

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.97 of 2016

Arising Out of PS.Case No. -270 Year- 2012 Thana -RAXAUL District-
EASTCHAMPARAN(MOTIHARI)

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Sheo Shankar Sah, Son of Late Rupan Sah, Resident of village- Inarwa, P.S.-
Birganj, District- Parsa (Nepal)

.... Appellant/s

Versus

1. The State of Bihar

.... Respondent/s

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Appearance :

For the Appellant : Mr. Yogesh Chandra Verma, Sr. Advocate
Mr. Shiw Kumar Prabhakar, Advocate.
Mr. Uma Shankar Sharma, Advocate.
For the Respondent : Mr. Binod Bihari Singh, APP.

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CORAM: HONOURABLE MR. JUSTICE ASHUTOSH KUMAR

CAV JUDGMENT

Date: 17-01-2018

Heard the learned counsel for the appellant and the
State.

2. Shiv Shankar Sah, the appellant stands convicted
under Sections 20(b) (ii) (c) of the N.D.P.S. Act, 1985 by judgment
dated 23.12.2015 passed by the learned 3rd Additional Sessions Judge-
cum-Special Judge, Motihari, East Champaran in N.D.P.S. Case No.
125 of 2012 and by order dated 04.01.2016 the appellant has been
sentenced undergo R.I. for 10 years, to pay a fine of Rs. 1 lakh and in
default of payment of fine to further suffer imprisonment for six
months.

3. The appellant was found to be in possession of 5
Kgs. of Charas on his person for which no valid explanation could be



given by him.

4. The prosecution case is based on the written report of Rajan Kumar Raj (P.W. 2) in which it has been alleged that on 18.12.2012, that he received confidential information on the same day at about 18:40 hours that there will be some transaction of narcotics between Raxaul – Duncan Road and Tumariya Tola. He communicated the aforesaid information to his superior officer and sought permission for conducting a raid. On being permitted, he took the cooperation of the local police and raided the place of occurrence. Two persons were found to be running away under suspicious circumstances. One of them was apprehended who disclosed his name as that of the appellant whereas the other person managed to effect his escape. The person who fled away threw something on the road which was later found to be Charas. The appellant was searched in presence of two independent persons viz. Upendra Yadav and Vinod Kumar Patel after informing the appellant that he had a right to be searched before a Gazetted Officer of his choice. With the consent of the appellant, his body was searched and in a towel which was tied to his body, Charas was found to be kept in packets. The appellant is said to have disclosed that the narcotics, of which he was in possession, had been handed over to him by one Shah Mohammad at Birganj and he was supposed to deliver the same to Jaan Mohammad and Nasim



Ansari at Raxaul. The appellant was arrested and a seizure list was prepared in presence of independent witnesses, a copy of which was handed over to the appellant. The appellant, the recovered contraband and other documents were handed over to the SHO, Haraiya O.P. for further legal action. On the basis of the aforesaid written report, a case vide Raxaul P.S. Case No. 270 of 2012 was instituted for the offences under Sections 20, 22, 23 and 24 of the N.D.P.S. Act, 1985.

5. On completion of investigation, charge sheet was submitted against the appellant whereupon cognizance was taken and charges were framed against the appellant under Sections 20 (b) (ii) (c) of the N.D.P.S. Act for being in conscious possession of 10 Kgs. of Charas which is more than the commercial quantity and under Section 23(C) of the N.D.P.S. Act for importing Charas from Nepal to India for the purposes of sale.

6. In order to prove the charges, the prosecution has examined as many as seven witnesses, all of whom were the members of the raiding party; the informant being P.W. 2.

7. So far as the documentary evidences are concerned, notice for search under Section 50 of the N.D.P.S. Act dated 18.10.2012, bearing the thumb impression of the appellant has been marked as Ext. 1; the filled up proforma of the intercepted goods dated 18.10.2012 showing 10 Kgs. of Charas and including the list of



personnel and independent witness with their signature has been marked as Ext. 2; a letter accepting the guilt dated 18.10.2012 of the appellant relating to recovery of the narcotics from his body, weighing 10 Kgs. including what was recovered from his body has been marked as Ext. 3; the arrest memo which does not bear his signature has been marked as Ext. 4. The appellant was put to medical examination and the documents relating to the aforesaid medical examination have been marked as Ext. 5 and 5/1. The written application which was submitted by P.W. 2 to the SHO of Haraiya O.P. and the application of the I.O. to the Special Judge seeking permission for examination of the seized narcotics by FSL at Patna or Kolkata and the formal FIR have been exhibited as Exts. 6, 7 and 8 respectively. The report of the FSL and the test memo receipt from the Custom House, Kolkata along with the reports through which sample had been sent to the FSL have been marked as Exts. 9 and 9/1 as well as 10 and 10 /1.

