

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Appeal (DB) No.276 of 2015

Arising Out of PS. Case No.-314 Year-2011 Thana- ALAMGANJ District- Patna

BHAIRO SINGH S/O SUKHDEO SINGH, r/o Village Kumharar, P.S. Agamkuan, District Patna.

... .. Appellant/s

Versus

The State Of Bihar

... .. Respondent/s

Criminal Appeal (DB) No. 834 of 2015

Arising Out of PS. Case No.-314 Year-2011 Thana- ALAMGANJ District- Patna

MD. ASIM @ MD. ASIM ALAM Son of Nejamuddin, resident of village - Samaspur, P.S. - Bela, District - Gaya.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

Appearance :

(In Criminal Appeal (DB) No. 276 of 2015)

For the Appellant/s : Mr. Manish Kumar No. 13, Adv, Mr. Rohit Kumar, Adv, Mrs. Kanchan Jha, Adv and Mrs. Nitu Kumari No. 7, Adv

For the State : Mr. Ashwani Kumar Sinha, Addl.P.P.

(In Criminal Appeal (DB) No. 834 of 2015)

For the Appellant/s : Mr. Sanjay Kumar @ Manu, Adv, Mr. Raj Kishore Prasad, Adv and Mrs. Anjani, Adv

For the State : Mr. Ashwani Prasad Sinha, Addl. P.P.

CORAM: HONOURABLE DR. JUSTICE RAVI RANJAN

and

HONOURABLE MR. JUSTICE S. KUMAR

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE S. KUMAR)

Date : 06.11.2017

Criminal Appeal (D.B.) 276 of 2015 and Criminal Appeal (D.B.) 834 of 2015 are in the form of Jail Appeal arising out of judgment and order of conviction dated 12.05.2014 under



Section 20(b)(ii)(C) of the NDPS Act and order of sentence dated 13.05.2014 to undergo rigorous imprisonment for 14 years with fine of Rs. 1,00,000/- each and in default of payment of fine they shall further undergo rigorous imprisonment for two years passed in Special Case No. 46 of 2011 arising out of Alamganj P.S. Case No. 314 of 2011 under Sections 20 and 22 of the NDPS Act, passed by the Additional Sessions Judge-XI, Patna.

Heard learned counsel for the parties.

Briefly stated, the facts of the case is that as per FIR Sidhnath Singh, police Sub-Inspector, was posted in Alamganj P.S. Patna and on 18.11.2011 at about 9:30 am, he received secret information that one white coloured Tavera Jeep is coming from Hajipur towards Patna which contains ganza loaded on it. On receiving said information, he took Alamganj Mobile No. 1 along with A.S.I. Vikash Chandra Yadav and other police force personnel and reached southern end of Ganga Over-Bridge at about 9:40 am. He saw the white coloured Tavera Jeep coming from the opposite side, stopped the said vehicle and found two persons sitting on the vehicle and took away the key of the vehicle, and thereafter searched the vehicle and found ganza packet in the said vehicle. In presence of two



independent witnesses seized 40 packets of ganza each packet containing 10 Kg of ganza totalling 4 Quintals and prepared seizure list of the contraband articles in presence of two independent witnesses. A copy of the same was given to the two accused persons, who put their signature on the seizure list. The two accused persons, one who was driving the vehicle disclosed his name as Md. Aasim Alam and the person sitting by his side disclosed his name as Bhairo Singh and the registration number of the vehicle was BR-06L-1512, however, it appears that the number of the vehicle was BR-06L-1215 which was erased and mentioned as BR-06L-1512, and on demand they could not produce the ownership documents of the vehicle or the driving licence. Both persons were taken into custody giving rise to Alamganj P.S. Case No. 314 of 2011 dated 18.11.2011 for the offences punishable under Section 414 of the Indian Penal Code and Section 20/22 of the NDPS Act and after registration of FIR the investigation of the case was handed over to A.S.I Vikash Chandra Yadav.

After completing the investigation the investigating officer, A.S.I. Vikash Chandra Yadav, submitted chargesheet on 16.02.2012 under Section 414 of the Indian Penal Code and Section 20/22 of the NDPS Act, against the accused-appellants.



The charges were framed against the accused-appellants under Section 20(b)(ii)(C) of the NDPS Act by the Additional Sessions Judge-II, Patna on 17.04.2012, and the accused-appellants pleaded not guilty and claimed to be tried. No charge under Section 414 of the IPC was framed against the accused-appellants.

PW-1 Md. Ladan is the seizure list witness, who was declared hostile by the prosecution. He denied that 4 Quintals of ganja was seized in his presence. He further stated that his house was within the campus of the police station and on the request made by the informant (Sidhnath Singh), he put his signature over the seizure list in the Police Station.

