

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.692 of 2016

Arising Out of PS.Case No. -134 Year- 2011 Thana -AMAS District- GAYA

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1. Mangal Singh Son of late Ram Pravesh Ram R/o Hetampur, Ps. Barhara, District Bhojpur.

.... Appellant/s

Versus

1. The State of Bihar

.... Respondent/s

with

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Criminal Appeal (SJ) No. 538 of 2016

Arising Out of PS.Case No. -134 Year- 2011 Thana -AMAS District- GAYA

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1. Bhuneshwar Singh son of Ram Govind Singh Resident of Village- Ekauna, P.S.- Barhara, District- Bhojpur.

.... Appellant/s

Versus

1. The State of Bihar

.... Respondent/s

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Appearance :

(In CR. APP (SJ) No. 692 of 2016)

For the Appellant/s : Mr. Syed Mohammad Shabbir Alam, Advocate

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

(In CR. APP (SJ) No. 538 of 2016)

For the Appellant/s : Mr. Nawal Kishore Singh, Advocate

Mr. Jitendra Nath Tiwary, Advocate

For the Respondent/s : Mr. Syed Ashfaque Ahmad, APP

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI

ORAL JUDGMENT

Date: 12-07-2017

Criminal Appeal (SJ) No.538 of 2016 wherein Bhuneshwar Singh is the appellant, Criminal Appeal (SJ) No.692 of 2016 wherein Mangal Singh is the appellant have been heard conjointly and are being decided by a common judgment as both the appeals arise out of common judgment of conviction dated 11.05.2016 and order of sentence dated 13.05.2016 passed by Additional Sessions Judge-cum-Special Judge, (NDPS), Gaya relating to NDPS Case No. 20/2011



arising out of Amas PS Case No. 134/2011 whereby and whereunder both the appellants have been found guilty for an offence punishable under Sections 20(C) of NDPS Act and each one has been directed to undergo RI for 10 years with fine of Rs. 1,00000/- (One Lac) in default thereof, to undergo RI for 5 years, additionally.

2. Jairam Singh, S.I. (PW 2) of Amas PS filed a written report addressed to O/C, Amas PS divulging thereunder that on the same day while he along with S.I, Ramdhin Ram and police personnel were proceeding towards Chandi Asthan for distribution of fertilizer, they were instructed by (yourself) the O/C, to conduct a raid as he had received confidential information regarding transportation of Ganja from Sherghati to Aurangabad. On the basis of aforesaid information, they had gone toward toll-plaza where they indulged in surveillance and during course thereof, one jeep bearing Registration No. WB16N-2047 came. The driver, seeing the police, dashed against barrier, taken out and sped away the vehicle which was intercepted after a short chase. Two persons were apprehended including the driver who disclosed their identity as Bhuneshwar Singh, occupant and Mangal Singh, driver. Furthermore, in presence of two seizure list witnesses, namely, Rampavitra and Rajnish, apart from physical search of aforesaid two persons, the vehicle was also searched and during course thereof, from a box attached with jeep, 80 packets of Ganja



each containing 1 K.G. were seized and for that both the accused did not plead any kind of explanation whereupon seizure list was prepared material as well as accused were taken into custody and then, the written report was lodged.

3. On the basis of the aforesaid written report, Amas PS Case No. 134/2011 was registered under Section 20(C) and 22(C) of the NDPS Act followed with investigation which culminated by way of submission of charge-sheet which happens to be basis of trial meeting with ultimate result, the subject matter of instant appeal.

4. The defence case as is evident from the mode of cross-examination as well as statement of accused under Section 313 CrPC is that of complete denial of occurrence. However, neither any DW nor any chit of paper has been adduced on behalf of defence.

