

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.108 of 2009

Arising Out of NDPS.Case No. -26 Year- 2002 District- MUZAFFARPUR

=====

Sanjay Kumar Gupta, son of late Uma Shankar Gupta, R/O Mohalla-Gudri Bazar,
PS-Samastipur Town, Distt-Samastipur.

.... Appellant/s

Versus

State of Bihar

.... Respondent/s

=====

Appearance :

For the Appellant/s : Mr. Vijay Anand, Adv.

For the Union of India : Mr. Kumar Priya Ranjan, Adv.

For the State : Mr. Parmeshwar Mehta, APP

=====

CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI

ORAL JUDGMENT

Date: 10-10-2018

Appellant, Sanjay Kumar Gupta has been found guilty for an offence punishable under Section 20 of the NDPS Act and sentenced to undergo RI for 10 years as well as to pay fine of Rs. 1 Lakh in default thereof, to undergo RI for one year, additionally vide judgment of conviction dated 09.01.2009 and order of sentence dated 13.01.2009 passed by 5th Additional Sessions Judge- Muzaffarpur in DRI (NDPS) Case No. 26/2002, Trial No. 18/2008.

2. Briefly, the case as set up by the prosecution is that on getting confidential information, the members of the DRI conducted a raid at Platform No.4 of Muzaffarpur Railway Station where a person was found in possession of two straw board cartoons which were searched out and therefrom 25 Kilograms of Ganja wrapped in five independent bundles were seized and for that, seizure



list, Punchnama, inculpatory extra-judicial confessional statement were prepared. Accused was forwarded to custody while the matter was inquired into and then, at the end of PW-2, R.K. Srivastava complaint was filed. There happens to be disclosure in the complaint that samples were sent for examination but, report was awaiting. It is further evident from the record that report has been received and is made an exhibit. After examination of witnesses before charge, charge was framed, witnesses were cross-examined after charge, some were examined after charge. Statement under Section 313 CrPC was recorded and then thereafter, hearing the argument, vide judgment impugned, the appellant has been found guilty in a manner as indicated above, hence this appeal.

3. Defence case as is evident from the mode of cross-examination as well as statement recorded under Section 313 CrPC is that of complete denial. However, nothing has been adduced in defence.

4. In order to substantiate its case, prosecution had examined altogether seven PWs who are PW-1, Rakesh Ranjan, PW-2, R.K. Srivastava, PW-3, Surendra Kumar, PW-4, Sanjay Kumar, PW-5, Laxman Chaudhary, PW-6, Deepak Kumar and PW-7, Mithileshwar Pd. Singh, as well as had also exhibited Ext-1, Seizure List, Ext-2, Punchnama, Ext-3, inculpatory extra-judicial confessional



Statement of the accused, Ext-4, Signature over complaint petition, Ext-5, Signature over seizure list of the respective witnesses, Ext-6, Signature over Punchnama by the witnesses, Ext-7, Inventory certificate, Ext-8, 8/1, Signature, Seizure and Punchnama and Ext-9, report of Assistant Chemical examiner. As stated above, nothing has been adduced in defence.

5. The impact of non production of seized material has been considered by the Constitution Bench of Hon'ble Apex Court in the case of *Vijay Jain v. State of Madhya Pradesh* as reported in (2013) 14 SCC 527, where in Noor Aga case was considered 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.

11......

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.”

6. Furthermore, having stringent punishment prescribed therefor, in likewise manner, there should be strict compliance of the mandate of law so prescribed. In the aforesaid background, now one has to see whether there happens to be proper compliance at the end of prosecution.

