

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.137 of 2016

Arising Out of PS. Case No. -337 Year- 2012 Thana -BARACHATTI District- GAYA

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Naresh Keshari son of Ram Chandra Sao Keshri Resident of village -
Barachatti, Police Station - Barachatti, District - Gaya.

.... **Appellant/s**

Versus

The State of Bihar

.... **Respondent/s**

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Appearance:

For the Appellant/s : Mr. Baxi S.R.P Sinha, Sr. Adv
: Mr.Mrigendra Pratap Singh, Adv
For the Respondent/s : Mr. Sujit Kumar Singh, APP

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
ORAL JUDGMENT

Date: 28-05-2018

Appellant, Naresh Keshari has been found guilty for an offence punishable under Section 20(c) of the NDPS Act and sentenced to undergo R.I for 10 years as well as to pay fine appertaining to Rs. 1, 00,000/- and in default thereof to undergo R.I for 5 years additionally, vide judgment of conviction dated 03.02.2016 and order of sentence dated 08.02.2016 passed by 1st Additional Sessions Judge-cum Special Judge (NDPS Act), Gaya in connection with NDPS Case No. 16 of 2012 arising out of Barachatti P.S. Case No. 337 of 2012.

2. PW-7, Ramdeo Prasad Sharma submitted written report on 24.07.2012 divulging the fact that in the preceding evening while he along with constable Balram Ram, Mahendra Singh, Birendra Kumar Singh were on patrolling, received confidential information regarding storage of *ganja* at the grocery shop of appellant Naresh Keshari lying at village Bhaluachatti. Accordingly, they reached at the destination. Seeing the police, shopkeeper Naresh Keshari after locking the shop succeeded in his



escape. His family members were informed to come and hand over the key or to open the shop but, none came and on account thereof, in presence of two villagers namely Surendra Manjhi and Charitra Yadav locks were broken, search was conducted, during course thereof, from a drum 30 Kg. *Ganja* was seized and for that, search-cum-seizure-list was prepared in presence of aforesaid two witnesses Surendra Manjhi and Charitra Yadav.

3. After registration of Barachatti P.S. Case No. 337/2012 investigation commenced and during course thereof, presence of appellant Naresh Keshari was procured, seized articles were sent to Forensic examination and, awaiting the report charge-sheet was submitted facilitating the trial meeting with the ultimate result, subject matter of instant appeal.

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

5. Prosecution, in order to prove its case had examined altogether 7 PWs, who are PW-1, Charitra Yadav, PW-2, Surendra Manjhi, PW-3, Bipin Kumar Singh, PW-4, Sanjay Prasad, PW-5, Lamau Mandal, PW-6, Raj Kumar Mandal and PW-7, Ramdeo Prasad Sharma. Side by side had also exhibited, Ext.1- written report, 1/1- seizure list, Ext.2- requisition for getting the sample transmitted to FSL and Ext.3- FSL report.

6. As is evident, no documentary evidence has been adduced on behalf of defence. However, DW-1, Vilash Yadav had



been examined.

7. From the record, it transpires that both the seizure list witnesses that means to say PW-1 as well as PW-2 had not supported the factum of recovery. In likewise manner, the other independent witnesses who happen to be the co-villager of the appellant, PW-4, PW-5 and PW-6 have also not supported the case of the prosecution. Therefore, only two witnesses are relevant and that being PW-7 the informant and PW-3 the I.O.

8. It is the quality not the quantity which matters while appreciating the evidence in order to search out whether the facts in issue has been proved or not and that happens to be Section 134 of the Evidence Act. Moreover, being a technical offence prescribing stringent punishment, on account thereof, there happens to be consisted judicial pronouncement that the mandatory provisions so prescribed thereunder are to be followed in its true spirit. That being so, while scrutinizing the evidence, it should also been seen whether mandatory provisions have been properly exercised or not.

9. PW-7, during course of examination-in-chief had stated that while he along with other police personnel were on night patrolling, conducted raid at the grocery shop of the accused after getting confidential information regarding storage of Ganja. The shop was closed. After breaking open the lock, shop was searched and during course thereof, 30 Kg of *ganja* was recovered and for that seizure list was prepared in presence of two seizure list witnesses. Then thereafter, he recorded his own written report (Exhibited the same). He had further stated that as accused was



not present on account thereof, he was not able to identify the accused in dock. During cross-examination, he had stated that he had not sealed the seized ganja at the spot because of the fact that it happens to be the duty of the Investigating Officer. In Para 8, he had stated that villagers including Sarpanch had disclosed name of the proprietor of the shop to be Naresh Keshari whereupon he has been named as an accused.

10. PW-3 is the I.O. He had deposed that he was entrusted with the investigation of the Barachatti P.S Case No. 337/2012 on 23.07.2012 itself. During course thereof, he recorded further statement of the informant. Copies of the search-cum-seizure-list in the C.D. He had gone to the place of occurrence which happens to be the grocery shop of Naresh Keshari lying at village Bhalua having boundary East- Panchayat Bhawan, West- Prabhu Sao, North- Ramchandra Keshari, South- Bhuiyan Tola. Also recorded statement of different witnesses. Arrested Naresh Keshari. On 28.08.2012, he procured order from the court for getting the seized article examined by the FSL (Exhibited). Then on 30.08.2012, he submitted charge-sheet. During cross-examination at para 9, he had stated that he received search-cum seizure-list along with the seized article which was kept at the police station. It was not sealed. He took out samples and then brought to the court which was sealed at the court. He alone had taken out the sample. He had not seen any documentary proof with regard to the ownership of the shop.

11. Ext.3 is the FSL report wherefrom, it is evident that it was transmitted vide letter no. 2119 dated 29.08.2012 but was



received at the office on 06.02.2013, that means to say approximately after six months. There happens to be no explanation at the end of the prosecution where the sample was during the intervening period. Be that as it may, from the evidences available on the record more particularly, that of PW-7 informant as well as PW-3, I.O that sample was not prepared at the spot nor it was sealed at the spot. In likewise manner, the seized article was also not sealed at the spot. There happens to be no disclosure at the end of the prosecution that it was ever kept at Malkhana. Furthermore, the seized article has not been made material exhibit of the case. Prosecution had not kept complete silence whether superior officials were informed over recovery of Ganja.

12. In *Vijay Jain v. State of Madhya Pradesh* reported in **(2013) 14 SCC 527** it has been held:-

“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.”

13. Consequent thereupon, the judgment of conviction and sentence recorded by the learned lower court is set aside. Appeal is allowed. Appellant is under custody, hence is directed to be released forthwith if not wanted in any other case.

(Aditya Kumar Trivedi, J.)

Prakash Narayan

AFR/NAFR	A.F.R.
CAV DATE	N.A.
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