5. In order to substantiate its case, prosecution had examined altogether eight PWs out of whom PW-1, Ramdhin Ram, PW-2, Jairam Singh, PW-3, Punawala, PW-4, Binay Kumar, PW-5, Arjun Thakur, PW-6, Sanjay Baitha, PW-7, Nagendra Nath Tiwari and PW-8, Dr. Ram Bilas Prasad. Side by side had also exhibited Ext-1, written report, Ext-2 Formal FIR Ext-3, Seizure list and Ext-4, FSL report.

6. Learned respective counsels representing both the appellants independently, have submitted that the prosecution case as



has been flashed during course of trial is not at all convincing in the background of deficiency persisting thereunder. To substantiate such plea, it has been submitted that from the evidence of PW-7, the Investigating Officer-cum-O/C of Amas PS, it is apparent that apart from seizure having been made on 13.09.2011, another seizure was made on 15.09.2011 after getting an information from other sources whereupon the seized jeep was searched but none of the other witnesses have substantiated the same. In the aforesaid background, it has also been submitted that recovery as alleged occurred under two separate instance for that two separate seizure lists were prepared out of which seizure list dated 13.09.2011 has been brought up on record while seizure list relating to 15.09.2011 has not been brought up as an exhibit and that has purposely been withheld by the prosecution so that the controversy regarding preparation of sample could not arise and in the aforesaid background, adverse inference is to be drawn against the prosecution. Furthermore, it has also been submitted that none of the witnesses had deposed with regard to the manner of sampling. Apart from this, it has also been submitted that none of the witnesses had stated that sample was prepared in presence of seizure list witnesses having their signatures over the sample including accuses who had also put their signatures over the same and further, the sealing of the sample. Therefore, the process of sampling which



happens to be backbone of the prosecution is found completely smashed.

7. Furthermore, it has also been submitted that material has not been produced before the court as an exhibit. The prosecution has not produced any reliable evidence which the prosecution could have by way of exhibiting the Malkhana register that the so alleged seized Ganja was ever deposited in the Malkhana under proper reference in the Malkhana register in sealed condition and corresponding information regarding taking it out from the Malkhana for the purpose of preparation of sample and then again depositing the same in sealed condition in terms of Section 55 of the NDPS Act and so, the whole prosecution case comes within the scanner's eye whereunder it did not speak with regard to its reliability. Furthermore, it has also been submitted that from the Ext-4, it is evident that it was alleged to be transmitted on 14.10.2011 while it was received at the office of FSL on 03.11.2011 and the prosecution happens to be silent with regard to intermediary period in whose possession samples were. Furthermore, it did not justify whether the aforesaid sample relates with alleged seizure dated 13.09.2011 or 15.09.2011, apart from silence at the end of prosecution regarding intermediary possession.

8. It has further been submitted that though under the NDPS Act mode of sampling, process of sampling, numbers of



sampling have not been properly exposed but, the Narcotic Bureau, issued orders time to time in order to guard the issue and if the aforesaid orders are being taken together, it is apparent that whenever there happens to be recovery of narcotic substance in bulk and if there happens to be packets containing same weight material, then in that event, there should be a group so formulated comprising 20 packet and two samples from each group is to be taken and it should weigh in between 5 to 25 grams. At least the prosecution should have disclosed the manner of sampling whether any such group was formulated and if not, then whether samples from each of the packets numbering 80 were taken out, two in number having duly sealed and further to corroborate the same, once sealed sample should have been produced before the Court. Deficiency on that very score at the end of the prosecution is indicative of the fact that neither there was search nor seizure rather the appellants fell victim of high handedness of police.

9. Learned APP while controverting the submissions having been made on behalf of appellants, has submitted that on flimsy grounds the evidence of the prosecution should not be brushed aside. Recovery of Ganja in such a huge quantity could not be an example of false implication and so, the version of the prosecution having been substantiated by examination of witnesses along with documentary evidence which happens to be genuine, reliable,



admissible, appreciable identifying the appellants to be in possession thereof, during course of search and seizure, coupled with presumption which has not been rebutted at the end of appellants. Subsequently thereof, judgment of the learned lower court is fit to be confirmed.