PW-2 Sonu Kumar is also seizure list witness who was also declared hostile. He stated that no ganja was seized in his presence. He also stated that his house was within the campus of the police station and on the request made by the informant (Sidhnath Singh), he put his signature over the seizure list in the Police Station.

PW-3 is Vikash Chandra Yadav, who is the investigating officer of the case. He has stated in his deposition that on 18.11.2011, he was posted as A.S.I. in Alamganj P.S., Patna Sahib and Sidhnath Singh (informant) police Sub-



Inspector was also posted there. On receiving secret information he had accompanied him on Mobile Jeep No. 1, but Sidhnath Singh (informant) did not disclose to him about the secret information received by him and when in midway Sidhnath Singh received phone call, he said to move quickly towards Ganga Bridge and thereafter all on the Jeep reached the southern side of the Ganga Over-Bridge and Sidhnath Singh (informant) asked to stop the vehicle coming from the side of Hajipur and soon they saw the white coloured Tavera Jeep coming from the side of Hajipur, which was stopped and two persons were found sitting in the vehicle and 40 packets of ganza was found kept in the vehicle and the person who was driving the Tavera Jeep disclosed his name as Md. Aasim Alam and the person who was sitting by his side whose leg was fractured disclosed his name as Bhairo Singh. He further stated that 40 packets of ganza was weighed and it was found to be 4 Quintals, which was seized and seizure list was prepared and one copy each of which was given to both the accused-appellants in the presence of two independent witnesses. Sidhnath Singh (informant) prepared his self written statement which was in his writing and signature and thereafter they came to the Police Station along with the seized ganza as well as the



Tavera Jeep with two arrested accused. Thereafter formal FIR was drawn. He further stated that he was given the charge of investigation of the case and after taking charge of the investigation, he took re-statement of Sidhnath Singh (informant) and other police personnel accompanying in the Jeep and he also verified the address of the accused-appellants and sent the sample of seized ganza to Scientific Forensic Laboratory, Kolkata and Scientific Forensic Laboratory, Patna through trial court. The requisition was sent through Patna Civil Court and thereafter he deposited the sample in Forensic Science Laboratory, Patna and a receipt was granted to him. He also verified from the D.T.O. Office regarding the seized Tavera Jeep and after investigation submitted the chargesheet in the court. In his cross-examination he stated that he took charge of the investigation at 11:15 am on 18.11.2011. He also accompanied the raiding party and was made investigating officer. In paragraph no. 6 of his cross-examination, he has stated that neither there is any information of informing the senior officials about the seizure nor it has been mentioned in the case diary or there is any document in support of it. He did not produce the Tavera Jeep or the seized contraband articles before the court. Only sample was produced in the court. He



has further stated that he was fully aware of the mandatory provisions as mentioned in the NDPS Act. He further stated that if the seized contraband article is less in quantity then the same is produced before the court but if its quantity is much then only sample is produced in the court. He has further stated that there is no reference in the case diary of keeping the seized 400 Kgs of ganza in the Malkhana of the P.S. There is no reference of sealing of sample. The samples were sent on 17.12.2011 for chemical test. In the diary it has not been stated that from which packet the sample was drawn but it has been stated that the weight of sample is 25 Grams. In paragraph no. 20 of the case diary, it has been stated that he received sealed sample from the court. He further stated in paragraph no. 10 of his cross examination that who weighed the contraband ganza has not been disclosed in the case diary. In paragraph no. 11 of his cross-examination he stated that on 23.12.2011, the same was sent to FSL. He does not know that where the sample of the seized ganza was kept from 17.12.2011 to 23.12.2011. In paragraph no. 13 of his cross-examination, he stated that no inventory was prepared of the seized ganza before the Magistrate nor any certificate was given by the Magistrate.

PW-4 is Lalan Ram, who was posted as Havildar and



had accompanied Vikash Chandra Yadav (I.O.) on the patrolling Jeep and searched the Tavera Jeep from which 40 packets of ganza each containing 10 Kg was recovered and seized and two persons were arrested. In his cross-examination, he stated that he had accompanied the police party in search and seizure of the Tavera Jeep. The checking and search was by oral order. In his cross-examination, he further stated that the order for search of vehicle was given by Vikash Chandra Yadav and Vikash Chandra Yadav was the only officer present there. In paragraph no. 8 of his cross-examination, he stated that the seized ganza was kept in the Malkhana of P.S. and Sheonath Singh was incharge of the Malkhana. The Officer-in-Charge of the Alamganj P.S. at that point of time was P.N.M Singh.

