

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.299 of 2003

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Harendra Kumar Singh, Son of Late Teras Singh, Resident of Village – Chota
Telpa, P.S. Chapra, District – Saran.

.... Appellant/s

Versus

State of Bihar

.... Respondent/s

with

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Criminal Appeal (SJ) No. 340 of 2003

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Surendra Singh, Son of Ramdayal Singh, Resident of Village – Kashi Bazar, P.S.
– Bhagwan Bazar, District – Saran.

.... Appellant/s

Versus

State of Bihar

.... Respondent/s

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Appearance :

(In CR. APP (SJ) No.299 of 2003)

For the Appellant/s : Mrs Rina Sinha, Amicus Curiae

For the Respondent/s : Mr. Bipin Kumar, APP

(In CR. APP (SJ) No.340 of 2003)

For the Appellant/s : Smt. Uma Kumari, Amicus Curiae

For the Respondent/s : Mr. Bipin Kumar, APP

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CORAM: HONOURABLE MR. JUSTICE VINOD KUMAR SINHA
ORAL JUDGMENT

Date: 22-03-2018

Nobody appeared on behalf of appellants in both the appeals in spite of repeated calls and since the matter is of the year 2003, I deem it appropriate to appoint Mrs. Rina Sinha as *Amicus Curiae* in Criminal Appeal No. CR. APP (SJ) No.299 of 2003 and Smt. Uma Kumari as *Amicus Curiae* in CR. APP (SJ) No.340 of 2003.

2. As both the above appeals arise out of same judgment, they are clubbed together and are being decided by this common order, for the sake of convenience.



3. These appeals are directed against the judgment of conviction and order of sentence dated 30.04.2003, passed by Sri Baikunth Nath Shahi, 9th Additional Sessions Judge, Saran at Chapra in N.D.P.S. Case No. 22/99 / 1/02, by which the appellant Harendra Singh stood convicted under Section 22 (b) of the Narcotic Drugs and Psychotropic Substance Act(hereinafter referred to as the “NDPS Act”) and was sentenced to undergo R.I. for five years with a fine of Rs. 25,000/- having default clause and appellant Surendra Singh has been convicted under Section 22(a) and 27 of the NDPS Act, was sentenced to undergo R.I. for six months with a fine of Rs. 5,000/- having default clause. No separate sentence was passed under Section 27 of the NDPS Act.

4. Prosecution case as per the self statement of the informant Ram Swarth Yadav, the then inspector cum officer in charge of Town P.S. Chapra recorded on 8.8.99 at 4.45 P.M. in short is that on 08.08.99, when he along with S.I. R.K. Saran, S.I. P.N. Thakur and homeguards, namely, Rajan Prasad, Upendra Prasad Yadav, Rajeshwar Gupta, Bhutkun Srivastava and Maheshwar Singh, were on patrolling, received a secret information that some persons were consuming heroine at Chota Telpa (Rawal Tola), causing annoyance to local public and proceeded and reached at the place of occurrence and on seeing the police party, some persons started fleeing away but one person was caught, who disclosed his name as Surendra Singh (the appellant) and in presence of two independent witnesses, namely, Akhatar Ali and Satendra Singh, his person was searched. On search



two packets containing (puriya) containing heroin was recovered from his pocket. On being asked, he disclosed that he had purchased the recovered heroin from the appellant Harendra Kumar Singh. Thereafter, the police party proceeded towards the house of appellant Harendra Kumar Singh along with appellant Surendra Singh and on instruction of the appellant Surendra Singh, one of the rooms of appellant Harendra Kumar Singh was searched in presence of the above two witnesses, from where 5 grams of heroin kept in a polythene packet along with four other tiny packets containing heroin was recovered. At the time of search & seizure, appellant Harendra Kumar Singh was not present at his house. On being asked from his wife, she disclosed that appellant Harendra Kumar Singh used to bring heroin from Nepal and used to sell to rickshaw puller and tempo drivers. Appellant Surendra Singh also disclosed that he very often used to purchase heroin and used to sell the same at Chapra Kachahari Station and Railway Junction. Thereafter, a common seizure list was prepared in presence of the said witnesses and signatures of witnesses were taken and copy of the same was given to the accused.

