

THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.2587 of 2017

Arising Out of PS.Case No. -70 Year- 2014 Thana -JAMALPUR District- MUNGER

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1. Md. Khalid, Son of Md. Islam, R/o Village- Nathnagar (Town Tola), P.S.- Nathnagar, District- Bhagalpur.
 2. Md. Shahid, Son of Md. Kalo, R/o Village- Sanhajangi), Risalabad, P.S.- Habibpur, District- Bhagalpur.

.... Appellant/s

Versus

1. The State of Bihar

.... Respondent/s

with

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Criminal Appeal (SJ) No. 2598 of 2017

Arising Out of PS.Case No. -70 Year- 2014 Thana -JAMALPUR District- MUNGER

- =====
1. Ramdeo Bhagat, Son of Ravindra Bhagat, Resident of Village- Malani, New Nawadah, Police Station- Khaira, District- Jamui.
 2. Chhotu Bhagat, Son of Ravindra Bhagat, R/o Village Malani New Nawada, Police Station- Khaira, Distt- Jamui.

.... Appellant/s

Versus

1. The State of Bihar.

.... Respondent/s

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Appearance :

(In CR. APP (SJ) No.2587+2598 of 2017)

For the Appellant/s : Mr. Indu Bhushan, Adv.
Mr. Vikramdeo Singh, Adv.
Mr. Sunil Kumar, Adv.
Mr. Satya Prakash Prasad, Adv.
For the Respondent/s : Mr. Z. Hoda, APP

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI

ORAL JUDGMENT

Date: 23-01-2018

Cr. Appeal (SJ) No. 2587/2017 whereunder Md.

Khalid and Md. Shahid are the appellants, Cr. Appeal (SJ) No.

2598/2017 wherein Ramdeo Bhagat and Chhotu Bhagat are the

appellants originated against the common judgment of conviction

dated 03.08.2017 and order of sentence dated 10.08.2017 passed by



District & Sessions Judge, Munger in Jamalpur PS Case No.70/2014 whereby and whereunder all the appellants have been convicted for an offence punishable under Sections 20 NDPS Act and sentenced to undergo RI for 10 years and to pay fine of Rs. 1,00000/- (Rs. One Lac) and in default thereof, to undergo SI for three months, under Sections 21 NDPS Act and sentenced to undergo RI for 10 years and to pay fine of Rs. 1,00000/- (Rs. One Lac) and in default thereof, to undergo SI for three months, under Sections 22 NDPS Act and sentenced to undergo RI for 10 years and to pay fine of Rs. 1,00000/- (Rs. One Lac) and in default thereof, to undergo SI for three months, under Sections 27(A) NDPS Act and sentenced to undergo RI for 10 years and to pay fine of Rs. 1,00000/- (Rs. One Lac) and in default thereof, to undergo SI for three months, under Sections 29 NDPS Act and sentenced to undergo RI for 10 years and to pay fine of Rs. 1,00000/- (Rs. One Lac) and in default thereof, to undergo SI for three months, with a further direction to set off with regard to the period already undergone by Md. Shahid and Md. Khalid, with a further direction to run the sentences concurrently, on account thereof, have been heard together and are being disposed of by a common judgment.

2. PW-6, Panna Kumar Singh got confidential information from the STF, Bihar with regard to transportation of



Ganja in a huge quantity over motorcycle as well as Indigo Car whereupon after constituting a raiding party indulged in checking the vehicle and during course thereof, found motorcycle as well as Indigo car, intercepted and checked. From the physical possession nothing was recovered from all the four accused while on search of a bag which accused, Chhotu Bhagat was carrying being a pillion rider of motorcycle, 4 Kilograms (4 packets) of Ganja was seized and in likewise manner, from the dickey of the Indigo Car which was occupied by Md. Khalid, Md. Shahid, 100 Kilograms (100 packets) of Ganja were seized. One packet was torn, smelt and was found to be Ganja which was taken as sample. Accordingly, seizure list was prepared and after recording of self statement, Jamalpur PS Case No. 70 of 2014 was registered followed with an investigation, submission of charge-sheet as well as conduction of trial which ultimately concluded in a manner subject matter of the instant appeal.

3. Defence case as is evident from mode of cross-examination as well as statement recorded under Section 313 CrPC is that of complete denial. However, neither ocular nor documentary evidence has been adduced.

4. In order to substantiate its case, prosecution had examined altogether 7 PWs out of whom PW-1, Md. Anwarul Haque, PW-2, Prem Prakash Sah, PW-3 Dinesh Paswan PW-4, Deepak



Kumar, PW-5, Rajesh Kumar, PW-6, Panna Kumar Singh, PW-7, Vijay Kumar, as well as had also exhibited Ext-1, Seizure List, Ext-2, Self Statement, Ext-3, Verification report, Ext-4, FSL report.

5. Now-a-days, whenever Bench is confronted with the judgment of conviction and sentence recorded under the NDPS Act, it is apparent that the prosecution launched by the Bihar Police or Bihar Excise Department under the aforesaid Act is only meant for acquittal on account of non compliance of mandatory provisions of law either being intentional or out of ignorance, whichever may be, but it happens to be the truth. Times without number, the State has been reckoned to have proper appraisal of the niceties of the Act and be dispersed by providing refresher course to the authorities so that such kind of lapses should not recur. Recurrence of such kind of mistakes, illegality, irregularity is indicative of the fact that on one pretext or the other, the efforts of the courts have gone unheeded whereupon ultimate beneficiary happens to be culprit who by such activity is spoiling future of the country not only economically rather making children, adolescent, youngsters and even the older to be addict.

