

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.60 of 2015

Arising Out of PS.Case No. -214 Year- 2011 Thana -BHAGWAN BAZAR District- SARAN

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Om Prakash Mahto, son of Late Lakhan Mahto, resident of village-Titira, P. S.-
Parsa, District-Saran (Chapra).

.... Appellant/s

Versus

The State of Bihar

.... Respondent/s

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Appearance :

For the Appellant/s : Mr. Ajay Kumar Thakur-Advocate
Mr. Md. Imtiyaz Ahmad-Advocate
Mr. Amit Kumar-Advocate
Mr. Ravi Ranjan-Advocate
For the Respondent/s : Smt. Abha Singh-A.P.P.

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
ORAL JUDGMENT

Date: 29-08-2017

Appellant, Om Prakash Mahto has been found guilty for an offence punishable under Section 20(b)(ii)(B) of the N.D.P.S. Act and sentenced to undergo R.I. for 5 Years as well as to pay fine appertaining to Rs.25,000/- and in default thereof, to undergo S.I. for three months vide judgment of conviction dated 12.01.2015 and order of sentence dated 15.01.2015 passed by the 1st Additional Sessions Judge-cum-Special Judge, N.D.P.S., Saran at Chapra in N.D.P.S. Case No.13 of 2011, arising out of Bhagwan Bazar P. S. Case No.214 of 2011, G. R. No.5549 of 2011.

2. PW-5, Keshri Chand, who happened to be O/c of Bhagwan Bazar, got confidential information with regard to



transportation of Narcotic Substance by a carrier, instructed his subordinates and then, along with police officials as well as armed personnel reached at Bhagwan Bazar Station Chowk near Durga Asthan where, as per information, there has been one person coming on rickshaw having attaché, who was signaled to stop. After stoppage of the rickshaw, the person was encircled, was interrogated with regard to material having in attache, which he disclosed to be Charas. He was directed to open the attaché. After opening of the attaché, a packet was found duly wrapped, Charas. After weighing the same, it was 700g.m. After taking out sample there from, the articles was seized in presence of two seizure list witnesses namely Santosh Kumar Sah as well as Kalam. Then thereafter, they returned back along with accused as well as seized articles, sample.

3. After registration of the case, as Bhagwan Bazar P. S. Case No.214 of 2011, investigation was entrusted to PW-6, Manoj Kumar Sah, who after completing the same, submitted chargesheet facilitating the trial which concluded in a manner adverse to appellant, the subject matter of instant appeal.

4. Defence case, as has been pleaded during course of statement under Section 313 of the Cr.P.C. as well as suggested to the respective witnesses during course of cross-examination is of



complete denial. However, neither any DW has been examined nor document has been exhibited in defence.

5. In order to substantiate its case, prosecution had examined altogether seven PWs, who are PW-1, Brijesh Prasad Singh, PW-2, Aditya Rout, PW-3, Santosh Kumar, PW-4, Kalam, PW-5, Keshri Chand, PW-6 Manoj Kumar Sah and PW-7 Badruddin Ansari. Side by side, had also exhibited the documents, which are marked as Exhibit-1, signature of Santosh Kumar (PW-3) over seizure list, Exhibit-2, seizure list, Exhibit-3, fard-bayan, Exhibit-4, prayer having made before the learned Special Judge for granting permission to get the sample examined by the F.S.L., Exhibit-5, the F.S.L. Report. Neither any D.W. nor a chit of paper has been adduced on behalf of defence.

6. The learned counsel for the appellant while assailing the judgment of conviction and sentence has raised manifold arguments. The first and foremost happens to be with regard to non-compliance of mandatory provisions of law. It has been submitted at the end of the learned counsel for the appellant that repeatedly it has been observed by the Hon'ble Apex Court that having stringent punishment prescribed under the N.D.P.S. Act as well as presumption in terms of Section 35 as well as 54 along with Section 67 of the Act,



basically, the act goes against an accused and on account thereof, the prosecution is found under obligation to fulfil all mandatory requirements, so prescribed, in order to ruled out any kind of unscrupulous activity as well as possibility of false implication. Therefore, first of all, its obligation on the part of the prosecution is to see whether the same has been properly discharged or not. In order to substantiate the same, it has been submitted that the prosecution had not complied with mandatory provisions in terms of Section 42(2) of the N.D.P.S. Act whereunder information is to be passed over to the just superior officer within 72 hours as well as in terms of Section 57 of the N.D.P.S. Act whereunder the arrest, recovery of Narcotic Substance is to be communicated within 48 hours to the superior officials. Neither PW-5, the informant, nor PW-6, the I.O. happens to be on that very score.