8. No documentary or oral evidence seems to have been adduced on behalf of the appellant.

9. After completion of the trial, the trial court by its judgment and order indicated above convicted and sentenced the appellant only under Sections 20 (b)(ii)(c) of the N.D.P.S. Act but acquitted him of the charge under Section 23(c) of the N.D.P.S. Act.

10. I have heard Mr. Yogesh Chandra Verma, the



learned senior advocate for the appellant and Mr. Binod Bihari Singh, the learned APP for the State.

11. The trial court judgment has been assailed on behalf of the appellant on the following grounds:

(I). Constables Upendra Singh Chauhan, Nagendra, Narendra and Ishaq Baig who were FIR named witnesses have not been examined at the trial and no explanation has been offered for their non-examination.

(II). Similarly the seizure list witnesses Upendra Yadav and Vinod Kumar Patel have also not been examined leading to the adverse inference under Section 114(G) of the Evidence Act.

(III). Innumerable contradictions in the deposition of the witnesses with respect to the number of packets containing the narcotics which was recovered from the spot and from the possession of the appellant.

(IV). The witnesses have categorically stated that sampling and sealing was not done in their presence.

(V). No evidence at all having been adduced with respect to the sampling and storage of the narcotics recovered.

(VI). Non-examination of the public analyst who only was the competent witness to formally prove the report issued by the FSL and lastly,

(VII). The seized article or the sealed sample were not produced in the court. In fact, even



the destruction report has not been produced.

12. On the aforesaid grounds, the learned senior advocate for the appellant has submitted that since the N.D.P.S. Act, 1985 provides for a deterrent punishment, the courts should not brook of any departure from the requirements of law with regard to investigation, search, seizure and storage of the narcotics. Stricter the offence, learned counsel for the appellant has argued, greater is requirement of following the rules to its letters and in the event of not doing the same, the conviction and sentence of the appellant cannot be sustained.

13. On behalf of the State, it has been argued that the appellant was arrested on the spot and from him and from what was thrown by his colleague/accomplice, a clear case under Sections 20 (b)(ii)(c) of the N.D.P.S. Act was made out against the appellant. All the necessary requirements to be followed in the investigation and trial in a case of the N.D.P.S. Act has been adhered to and merely because the sampling was not done at the spot or there being no evidence with regard to sampling at the spot as well as non-production of the narcotics before the court, the prosecution case cannot be thrown out.

14. In order to examine the merits of the case, it would be necessary for this Court to appreciate the evidence received before



the trial court.

15. It would be relevant to refer to the relevant part of the deposition of Rajan Kumar Raj, informant (P.W. 2) who is stated to have received information on 18.10.2012 about the movement of people with narcotics in the area. The aforesaid information was communicated to the Commandant and on obtaining his permission, a team was constituted. At about 07:45, two persons were spotted coming towards their side under suspicious circumstances. On being signalled to stop, they started running away. One of them viz. the appellant was caught whereas the other threw his belonging and managed to escape. After informing the appellant about his rights of being searched before a Gazetted Officer, his body was searched and 10 packets of Charas was recovered which was kept tied in a towel on the body of the appellant. On being tested by the field-kit, the narcotics was found to be Charas and it weighed 10 Kgs. The appellant is said to have disclosed that the seized article belonged to Sah Mohammad and had to be delivered to Jan Mohammad for which the appellant would have been given Rs. 500/- Nepali currency. A seizure list was prepared. The confession of the appellant was also recorded.

16. In his deposition before the trial court, P.W. 2 has stated that two independent persons were orally asked to become the



witness to the seizure. From the possession of the appellant, 10 packets of Charas weighing 5 Kgs. was recovered. In his cross-examination P.W. 2 has admitted that many Gazetted Officers reside in Raxaul but nobody was searched by him and the information was only given to his superior officer. He has also admitted that the seized drug was not sealed and was just handed over to the police the way it was seized. He also did not know as to where the narcotics had been kept all the while.

