only with regard to keeping of the seized article at Malkhana of the PS. rather it also provides methodology regarding preparation of sample, which also to bear seal of the officer-Incharge. From Ext-4, the FSL report, aforesaid event has not been found substantiated nor the PW-4, Investigating Officer during course of his evidence divulged. The situation has become worsen as the prosecution failed to produce the remaining seized article, more particularly, having absence of the evidence on record that they were destroyed in terms of Section 52 A of the NDPS Act.

10. The aforesaid eventualities have been found sufficient to undo the recording of the learned lower court in the background of



principle having been laid down by the Hon'ble Apex Court in the case of *Vijay Jain v. State of Madhya Pradesh* as reported in (2013) 14 SCC 527, wherein the Hon'ble Apex Court had occasion to see the impact of non production of material exhibit during course of trial and has dealt with in following way:-

9. Para 96 of the judgment of this Court in *Noor Aga case* (2008) 16 SCC 417 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* (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 NDPS Act.

10. On the other hand, on a reading of this Court's judgment in *Jitendra case* (2004) 10 SCC 562, 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* (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. Apart from this, considering the prosecution case that after coming to know about the illegal activity of the Naresh Ram, a raid was conducted and during course thereof, they ran therefrom but unfortunately, five out of seven were apprehended on the spot and further, there happens to be specific disclosure that the whole event materialized under the leader-ship of Dy.S.P. who, reason best known to the prosecution did not come forward to depose, will not exonerate the obligation of the prosecution to follow the procedure prescribed



under Section 57 of the NDPS Act whereunder Superior Official were to be reported regarding search and seizure along with apprehension of the accused within 48 hours next.

12. The aforesaid eventualities have purposely been introduced to put safeguard upon the interest of the accused so that, they would not fall victim of false implication or curse at the end of the prosecutions. In the backdrop of legal deficiency as indicated above, the facts of the case is also to be seen. It is apparent that PW-3, seizure list witness, though had accepted his signature over the seizure list but declined to corroborate the factum of seizure. PW-2, who claimed himself to be bodyguard of Dy.S.P. had, stated that he being the bodyguard of Dy. S.P., accompanied along with other members of the raiding party to the house of Naresh Ram where a raid was conducted and during course thereof, they were apprehended. However, he also happens to be silent over compliance of mandatory provisions of the Act as failed to depose over preparation of sample. With regard to evidence of PW-1 as well as PW-4, the same has already been discussed in detail hereinabove.

13. The cumulative effect does not justify the finding rendered by the learned lower court. Consequent thereupon, the judgment of conviction and sentence recorded by the learned lower court is set aside. All the appeals are allowed.



14. Appellant, namely, Naresh Ram (Criminal Appeal No. 237 of 2015) is under custody, he is directed to be released forthwith, if not wanted in any other case.

15. Since appellants, Indrakant @ Chintu Paswan (Criminal Appeal No. 218 of 2015) as well as Chandan Kumar (Criminal Appeal No. 219 of 2015) are already on bail, they are discharged from the liability of their bail bonds.

(Aditya Kumar Trivedi, J)

Patna High Court
20th day of February 2017.
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