7. It has also been submitted that the witnesses are not consistent over manner of sampling as well as sealing of the seized article as well as sample.

8. In likewise manner, it has also been submitted that witnesses are contradictory to each other over arrest of the appellant coupled with recovery of the Charas that too, in absence of having the rickshaw puller having stamped as a witness, all these lacunae are taken together, it did not justify the conviction and sentence.



9. On the other hand, the learned Additional Public Prosecutor stoutly supported the finding recorded by the learned lower Court on the score that there happens to be no ambiguity in the evidence of PW-8 over arrest as well as recovery of Charas from the possession of appellant. It has also been submitted that Section 42(2) as well as 57 of the Act are not mandatory, hence non-compliance thereof, would not vitiate the trial.

10. In the case of *Noor Aga vs. State of Punjab and another reported in (2008) 16 SCC 417*, it has been held:-

BURDEN OF PROOF

“56. The provisions of the Act and the punishment prescribed therein being indisputably stringent flowing from elements such as a heightened standard for bail, absence of any provision for remissions, specific provisions for grant of minimum sentence, enabling provisions granting power to the Court to impose fine of more than maximum punishment of Rs.2,00,000/- as also the presumption of guilt emerging from possession of Narcotic Drugs and Psychotropic substances, the extent of burden to prove the foundational facts on the prosecution, i.e., ‘proof beyond all reasonable doubt’ would be more onerous. A heightened



scrutiny test would be necessary to be invoked. It is so because whereas, on the one hand, the court must strive towards giving effect to the parliamentary object and intent in the light of the international conventions, but, on the other, it is also necessary to uphold the individual human rights and dignity as provided for under the UN Declaration of Human Rights by insisting upon scrupulous compliance of the provisions of the Act for the purpose of upholding the democratic values. It is necessary for giving effect to the concept of 'wider civilization'. The courts must always remind itself that it is a well settled principle of criminal jurisprudence that more serious the offence, the stricter is the degree of proof. A higher degree of assurance, thus, would be necessary to convict an accused. [In State of Punjab v. Baldev Singh](#), (1999) 6 SCC 172, it was stated:

"28. ..It must be borne in mind that severer the punishment, greater has to be the care taken to see that all the safeguards provided in a statute are scrupulously followed."

[See also Ritesh Chakravarty v. State of Madhya Pradesh, JT (2006) 12 SCC 321]



kind of deficiency on that very score, will ultimately cost dear to the prosecution. Although some sort of obligation has been made in terms of Section 42 of the N.D.P.S. Act in consonance with Section 57 of the N.D.P.S. Act, whereunder not only the information has to be recorded in writing under Sub-Section (2) of Section 42 of Act, rather apprehension of accused, recovery, if any, is also to be communicated to the just superior officials. However, it has not been found and held to be mandatory unless there happens to be cause of prejudice which, the Court would perceive on the facts of each case ceasing the interest of the accused. Apart from this, some sort of laxity has been allowed in favour of prosecution to be cared in case, at an appropriate stage due to reason so assigned. There would not be prompt compliance. The matter has been considered by Constitution Bench in ***Karnal Singh vs. State of Haryana reported in 2009 CRI.L.J. 4299***, wherein it has been held:-

“14. The Constitution Bench in Baldev Singh (supra) considered the compliance of [Section 50](#) of the Act. While doing so, the Bench also considered the provisions of [Sections 41](#) and [42](#) of the Act. It observed as follows:

"8. [Section 41](#) of the NDPS Act provides that a Metropolitan Magistrate or a Magistrate of the First Class or any Magistrate of the Second Class



especially empowered by the State Government in this behalf, may issue a warrant for the arrest of and for search of any person whom he has reason to believe to have committed any offence punishable under Chapter IV. Vide sub-section (2) the power has also been vested in gazetted officers of the Departments of Central Excise, Narcotics, Customs, Revenue Intelligence or any other department of the Central Government or of the Border Security Force, empowered in that behalf by a general or special order of the State Government to arrest any person, who he has reason to believe to have committed an offence punishable under Chapter IV or to search any person or conveyance or vessel or building etc. with a view to seize any contraband or document or other article which may furnish evidence of the commission of such an offence, concealed in such building or conveyance or vessel or place.

