

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.409 of 2015

Arising Out of PS.Case No. -9 Year- 2013 Thana -PURUSHOTTAMPUR District-
WESTCHAMPARAN(BETTIAH)

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Mojamil Shekh S/o Nurul Hasan Resident of Village Bhedihari, P.S.
Purushottampur, District West Champaran.

..... Appellant/s

Versus

The State of Bihar

..... Respondent/s

with

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Criminal Appeal (SJ) No. 445 of 2015

Arising Out of PS.Case No. -9 Year- 2013 Thana -PURUSHOTTAMPUR District-
WESTCHAMPARAN(BETTIAH)

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Shekh Baharul @ Baharul Shekh Son of Shekh Mqubul @ SK. Maquful, Resident
of Village- Bhedihari, P.S. Purushottampur, District- West Champaran.

..... Appellant/s

Versus

The State of Bihar

..... Respondent/s

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Appearance :

(In CR. APP (SJ) No.409 of 2015)

For the Appellant/s : Mr. Bimlesh Kumar Pandey, Adv.

For the Respondent/s : Dr. Mayanand Jha, APP

(In CR. APP (SJ) No.445 of 2015)

For the Appellant/s : Mr. Bimlesh Kumar Pandey, Adv.

For the Respondent/s : Dr. Mayanand Jha, APP

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI

ORAL JUDGMENT

Date: 09-03-2017

Heard learned counsel for the appellants as well as
learned Additional P.P. for the State.

2. Criminal Appeal (SJ) No. 409 of 2015 wherein
Mojamil Shekh is the appellant while Criminal Appeal (SJ) No. 445



of 2015 wherein Shekh Baharul @ Baharul Shekh is the appellant, commonly originate against the judgment of conviction dated 04.05.2015 whereby and whereunder both the appellants have been found guilty for the offence under Section 20(b)(ii) (C), 23(C) of the NDPS Act and order of sentence dated 13.5.2015 whereby they both independently has been directed to undergo R.I. for ten years as well as to pay fine of Rs. one lac in default thereof, to undergo imprisonment for six months additionally, under both heads, separately with a further direction of setoff relating to custodial period during trial in terms of Section 428 of the Cr. P.C. by Additional Sessions Judge, VIth, West Champaran at Bettiah in Trial No. 55 of 2013 arising out of NDPS Case No. 13 of 2013 originating from Purushottampur P.S. Case No. 09 of 2013, consequent thereupon, have been heard together and are being disposed of by a common judgment.

3. Officials of 27th Battalion of SSB, received confidential information regarding transportation of Narcotics drug whereupon they cordoned the area followed with appearance of one person coming through bicycle with a bag towards railway line, simultaneously, one person over motorcycle, and parked the same by the side of a main road and proceeded towards first person, whereupon they were challenged whereupon they ran away leaving



the bag. They were chased and ultimately, were apprehended, who disclosed their identity as the appellants. Furthermore, from the bag, 72 packets were taken out weighing 69 Kg of *charas*. Furthermore, other articles were seized from their personal possession. After preparing seizure list, the articles so recovered been seized along with apprehension of the accused, were produced by the informant Shrikrishna Awadhiya, Deputy Commandant, 27th battalion (SSB) before the O/C, Purusottampur with a written report .

4. On the basis of the aforesaid written report, Purusottampur Case No. 9 of 2013 was registered, followed with investigation and after concluding the same, charge sheet was submitted, whereupon cognizance was taken and, accordingly, trial commenced and conceived in a manner, subject matter of instant appeal.

5. The defence case, as is evident, from mode of cross-examination as well as statement recorded under Section 313 of the Cr. P.C. is of complete denial of the occurrence. Simultaneously, also pleaded innocence as well as of false implication at the hands of the police officer. However, neither any DW nor any chit of paper has been exhibited on their behalf.

6. In order to substantiate its case, the prosecution had examined altogether 13 PWs out of whom PW. 1 is Lalbabu Sah,



P.W. 2 is Jitendra Paswan, PW. 3 is Umesh Chaudhary, PW. 4 is Narendra Singh, PW. 5 is A.K.Awadhiya (informant), PW. 6 is Ravish Kumar Singh, PW. 7 is K.Manivanan, PW. 8 is Krishnand Rai, PW 9 is Khailash Kumar, P.W. 10 is Chathu Ram, P.W. 11 is Avinash Sharma, P.W. 12 is Sunil Kumar and P.W. 13 is Gopal Sharan. Side by side also exhibited Ext. 1 signature of Narendra Singh over arrest memo, Ext.2- seizure list, Ext. 3- apprehension memo, Ext.4- written report, Ext.5 series are signature of witnesses over the statement of both the appellants. Ext. 6- signature over arrest memo, Ext.7- formal F.I.R., Ext. 8- F.S.L. report. As stated above, nothing has been produced on behalf of the defence.

