

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.157 of 2015

Arising Out of PS. Case No. -72 Year- 2008 Thana -MUFFASIL District- WESTCHAMPARAN(BETTIAH)

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1. SARASWATI DEVI, WIFE OF SHEO NATH BHARTI
2. NAND KISHOR BHARTI, SON OF PRABHU NATH BHARTI.
BOTH RESIDENTS OF VILLAGE - AFARAD KE MATHIAN, P.S. -
MAHARAJGANJ, DISTRICT - SIWAN.

.... APPELLANT/S

VERSUS

THE STATE OF BIHAR

.... RESPONDENT/S

with

=====

Criminal Appeal (SJ) No. 173 of 2015

Arising Out of PS. Case No. -72 Year- 2008 Thana -MUFFASIL District- WESTCHAMPARAN(BETTIAH)

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SEEMA SINGH, W/O RAM PRASAD SINGH RESIDENT OF VILLAGE
HARDIYA CHOUCK, P.S. SHIKARPUR, DISTRICT BETTIAH (WEST
CHAMPARAN).

.... APPELLANT/S

VERSUS

THE STATE OF BIHAR

.... RESPONDENT/S

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Appearance:

(In CR. APP (SJ) No.157 of 2015)

For the Appellant/s : Mr. Mahesh Narayan Parbat, Sr. Adv.
Mr. Sanjay Kumar Jha, Adv.

For the State : Mr. Bipin Kumar, APP

(In CR. APP (SJ) No.173 of 2015)

For the Appellant/s : Mr. Mahesh Narayan Parbat, Sr. Adv.
Mr. Sanjay Kumar Jha, Adv.

For the State : Mr. Abha Singh, APP

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI

ORAL JUDGMENT

Date: 03-01-2018

Criminal Appeal (SJ) No.157 of 2015 wherein
Saraswati Devi and Nand Kishor Bharti are the appellants,
Criminal Appeal (SJ) No. 173 of 2015 wherein Seema Singh is the
appellant arise out against the same judgment of conviction dated
21.01.2015 and order of sentence date 28.01.2015 passed by
learned Additional Sessions Judge, IVth, West Champaran at
Bettiah in Muffasil P.S. Case No.72/2008, Trial No.29/2008



whereby and whereunder all the appellants have been convicted for an offence punishable under Section 20(c) of the NDPS Act and each one has been directed to undergo R.I. for ten years as well as to pay fine appertaining to rupees one lac and in default thereof, to undergo S.I. for one year, additionally, under Section 22(c) of the NDPS Act and each one has been directed to undergo R.I. for ten years, to pay fine appertaining to rupees one lac and in default thereof, to undergo S.I. for one year, additionally, with a further direction to run the sentences concurrently, on account thereof, have been heard together and are being decided by a common judgment.

2. Before coming to deal with merit of the case, after hearing respective parties as well as going through the record it is evident that prosecution under NDPS Act happens to be only for the purpose of showing the graph of apprehension of the accused as on account of failure having at the end of the search/seizure authority as well as by the investigating authority times without number in proper compliance of mandatory provisions of law, sermon has been given, relevant provisions have been highlighted so that to be complied with by the authorities at the first instance, how the search, seizure, sampling is to be carried out and in likewise manner, conduct of the investigating authority with regard to storage, destruction, of the seized articles procurement of FSL report. So far facts of the instant appeal is concerned, it is evident that irrespective of recovery of 3 Kg. of heroin from the conscious possession of the appellants Saraswati Devi as well as



Seema Singh, there happens to be complete violation at the end of prosecution whereunder physical search which is to be carried out before a Gazetted Officer had not been done and in likewise manner, there happens to be no proper legal recourse at the end of the official concerned in preparing the sample, storage of the same as well as non-production of the sample in court during course of trial make the situation more worsen. Apart from this, there also happens to be violation at the end of the prosecuting agency in getting the matter intimated to the superior officials as required under Section 42(2) of the NDPS Act in consonance with the Section 57 of the NDPS Act. These defects have been pointed out before dealing with the factual aspect so that, the prosecuting agency should take care of at least during course of future activities though previous effort gone unheeded. The Constitution Bench had conclusively decided that no conviction could sustain on account of failure at the end of prosecution. The conduct suggest that the prosecution agency commands unrestricted sphere without having any sort of concern with regard to compliance of mandatory provisions of the law enabling the culprit to have their acquittal on that very score who, by such activity are not only destroying the culture rather future of the country spoiling the youngster by giving an opportunity to become an addict. It is high time and that being so, the anxiety of the court is being expressed over non-sensitization of the prosecuting agency. Accordingly, a copy of the judgment should be forwarded to the learned Advocate General in order to have some sort of



administrative activity, to the extent of equipping the police officials with the niceties of the act so that flaw should not erupt during course of investigation as well as during course of trial.