7. Circular 1/88 as well as 1/89 deal with mode of search and seizure as well as preparation of samples. Relevant direction under aforesaid two Circulars are to be incorporated independently which are as follows:-

“1.6 Quantity of different drugs required in the sample. *The quantity to be drawn in each sample for chemical test should be 5 grams in respect of all narcotic drugs and psychotropic substances except in the cases of Opium, Ganja and Charas/ Hashish where a quantity of 24 grams in each case is required for chemical test. The same quantities should be taken for the duplicate sample also. The seized drugs in the packages/ containers should be well mixed to make it homogeneous and representative before the sample in duplicate is drawn.”*

“1.7 Number of samples to be drawn in each seizure case. (a) *In the case of seizure of single package/container one sample in duplicate is to be drawn. Normally it is advisable to draw one sample in duplicate from each package/container in case of seizure of more than one package/container. (b) However, when the*



package/ container seized together are of identical size and weight, bearing identical markings and the contents of each package give identical results on colour test by U.N. kit, conclusively indicating that the packages are identical in all respect/ the packages/ container may be carefully bunched in lots of 10 packages/ containers may be bunched in lots of 40 such packages such packages/ containers. For each such lot of packages/ containers, one sample in duplicate may be drawn.

(c) Where after making such lots, in the case of Hashish and Ganja, less than 20 packages/containers remains, and in case of other drugs less than 5 packages/containers remain, no bunching would be necessary and no samples need be drawn. (d) If it is 5 or more in case of other drugs and substances and 20 or more in case of Ganja and Hashish, one more sample in duplicate may be drawn for such remainder package/containers. (e) While drawing one sample in duplicate from a particular lot, it must be ensured that representative drug in equal quantity is taken from each package/ container of that lot and mixed together to make a composite whole from which the samples are drawn for that lot.”

8. How to transmit the sample and the mode and time limit for transmitting of samples to laboratory has also been properly detailed as is evident from para-1 to 13 under Circular No. 1/89 and is quoted below:-

SECTION II-
GENERAL PROCEDURE FOR SAMPLING, STORAGE, ETC.

2.1 All the drugs shall be properly classified, carefully, weighed and samples on the spot of seizure.

2.2 All the packages/containers shall be serially numbered and kept in lots for sampling. Samples from the narcotic drugs and psychotropic substances seized, shall be drawn on the spot of recovery, in duplicate, in the presence of search witness (Panchas) and the person from whose possession the drug is recovered, and a mention to this effect should invariably be made in the panchanama.



Quantity to be drawn for the sampling]

2.3 The quantity to be drawn in each sample for chemical test shall not be less than 5 grams in respect of all narcotic drugs and psychotropic substances save in cases of opium, ganja and charas (hasish) where a quantity of 24 grams in each case is required for chemical test. The same quantities shall be taken for the duplicate sample also. The seized drugs in the packages /containers shall be well mixed to make it homogeneous and representative before the sample (in duplicate) is drawn.

2.4 *****

2.5 *****

2.6 *****

2.7 *****

Drawl of representative samples:

2.8 While drawing one sample (in duplicate) from a particular lot, it must be ensured that representative sample are in equal quantity is taken from each package/container of that lot and mixed together to make a composite whole from which the samples are drawn for that lot.

Storage of samples- procedure

2.9 The sample in duplicate should be kept in heat sealed plastic bags as it is convenient and safe. The plastic bag container should be kept in a paper envelope which may be sealed properly. Such sealed envelope may be marked as original and duplicate. Both the envelope should bear the S.No. of the package(s)/ containers from which the sample has been drawn. The duplicate envelope containing the sample will also have a reference of the test memo. The seals should be legible. This envelope which should also be sealed and marked 'secret -drug sample/Test memo' to be sent to the chemical laboratory concerned.

Maintenance of Godowns and procedure for deposit drugs

3.3 Such godowns, as a matter of rule, shall be placed under the over-all supervision and charge of a Gazetted officer of the respective enforcement agency, who shall exercise utmost care, circumspection and personal supervision as far as possible. Each seizing officer shall deposit the drugs fully packed and sealed in the godown within 48 hours of such seizure, with a forwarding memo indicating NDPS Crime No. as per Crime and Prosecution (C & P Register) under the new law, name of the accused, reference of test memo, description of the drugs, total no. of packages/containers, etc.



