

IN THE HIGH COURT OF JUDICATURE AT PATNA**Criminal Appeal (SJ) No.412 of 2015**

Arising Out of PS.Case No. -13 Year- 2010 Thana -BELCHAR District-
WESTCHAMPARAN(BETTIAH)

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Noor Mahamad @ Badari @ Noor Mohammad @ Noor Mahmad Miya, S/o
Late Hanif Mohammad, resident of Village- Mil Parsa, P.S. Balthar, District- West
Champaran.

.... Appellant/s

Versus

The State of Bihar

.... Respondent/s

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Appearance :

For the Appellant/s : Mr. Akhileshwar Kumar Shrivastava-Advocate
For the Respondent/s : Smt. Abha Singh-A.P.P.

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
ORAL JUDGMENT

Date: 25-04-2018

Appellant Noor Mahamad @ Badari @ Noor
Mohammad @ Noor Mahmad Miya has been found guilty for an
offence punishable under Section 20(b)(ii) C of the N.D.P.S. Act and
sentenced to undergo R.I. for ten years as well as to pay fine
appertaining to Rs.1,00,000/- (one lac) and in default thereof, to
undergo S.I. for two years, under Section 22(C) of the N.D.P.S. Act
and sentenced to undergo R.I. for ten years as well as to pay fine
appertaining to Rs.1,00,000/- and in default thereof, to undergo S.I.
for two years, under Section 23(C) of the N.D.P.S. Act and sentenced
to undergo R.I. for ten years as well as to pay fine appertaining to
Rs.1,00,000/- and in default thereof, to undergo S.I. for two years,



additionally, with a further direction to run the sentences concurrently vide judgment of conviction dated 24.03.2015 and order of sentence dated 27.03.2015 passed by the Additional Sessions Judge-3rd, West Champaran at Bettiah in Trial No.63 of 2010 arising out of Balthar P. S. Case No.13 of 2010.

2. Amit Singh (PW-2), Assistant Commandant of S.S.B.-27th Battalion filed written report on 01.06.2010 disclosing therein that while two Constables of 27th Battalion namely Charlin Chungkreg (PW-1) and Alok Kumar Singh (PW-5) were on patrolling, they had seen two persons over motorcycle, who seeing them, got down from the motorcycle and ran away, one of them having a bundle over his head. Seeing their activity suspicious, they were chased and during course thereof, one managed to escape while another the appellant was apprehended along with bundle of Ganja weighing 38 k.g. Accordingly, Ganja as well as motorcycle has been produced and for that, production-cum-seizure list was prepared over which, Charlin Chungkreg (PW-1) and Amit Singh (PW-2) stood as a witness.

3. After registration of Balthar P. S. Case No.13 of 2010, investigation commenced and concluded by way of submission of chargesheet, whereupon trial commenced and concluded in a manner, subject matter of instant appeal.



4. Defence case, as is evident from mode of cross-examination as well as statement recorded under Section 313 Cr.P.C. is that of complete denial. However, neither oral nor documentary evidence has been adduced.

5. In order to substantiate its case, prosecution had examined altogether nine PWs, who are PW-1 Charlin Chungkreg, PW-2 Amit Singh, PW-3 Bhole Ram, PW-4 Niranjan Bhuiyar, PW-5 Alok Kumar Singh, PW-6 Nagendra Rai, PW-7 Aslam Gaddi, PW-8 Saheb Gaddi and PW-9 Vijay Ram. Side by side, had also exhibited as Exhibit-1, signature of PW-1 over seizure list, Exhibit-2, signature of PW-2 over seizure list, Exhibit-3 written report in the pen of PW-2, Exhibit-2/1 happens to be signature of Alok Kumar Singh (PW-5), F.S.L. Report exhibited as Exhibit-4. As is evident, neither oral nor documentary evidence has been adduced on behalf of defence.

6. From the evidence, it is apparent that I.O. has not been examined. Furthermore, it is also evident that PW-6, PW-7, PW-8 and PW-9 have not supported the case of prosecution and on account thereof, they were declared hostile. It is further evident that PW-3 and PW-4 though happen to be Sepoy of 27th Battalion of S.S.B., but they have not claimed themselves to be the member of patrolling party and on account thereof, they have not claimed to be an eye witness to occurrence. Now, remains the evidence of PW-1,



PW-2 and PW-5. From the evidence of PW-1 and PW-5, it is evident that they both were on patrolling and during course thereof, they have perceived two persons coming over motorcycle, who seeing them, got down from the motorcycle and ran away along with bundle having over their head, out of whom, one was apprehended, who disclosed his identity as appellant while remaining one escaped there from. It is also evident that they have identified the accused in dock. So, their evidences on that very score is found intact as during course of cross-examination, defence could not be able to dismantle that part of evidence.

7. PW-2, the informant had clearly stated that after apprehension of the accused, he was informed, whereupon he came and found the accused along with Ganja. Then, they had gone to police station and handed over the same. From his cross-examination at Para-6, he had stated that he handed over Ganja at the police station without sealing it. At Para-9, he had again been tested on that very score, whereupon had said that Ganja was not sealed in his presence. In Para-5, he had stated that Alok Kumar Singh was directed to get the Ganja weighed, whereupon he had gone to market and got it weighed while PW-5 Alok Kumar Singh had stated at Para-6 that Ganja was weighed at Police Station. At that very time, he was not present.



8. Apart from inconsistency having amongst the evidence of PWs, it is evident that on account of non-examination of the I.O., the mandatory provisions as provided under **Section 42(2) of the N.D.P.S. Act** along with **Section 57 of the N.D.P.S. Act** whereunder superior officials have to be informed regarding apprehension as well as seizure of the narcotics, could not be brought up on record. On the other hand, whoever been examined are also silent over the same. Furthermore, the material exhibit have not been produced in Court nor there happens to be any sort of information before the Court regarding its destruction in terms of Section 52(A) of the Act nor its sample so prepared in terms of Section 52(A) of the Act has been made an exhibit. Furthermore, due to non-examination of the I.O., it could not be brought up on record whether Ganja was sealed or not, how its sample was prepared, more particularly in the background of Exhibit-4, F.S.L. Report, which suggests that it was despatched vide Memo No.1374 dated 22.07.2010, through Special Messenger, A.S.I. Ram Babu Singh, which reached at the Office of F.S.L. on 26.08.2010 that means to say, more than one month and there happens to be no evidence where the sample were kept during the intermediary period.

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. In the aforesaid facts and circumstances of the case,



the judgment impugned did not survive. Consequent thereupon, same is 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.
CAV DATE	N.A.
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