3. Now coming to the fact of the case, PW.1 Shailesh Mishra had recorded his self-statement that after being secretarially informed that peddlers are in a way whereupon, a station Diary Entry was made, raiding party was constituted and proceeded towards destination. As per information, they have seen three persons (two ladies and a gent) whose activities were found suspicious and that being so, were apprehended, searched and during course thereof, it has been alleged that from the possession of both the ladies 3 Kg. of Hasis (Charas) were seized. For that, seizure list was prepared, self-statement was recorded which happens to be basis of registration of Bettiah Muffasil P.S. Case No.72/2008 whereupon, investigation commenced and culminated by way of submission of charge sheet, facilitating the trial which ultimately concluded in a manner, subject matter of instant appeal.

4. Defence case as is evident from mode of cross-examination as well as statement recorded under Section 313 of the Cr.P.C. is that of complete denial. However, neither ocular nor documentary evidence has been adduced on behalf of defence.

5. In order to substantiate its case, prosecution had examined altogether eight PWs and those are PW.1-Shailesh Mishra, PW.2-Bhakti Deonath, PW.3-Sheo Ratan Singh, PW.4-



Ajay Kumar Singh, PW.5-Sanjay Kumar Singh, PW.6-Umesh Tiwari, PW.7-Dilip Kumar, PW8-Bipin Kumar Pandey. Side by side had also exhibited seizure list Ext.1, formal FIR Ext.2, fardbeyan-Ext.3, signature of PW.4, PW.5 over seizure list under Ext.4 Series, Ext.5-Charge sheet and Ext.6-FSL Report. As disclosed hereinabove, neither ocular nor documentary evidence has been adduced on behalf of defence.

6. As per Ext.6-FSL report, it is evident that the sample which was transmitted to the FSL was chemically examined and was found to be Charas. From the evidence of the Investigating Officer PW.6, it is evident that he was entrusted with investigation on 08.05.2008 itself. From his examination-in-chief para-6, it is evident that he after taking permission from the learned Sessions Judge on 01.07.2008 sent the seized article to the FSL for chemical examination however, he is completely silent with regard to custody of the seized article during intervening period as well as he is also silent with regard to preparation of sample as well as being sealed. At the present moment, the evidence of PW.1, informant looks pertinent to be referred as, during course of his examination-in-chief he had not divulged the fact that sample was prepared, sealed, custody thereof though, during course of cross-examination at para-17, he had stated that he had entrusted the seized Charas to the incharge-Malkhana. Furthermore, from the record, it is evident that seized charas was not at all produced before the court as a material exhibit nor Malkhana register has been exhibited to suggest that seized charas was deposited in the



Malkhana under proper seal of PW.1. Moreover, as per Section 55 of the Act the Officer-in-charge has been authorized to take charge of the seized article and will keep the same in safe custody pending orders of the Magistrate under his own seal. As stated above, neither in the self-statement nor during course of evidence, informant PW.1 had stated that he continued with control over the seized article, prepared the sample, sealed the same having signature of seizure list witnesses, accused, deposited the same in the Malkhana.

7. Apart from this, as per Section 42(2) of the NDPS Act, it is incumbent upon the apprehending authority to inform his superior regarding event within 72 hours. Though, belated compliance has been acknowledged but not its violation. In likewise manner, Section 57 of the Act also cast an obligation to inform the superior officials but, from the evidences of PW.1 as well as PW.6, it is apparent that they have not spoken a word with regard to compliance of aforesaid mandatory provision even belatedly. Basing upon earlier verdict, the Apex Court in **Kishan Chand v. State of Haryana** reported in (2013) 2 SCC 502 has observed:

“21. When there is total and definite non-compliance with 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 with 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 relevance. Absolute duty coupled with strict compliance would rule out the element of prejudice where there is total non-compliance with the provision.