9. Sub-section (1) of [Section 42](#) lays down that the empowered officer, if has a prior information given by any person, he should necessarily take it down in writing and where he has reason to believe from his personal knowledge that offences under Chapter IV have been committed or that 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 he may do so without recording his reasons of belief.

10. The proviso to sub-section (1) lays down that if the empowered officer has reason to believe that a search warrant or authorisation cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place, at any time between sunset and sunrise, after recording the grounds of his belief. Vide sub- section (2) of [Section 42](#), the empowered officer who takes down information in writing or records the grounds of his belief under the proviso to sub-section (1), shall forthwith send a copy of the same to his immediate official superior. [Section 43](#) deals with the power of seizure and arrest of the suspect in a public place. The material difference between the provisions of [Section 43](#) and [Section 42](#) is that whereas [Section 42](#) requires recording of reasons for belief and for taking down of information received in writing with regard to the commission of an offence before conducting search and seizure, [Section 43](#) does not contain any such provision and as such while acting under [Section 43](#)



of the Act, the empowered officer has the power of seizure of the article etc. and arrest of a person who is found to be in possession of any narcotic drug or psychotropic substance in a public place where such possession appears to him to be unlawful."

It is to be noted that Baldev Singh's case (supra) has dealt with [Section 50](#) of the Act and the effect of non-compliance of the same. It was held that the same provisions of [Section 50](#) containing certain protection and safeguards implicitly make it imperative and obligatory and cast a duty on the investigating officer to ensure that search and seizure of the person concerned is conducted in a manner prescribed by [Section 50](#). The unamended [Section 50](#) as existed during that period is as follows:

"[Section 50](#) - Conditions under which search of persons shall be conducted.

(1) When any officer duly authorized under [section 42](#) is about to search any person under the provisions of [section 41](#), [section 42](#) or [section 43](#), he shall, if such person so requires, take such person without unnecessary delay to the nearest Gazetted Officer of any of the departments mentioned in [section 42](#) or to the nearest



Magistrate.

(2) If such requisition is made, the officer may detain the person until he can bring him before the Gazetted Officer or the Magistrate referred to in subsection (1).

(3) The Gazetted Officer or the Magistrate before whom any such person is brought shall, if he sees no reasonable ground for search, forthwith discharge the person but otherwise shall direct that search be made.

(4) No female shall be searched by anyone excepting a female."

The safeguard or protection to be searched in the presence of a gazetted officer or a Magistrate has been incorporated in [Section 50](#) to ensure that persons are only searched with a good cause and also with a view to maintain the veracity of evidence derived from such search. But this strict procedural requirement has been diluted by the insertion of subsection (5) and (6) to the Section by Act 9 of 2001, by which the following subsections were inserted accordingly:

"(5) When an officer duly authorized under [section 42](#) has reason to believe that it is not possible to



take the person to be searched to the nearest Gazetted Officer or Magistrate without the possibility of the person to be searched parting with possession of any narcotic drug or psychotropic substance, or controlled substance or article or document, he may, instead of taking such person to the nearest Gazetted Officer or Magistrate, proceed to search the person as provided under section 100 of the Code of Criminal Procedure, 1973 (2 of 1974).

(6) After a search is conducted under sub-section (5), the officer shall record the reasons for such belief which necessitated such search and within seventy-two hours send a copy thereof to his immediate official superior."

Through this amendment the strict procedural requirement as mandated by Baldev Singh's case was avoided as relaxation and fixing of the reasonable time to send the record to superior official as well as exercise of [Section 100](#) of CrPC was included by the legislature. The effect conferred upon the previously mandated strict compliance of [Section 50](#) by Baldev Singh's case was that the procedural requirements which may have handicapped an emergency requirement of



search and seizure and give the suspect a chance to escape were made directory based on the reasonableness of such emergency situation. Though it cannot be said that the protection or safeguard given to the suspects have been taken away completely but certain flexibility in the procedural norms were adopted only to balance an urgent situation. As a consequence the mandate given in Baldev Singh's case is diluted.