5. On the basis of the aforesaid self statement Chapra Town P.S. Case No. 183/99 was registered against the appellants. Post investigation charge-sheet was submitted by the police. Cognizance of the offence was taken and the case was committed to the court of Sessions, which ultimately came to the file of Sri Sri Baikunth Nath Shahi, 9th Additional Sessions Judge, Saran at Chapra, for trial and disposal.



6. Charges were framed under Section 22 and 27 of the NDPS Act.

7. In order to prove its case, prosecution examined altogether 11 witnesses, they are; P.W. 1 – Satendra Singh, proved Ext. 1 and was declared hostile, P.W. 2 – Satyadeo Mahto, declared hostile, P.W. 3 – Mahendra Singh homeguard and member of raiding party, P.W. 4– Bhutkun Srivastava homeguard and member of raiding party, P.W. 5 – R.K. Sharan S.I. and member of raiding party, P.W. 6 – Rajeshwar Prasad Gupta, homeguard and member of raiding party, P.W. 7 – Upendra Prasad Gupta, homeguard and member of raiding party and P.W. 8- Animesh Kumar Singh, S.I. Town P.S. Chapra one of the Investigating Officers, P.W. 9 – Mohan Ram, one of the Investigating Officers, P.W. 10 – Pashupati Nath Thakur, S.I. Member of raiding team and investigating officer and P.W. 11 – Akhatar Ali, seizure list witness.

8. Apart from that following documents have been brought on record as Ext. 1 - Signature of Satendra Singh on seizure list, Ext. 2 – F.S.L. Report, Ext. 3 – Seizure list, Ext. 1/1 – Signature of R.S. Yadav on fardbeyan, Ext. 1/2- Signature of R.S Yadav on formal F.I.R., Ext. 1/3 – Signature of Akhatar Ali on seizure list and Ext. 4 – Fardbeyan.

9. No evidence either ocular or documentary has been brought on record by the defence and the defence of the accused persons as per the statement under Section 313 Cr.P.C. and as per the trend of cross-examination is of false implication and of innocence.

10. Post trial, learned Trial Court convicted the appellant Harendra



Singh under Section 22 (b) of the NDPS Act and appellant Surendra Singh under Section 22(a) and 27 of the NDPS Act and sentenced them in the manner as stated above.

11. Being aggrieved, the appellants preferred the present appeal.

12. Mrs. Rina Sinha and Smt. Uma Kumari learned *Amicus Curiae* appearing on behalf of the appellants in the above appeals respectively assailed the judgment of trial court on the ground that in his case informant, who seized the alleged heroin and prepared the seizure list has not been examined and other seizure list witnesses has also not supported the prosecution case and as such seizure is itself is itself has not been established and apart from that there is no compliance of Section 50(1) of the N.D.P.S. Act as there is no evidence available on record that the appellant Surendra Singh was even orally informed about his right of being searched of his person in presence of the Gazetted Officer or the Magistrate. On account of such breach of the provision of the Act, the prosecution is bound to fail. Reliance in this regard has been placed on the decision in the case of **State of Punjab v. Baldev Singh** reported in **AIR 1999 Supreme Court 2378**. Further, there is also non compliance of mandatory provisions of Section 42(2) of N.D.P.S. Act. as there is nothing on record to show that in spite of information being received that the appellant Surendra Singh used to purchase the heroin from the appellant Harendra Kumar Singh, the raiding team before proceeding to search the house of appellant Harendra Singh, noted down the same in writing or informed their superior authority before searching the house of



appellant Harendra Kumar Singh. Further submission is that there is nothing on record to show that the samples were prepared in compliance of standing order no. 1 of 89 issued under Section 52(A) of the N.D.P.S. Act. It has also been submitted that there is no compliance of Section 57 of N.D.P.S. Act as no information was given to higher authorities with regard to search & seizure. Further there is nothing available on record to show that samples were prepared in presence of '*panches*' or Magistrate and that sample was sent to the F.S.L. for examination and there is also nothing available on record to show that recovered articles were sealed in a packet and were kept in *Malkhana* prior to sending them to F.S.L. and there is also delay of one month in sending the seized articles to F.S.L. for their examination. Contention of learned *Amicus Curiae* is that the trial court without considering all these vital infirmities, has convicted the appellant Harendra Singh under Section 22 (b) of the NDPS Act and convicted the appellant Surendra Singh under Section 22(a) and 27 of the NDPS Act, which is not sustainable in the eye of law and if allowed to maintain, the same would result in travesty of justice.