10. In this case, really, prosecution has adopted a peculiar methodology since its inception unknown to the Act. Such methodology is apparent from the record itself. Both the appellants were apprehended on 13.09.2011, search and seizure were made in their presence allegedly having their signature over the same, got them remanded to judicial custody on the following day and then thereafter, as is evident though not exhibited on record, another seizure list to be relating to 23 Kilograms of Ganja on 15.09.2011 from a box having been attached with the mudguard of the jeep bearing Registration No. WB16N-2047. When the aforesaid recovery was made, then in that event, proper investigation should have been made relating thereto, trial should have been proceeded for against the appellants for the total quantum of recovery of Ganja because of the fact that when the format of the charge has been gone through, it relates with 13th September 2011 and with regard to recovery of 80 Kilograms of Ganaja . It is not that the case of the prosecution should be doubted on that very score rather it happens to be an occasion



which lent doubt regarding authenticity of the prosecution version.

11. In likewise manner, the other illegality persisting on the record is with regard to status of PW-1, Ramdhin Ram. He turned up for evidence, his examination-in-chief was recorded, his part cross-examination was there and then thereafter, he did not turn up for cross-examination. The learned lower court instead of perceiving the amplitude of Section 33 of the Evidence Act, considered the prayer of the prosecution and directed to expunge his evidence vide order dated 11.02.2015, although there happens to be no such provision available under CrPC as well as under Evidence Act, and by such activity discarded evidence of PW-1 from consideration.

12. From the evidence available on the record, it is evident that PWs-3, 4, 5 and 6 have not identified both the appellants in the dock although they were members of raiding party as well as supported the case of the prosecution regarding recovery of Ganja from a Jeep. Therefore, either their presence as a member of raiding party, conduction of raid, apprehension of jeep, search and seizure followed with recovery happens to be suspicious or their presence in that capacity was not at all. Furthermore, PW-6, Sanjay Baitha as per signature having over the seizure list of dated 15.09.2011 given an impression of his presence but during course of evidence, the prosecution had not made any effort on that very score. Therefore,



legal evidence lacks on account of aforesaid activities of the respective witnesses against the appellants, at least identifying them to be the culprit having been apprehended during course of raid.

13. Now the evidence of remaining witnesses has to be seen. Though, the learned lower court treated PW-1 illegally, however, from his evidence it is evident that he was one of the members of the raiding party under the leadership of PW-2, Jai Ram Singh who, after reaching at Toll-plaza put the situation under their surveillance and during course thereof, found a jeep which was intercepted. Two occupants of the jeep managed to escape while the driver and one another were apprehended who disclosed their identity as Mangal and Bhuneshar. Nothing was recovered from their physical possessions. However, during course of search of jeep, from a box having present between two seats 80 packets of Ganja were seized, each weighing 1 Kilogram in presence of Rampavitra and Rajnish. Also put their signatures. He had identified the accused in dock. He had not spoken a word with regard to taking out of sample sealing of material exhibit transferring possession at P.S., deposit of the same in *Malkhana*. Though had admitted presence of PW-7, O/C also during course of search and seizure.

14. PW-2 is Jai Ram Singh, informant who had reiterated his earlier version and further disclosed that vehicle was searched and



during course thereof, from a box having present in between two seats, 80 packets, each weighing 1 KG Ganja was seized. He exhibited his written report, search-cum-seizure list but he too failed to disclose whether sample was prepared in his presence as well as in presence of witness accused, having their signature and further, the seized 80 packets of Ganja were sealed by him or in his presence. The most surprising feature coming out from his evidence is to the effect that he had not disclosed whether those recovered Ganja were under his possession and in likewise manner, whether the seized Ganja along with written report were placed before the O/C in fulfilment of requirement so prescribed under Section 55 of the NDPS Act. If the evidence of this witness is taken together with the evidence of PW-1, it is apparent that PW-1 had disclosed presence of PW-7, Nagendra Nath Tiwary and further identified his active involvement during course of search and seizure which, PW-2 completely ignored and the reason best known to the prosecution. Again this witness is silent with regard to preparation of sample.

