

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Appeal (SJ) No.3166 of 2017

Arising Out of PS. Case No.-1025 Year-2013 Thana- GOVERNMENT OFFICIAL COMP.
District- Patna

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Ashok Kumar Gupta, Son of Late Yashwant Gupta, Resident of House No.
V/17, Budh Vihar, Phase No. 2, P.O. + P.S. - Vijay Vihar, New Delhi

... .. Appellant/s

Versus

Union Of India, Through Narcotics Control Bureau

... .. Respondent/s

with
Criminal Appeal (SJ) No. 3268 of 2017

Arising Out of PS. Case No.- Year-1111 Thana- District- Patna

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Punit Singhal, Son of Sanjay Singhal, Resident of House No. U/4, Budh Vihar
Phase – 1, Police Station – Vijay Nagar, New Delhi – 11 00086

... .. Appellant/s

Versus

The Union Of India, (through Sujeet Kumar) Enforcement Officer, N.C.B.,
Patna

... .. Respondent/s

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Appearance :

(In Criminal Appeal (SJ) No. 3166 of 2017)

For the Appellant/s : Ms. Surya Nilambari, Advocate
Mr. Nishant Kumar, Advocate

For the Respondent/s : Mr. S.D.Sanjay
ASG
Mr. Manoj Kumar Singh
CGC

(In Criminal Appeal (SJ) No. 3268 of 2017)

For the Appellant/s : Mr. Raj Kumar
Advocate

For the Respondent/s : Mr. S.D Sanjay
Addl. Soc. Gen.
Mr. Anjani Kumar Sharan
ASG

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CORAM: HONOURABLE MR. JUSTICE ASHUTOSH KUMAR
ORAL JUDGMENT



Date : 03-08-2018

Both the appeals have been heard together and are being disposed off by this common judgement.

2. The appellants have been convicted under Sections 20(b) (ii) (B) and Section 29 of the N.D.P.S. Act, 1985 by judgement dated 08.09.2017 passed by the Additional District & Sessions Judge, Patna in Special Case No. 60 of 2013 and by order dated 15.09.2017 they have been directed to undergo RI for eight years, to pay a fine of Rs. 60,000/- (sixty thousand) and in default of payment of fine, to further suffer rigorous imprisonment for two and a half years for both the offences. The sentences have, however, been ordered to run concurrently.

3. The prosecution case is based on the complaint of one Sujit Kumar, P.W. 3, alleging that pursuant to specific intelligence report received on 06.09.2013 at about 11.30 hours, that, one person aged 20 years is about to deliver a consignment of *Ganja* near Mithapur Bus Stand, a team of officers of the NCB, Patna was constituted. The team arrived at the Mithapur Bus Stand on the same day. Two persons, namely, Shivam Kumar and Rajesh Singh, who were found present near the Bus Stand, were requested to become witnesses to the search and seizure. While the team was at the surveillance, a person came outside from



Mithapur Bus Stand along with a brown-red coloured carry bag and a coloured printed nylon sack, containing some substance. He was identified by the informer. The members of the raiding team maintained close watch over the movement of the aforesaid person. He reached near the Law College and was about to hand over the consignment to two persons when he along with those two were intercepted. In presence of the independent witnesses, referred to above, they disclosed their names as Saheb Kumar Sahani and the appellants.

4. A notice under Section 50 of the N.D.P.S. Act, 1985 was served separately upon them for their personal search and they were made to understand that it was within their right to insist for being searched before a Magistrate or a Gazetted Officer. However, the accused persons, including the appellants, declined in writing and informed the team that they could proceed ahead for searching them. The members of the raiding team also offered themselves for being searched by appellants but that too was declined. The bag and nylon sack which was being carried by Saheb Kumar Sahani contained brown coloured dried materials which appeared to be *Ganja*. It was tested with the field-test-kit which responded positively to the test of cannabis. The total weight of the narcotics was found to be 15 kgs and 600 gms. The total



quantity of *Ganja* was kept in a separate nylon sack and seized under the provisions of Section 43 A of the N.D.P.S. Act, 1985.

Thereafter, two samples (S1 and S2) of 25 gms each were drawn randomly before the appellants, independent witnesses and members of the team and the same was kept in a sealed packet. The rest of the *Ganja* was wrapped and sealed and the signature of the appellants and independent persons were obtained on the sample packets as well as the residue.

5. It has further been stated by the P.W. 3 in his complaint that the copies of the search and seizure list were served upon the appellants and they were also noticed under Section 67 of the N.D.P.S. Act for recording of their statements in NCB Office, Patna, to which they agreed and came along with the raiding team to the office for recording their statement.