13. Per contra, learned counsel for the respondent – State has supported the finding of guilt recorded by the trial court and has argued that there is recovery of two small puriya (packets) of heroin from the possession of appellant Surendra Singh and on his disclosure there was further recovery of 5 grams and 4 small puriya (packets) of heroin from the house of appellant Harendra Kumar Singh and since it was a chance recovery, as such, there is no necessity of compliance of



42(2) and 50 of the N.D.P.S. Act. It has further been submitted that the sample were sent to the F.S.L. for examination in the sealed packet wrapped in a cloth and F.S.L. report (Ext. 2) shows that seized article was heroin and, as such, there is no infirmity in the impugned judgment of trial court and conviction of the appellants is just and proper.

14. Heard both sides. On perusal of the evidence, it appears that in this case informant, who has seized the articles has not been examined in spite of summon issued to him and seizure list witness, P.W. 1, P.W. 2 and P.W. 11 has also not supported the case of prosecution as according to them their signatures were taken on a blank paper. So far other witnesses are concerned, P.W. 10 is the first I.O. and member of raiding team of this case and he has stated in his evidence that he was not present at the time of seizure and his evidence also disclosed that he went to Chota Telpa and found some persons consuming heroin and seeing the police, they started fleeing from there but appellant Surendra Singh was caught, and two puriya (packets) of heroin was recovered and he disclosed that he purchased the same from appellant Harendra Kumar Singh. Thereafter, he along with appellant Surendra Singh and other witnesses, raided the house of appellant Harendra Kumar Singh and on search 5 grams of heroin kept in a polythene and 5 puriya (packets) containing heroin, was recovered. This witness has also disclosed that after recording fardbeyan, he has been handed over the investigation of the case and evidence of this witness also discloses that he has sent the seized articles to F.S.L. for examination.



Evidence of P.W. 10 also disclosed that he received the articles after one month i.e. on 08.09.99 and it was kept in *Malkhana* and he has sent the articles to F.S.L. However, his evidence is silent on the point that he has complied the standing order issued under Section 52(A) of the N.D.P.S. Act or not.

15. P.W. 9 is the other I.O. of this case but as per his evidence, he has not done anything relevant in this case.

16. P.W. 8 is also an I.O. in this case and he has received the report of F.S.L. and also recorded the statement of some witnesses and submitted charge-sheet against appellant Harendra Kumar Singh.

17. P.W. 3 to 7 are the homeguards, who were the members of raiding party and search & seizure. However, the evidence of P.W. 5 in para – 14 shows that the articles seized were not sealed at the place of occurrence and they were kept in papers separately and only a paper was attached writing the name of accused. Evidence of P.W. 5 also shows that he along with inspector sahib and witnesses has entered into the house of appellant Harendra Kumar Singh and evidence of P.W. 3 shows that search of appellant Surendra Singh was not made before the superior officer or the Magistrate.

18. On close scrutiny of their evidence, it appears that the person of appellant Surendra Singh was searched in this case and as rightly pointed out by learned *Amicus Curiae*, there is nothing available on record to show that appellant Surendra Singh, whose person was searched, was even orally informed about his right of being searched of his person in presence of the Gazetted Officer or the Magistrate as



provided under Section 50(1) of N.D.P.S. Act and the Hon'ble Apex Court in the case of State of Punjab v. Baldev Singh (supra), while considering the provisions of Section 50 N.D.P.S. Act is mandatory or not, held as follows:

The Constitution Bench in Sanjay Dutt's case, thus clearly held that once the prosecution has proved unauthorised conscious possession of any of the specified arms and ammunition etc. in a notified area by the accused, the offence is complete and the conviction must follow on the strength of the statutory presumption, unless the accused proves the non-existence of a fact essential to constitute any of the ingredient of that offence. Indeed, the presumption, even though statutory in nature, was held to be rebuttable. Thus, even if, it be assumed for the sake of argument that all the material seized during an illegal search, may be admissible as relevant evidence in other proceedings, the illicit drug or psychotropic substance seized in an illegal search cannot by itself be used as proof of unlawful conscious possession of the contraband by the accused. An illegal search cannot also entitle the prosecution to raise a presumption under Section 54 of the Act because presumption, is an inference of fact drawn from the facts which are known as proved. A presumption under Section 54 of the Act can only be raised after the prosecution has established that the accused was found to be in possession of the contraband in a search conducted in accordance with the mandate of Section 50. We, therefore, hold that an illicit article seized from the person of an accused, during search conducted in violation of the safeguards provided in Section 50 of the Act, cannot by itself be used as admissible evidence of proof of unlawful possession of the contraband on the accused. Any other material/article recovered during that search may, however, be relied upon by the prosecution in other/independent proceedings against an accused notwithstanding the recovery of that material during an illegal search and its admissibility would depend upon the relevancy of that material and the facts and circumstances of that case. Thus, considered we are of the opinion that the judgment in Ali Mustaffas case correctly interprets and distinguishes the judgment in Pooran Mals case and the broad observations made in Pirthi Chands case and Jasbir Singhs case are not in tune with the correct exposition of law, as laid down in Pooran Mal's case. On the basis of the reasoning and discussion above, the following conclusions arise : (1) That when an empowered officer or a duly authorised officer acting on prior information is about to search a person, it is



