

IN THE HIGH COURT OF JUDICATURE AT PATNA**Criminal Appeal (SJ) No.342 of 2015**

Arising Out of P. S. Case No. -16 Year- 2009 Thana -BHAGHA District- WESTCHAMPARAN
(BETTIAH)

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Ramcharan, S/o Sri Nihore, resident of village-Bari, P.S.- Shikariganj, District - Gorakhpur, State-Uttar Pradesh.

.... Appellant/s

Versus

The State of Bihar

.... Respondent/s

Appearance :

For the Appellant/s : Mr. Arun Kumar Tripathi-Amicus Curiae

For the Respondent/s : Mr. S. A. Ahmad-A.P.P.

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
ORAL JUDGMENT

Date: 22-03-2018

On call, learned counsel for the appellant is absent, on account thereof, Sri Arun Kumar Tripathi has been requested to assist the Court as an Amicus Curiae, which he consented.

2. Appellant Ramcharan along with Jairam Sharma (not appellant) has been found guilty for an offence punishable under Section 20(B) of the N.D.P.S. Act and sentenced to undergo R.I. for two years as well as to pay fine appertaining to Rs.10,000/- and in default thereof, to undergo S.I. for two months, additionally, under Section II(B) of the N.D.P.S. Act and sentenced to undergo R.I. for two years as well as to pay fine appertaining to Rs.10,000/- and in default thereof, to undergo S.I. for two months, additionally, under Section 22(B) of the N.D.P.S. Act and sentenced to undergo R.I. for



two years as well as to pay fine appertaining to Rs.10,000/- and in default thereof, to undergo S.I. for two months with a further direction to run the sentences concurrently, with a further direction that the period having undergone during course of trial will be subject to set off by the Additional Sessions Judge-6th, West Champaran at Bettiah vide judgment of conviction and order of sentence dated 18.04.2015 in Trial No.34 of 2009 arising out of Bhagha P. S. Case No.16 of 2009, G.R. No.2196 of 2009. Before coming to adjudicate upon merit of the case, the judgment impugned suggest that the same has been passed in mechanical manner as the learned lower Court had failed even to see the format of the charge wherefrom it is apparent that no charge under Section II(B) was framed against the appellant nor such provision under N.D.P.S. Act rather it happens to be Section 20(b)(II) (B) of the N.D.P.S. Act. Furthermore, from the format of the charge, it is evident that charge under Section 22(B) of N.D.P.S. Act has been framed, but it happens to be Section 22(b) of the N.D.P.S. Act.

3. PW-1 Gokul Chandra Day an Assistant Commandant of S.S.B., 27th Battalion filed written report on 27.08.2009 by way of producing three apprehended persons namely Jairam Sharma, Ramcharan and Sadruddin along with three jackets containing 09 k.g. (03 k.g. in each jacket) Ganja, seizure list with an allegation that during course of patrolling, they have seen these three persons



crossing inside Indian Territory from Nepal at pillar no.423 and on account thereof, were challenged whereupon, they began to flee, were chased, apprehended and on search, Ganja were found inside the jacket duly stitched. Accordingly, same was taken out weighed measuring 09 k.g. (03 k.g. each from one jacket) and accordingly, seizure list was prepared. Then thereafter, the three apprehended persons along with seized Ganja, jacket were produced before the police.

4. On the basis of the aforesaid written report, Bagaha P. S. Case No.16 of 2009 was registered followed with an investigation as well as submission of the chargesheet on the basis of which, trial commenced and concluded in a manner, subject matter of instant appeal.

5. Defence case, as is evident from mode of cross-examination as well as statement of the accused recorded under Section 313 of the Cr.P.C. is that of complete denial. In order to substantiate the same, one DW has also been examined.

6. In order to substantiate its case, prosecution had examined altogether five PWs, who are PW-1 Gokul Chand Dey, PW-2 Narendra Kumar, PW-3 Matwar Singh, PW-4 Ghewar Singh and PW-5 Jamuna Prasad Singh as well as had also exhibited as Exhibit-1, signature of informant over written report, Exhibit-2, signature over



seizure list, Exhibit-3, seizure list, Exhibit-4, F.S.L. Report, Exhibit-5, formal F.I.R., Exhibit-6, requisition made before the Sessions Judge to order for examination of the seized article.

7. Now, coming to the evidence available on the record, it is apparent that prosecution has miserably failed to substantiate its case in the background of the fact that none of the witnesses had disclosed that at the time of search and seizure, accused was given an opportunity to be searched in presence of Gazetted Officer and in likewise manner, he was not at all physically searched in presence of Gazetted Officer. Accused persons were wearing jacket and during physical search, the aforesaid Ganja was found inside the jacket properly stitched and that being so, there was utter violation of Section 50 of the Act. In likewise manner, it is also apparent from the evidence of the respective PWs that they have not disclosed how seized articles were packeted, sealed and in likewise manner, sample was prepared at the spot and was sealed. Not only this, PW-5, who happens to be the Investigating Officer is also found completely blanked on that very score. It is further evident from the evidences of the PWs, more particularly PW-1 as well as the I.O. (PW-5) that no information was given to the superior officials as provided under Section 42(2) of the N.D.P.S. Act as well as Section 57 of the N.D.P.S. Act. Not only this, during course of trial, neither the seized



articles have been produced nor there happens to be report in terms of Section 52 (A) of the N.D.P.S. Act regarding its destruction. That means to say, there happens to be complete violation of the mandatory provisions of law affecting credibility of the prosecution version. One additional factor as is evident from the evidence of the PWs is that PW-1 and PW-2 have not claimed identification of any of the accused in dock while PW-3 and PW-4, though claimed, but their evidences are found deficient on that very score.

8. 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.

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12. We are thus of the view that as the prosecution has not



produced the brown sugar before the Court and has also not offered any explanation for non-production of the brown sugar alleged to have been seized from the appellants and as the evidence of the witnesses (PW 2 and PW 3) to the seizure of the materials does not establish the seizure of the brown sugar from the possession of the appellants, the judgment of the trial court convicting the appellants and the judgment of the High Court maintaining the conviction are not sustainable.”

9. Consequent thereupon, the judgment of conviction and sentence recorded by the learned lower Court would not survive and is accordingly, set aside. Appeal is allowed. Appellant is on bail, hence is discharged from its liability.

(Aditya Kumar Trivedi, J)

Vikash/-

AFR/NAFR	A.F.R.
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