15. PW-7 is the officer-in-charge as well as the Investigating Officer. He had deposed that on 13.09.2011, he was officer-in-charge of Amas PS. After receipt of the written report, he had registered a substantial case and took up investigation. He had recorded statement of the witnesses, visited the place of occurrence,



seen the samples, filed petition before the court seeking permission for examination of the sample and then thereafter, as he was transferred, handed over the charge. During midst thereof, it has also been divulged by him that he took up investigation at the place of occurrence itself as he was present there. He had also joined hands with the other police personnel during course of apprehension of the accused. Vehicle was searched in his presence and from there 80 packets, each weighing 1 Kg ganja were seized. On getting confidential information, vehicle was re-searched and during course thereof, 23 packets of Ganja were again seized.

16. From his evidence, it is apparent that he happens to be completely silent whether the seized articles at least regarding date 13.09.2011 was actually possessed by him at the place of occurrence itself, handed over to him by PW-2 at the place of occurrence itself, or was handed over to him along with written report at the PS and further, in terms of Section 55 of the Act, he had sealed with his seal and deposit the same in Thana Malkhana under proper entry under Malkhana register. In likewise manner, he failed to disclose that sampling was at the place of occurrence or at the PS itself and on which day as per Ext-4 suggests its transportation on 14.10.2011. On account of absence of positive evidence that the Ganja was kept at Malkhana under proper entry, the prosecution has to explain under



whose possession Ganja remained from 13.09.2011 to 13.10.2011, where the prosecution case is lacking.

17. PW-8, Dr. Ram Vilash is the part Investigating Officer who had stated that he had transmitted the sealed sample to FSL for proper examination and then thereafter, submitted the charge-sheet. Again from his evidence, it is apparent that he had not claimed himself to have prepared the sample.

18. The Hon'ble Apex Court in *Noor Aga case (2008) 16 SCC 417* has observed that on account of prescribing the stringent punishment, the prosecution has to follow the mandatory provisions of law so that, there should not be an opportunity to have an access to the prosecution to implicate or one should face high handedness of the prosecution. Furthermore, in the aforesaid case, the Hon'ble Apex Court has also taken cognizance with regard to non production of material exhibit in court whereupon observed that the prosecution lacks physical evidence and more particularly, where the version of the prosecution suffers from impropriety then in that event, non production of material in the court happens to be additional ground to discard the whole prosecution case.

19. In the case of *Vijay Jain v. State of Madhya Pradesh* as reported in *(2013) 14 SCC 527*, 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.

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12. We are thus of the view that as 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 (PW 2 and PW 3) to the seizure of the materials does not establish the seizure of the brown sugar from the possession of the appellants, the judgment of the trial court convicting the appellants and the judgment of the High Court maintaining the conviction are not sustainable.”

20. Considering the totality of the event inconsonance with the deficiency persisting on the record, it is evident that prosecution case suffers from following deficiencies:-

(i) Independent search and seizure witnesses have not been



examined nor there happens to be an explanation on that score. (ii) Material exhibit has been made (iii) No positive evidence has been adduced over keeping the seized material in the *Malkhana*, (iv) No evidence regarding storage of seized articles. (v) No evidence over preparation of sample (vi) No evidence over transmitting information to superior officials over arrest of accused along with recovery of Ganja, (vii) No evidence whether sampling was relating to first recovery or 2nd recovery or from both, though presumption is found attributed against accused but same is to be taken only after having the prosecution succeeds in duly proving its case.

21. On account of aforesaid lapses, it looks unsafe to concur with the finding recorded by the learned lower court.

22. That being so, the same is set aside. Both the appeals are allowed. Both the appellants are under custody, hence, are directed to be set at liberty forthwith if not wanted in any other case.

(Aditya Kumar Trivedi, J)

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