imperative for him to inform the concerned person of his right under Sub-section (1) of Section 50 of being taken to the nearest Gazetted Officer or the nearest Magistrate for making the search. However, such information may not necessarily be in writing; (2) That failure to inform the concerned person about the existence of his right to be searched before a Gazetted Officer or a Magistrate would cause prejudice to an accused; (3) That a search made, by an empowered officer, on prior information, without informing the person of his right that, if he so requires, he shall be taken before a Gazetted Officer or a Magistrate for search and in case he so opts, failure to conduct his search before a Gazetted Officer or a Magistrate, may not vitiate the trial but would render the recovery of the illicit article suspect and vitiate the conviction and sentence of an accused, where the conviction has been recorded only on the basis of the possession of the illicit article, recovered from his person, during a search conducted in violation of the provisions of Section 50 of the Act; (4) That there is indeed need to protect society from criminals. The societal intent in safety will suffer if persons who commit crimes are let off because the evidence against them is to be treated as if it does not exist. The answer, therefore, is that the investigating agency must follow the procedure as envisaged by the statute scrupulously and the failure to do so must be viewed by the higher authorities seriously inviting action against the concerned official so that the laxity on the part of the investigating authority is curbed. In every case the end result is important but the means to achieve it must remain above board. The remedy cannot be worse than the disease itself. The legitimacy of judicial process may come under cloud if the court is seen to condone acts of lawlessness conducted by the investigating agency during search operations and may also undermine respect for law and may have the effect of unconscionably compromising the administration of justice. That cannot be permitted. An accused is entitled to a fair trial. A conviction resulting from an unfair trial is contrary to our concept of justice. The use of evidence collected in breach of the safeguards 50 have by Section 50 at the trial, would render the trial unfair. (5) That whether or not the safeguards provided in Section 50 have been duly observed would have to be determined by the Court on the basis of evidence led at the trial. Finding on that issue, one way or the other, would be relevant for recording an order of conviction or acquittal. Without giving an opportunity to the prosecution to establish, at the trial, that the provisions of Section 50, and particularly the safeguards provided therein were duly complied with, it would not be permissible to cut- short a criminal trial; (6) That in the context in which the protection



has been incorporated in Section 50 for the benefit of the person intended to be searched, we do not express any opinion whether the provisions of Section 50 are mandatory or directory, but, hold that failure to inform the concerned person of his right as emanating from Sub-section (1) of Section 50, may render the recovery of the contraband suspect and the conviction and sentence of an accused bad and unsustainable in law; (7) That an illicit article seized from the person of an accused during search conducted in violation of the safeguards provided in Section 50 of the Act cannot be used as evidence of proof of unlawful possession of the contraband on the accused though any other material recovered during that search may be relied upon by the prosecution, in other proceedings, against an accused, notwithstanding the recovery of that material during an illegal search; (8) A presumption under Section 54 of the Act can only be raised after the prosecution has established that the accused was found to be in possession of the contraband in a search conducted in accordance with the mandate of Section 50. An illegal search cannot entitle the prosecution to raise a presumption under Section 54 of the Act (9) That the judgment in Pooran Mal's case cannot be understood to have laid down that an illicit article seized during a search of a person, on prior information, conducted in violation of the provisions of Section 50 of the Act, can by itself be used as evidence of unlawful possession of the illicit article on the person from whom the contraband has been seized during the illegal search; (10) That the judgment in Ali Mustaffa's case correctly interprets and distinguishes the judgment in Pooran Mal's case and the broad observations made in Pirthi Chand's case and Jasbir Singh's case are not in tune with the correct exposition of law as laid down in Pooran Mal's case. The above conclusions are not a summary of our judgment and have to be read and considered in the light of the entire discussion contained in the earlier part.