15. Under [Section 42\(2\)](#) as it stood prior to amendment 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 would adversely affect the prosecution case and 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, it is to be concluded that the mandatory enforcement of the provisions of [Section 42](#) of the Act non-compliance of which may vitiate a trial has been restricted only to the provision of sending a copy of the information written down by the empowered officer to



his immediate official superior, before proceeding to take action in terms of clauses (a) to (d) of [section 42\(1\)](#).

(b) But if the information was received when the officer was not in the police station, but while he was on the move either on patrol duty or otherwise, either by mobile phone, or other means, and the information calls for immediate action and any delay would have resulted in the goods or evidence being removed or destroyed, it would not be feasible or practical to take down in writing the information given to him, in such a situation, he could take action as per clauses (a) to (d) of [section 42\(1\)](#) and thereafter, as soon as it is practical, record the information in writing and forthwith inform the same to the official superior .

(c) In other words, the compliance with the requirements of [Sections 42](#) (1) and 42(2) in regard to writing down the information received and sending a copy thereof to the superior officer, should normally precede the entry, search and seizure by the officer. But in special circumstances involving emergent situations, the recording of the information in writing and sending a copy thereof to the official superior may get postponed by a



reasonable period, that is after the search, entry and seizure. The question is one of urgency and expediency.

(d) While total non-compliance of requirements of sub-sections (1) and (2) of [section 42](#) is impermissible, delayed compliance with satisfactory explanation about the delay will be acceptable compliance of [section 42](#). To illustrate, if any delay may result in the accused escaping or the goods or evidence being destroyed or removed, not recording in writing the information received, before initiating action, or non-sending a copy of such information to the official superior forthwith, may not be treated as violation of [section 42](#). But if the information was received when the police officer was in the police station with sufficient time to take action, and if the police officer fails to record in writing the information received, or fails to send a copy thereof, to the official superior, then it will be a suspicious circumstance being a clear violation of [section 42](#) of the Act. Similarly, where the police officer does not record the information at all, and does not inform the official superior at all, then also it will be a clear violation of [section 42](#) of the Act. Whether there is adequate or substantial



compliance with [section 42](#) or not is a question of fact to be decided in each case. The above position got strengthened with the amendment to [section 42](#) by Act 9 of 2001.”

12. From the evidence so adduced on behalf of prosecution, it is apparent that though information had already been received by the informant, PW-5, but he had not disclosed that aforesaid information was noted down, nor the fact specifically disclosed that since inception of this case by way of recording self-statement by PW-5, O/c of the Bhagwan Bazar P. S., any step was taken to inform the superior officials nor during course of evidence, it has been deposed at his end that not only information rather apprehension of the accused along with recovery of Charas was communicated.

13. Now, coming over factum of recovery, sampling, sealing, it is evident from Exhibit-3, fard-bayan that appellant was apprehended while coming to over rickshaw having briefcase and on query, he confessed that he was carrying Charas in the briefcase to Varanasi and is found corroborated by way of recovery there from in front of two independent witnesses namely Santosh Kumar as well as Kalam. It is also evident that during course of trial, the aforesaid two witnesses namely Santosh Kumar (PW-3) and Kalam (PW-4) have



become volte-face to the prosecution whereupon, were declared hostile. However, they have admitted their presence over the seizure list though with an explanation that they have signed/ put his L.T.I. on blank paper. From the evidence of PW-6, I.O., it is evident that seized article was produced in Court along with attaché during trial and the same has been marked as material Exhibit-I and II. However, nothing has been elicited from his side on that very score. At the other end, substantiate the recovery having from the possession of appellant on its face.

14. All the witnesses namely Brijesh Prasad Singh (PW-1), Aditya Rout (PW-2), Keshri Chand (PW-5) and Badruddin Ansari (PW-7), all police officials, Sepoy stood over the same divulging apprehension as well as recovery, sampling, sealing of the seized article as well as sample.