7. While going through the evidence adduced on behalf of the prosecution, it is evident that due to ignorance of law the prosecuting agency failed to properly appreciate the niceties of the NDPS Act. The aforesaid eventuality is visualised after perceiving the evidence wherefrom it is evident that they have had utterly failed to comply with the mandate of law since inception of prosecution. The prosecuting agency produced the oral evidence to substantiate the allegation whereupon conviction has been recorded against accused-Appellants, but failed to divulge with regard to proper compliance of mandatory requirement so prescribed under the N.D.P.S. The Hon'ble Supreme Court by different judicial pronouncements has recorded



adverse to prosecution on account of non-compliance of the respective provisions, as well as event of ignoring the standing orders, ignoring event of sampling, the mode of custody of the seized narcotics, the mode of destruction of narcotics so seized and further non production of under trial before the court. Apart from this, the investigating Officer is found completely mum over the aforesaid eventuality. Side by side, it is also found from the evidence that the deposit of the seized narcotics that too, such huge quantity in malkhana as well as preparation of sample is found completely contradicted with the relevant standing order which, the instant judgment is going to be discussed hereinafter. Not only this, at an earlier occasion, a Division Bench of this Court has perceived such lapses and in *Shekhar Dutta vs. The State of Bihar [2013 (2) PLJR 844* had taken pain to identify the relevant provisions expecting the prosecution to have proper compliance thereof in order to have accused and properly, legally convicted sentence further, non-compliance thereof, perceived fatal to the prosecution case and for that, the Director General of Police was given direction to equip the concerned police officials with the technologies relating to NDPS Act. Furthermore, a copy of the judgment was sent for strict compliance, but the reason best known to the concerned officials, the aforesaid direction gone unheeded as a result of which, same nature of mistake still found whenever those



happens to be prosecution relating to NDPS Act. Though, it happens to be painful event for the court to rescind the police high ups, but considering gravity of the offence, which, apart from being penal one, has got social impact, receiving future of the nation, apart from having adverse financial impact, hence the office is directed to serve a copy of the judgment to DGP, Bihar, which at least communicate anguish of the court, and further to sensitive over the issue.

8. The learned Additional P.P. has fairly submitted that all the 13 witnesses, who have been examined, they all have substantiated the prosecution case by means of oral evidence. They have thoroughly stated that both the accused- appellants were chased, apprehended and from a bag 72 packets of charas weighing 69 Kg. having market value appertaining to Rs. 6 crores, 19 lac were seized. But, so far compliance of the mandatory provisions of law is concerned, those happens to be complete silence at their end.

9. The learned counsel for the appellants, brushing aside the oral evidence, picked up illegalities having committed by the prosecution during course of the investigation as well as during course of the trial and further, by referring different judgments submitted that the finding recorded by the learned lower court does not happen to be sustainable.

10. As stated above, and further not being controverted at



the end of the appellants, excluding the P.w.13 whose status is that of the Investigating Officer and further P.W. 5 A.K. Awadhiya who happens to be the Deputy Commandant as well as the informant of the case and further P.W. 1, P.W. 2 and P.W. 3, an independent witness, the remaining witnesses are members of the S.S.B. battalion who were present as patrolling party and further, at their involvement, both the appellants were apprehended. Furthermore, there happens to be positive evidence at their end with regard to recovery of 72 packets of charas weighing 69 Kg.

11. Now coming to the evidence of P.W. 1, P.W.2 and P.W. 3, they all are independent witnesses who have stated that they have seen the appellants under custody of SSB personnel but they have not substantiated the factum of recovery.

12. Now, coming to the evidence of P.W.5, informant, it is evident that although both the appellants were apprehended on 10.2.2013, they were produced before P. W. 13 Officer Incharge of Purushottampur Police Station on 11.2.2013 with a written report (Ext. 4) along with seizure list Ext. 2. Neither from the written report nor from seizure list nor from his deposition it is apparent that the bag was seized from the physical possession of either of the appellants. In likewise manner, there happens to be absence over distance, in between recovery of bag in consonance with apprehension of these



two appellants. Furthermore, even accepting the plea of the learned Additional P.P. that apprehension being effected at open field, attracting Section 43 of the N.D.P.S. Act, neither P.W. 5 nor P.W. 13- Investigating Officer, had stated that in terms of Section 53 of the N.D.P.S. Act, they have informed superior officer with regard to apprehension of these two appellants along with such huge quantity of charas.

