

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Appeal (SJ) No.271 of 2009

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BISHUN SINGH son of late Dhurkhel Singh, Resident of Village
Rupnarayanpur Karnauti, PS-Mahnar, Distt-Vaishali. Appellant/s

Versus

STATE OF BIHAR Respondent/s

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Appearance :

For the Appellant/s : Mr. Baban Roy, Amicus Curiae

For the Respondent/s : Mr. Parmeshwar Mehta, APP

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
ORAL JUDGMENT

12-12-2018 None appears on behalf of appellant, on account thereof,

Sri Baban Roy, learned Advocate who is present in the court,

has been requested to assist as an Amicus Curiae.

2. Sole appellant, Bishun Singh has been found guilty

for an offence punishable under Section 22 of the NDPS Act and

has been sentenced to undergo RI for 10 years as well as to pay

fine appertaining to Rs. 1,00000/- (One Lac) in default thereof,

to undergo SI for 2 years vide judgment of conviction dated

04.02.2009 and order of sentence dated 06.02.2009 passed by 1st

Additional Sessions Judge-cum-Special Judge, NDPS in

connection with NDPS Case No. 02/2007 arising out of

Sarairanjan PS Case No. 111/2006.

3. Hari Narain Singh O/C of Sarairanjan PS along with

police party while were engaged in routine vehicle checking on

23.10.2006 at about 7:00 AM, during course thereof, a cyclist

came who, seeing the police, tried to escape. Considering his

suspicious activity, he was apprehended and from a bag kept at



carrier of the cycle, during course of search in presence of two independent witnesses, Tej Narain Rai and Satrugan Rai, three packets of Ganja weighing 23 Kilograms was seized and for that, he failed to produce any kind of explanation/document in order to justify such possession. Accordingly, seizure list was prepared. On interrogation, the apprehended accused disclosed his identity as Bishun Singh who also made inculpatory extra judicial confessional statement.

4. After registration of Sarairanjan PS Case No.111/2006, investigation was entrusted to Arun Kumar Singh (PW-13) who after concluding the same, submitted the charge-sheet, basis for trial which culminated in a manner, subject matter of instant appeal.

5. 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.

6. As is evident, prosecution has examined altogether 16 Pws who are PW-1, Prem Kumar Singh, PW-2, Jagdish Mahto, PW-3, Hari Narain Singh, PW-4, Ramadhar Singh, PW-5, Tej Narain Rai, PW-5A (ought to have been 6), Satrugan Rai, PW-6, Hari Choudhary, PW-7, Ram Shobhit Singh, PW-8, Ram



Kishore Singh, PW-9, Arjun Das, PW-10, Nagendra Paswan, PW-11, Prabhat Kumar Choudhary, PW-12, Arjun Sah, PW-13, Arun Kumar Singh, PW-14, Dhaneshwar Vishwas, PW-15, Gopal Prasad Choudhary. Side by side has also exhibited Ext-1, Seizure List, Ext-2, Fardbeyan, Ext-3, inculpatory extra judicial confessional statement of the accused, Ext-4, FIR and Ext-5, FSL report. As stated above, nothing has been adduced on behalf of defence.

7. Now coming to the status of the witnesses, it is evident that PW-1, PW-2, PW-7, PW-8, PW-9, PW-10 and PW-12 have not supported the prosecution and on account thereof, they were declared hostile. It is further evident that PWs-5 and 6 who stood as seizure list witnesses, though affirmed their status but, prosecution failed to explicit from their mouth regarding search and seizure of 23 Kilograms of Ganja from a bag having been kept on the carrier of bicycle of accused/appellant, Bishun Singh in their presence. Now coming to the evidence of remaining witnesses, it is evident that PW-3 is the informant while PW-14 is the I.O. remaining one, are either Hawildar ro Sepoy, and claimed to have member of the police party under leadership of PW-3, as well as recovery of Ganja from a bag having over carrier of the bicycle possessed by the



appellant/accused.

8. After having minute observation of their evidences, it is crystal clear that none of them has stated that sample was prepared at the place of occurrence and remaining part along with sample were sealed at the place of occurrence. PW-3, informant as well as PW-14, I.O. did not say with regard to place where seized Ganja was kept and in likewise manner, both of them failed to disclose that information was given to the Superior Officials in terms of Section 54 of the NDPS Act. PW-14 even failed to disclose that he had produced sample before the Magistrate/Special Judge for getting the same examined by the FSL nor he said that after obtaining order of the court he transmitted the sample for examination. Though Ext-5 is the FSL report suggesting the sample to be Ganja but, that will not serve the purpose in the background of aforesaid deficiency coupled with the fact that so alleged seized material neither has been produced before the court during course of trial nor, there happens to be discloser at the end of prosecution regarding destruction in accordance with Section 52A of the NDPS Act.

9. 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.”

10. From the judgment impugned, it is evident that learned lower court has completely ignored the mandate of law. Accordingly, the judgment impugned is set aside. Appeal is allowed.

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

12. The first and last pages of the instant judgment be handed over to the learned Amicus Curiae for the needful.

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(Aditya Kumar Trivedi, J)

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