15. Learned counsel for the appellant has submitted that on account of deficiency in the evidence of the prosecution relating to manner of sampling, custody, mere production of the articles in Court would not support the case of the prosecution. For that, the evidence of each witness has been gone through. PW-1 at Para-3 had stated that on query, the accused had stated that Charas happens to be inside the briefcase which he is carrying to Varanasi over which, the O/c had opened the briefcase and found Charas wrapped in brown tape. It



weighed 700 g.m. and for that, seizure list was prepared. A copy thereof, was handed over to the accused. After preparation of seizure list, sample was taken out and then, sample as well as remaining seized Charas were sealed and then, they returned back to police station. During cross-examination at Para-9, he had stated that after weighing, sample was taken out. Then thereafter, the seized Charas was not at all weighed. O/c had sealed and as well as put his signature along with signature of the witnesses was also obtained over the same.

16. PW-2 in Paras-2 and 3 have reiterated with regard to aforesaid exercise. During cross-examination at Para-7, had stated that O/c had taken out sample and then thereafter, the seized Charas was weighed being 700gm. Sample was also weighed approximately 50 gm.

17. PW-5, informant during his examination-in-chief at Para-4 had stated that seized Charas was weighed and was 700gm for which, seizure list was prepared in presence of seizure list witnesses. Then thereafter, sample was taken out weighing approximately 100gm. During cross-examination at Para-12 had stated that he had weighed the Charas along with packet and then, took out sample. After taking out of sample, the remaining part of Charas was not weighed. After sampling, both the packets were sealed whereupon, he along with witness Santosh Kumar had put his signature. Then had



stated that at the place of occurrence both the packets were tied with cord/ string and was taken to P.S. where it was sealed.

18. PW-7, another member of the raiding party, during his examination-in-chief at Para-3, had stated that Officer-in-Charge directed the accused to open attaché. After opening of the same, one packet having duly taped was recovered. On weighing, it was 700gm and then thereafter, 100 gm was taken out there from as a sample. He had further stated that 100 grams was sealed in a plastic packet while remaining after having been wrapped under cloth. However, had not disclosed where it was sealed. During cross-examination at Para-6, had stated that after taking out of sample, the remaining part was again weighed and found 600 grams. In Para-11, he had stated that seized articles were sealed whereupon, O/c had put his signature. None others had put his signature. As stated above, although alleged seized Charas was produced in Court as material exhibit, but from the evidence of PW-6, it is evident that neither in contained P. S. Case Number nor having signature of O/c as well as PW-3, Santosh Kumar Singh, whose presence over the same, as per PW-5, informant was. That being so, in spite of production of Charas, it has become difficult to connect the same to be the case property of the instant case. From the judgment impugned, it is evident that learned lower Court did not pin-pointed the same nor gave any finding on that score.



19. Apart from this, when the evidence of PW-5, informant, has been minutely gone through, it is apparent that though he had disclosed that he along with other police personnel, accused, sealed articles came to P.S., but the reason best known to him, he had not deposed that seized articles were kept in the Malkhana along with sample or it was handed over to the Investigating Officer, PW-6, Manoj Kumar Sah. In likewise manner, Manoj Kumar Sah, the Investigating Officer also failed to say that seized articles along with sample were handed over to him by the informant, PW-5 nor he deposed to the effect that those articles were kept in Malkhana under proper entry and he took out there from for the purpose of transmitting the sample to F.S.L. for its chemical examination after getting permission from the Special Judge or the sample was produced before the Special Judge having seal of Special Judge, though his requisition as Exhibit-4, has been brought up on record. Apart from this, from Exhibit-4, it is evident that aforesaid exercise was taken up on 11.01.2012 that means to say, after fortnight of alleged recovery. Prosecution is completely silent regarding the intermediary event that means to say, custody of the seized articles along with sample during midst thereof.

20. The cumulative effect on account of aforesaid deficiencies persisting in the prosecution case, did not justify



sustenance of the judgment impugned. Consequent thereupon, same is set aside. Appeal is allowed. Appellant is on bail, hence is discharged from its liabilities.

(Aditya Kumar Trivedi, J)

Vikash/-

AFR/NAFR	A.F.R.
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