PW-5 is Yogendra Pandit. He stated in his examination-in-chief that on 18.11.2011, he was posted as police Sub-Inspector and in the morning an information was received in the P.S. that one white coloured Tavera Jeep loaded with ganza was coming from Hajipur towards Patna through Gandhi Setu and thereafter S.I. Sidhnath Singh (informant) asked other police personnel to sit in Mobile Jeep No. 1 and proceeded towards Gandhi Setu. At about 9:30 am the Mobile Jeep No. 1 along with all police personnel left for Gandhi Setu



and at about 9:40 am they reached the southern end of Gandhi Setu and saw the white coloured Tavera Jeep coming from the Northern side and after search of the vehicle, 40 packets of ganza was recovered from the vehicle and two persons who were sitting in the vehicle were arrested and seizure list was prepared at about 10:00 am by Sidhnath Singh (informant) before the two independent witnesses. In paragraph no. 5 of his cross-examination, he had stated that the seizure list was prepared at 10:00 am. He also does not know that whether 14 has been over-written as 10 or not. He has also stated that he does not know that there is over-writing in the seizure list and self statement. He has also stated that 40 packets of ganza is not before him in the court room.

PW-6 Sidhnath Singh is the informant of this case. He had stated in his examination-in-chief that on 18.11.2011, he was posted as police Sub-Inspector in Alamganj PS. Patna, where he received a secret information that one white coloured Tavera Jeep is coming from Hajipur side towards Patna with ganza kept in it, and he had to proceed at once, as if there would be delay the accused persons could not be apprehended. He stated that he made entry in the station diary of the said secret information and along with other police personnel proceeded



towards Gandhi Setu and found one white coloured Tavera Jeep coming from the side of Hajipur and the same was stopped and searched and 40 packets of ganza each containing 10 Kg was seized and two persons sitting in the vehicle were arrested and seizure list was prepared in presence of two independent witnesses at about 10:00 am. Thereafter the seized ganza along with the accused-appellants and Tavera Jeep were brought to the P.S and formal FIR was drawn and registered. In his cross-examination, he stated that he did not mention about the secret information in his self statement. He stated that he has not made any over-writing. He stated that nowhere in his self statement he had said about weighing of the seized ganza. In paragraph no. 7 of his cross-examination, he had stated that the seized ganza is not before him in the court room. In paragrpah no. 14 of his cross-examination, he had admitted that at the time of seizure there was no gazetted officer or Magistrate with him.

From the facts of the prosecution case, it is apparent that secret information which was received by the informant was entered in the station diary as required under Section 42(1) but the same was not exhibited. The said secret information was not communicated to the higher police authorities as required under Section 42(2) of the NDPS Act. The vehicle seized was



not a public carrier and as such any search and seizure has to be made in presence of a gazetted officer or any officer empowered by the Central Government and in the present case, the informant himself has admitted that the search and seizure of the vehicle was done in which neither any gazetted officer nor any Magistrate was present and the same is in contravention of Section 50 of the NDPS Act. The accused persons were not even informed about their right to be searched before a gazetted officer or Magistrate as mandated under Section 50 of the NDPS Act.

Similar issue had come up before the Apex Court in the case of *State of Rajasthan vs Jagraj Singh @ Hansa reported in (2016) 11 SCC 687*, in which also search and seizure was made in a Jeep which was not a public transport and High Court set aside the conviction for non-compliance of mandatory provisions of Section 42(1)(2) and 50 the NDPS Act and same was upheld by the Apex Court. The only difference between the present case and above referred case is that in the present case search and seizure was made between sunrise and sunset whereas in case as referred, search and seizure was made between sunset and sunrise. The relevant portion of referred judgment of the Apex Court is reproduced hereinbelow:-

“5.3 The jeep which was the personal jeep of Vira Ram



could not be treated as public transport vehicle. No evidence was brought on the record that there was any permit for public transport vehicle. The brother in law of Vira Ram i.e. Kartararam do not support the case that the vehicle was a public transport vehicle. Section 43 of the Act was not applicable; hence, the view of the court below that compliance of Section 42 was not necessary, is incorrect.

9. Whether the High Court committed error in acquitting the accused is the issue which needs to be considered in this appeal. Whether there were sufficient material to support the findings of the High Court regarding non-compliance with Section 42(1) and Section 42 (2) and whether Section 43 was applicable in the present case are the other issues which need to be answered. Whether recovery as claimed by the prosecution is supported from the evidence on record and material and samples were properly sealed are other related issues.