6. The statement of appellant / Ashok Kumar (Criminal Appeal No. 3166 of 2017) was recorded under Section 67 of the N.D.P.S. Act, 1985, wherein he stated that he came from Delhi to Patna on 06.09.2013 by train and the seized substance had to be received from Saheb Kumar Sahani and had to be delivered to one Manoj Bengali @ Manoj Bhai at Delhi. He confessed, that this was the second time when *Ganja* was to be delivered by



him to aforesaid Manoj Bengali at Delhi. He admitted that he only acted as a carrier for payment. After the aforesaid confession of appellant/Ashok Kumar, he was arrested.

7. Similarly, appellant/Punit Singhal also got his statement recorded, who admitted that appellant/Ashok Kumar had to receive the consignment of *Ganja* from Saheb Kumar Sahani and he had to deliver it at Delhi. He also submitted that appellant/Ashok Kumar had brought him to Patna from Delhi to assist him in transporting *Ganja* to Delhi which was to be received at Patna. Appellant/Punit Singhal was arrested after the aforesaid statement.

8. The third accused person, namely, Saheb Kumar Sahani, who had brought the consignment, also gave his statement under Section 67 of the N.D.P.S. Act intimating that earlier also he had given *Ganja* to appellant/Ashok Kumar and that he had brought the same, on this occasion, from his cousin Rama Sahani.

9. The sealed packets of the samples along with test memo in duplicate were produced before the District & Sessions Judge-cum-Special Judge, N.D.P.S. Act and thereafter was sent to CRCL, Kolkata for chemical examination on 07.09.2013 under the permission of the Court. The rest of the *Ganja* with the seal of NCB was



kept in the Malkhana of the NCB with the endorsement of the Malkhana Incharge as well as Malkhana Officer.

10. The appellants were produced before the Special Judge on 07.09.2013 from where they were remanded to custody.

11. A report of the search, seizure and arrest of the appellants was furnished to higher authorities as contemplated under Section 57 of the N.D.P.S. Act, 1985.

12. The complaint further reveals that a raid was conducted in the house of the cousin of co-accused Saheb Kumar Sahani, namely, Rama Sahani but nothing was recovered from there. The wife of aforesaid Rama Sahani was also made to give her statement under Section 67 of the N.D.P.S. Act, 1985, wherein she declined to have had any knowledge about the trade of *Ganja* at the instance of her husband.

13. On the basis of the aforesaid complaint, Special Case No. 60 of 2013 was instituted for offences under Sections 8, 20 and 29 of the N.D.P.S. Act, 1985. Thereafter, cognizance was taken under the aforesaid sections against the appellants.

14. As against the appellants, charges were framed under Sections 20 (b) (ii) (B) and Section 29 of the N.D.P.S. Act, 1985.



15. At the trial, the learned trial court after examining eight witnesses on behalf of the prosecution, convicted and sentenced the appellants, as aforesaid.

16. Be it noted that because of the absence of co-accused / Saheb Kumar Sahani, his trial was separated and only the appellants were tried in the present case.

17. The learned Advocates, who appeared on behalf of the appellants, assailed the judgement and order of conviction on the grounds that (i) none of the independent persons before whom search and seizure was made were examined at the trial; (ii) only Saheb Kumar Sahani was caught with the narcotics; (iii) the appellants were intercepted on mistaken identity; (iv) nothing was recovered from their possession; (v) verdict of guilt against the appellants have been returned only on the basis of evidence by police personnel; (vi) the discrepant deposition of the witnesses with regard to material particulars were believed; (vii) non-observance of the provisions contained under Section 42 (2), 50 and 52 (2) of the N.D.P.S. Act; (viii) no Malkhana register has been produced at the trial and that the seized narcotics was not produced before the trial court. On the above grounds, it was urged on behalf of the appellants that the judgement and order of conviction is much too presumptuous and even when the violation of mandatory provisions of the



N.D.P.S. Act was writ large in the evidence on record, the judgement of guilt has been arrived at by the trial court.

18. It was lastly submitted that the object of N.D.P.S. Act, 1985 is to make stringent provisions for control and regulation of operations relating to drugs and substances but to avoid harm to the innocent persons and to avoid abuse of the provisions by the officers, certain safeguards have been provided which have to be strictly adhered to. The aforesaid safeguards are mandatory and failure to comply with those requirements not only affects the prosecution case but also vitiates the trial.

19. In order to appreciate the contentions raised on behalf of the appellants, it would be necessary to refer to the deposition of witnesses offered on behalf of the prosecution in brief.

20. It would be relevant to first refer to the deposition of Sujit Kumar (informant) who has been examined as P.W. 3. He has supported the prosecution version in its entirety. In his examination-in-chief, he has stated that he was entrusted to file the complaint on 17.10.2013. After such entrustment, he examined the entire records and then prepared the complaint, which was produced before the superior police officers. Under the direction of the superior police officers, the complaint was placed before the Special PP, who after making some



amendments, returned the complaint to him. Thereafter, the complaint was accordingly modified and was placed before the Additional Director, NCB and only thereafter, was placed before the District & Sessions Judge, Patna on 31.10.2013. He has proved the complaint (Exhibit 5).