9. Evidence of PW-5, Laxman Chaudhary and PW-6, Deepak Kumar relates with the activity of the prosecution having taken in accordance with Section 52A of the NDPS Act and, the representative sample was drawn in presence of Anjani Kumar Srivastava, Judicial Magistrate, 1st Class who has not been examined. One of the seizure list witnesses has not been examined. Sample has not been produced in court nor the representative sample prepared, if any, in accordance with Section 52A of the Act. The other happens to be PW-3, Surendra Kumar who during his examination-in-chief had stated that in his presence 25 Kilograms of Ganja was recovered from the possession of the appellant and for that, seizure list was prepared in his presence whereupon he had put his signature, exhibited. Also exhibited his signature over Punchnama. Also exhibited inculpatory extra-judicial confessional statement of the accused/appellant having in his presence whereupon Sanjay Kumar and R.K. Srivastava put their signatures in his presence. During cross-examination at para-5, had stated that he knew what has been mentioned in the seizure list but, at Column No.4 of seizure list, it has not been incorporated that from whose possession, Ganja has been recovered.

10. PW-4, Sanjay Kumar and PW-7, Mithilesh Pd. Singh are the RPF personnel. PW-4 had stated that in his presence on 11.06.2002, 25 Kilograms of Ganja was recovered from the



possession of Sanjay Kumar (five packets) by the DRI officials for which no document was shown by the accused. Identified the accused. During cross-examination, he had stated at para-5 that Ganja was seized from the possession of Sanjay Kumar Gupta but he is unable to say wherefrom. PW-7 is another RPF personnel who during course of examination-in-chief has reiterated the version of the prosecution and further, exhibited his signature over Punchnama as well as seizure list. During cross-examination at para-6, he has stated that at the time of search and seizure no Magistrate was there. He is not remembering whether sample was taken out or not. In para-7, he had stated that he is not remembering whether the officials of DRI had sealed the Ganja or not. Then had said that DRI officials left for their office along with Ganja.

11. PW-1 and PW-2 are DRI officials. PW-1 had stated that on confidential information received from RPF personnel a raid was conducted at Platform No.4 of Muzaffarpur railway station wherefrom 25 Kilograms of Ganja was seized from the possession of the accused, Sanjay Kumar Gupta. Then had said that the aforesaid recovery was made from the brake van of guard of the Summer Express. The aforesaid activity was done in the presence of RPF officials whereupon seizure list was prepared, Punchnama was prepared, statement of accused was recorded, sample was prepared



after taking out some part from the seized packet. The aforesaid activity was done by R.K. Srivastava (PW-2). During cross-examination at para-6, he had stated that in Column No.3 of the seizure list, date has wrongly been mentioned as 11.05.2002. In para-8, he had admitted that he was not the Seizing Authority. In para-11, he has admitted that no Gazetted officer was present.

12. PW-2 is the complainant who during examination-in-chief had stated that on getting confidential information he along with other officials so named (not examined save and except PW-1) rushed to Platform No.4 of Muzaffarpur railway station where apprehended one person carrying two straw cartoons which were searched out and therefrom 25 Kilograms (net) Ganja was seized having been wrapped in five packets, for that, no paper was shown. Accordingly, seizure list was prepared in presence of RPF personnel, independent seizure list witnesses. In likewise manner, Punchnama was prepared, inculpatory extra-judicial confessional statement of the accused was recorded, sample was prepared and sent for chemical examination. Then thereafter, awaiting chemical examination report, he had filed complaint petition.