18. Explanation to Section 43 defines expression “public place” which includes any public conveyance. The word “public conveyance” as used in the Act has to be understood as a conveyance which can be used by public in general. The Motor Vehicles Act, 1939 and thereafter the Motor Vehicles Act, 1988 were enacted to regulate the law relating to motor vehicles. The vehicles which can be used for public are public Motor Vehicles for which necessary permits have to be obtained. Without obtaining a permit in accordance with the Motor Vehicles Act, 1988, no vehicle can be used for transporting passengers.

25. The question considered above arise frequently before the trial courts. Therefore we find it necessary to set out our conclusions which are as follows :

(1) If a police officer without any prior information as contemplated under the provisions of the NDPS Act makes a search or arrests a person in the normal course of investigation into an offence or suspected offences as provided under the provisions of CrPC and when such search is completed at that stage Section 50 of the NDPS Act would not be attracted and the question of complying with the requirements thereunder would not arise. If during such search or arrest there is a chance recovery of



any narcotic drug or psychotropic substance then the police officer, who is not empowered, should inform the empowered officer who should thereafter proceed in accordance with the provisions of the NDPS Act. If he happens to be an empowered officer also, then from that stage onwards, he should carry out the investigation in accordance with the other provisions of the NDPS Act.

(2-A) Under Section 41(1) only an empowered Magistrate can issue warrant for the arrest or for the search in respect of offences punishable under Chapter IV of the Act etc. when he has reason to believe that such offences have been committed or such substances are kept or concealed in any building, conveyance or place. When such warrant for arrest or for search is issued by a Magistrate who is not empowered, then such search or arrest if carried out would be illegal. Likewise only empowered officers or duly authorized officers as enumerated in Sections 41(2) and 42(1) can act under the provisions of the NDPS Act. If such arrest or search is made under the provisions of the NDPS Act by anyone other than such officers, the same would be illegal.

(2-B) Under Section 41(2) only the empowered officer can give the authorisation to his subordinate officer to carry out the arrest of a person or search as mentioned therein. If there is a contravention, that would affect the prosecution case and vitiate the conviction.

(2-C) Under Section 42(1) the empowered officer if has a prior information given by any person, that should necessarily be taken down in writing. But if he has reason to believe from personal knowledge that offences under Chapter IV have been committed or materials which may furnish evidence of commission of such offences are concealed in any building etc. he may carry out the arrest or search without a warrant between sunrise and sunset and this provision does not mandate that he should record his reasons of belief. But under the proviso to Section 42(1) if such officer has to carry out such search between sunset and sunrise, he must record the grounds of his belief.

To this extent these provisions are mandatory and contravention of the same would affect the prosecution



case and vitiate the trial.

(3) Under Section 42(2) such empowered officer who takes down any information in writing or records the grounds under proviso to Section 42(1) should forthwith send a copy thereof to his immediate official superior. If there is total non-compliance of this provision the same affects the prosecution case. To that extent it is mandatory. But if there is delay whether it was undue or whether the same has been explained or not, will be a question of fact in each case.

(4-A) If a police officer, even if he happens to be an "empowered" officer while effecting an arrest or search during normal investigation into offences purely under the provisions of CrPC fails to strictly comply with the provisions of Sections 100 and 165 CrPC including the requirement to record reasons, such failure would only amount to an irregularity.

(4-B) If an empowered officer or an authorised officer under Section 41(2) of the Act carries out a search, he would be doing so under the provisions of CrPC namely Sections 100 and 165 CrPC and if there is no strict compliance with the provisions of CrPC then such search would not per se be illegal and would not vitiate the trial.

The effect of such failure has to be borne in mind by the courts while appreciating the evidence in the facts and circumstances of each case.

(5) On prior information the empowered officer or authorised officer while acting under Sections 41(2) or 42 should comply with the provisions of Section 50 before the search of the person is made and such person should be informed that if he so requires, he shall be produced before a Gazetted Officer or a Magistrate as provided thereunder. It is obligatory on the part of such officer to inform the person to be searched. Failure to inform the person to be searched and if such person so requires, failure to take him to the Gazetted Officer or the Magistrate, would amount to non-compliance of Section 50 which is mandatory and thus it would affect the prosecution case and vitiate the trial. After being so informed whether such person opted for such a course or not would be a question of fact.”



As far as sampling of the seized Ganza is concerned, the same was required to be done as per the procedure laid down in standing order of 1989 of the Central Government, which mandates preparation of samples from seized Narcotic substance in presence of accused and witnesses at the time of seizure. Para 2.2 of the standing order reads as follows:-

“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.”