23. Reverting to the facts of the present case, we have already noticed that both the trial court and the High Court have proceeded on the basis of substantial compliance and there being no prejudice to the accused, though clearly recording that it was an admitted case of total non-compliance. The statement of PW 7 puts the matter beyond ambiguity that there was “total non-compliance with the statutory provisions of Section 42 of the Act”. Once there is total non-compliance and these provisions being mandatory in nature, the prosecution case must fail.

24. Reliance placed by the learned counsel appearing for the State on *Sajan Abraham (2001) 8 SCC 692* is entirely misplaced, firstly in view of the Constitution Bench judgment of this Court in *Karnail Singh (2009) 8 SCC 539*. Secondly, in that case the Court was also dealing with the application of the provisions of Section 57 of the Act which are worded differently and have different requirements, as opposed to Sections 42 and 50 of the Act. It is not a case where any reason has come in evidence as to why the secret information was not reduced to writing and sent to the higher officer, which is the requirement to be adhered to “pre-search”. The question of sending it immediately thereafter does not arise in the present case, as it is an admitted position that there is total non-compliance with Section 42 of the Act. The sending of report as required under Section 57 of the Act on 20-7-2000 will be no compliance, factually and/or in the eye of the law to the provisions of Section 42 of the Act. These are separate rights and protections available to an



accused and their compliance has to be done in accordance with the provisions of Sections 42, 50 and 57 of the Act. They are neither interlinked nor interdependent so as to dispense compliance of one with the compliance of another. In fact, they operate in different fields and at different stages. That distinction has to be kept in mind by the courts while deciding such cases.”

8. In the self-statement as well as during course of evidence PW.1, informant had stated that he asked from the accused persons whether they intend to be searched in presence of Gazetted Officer over which they kept mum and so, search was made by the lady constable PW.2 Bhakti Deonath which also happens to be in utter violation of the Section 50 of the NDPS. Physical search is to be carried out in presence of gazetted officer only. Violation thereof, has been found adverse to the prosecution.

9. Apart from this, during course of evidence as is evident from the evidence of PW.6, Investigating Officer, there happens to be no disclosure at his end that remaining part of seized charas were destroyed in terms of Section 52A of the NDPS Act nor any kind of destruction report has been brought upon record and that being so, the remaining part of seized Charas would have been a material exhibit of the trial, which has not been done. The cumulative effect of non-compliance of the aforesaid mandatory provisions make the prosecution a hollow event irrespective of examination of eight PWs along with six exhibits.

10. Now coming to status of the witnesses, it is evident that PW.8 is the driver who had not spoken over the search and seizure though confirmed arrest of the appellants while PW.7 a



constable failed to claim identification of the appellants in dock. PW.4 and PW.5 happens to be the seizure list witnesses who had contradicted the evidence of PW.1, informant regarding search and seizure stating that he had signed at police station while as per PW.1, search in a room by the side of the road where arrest was made, which PW.6, Investigating Officer during course of inspection of the place of occurrence had not found the room where allegedly appellant Seema and Sarswati were searched by PW.2 which, she (PW.2) had also contradicted. Apart from this, PW.1 at para-6 of his examination-in-chief had stated that a copy of seizure list was served upon accused persons who put their signature /thumb impression over the seizure list but, from Ext.1 seizure list, it is apparent that there happens to be non-presence of appellants over the same. So far evidence of PW.3 a hawaldar is concerned, at para-3 of his examination-in-chief it is evident that the female accused were not searched in a room and to that extent, he had controverted the evidence of PW.2 under para-8. In para-12 he had further stated that the lady constable had handed over the seized Charas to the Officer-in-charge Shailesh Mishra at police station whereupon, seizure list was prepared. While PW.2 had controverted the same who during her examination-in-chief had not stated that search of lady accused was made in a room while in para-8 she had stated that search was effected at the police station and for that, document was prepared at the police station itself. PW.1, the informant controverted the same as is evident from para-2 of his examination-in-chief.



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

“9. 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.

10. 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 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. Consequent thereupon, the judgment of conviction and sentence impugned is set aside. Both the appeals are allowed. Appellants are on bail, hence are discharged from their liabilities.

(Aditya Kumar Trivedi, J.)

Prakash Narayan

AFR/NAFR	A.F.R.
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