

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.297 of 2015

Arising Out of PS.Case No. -133 Year- 2007 Thana -BARAUNI District- BEGUSARAI

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Shyam Sundar Jha, son of Mukti Nath Jha, Resident of village Kill, P.S. Barauni
Gandhara, District Begusarai. Appellant

Versus

The State of Bihar Respondent

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Appearance :

For the Appellant : Mr. Arun Kr. Tripathi

For the Respondent : Mr. Abha Singh, A.P.P.

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI

ORAL JUDGMENT

Date: 16-05-2017

1. None appears on behalf of appellant, as such, Sri Arun Kr. Tripathi, learned counsel has been requested to assist the Court as *Amicus Curie* which he volunteered.

2. Vide judgment of conviction dated 22.04.2015, sole appellant Shyam Sundar Jha has been found guilty for an offence punishable under Section 21(b), 22(b) of N.D.P.S. Act and has been directed to undergo rigorous imprisonment for 07 year as well as to pay fine of Rs. 50,000/- under each head and in default of payment of fine to undergo simple imprisonment for 01 year, additionally with a further direction to run the sentences concurrently vide order of sentence dated 27.04.2015 passed by Addl. Sessions Judge I-cum-Special Judge, NDPS Act, Begusarai in N.D.P.S. case no. 10 of 2007.

3. PW3 Md. Majhrul Islam recorded his self- statement on 10.04.2007 at about 5 am disclosing therein that in the preceeding night, he along with other police personnel was on patrolling and



during course thereof, when he came at Dhala no. 6 at about 4 am, he saw one person coming from Barauni station having a Bag over which, he got suspicion whereupon, directed him to stop but, the aforesaid person ran away who was chased and apprehended. In presence of two witnesses namely Sanjay Singh as well as Dilip Kumar, he was searched out and from Bag, apart from cloth so detailed therein, one packet of *ganja* weighing approx. 3 kg was seized for which, no explanation was given. Accordingly, seizure list was prepared. Apprehended person disclosed his identity as appellant Shyam Sunder Jha.

4. On the basis of the aforesaid self-statement of informant, Barauni (Garhara) P.S. case no. 133 of 2007 was registered under Sections 21 and 22 of N.D.P.S. Act whereupon, investigation commenced and concluded by way of submission of charge-sheet whereupon, trial proceeded and concluded in a manner, the subject matter of instant appeal.

5. Defence case as is evident from mode of cross-examination as well as statement recorded under Section 313 Cr.P.C. is that of complete denial. However, neither any DW nor a chit of paper has been exhibited on behalf of defence.

6. In order to substantiate its case, prosecution had examined altogether five PWs out of whom, PW1 is Sanjay Singh, PW2 is Dilip Kumar, PW3 is Md. Majhrul Islam, PW4 is Devendra



Kumar and PW5 is Ram Naresh Singh. Side by side, prosecution had also exhibited Ext.1 series- signatures of seizure list witnesses, Ext.2- *fardbeyan*, Ext.3- seizure list and Ext.4- F.S.L. report.

7. After going through the record, it is evident that it happens to be a hopelessly conducted case by the prosecution. The nicety of the N.D.P.S. Act have not been properly appreciated and in likewise manner performed. On account thereof, the instant trial has become a mockery and accordingly, the judgment impugned.

8. Coming to that score, first of all, the status of the witnesses has to be acknowledged. PW1 and PW2 are seizure list witnesses who, though exhibited their signatures over the seizure list but declined to substantiate the case of the prosecution consequent thereupon, were declared hostile. PW3 is the informant, PW4 and PW5 are the members of the patrolling party, however, the investigating officer has not been examined.

9. From the evidence of PWs 3, 4 and 5, it is evident that they reiterated their version that during course of patrolling when they came at Dhala no. 6, they found one person having bag coming from Barauni junction who was apprehended and from the Bag, approx 3 kg. *ganja* was recovered. None of the witness had stated that sampling was made at the place of occurrence. That means to say, the prosecution had not cared to satisfy the initial burden with regard to preparation of sample relating to the article seized. When sample was



not prepared then in that event, genuineness of F.S.L. report (Ext.4) became under question mark. Moreover, Ext.4 discloses that vide memo no. 1259 dated 05.07.2007, the article which was transmitted through special messenger Vinay Kr. Singh, was received at his office on 10.07.2004. That means to say, there happens to be no explanation available on the record that on which date, sample was prepared, on which date it was brought to get it examined by F.S.L. and further at which place, the sample were lying during the intervening period that means to say after seizure and further, from 06.07.2007 to 09.07.2007. It has got an importance in the background of the fact that the F.S.L. report did not speak that the sample which was received at the office was in a sealed condition and in likewise manner, weight of the sample.

10. The other illegality is found from the evidence of PW3, the informant who during cross-examination at para 9, had stated that seized *ganja* along with *attachie* was kept at Garhara *malkhana* but there was no entry relating to article number. The informant who was posted at Garhara O.P. on the date of evidence did not care to substantiate the same by getting *malkhana* register exhibited. In likewise manner, none of the witness had stated that seized article was handed over to the officer-in-charge in terms of Section 53 of the Act.

11. Furthermore, it is evident from the record that the seized article have not been produced in Court. Considering the nature of the



evidence, its non-production has got an adverse impact, moreover, in **Vijay Jain v. State of Madhya Pradesh** reported in (2013) 14 SCC 527, the Hon'ble Apex Court has held :-

Para 96 of the judgment of this Court in Noor Aga 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.

On the other hand, on a reading of this Court's judgment in Jitendra Case, 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 produced 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. Apart from this, from perusal of the evidence of PW3 more particularly, neither there happens to be compliance of Section 42(2) nor Section 57 of N.D.P.S. Act. The cumulative effect did not justify the judgment impugned whereupon, is set aside.

13. Hence, appeal is allowed. Appellant is on bail hence is discharged from its liability. Copy of the first and last page of the judgment be handed over to learned *Amicus Curie* for the needful.

(Aditya Kumar Trivedi, J.)

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AFR/NAFR	N.A.F.R.
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