13. During cross-examination, his attention has been drawn with regard to the fact having been stated by the appellant/accused that the aforesaid item was kept in an Almirah of



the Guard. Then had stated at para-16 that he had not mentioned as to how much of the quantity was sent for chemical examination. Then had stated that after examination of the Ganja by FSL, residue thereof, along with report has been sent back from the Laboratory which he received (exhibited). At para-22, he had stated that he collected the samples from all the five packets and sent for chemical examination in one packet after mixing the same. He had further admitted that he had not mentioned that sample was taken out from all the five packets and then it was mixed. Then he had stated that he had not mentioned the fact that sample was collected. In para-23, he had shown his inability to explain the delay in transmitting the sample for examination. In para-24, he had stated that before proceeding for search and seizure, higher officials were informed. Then had stated that he had informed to Deputy Director, Patna, but having no document to support thereof. In para-25, it has been admitted at his end that Ganja was not seized in presence of Magistrate nor sample was prepared in presence of Magistrate.

14. From the evidence, it has become crystal clear that there happens to be non compliance of Circular No. 1/88 and 1/89 in its right perspective. Because of the fact that there happens to be no discloser at the end of PW-2 that 25 grams of sample of Ganja was sent to the laboratory for examination. In likewise manner, there



happens to be no discloser that sample in duplicate was prepared. There happens to be no discloser that sample was prepared after taking out from all the five packets although during course of cross-examination, he had stated so. Furthermore, nothing has been produced in court in order to suggest that sample was drawn at the spot after seizure having signatures of PW-2 as well as that of seizure list witnesses along with accused in duplicate. In likewise manner, there happens to be no discloser that seized Ganja was deposited in custom godown within 78 hours as stipulated. There happens to be admission at the end of PW-2 that there was inordinate delay in sending the sample to the concerned laboratory without any precaution, safeguard as the same was transmitted through Postal Department without keeping under a sealed box, so that it should not be vulnerable and in likewise manner, inability to explain the delay. Prosecution also failed to disclose regarding keeping of the sample during the intervening period.

15. PW-2 has simply stated that before conduction of raid, the matter was reported to the Superior Officers, but he failed to disclose that there was information to Superior Officers after raid/apprehension/recovery of contrabands. It is needless to say that as recovery has been made from a public place, hence, Section 42(2) would not be applicable, but Section 57 would be and for that, the



prosecution has to satisfy and in likewise manner, under Section 57 of the NDPS Act, the matter is to be reported to the Superior Officials within 72 as well as 48 hours respectively, which is not at all found complied with. In the case of *Sajan Abraham v. State of Kerala*, reported in (2001) 6 SCC 692, it has been held that Section 57 was not mandatory in nature so much so, that if a substantial compliance thereof is made, it would not vitiate the prosecution case. Considering the earlier judgment, in *Mohan Lal v. State of Rajasthan* reported in 2015 CrLJ 2811, it has been held as follows:-

27. A three-Judge Bench in *Sajan Abraham* (supra), placing reliance on [State of Punjab v. Balbir Singh](#)[(1994) 3 SCC 299], has held that [Section 57](#) is not mandatory in nature and when substantial compliance is made, it would not vitiate the prosecution case. In *Karnail Singh* (supra), the Constitution Bench, while explaining the ratio laid down in *Sajan Abraham* (supra), analysed the requirement of [Section 42\(1\)](#) and [42\(2\)](#) and opined that the said pronouncement never meant that those provisions need not be fulfilled at all. However, the Constitution Bench has not delved into the facet of [Section 57](#) of the NDPS Act.

28. [In Kishan Chand v. State of Haryana](#)[(2013) 2 SCC 502], the Court while dealing with the compliance of [Sections 42](#), [50](#) and [57](#), has opined thus:- "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.

16. Taking into account the overall scenario of the



case as projected by the prosecution, there happens to be utter violation of mandatory provisions of the law. Consequent thereupon, the finding recorded by the learned lower court is not at all found to be sustainable in the eye of law and accordingly, set aside. Appeal is allowed.

17. Since appellant is on bail, he is discharged from the liability of bail bond.

(Aditya Kumar Trivedi, J)

perwez

AFR/NAFR	AFR
CAV DATE	N/A
Uploading Date	25.10.2018
Transmission Date	25.10.2018