17. S.I. Shiv Prakash Singh (P.W. 1) was member of the raiding party has deposed before the trial court that on 18.10.2012, he was posted as Constable. P.W. 2 had received secret information regarding movement of narcotics. Thereafter, under the leadership of one Ram Vichar Rai, nine constables including P.W. 1 left for Duncan Road, Raxaul. Later, the Officer-in-charge of Haraiya O.P. also joined the team. During the raid, the appellant was arrested and from his possession 10 packets of Charas was recovered. On weighing the same, it came at 5 Kgs. The appellant is said to have told the raiding team that the Charas was being brought from Nepal.

18. Similarly, Munna Kumar Singh and Vijay Kumar, both members of the team have been examined as P.Ws. 3 and 4 who have supported the prosecution version but have stated that they did not inform about the arrest of the appellant to any Gazetted Officer.



They have also admitted that what quantity was drawn for sample was not known to them. P.W. 4 has also admitted in the cross-examination that no weight had been taken of the sample which was drawn from each of the packets seized.

19. Rajiv Kumar (P.W. 5) who was also a member of the raiding party, has also admitted that the seized contraband was not sealed at the place of occurrence.

20. Sunil Kumar, S.I. (P.W. 6) is the I.O. of this case. Incidentally, he was also one of the members of the raiding team. He has stated that he had taken charge of the investigation of the case on 10.10.2012 and recorded the statement of the informant as well as other witnesses. The sample of the seized contraband was sent by him with permission of the court for its examination to the FSL, Patna and Kolkata. However, he, too, has admitted that he did not remember as to whether any sample was drawn at the place of occurrence and whether the same was sealed or not. The seized narcotic was given to him by P.W. 2 and no inventory of the same was prepared by him. On being questioned, he has also categorically stated that in the investigation papers, he did not mention as to where was the sample of the narcotics prepared and who prepared the same. He has also not noted down in the diary that he had kept the seized narcotic in Malkhana under his supervision.



21. Likewise Bachcha Upadhyaya, another member of the raiding party, has admitted in his cross-examination that he had not signed over any paper relating to the case. Though he has admitted that the seizure list was prepared at the place of occurrence by P.W. 2, but he had not signed over the same and was not in a position to say or name the witnesses of the seizure. He has also categorically deposed that no separate weight of the seized narcotic from the person of the appellant was taken.

22. On appreciation of evidence on record, though I find that the witnesses have, by and large, consistently stated about the appellant having been apprehended at the spot with 5 Kgs. of Charas on his person but almost all of them have admitted that sampling was not done at the place of occurrence. Even the seized goods were not sealed. It has been seen from the evidence of the I.O. of the case that he had not even recorded the fact that the seized article was kept in Malkhana.

23. In order to prove a charge under the N.D.P.S. Act, it is important that representative samples be drawn from the seized substances for those to be sent to the laboratory for chemical analysis and report confirming the presence of narcotic drugs or psychotropic substances in the seized articles. It is also of utmost importance that the seized substance and samples are handled properly and in the



prescribed manner.

24. Standing Instructions No. I/88 dated 15.03.1988 of the Narcotics Control Bureau, Government of India, prescribes detailed procedure for sampling, sealing and dispatching the seized samples to the laboratory for test. The various clauses of the standing instructions make it imperative that the seized articles are to be properly numbered, marked and sealed. The samples are required to be taken from each of the packets seized and such samples have to be drawn on the spot of recovery, in duplicate, in presence of search witnesses and the person from whose possession the drug is said to have been recovered. All these aspects are required to be mentioned in the seizure list/Panchnama.

25. One of the clauses of the standing instructions further spells out that a minimum of 5 grams of sample is required to be drawn from the seized narcotics in cases of all other narcotic drugs and psychotropic substances but in the event of the seized commodity being Opium, Ganja or Charas/Hashish, 24 grams in each case is required for chemical test. As such, the same quantities are required to be taken out for the duplicate sample as well. The seized drugs in packets are also required to be well mixed to make it homogeneous and representative before the sample in duplicate is drawn.

26. Lastly, it is also required that the samples drawn



are to be sealed in presence of the accused and the seizure list witnesses, all of whom are under an obligation to put their signature on each of the samples. The official seal of the seizing officer has also to be affixed. In case, the accused wants to put his own seal on the sample, that also has to be allowed on both, the original as well as the duplicate of each of the samples.

27. There is nothing on record to show that P.W. 2 sealed the seized articles at the place of seizure or at any time even thereafter. There is no evidence to show that any sample from the seized articles were drawn on the spot of the recovery in presence of the accused. Non-collection of sample at the initial stage of seizure is a defect which cannot be cured later on.