(emphasis is ours)

However, the Apex Court has also found in the case of ***Union of India vs Mohanlal and Ors reported in (2016) 3 SCC 379***, that sampling in the said manner is not being followed by many enforcement agencies as many times, it is not practical to prepare sample at the place of seizure and the same is to be prepared as per the provision contained in Section 52-A of the NDPS Act. In the present case also admittedly the samples were not prepared at the place of seizure but when, how and by whom sample was prepared has nowhere been mentioned. As per procedure followed at the time of seizure of samples were required to be collected from each 40 packets of seized Ganza as per procedure prescribed under Section 52-A of



the NDPS Act. Section 52-A of the NDPS Act, reads as follows:-

[52A. Disposal of seized narcotic drugs and psychotropic substances.](1) The Central Government may, having regard to the hazardous nature of any narcotic drugs or psychotropic substances, their vulnerability to theft, substitution, constraints of proper storage space or any other relevant considerations, by notification published in the Official Gazette, specify such narcotic drugs or psychotropic substances or class of narcotic drugs or class of psychotropic substances which shall, as soon as may be after their seizure, be disposed of by such officer and in such manner as that Government may from time to time, determine after following the procedure hereinafter specified.

(2) Where any narcotic drug or psychotropic substance has been seized and forwarded to the officer-in-charge of the nearest police station or to the officer empowered under section 53, the officer referred to in sub-section (1) shall prepare an inventory of such narcotic drugs or psychotropic substances containing such details relating to their description, quality, quantity, mode of packing, marks, numbers or such other identifying particulars of the narcotic drugs or psychotropic substances or the packing in which they are packed, country of origin and other particulars as the officer referred to in sub-section (1) may consider relevant to the identity of the narcotic drugs or psychotropic substances in any proceedings under this Act and make an application, to any Magistrate for the purpose of-

(a) certifying the correctness of the inventory so prepared; or

(b) taking, in the presence of such Magistrate, photographs of such drugs or substances and



certifying such photographs as true; or

(c) allowing to draw representative samples of such drugs or substances, in the presence of such Magistrate and certifying the correctness of any list of samples so drawn.

(3) Where an application is made under subsection (2), the Magistrate shall, as soon as may be, allow the application.

(4) Notwithstanding anything contained in the Indian Evidence Act, 1872 (1 of 1872) or the Code of Criminal Procedure, 1973 (2 of 1974), every court trying an offence under this Act, shall treat the inventory, the photographs of narcotic drugs or psychotropic substances and any list of samples drawn under subsection (2) and certified by the Magistrate, as primary evidence in respect of such offence].”

(emphasis is ours)

The I.O. has stated that the sample of 25 gram was prepared but who, how, when it was prepared, has not been stated. However, there is much variation in weight of 25 Gram sample sent to F.S.L. Kolkata which in the report of F.S.L. Kolkata is 110 Gram, whereas no weight or seal number and other details is given in the sample send to FSL, Patna which makes the case of prosecution very doubtful. None of the procedure as prescribed by Section 52-A of the NDPS Act for preparation of inventory, detail description of seized Ganja and sampling in presence of Magistrate has been followed in this case, which vitiates entire trial.



As far as storage of seized 4 Quintals of Ganza, is concerned the I.O. who took the charge of the investigation at about 11:15 am on the same day has stated that he has not mentioned in the case diary regarding keeping of seized ganza in the Police Station Malkhana and has not obtained any receipt of the said deposit in the Police Station Malkhana. There is no P.S. Malkhana register showing safe custody of 4 Quintals of seized Ganza. The seized 4 Quintals of ganza was never produced before the Special Court or its inventory was prepared by any Magistrate or it was deposited in the Malkhana of Alamganj P.S. Patna, as required under Section 52-A of the NDPS Act, and the same would be treated as primary evidence in trial.

There is no destruction certificate of the seized 400 Kg of ganza which is mandatory requirement under NDPS Act. Nowhere in the prosecution case it has been stated that where 4 Quintals of ganza has been kept. There is no compliance of Section 55 of the NDPS Act with regard to safe custody of seized Ganza. Section 55 of the NDPS Act, reads as follows:-

“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.”

Considering the facts and circumstances of the present case, this Court finds that the order of conviction and sentence and fine of the accused-appellants are not sustainable either in fact or in law and the investigation is faulty and defective and mandatory provisions of NDPS Act has not been complied. Both the appeals filed by the accused-appellants are allowed, and the judgment and order of conviction and order of sentence and fine is set aside. The appellants are directed to be released forthwith, if not wanted in any other case.

(S. Kumar, J)

Dr. Ravi Ranjan,J. : I agree.

(Dr. Ravi Ranjan, J)

ranjan/-

AFR/NAFR	AFR
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