19. Hon'ble Apex Court after considering the several other cases, had come to the conclusion that without expressing any opinion whether the provisions of Section 50 are mandatory or directory, but, hold that failure to inform the concerned person of his right as emanating from Sub-section (1) of Section 50, may render the recovery of the contraband suspect and the conviction and sentence of an accused bad and unsustainable in law. In the present case also,



there is no compliance of Section 50(1) of N.D.P.S. Act. It further appears that on disclosure of appellant Surendra Singh, raiding team proceeded towards the house of appellant Harendra Kumar Singh and searched his house and recovered 5 grams of ganja and some puriya (packets) containing ganja but there is nothing available on record to show that there is compliance of clause 1.5 of standing order no. 1/89 issued under Section 52(A) of the N.D.P.S. Act, as clause 1.5 provides that :-

“Place and time of drawal of sample

1.5 Samples from Narcotic Drugs and Psychotropic Substance seized, must be drawn on the spot of recovery, in duplicate, in the presence of search (Panch) witnesses and the person from whose possession the drug is recovered, and mention to this effect should invariably be made in the Panchnama on the spot.”

20. There is also non compliance of Section 55 and 57 of the N.D.P.S. Act. No doubt sample was sent to F.S.L. but there is no evidence available on record to show that samples were prepared as per the provisions prescribed in standing order issued under Section 52(A) of the NDPS Act and in absence of that it cannot be said with certainty that those samples were taken from the seized heroin from the house of appellant Harendra Kumar Singh and Surendra Singh. It further appears that on disclosure of appellant Surendra Singh, police raided the house of appellant Harendra Singh and recovered 5 grams and puriyas (packets) containing heroin, however, as stated by learned



Amicus Curiae, there is nothing available on record to show that information was given to higher officers before conducting raid in the house of appellant Harendra Singh. No doubt, the recovery of heroin from the possession of appellant Surendra Singh was a chance recovery and on his information/disclosure, recovery from the house of appellant Harendra Singh was made and that can also be said to be a chance recovery and as such, it is not obligatory for the prosecution to show the compliance of Section 42(2) of N.D.P.S. Act in such a case. However, there are stringent provisions under N.D.P.S. Act with regard to sentence and also about the grant of bail and as such legislator has given some protection under various Sections of N.D.P.S. Act, so that they may not be misused and also with a view that the same may be under the supervision and control of higher officers and Magistrate and procedure for sampling, search and seizure under Section 42(2), 50, 52(A) and 57 of N.D.P.S. Act has been provided and even if these provisions cannot be held to be mandatory, they cannot be completely ignored. As such failure to comply these provisions will have a bearing on appreciation of evidence regarding arrest of the accused or seizure of the article.

21. In the present case, as discussed above, there is violation of Section 50, 52(A), 55 and 57 of the N.D.P.S. Act and there is also non compliance of Section 42(2) of N.D.P.S. Act. The purpose of above section is that the superior officers should know that what their subordinate staff is doing and no innocent person is implicated for the offence under NDPS Act. Further, there is absolutely nothing on



record to show that the seized articles were properly sealed and kept in *malkhana* and hence possibility of tampering of seized articles while in transit cannot be ruled out.

22. Evidence further shows that seizure was made on 8.8.99 whereas the report of F.S.L. shows that it was sent on 8.9.99 after a month and there is nothing available on record as to where the articles were kept for a period of one month and no *Malkhana* register was produced and even incharge of *Malkhana* has not been examined and that creates a serious doubt about the articles sent to F.S.L.

23. As such, the impugned judgment suffers from infirmities and inconsistencies as discussed above and learned Trial Court has not considered the same, while convicting the appellants under N.D.P.S. Act.

24. Accordingly, these appeals are allowed. Judgment of conviction and order of sentence dated 30.04.2003, passed by Sri Baikunth Nath Shahi, 9th Additional Sessions Judge, Saran at Chapra in N.D.P.S. Case No. 22/99 / 1/02, is hereby set aside.

25. As the appellants are on bail, they are discharged from liability of bail bonds.

(Vinod Kumar Sinha, J)

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