28. In *Noor Aga vs. The State of Punjab* (2008) 16 SCC 417, the Supreme Court has held as follows:

89. Guidelines issued should not only be substantially complied with, but also in a case involving penal proceedings, vis-à-vis a departmental proceeding, rigorous of such guidelines may be insisted upon. Another important factor which must be borne in mind is as to whether such directions have been issued in terms of the provisions of the statute or not. When directions are issued by an authority having the legal sanction granted therefor, it becomes obligatory on the part of the subordinate authorities to comply therewith.

90. Recently, this Court in *State of*



Kerala v. Kurian Abraham (P) Ltd., following the earlier decision of this Court in Union of India v. Azadi Bachao Andolan held that statutory instructions are mandatory in nature.

91. The logical corollary of these discussions is that the guidelines such as those present in the Standing Order cannot be blatantly flouted and substantial compliance therewith must be insisted upon for so that sanctity of physical evidence in such cases remains intact. Clearly, there has been no substantial compliance with these guidelines by the investigating authority which leads to drawing of an adverse inference against them to the effect that had such evidence been produced, the same would have gone against the prosecution.

29. From the perusal of records, it further appears that the permission of the learned Special Judge for sending the sample for its chemical examination was obtained on 23.10.2012 but the same was received in the office of the Director, FSL, Patna on 16.01.2013. This Court is at a complete loss to know as to where the samples in the meanwhile were kept. From the test memo (Ext. 10) however it appears that total of 8 seals and 5 facsimiles of the seals were sent but in the test report which is Ext. 9, the column of “*Mode in which seizure was found to be packed on receipt and description of the seal*” has been left blank. As stated earlier there is no record of the fact that the samples were sealed and if those were sealed, whose seal were put



on it.

30. Alas, one has only to make a guess work.

31. Apart from departures from the requirements of law, compliance of which is mandatory, neither the seized article nor the destruction report has been produced before the court, thus, keeping the trial court bereft of the primary evidence to decide the case. What strikes this Court most is that from the time of the seizure of the narcotics till the examination of the contents of the sample, it is absolutely unclear as to how the samples were stored or handled and by how many people. There are huge chinks and gaps in the prosecution version and no amount of guess work can plug the same. In that event, Ext. 9, even though disclosing the sample to be Charas, cannot be acted upon for convicting and sentencing the appellant.

32. There also appears to be a total non-compliance of the provisions of Section 42 of the N.D.P.S. Act especially the second part of it which mandates that where an officer takes down any information in writing under Sub- Section (1) of Section 42 or records grounds for his belief under the proviso thereto, he shall, within 72 hours send a copy thereof to his immediate official superior.

33. Be it noted that in case of *Abdul Rashid Ibrahim Mansuri vs. The State of Gujarat* 2002 (2) SCC 513 the Supreme Court had held that compliance of the Section 42 of the N.D.P.S. Act



is mandatory and non-compliance of the same would prejudice the accused. However later, in case of *Sajan Abraham vs. The State of Kerala* 2001 (6) *SCC* 692 it was held that the provisions under Section 42 of the N.D.P.S. Act would be deemed to have been followed even when there would be a substantial compliance of the same. In view of the different stand over the issue, the matter was referred to the constitution Bench of the Supreme Court in case of *Karnail Singh vs. The State of Haryana* 2009 (8) *SCC*, 539. In the aforesaid case it was held that total non-compliance of the requirements under Section 42 of the N.D.P.S. Act would be impermissible but delayed compliance with satisfactory explanation may be accepted.

34. There is nothing on record to suggests that the P.W. 2 or P.W. 6 transmitted the information to their superior police officers.

35. Thus, for the reasons indicated above, I am of the view that the prosecution has failed to prove its case beyond all reasonable doubts against the appellant. Hence, the appellant is entitled to acquittal.

36. The judgment and order of conviction dated 23.12.2015 and order of sentence dated 04.01.2016 passed by the learned 3rd Additional Sessions Judge-cum-Special Judge, Motihari,



East Champaran in N.D.P.S. Case No. 125 of 2012 is set aside.

37. The appeal stands allowed.

38. The appellant who is in custody, is directed to be released forthwith if not required in any other case.

39. A copy of the judgment be communicated to the superintendent of the concerned jail for information, compliance and record.

(Ashutosh Kumar, J)

KKSINHA/-

AFR/NAFR	NAFR
CAV DATE	11.01.2018
Uploading Date	17.01.2018
Transmission Date	17.01.2018