6. So far this case is concerned, irrespective of examination of 7 PWs, the mandatory provisions, as required have not been complied with and in likewise manner, so alleged seized articles have not been produced in court during course of trial. From the



evidence on record including that of Investigating Officer, PW-7, it is evident that non of them has spoken regarding receipt of confidential information, apprehension of accused along with recovery of Ganja to their Superior Officials as provided under Section 42(2) of the NDPS Act as well as 57 of the NDPS Act. In likewise manner, though from the self statement of the informant, it is evident that one of the packets was opened and that packet was kept as a sample but, the same would not serve the purpose because of the fact that 4 Kilograms (4 packets) of Ganja was recovered from the bag having been kept by Chhotu Bhagat while from dickey of the car 100 packets of Ganja, each containing 1 KG were seized and regarding which, there happens to be no disclosure, how the sample relating thereto was prepared.

7. PW-6 is the informant who had stated that after getting confidential information at the end of STF, they constituted raiding party and then began to keep vehicle checking during course of which, the miscreants along with Ganja were seized, arrested. He in his examination-in-chief at para-4, had stated that after recovery of psychotropic substance, Dy.S.P. Headquarters, Vishwanath Ram also arrived in whose presence the accused were interrogated and then thereafter, he had recorded his self statement which happens to be the basis of instant prosecution. In para-10 of his examination-in-chief he had stated that all the seized articles were kept in Malkhana. So from



his examination-in-chief, it is apparent that he kept silence on the aforesaid score. In para-17 of the cross-examination, he had stated that he had not put any specific mark over the seized article. He carried the seized articles to police station and then, kept at Malkhana but, without having entry therein. On court's question, he had admitted that Malkhana register is available but he had not caused entry there. If the evidences of other witnesses on this very score is taken into consideration, PW-1 at para-15 had stated that they had sealed seized article at police station but at that very time he was not present. PW-2 at para-12 had stated that after completing all formalities at the place of occurrence, they took accused as well as seized articles to the police station. Seized articles were not sealed. It was kept at the Malkhan. At para-20, he had stated that no mark of identification was given over the seized article at the place of occurrence. PW-3 at para-8 had stated that seized article was sealed at the police station after tying it in white cloth as well as sewing thereof by thread. PW-4 at para-7 had stated that seized article was packed in a cartoon but he is unable to disclose its number. At para-8 had stated that Darogaji had taken out some quantity from a bag as a sample. In para-16, he had further stated that seized article was sealed. PW-5 at para-8 had stated that no mark of identification was put over the seized article at the place of occurrence. In para-11, he had stated that Inspector, Dy. S.P.



were present at the place of occurrence.

8. PW-7, the Investigating Officer at para-7 of his examination-in-chief had stated that some quantity of seized Ganja was taken as sample and for its examination, a prayer was made before the court and then getting the same it was sent to Director, FSL vide Memo No. 42 dated 09.07.2014. During cross-examination at para-20, he had stated that he had not investigated any case relating to NDPS Act since before. He had further stated that the seized article is not before him. He had further stated that for transmitting the seized article to FSL, he took out the same from Malkhana but, it has got no entry in the Malkhana register as no Malkhana register was being maintained. Seized articles were kept in Malkhan by Officer incharge. When he returned back from market at that very time, the seized articles were kept outside. In para-22, he had stated that he had seen the seized articles on the date of occurrence itself at the police station. There were 104 bundles. He had not prepared samples from aforesaid 104 bundles rather from two packets. In para-23, he had stated that he had taken out 100 Grams from each packets as sample. In para-27, he had stated that Superior Officials were informed through wireless but he is unable to say whether any SD entry was made or not. He had further stated at para-28 that he took out sample in presence of O/C. He had not weighed the same.



9. In accordance with Section 55 of the NDPS Act, it happens to be incumbent upon officer-incharge to keep the seized articles in Malkhana under his proper seal awaiting order of the Magistrate. From the evidence of PW-6, informant, as stated above, the aforesaid activity is found completely absent and in likewise manner, there also happens to be no disclosure at the end of any of the PWs including PW-6 regarding their activity in terms of Section 42(2) as well as 57 of the NDPS Act. Not only this, from the evidence available on record it is evident that there happens to be inconsistency amongst the evidence of PW-6 as well as PW-7 over presence of Malkhana register as according to PW-6, though Malkhana register was there but there was no entry while PW-7, the I.O. had stated that there was no Malkhana register. That means to say, there happens to be ambiguity amongst the evidence of the PWs on that very score.

10. If the evidence of the prosecution witnesses is to be considered, 104 Kgs of Ganja have been seized but, during course of trial neither there happens to be disclosure at the end of the prosecution that aforesaid Ganja was subject to destruction, even then, the necessary requirement as prescribed under Section 52A of the NDPS Act would have substantiated but kept mum then, in the aforesaid background, the seized article would have been produced before the court which, the prosecution failed.



11. In the case of *Vijay Jain v. State of Madhya Pradesh* as reported in (2013) 14 SCC 527, the Hon'ble Apex Court had occasion to see the impact of non production of material exhibit during course of trial and has dealt with in following way:-

9. Para 96 of the judgment of this Court in *Noor Aga case* (2008) 16 SCC 417 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* (2008) 16 SCC 417 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* (2011) 5 SCC 123 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. The cumulative effects do not justify the judgment of conviction and order of sentence rendered by the learned lower court. Accordingly, the same is set aside. Both the appeals are allowed.

13. Since appellants are under custody, they are directed to be released forthwith if not required in any other case.

(Aditya Kumar Trivedi, J)

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