13. Not only this, it is further evident from the testimony of P.W.5 that he has not stated with regard to preparation of sample at the spot where it was recovered and seized in presence of the appellants nor P.W. 13- the Investigating Officer has stated that the sample was made at his end in presence of the appellants at the Police Station where the articles were produced by the P.W. 5. In paragraph- 5- the Investigating Officer- P.W. 13 has stated that as per the order of the Court he had sent the sample of the seized charas for examination at the FSL, Patna.

14. At the present moment, the relevant standing order No.1/88 having been issued by the Narcotic Control Bureau relating to sampling is to be taken note of. For better appreciation, the same is quoted herein below:

“ 1.5 Place and time of drawal of sample.

Samples from the Narcotic Drugs and Psychotropic Substances seized, must be drawn on the



spot of recovery, in duplicate, in the presence of search (Panch) witnesses and the person from whose possession the drug is recovered, and mention to this effect should invariably be made in the panchnama drawn on the spot.”

“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.”*



15. Apart from this, as per section 55 of the N.D.P.S. Act, an officer Incharge of the police Station has been entrusted to take charge of the seized article and be kept in Malkhana under his own seal as well as seal of person awaiting the orders of the Magistrate and in likewise manner, seal the sample. From the evidence of P.W. 5, the informant, it is apparent that he has not stated with regard to sealing of the seized article by him nor P.w. 13- the Investigating Officer had stated that the articles were produced before him in sealed condition whereupon he also put his seal as well. There happens to be no positive evidence at least by way of producing malkharan, register to substantiate that the seized articles were kept in malkhana in sealed condition. Not only this, from the evidence of P.W. 5 as well as P.W. 13 it is apparent that sampling was not at all made either identifying in bulk or from independent packet in duplicate manner. The FSL report- Ext. 8 speaks that three pieces dark brown cover sealed substance was received at FSL, Patna, which certainly did not satisfy the mandate in terms of Standing Order No. 1/88.

15. The worst part of the prosecution happens to be non-production of the material exhibit in court. The P.W. 13- Investigating Officer is completely silent over the fact that during the intervening period, the aforesaid seized quantity was destroyed in terms of section



52A of the NDPS Act by preparing sample thereof in presence of Magistrate nor he clearly stated that the aforesaid items were available in the thana Malkhana. Simultaneously, no step was taken at the end of the learned Additional P.P. for production of the seized article allegedly kept at thana Malkhana.

17. The aforesaid deficiency, even having presence of oral evidence will not improve the plea of the prosecution in having a verdict in its favour, as has been held by the Hon'ble Apex Court.

In the case of **Kishan Chand v. State of Haryana**, reported in (2013) 2 SSC 502 it has been observed that:

“21. When there is total and definite non-compliance of such statutory provisions, the question of prejudice loses its significance. It will per se amount to prejudice. These are indefeasible, protective rights vested in a suspect and are incapable of being shadowed on the strength of substantial compliance.

22. The purpose of these provisions is to provide due protection to a suspect against false implication and ensure that these provisions are strictly complied with to further the legislative mandate of fair investigation and trial. It will be opposed to the very essence of criminal jurisprudence, if upon apparent and admitted non-compliance of these provisions in their entirety, the Court has to examine the element of prejudice. The element of prejudice is of some significance where provisions are directory or are of the nature admitting substantial compliance. Where the duty is absolute, the element of prejudice would be of least relevancy. Absolute duty coupled with strict compliance would rule out the element of prejudice where there is total non-compliance of the provision.”



22. In Vijay Jain v. State of Madhya Pradesh reported in **(2013) 14 SCC 527**, it has been observed:-

9. Para 96 of the judgment of this Court in *Noor Aga (2008) 16 SCC (Cri) 748 Case* 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* 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* 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.

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 he 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.

18. After minute scrutiny of the material available on record, it is found and hold that on account of deficiency, as pointed out herein above, on account of lapse on the part of the prosecution, it looks difficult to concur with the finding recorded by the learned lower court. That being so, the same is set aside. Both these appeals are allowed. Both the appellants, who are under custody, are directed to be released forthwith, if not wanted in any case.

(Aditya Kumar Trivedi, J)

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