21. He has further submitted that he was not part of the raiding team and, therefore, had no personal knowledge about the aforesaid happenings. In his cross examination he has admitted that the first complaint which he had furnished to the department was modified. What modification was made was not in his memory at the time of deposing before the court. The second modified complaint, which was prepared by him, did not contain the original complaint as its annexure.

22. Learned Advocates appearing for the appellants have submitted that the first complaint which was prepared by P.W. 3 never saw the light of the day. Only after the complaint was vetted by the superior officers at the NCB and the Special Public Prosecutor, was it placed before the learned Special Judge. This is not permissible and is a serious departure from the established procedure for preferring complaint before the Special Court. This seriously raises doubts about the correctness of the first prosecution version.



23. Gyan Prakash, who has been examined as P.W. 4, has stated that on 06.09.2013, he was posted in NCB Office at Patna. A secret information was received that a person is about to deliver *Ganja* at Mithapur Bus Stand. The aforesaid information was reduced in writing and was placed before Vikash Kumar, Superintendent, NCB and on his direction, a team was constituted under his leadership. Two persons were requested to be the witnesses to the search and seizure. One person, after some time was spotted with two bags, whose movement was closely monitored. While he was about to deliver the consignment to two other persons, who were standing near the Law College, all the three, namely, the persons, who was carrying the narcotics and two others who were to receive such consignment, were intercepted. Two of the persons who were to receive the consignment disclosed their names as that of the appellants. The person who was carrying the bag disclosed his name as Saheb Kumar Sahani.

24. The aforesaid witness has supported every statement made in the complaint petition with respect to observance of the requirements of making the appellants / accused persons aware of their legal rights before they were searched, seizure of narcotics, drawing of samples, marking and sealing them etc. He has also testified to the



fact that the appellants were given notice to Section 67 of the N.D.P.S. Act, 1985 and their statements were recorded in the NCB Office. He has identified / proved the aforesaid statements as Exhibits 6, 7 and 7/2. Thereafter, the report which was prepared by him under Section 57 of the N.D.P.S. Act was proved (Exhibit 9).

25. In his cross examination, he has proved the notice under Section 50 of the N.D.P.S. Act, 1985 (Exhibits 11, 11/1 and 11/2). The notice under Section 67 of the N.D.P.S. Act, 1985 has also been proved by him (Exhibits 12 to 12/4). The CFSL report has also been proved (Exhibit 13).

26. P.W. 4 has also proved the railway ticket from New Delhi to Patna of two persons of the date of 05.09.2013, which was produced by appellant / Ashok Kumar. It contained the signature of appellant / Ashok Kumar (Exhibit 14). All other documents, which was signed by P.W. 4, has been proved by him.

27. He has further submitted that whatever was recovered was kept in the Malkhana of NCB. What is of further relevance, is that the address of the person, who was to be delivered the consignment of *Ganja* by the appellants and which name and address were provided by the appellants, was sent to NCB Delhi for further verification. The address was found to be correct but



Manoj Bengali who was to receive the consignment at New Delhi was found traceless. The aforesaid report by the Zonal Director has been proved by P.W. 4 as Exhibit 19 and 19/1. He has also testified to the fact that the narcotics which was seized was weighed by the electronic weighing machine, which had been brought from the office. He has also clearly stated that while Saheb Kumar Sahani was handing over the consignment in the hand of appellant/Punit Singhal, all the accused persons were caught by the police team.

28. Vikash Kumar P.W. 1 has testified to the fact that he too was a member of the raiding team and was present at the alleged place and time of the occurrence. He has further stated, that, on secret information, senior officers were informed and the team which was constituted for the purpose of apprehending the accused persons, proceeded towards Mithapur Bus Stand. In his cross examination, he has stated that before leaving the NCB office, the secret information was reduced in writing. However, he could not name the person, who was intercepted on the information by the spy. The statement of the spy was not taken.

29. Similar statements have been made by Ravi Ranjan Kumar, P.W. 2 and Balwant Rai, P.W. 5.



30. Amar Shankar, P.W. 6 is the handling officer of the NCB. He has testified to the fact, that, the inventories were certified by Shri Krishna Gopal, Judicial Magistrate, 1st Class. The aforesaid Judicial Magistrate had visited the Malkhana on 16.07.2015. In his presence, the Malkhana Incharge produced the *Ganja* which was weighed in his presence. The sample also was drawn on that date. The samples contained the signature of the Malkhana Incharge, Judicial Magistrate and the aforesaid witness. It has been proved as Exhibit 5.

31. The sealed seized items were photographed and over the photographs also, the Judicial Magistrate put his signature. From the perusal of the aforesaid witness, it appears that the inventory and the seizure were made after two years and therefore they are of no consequence. But what can be gathered from his deposition is that every item was kept in the Malkhana and that there was no way in which it could be said to have been tampered.

32. Vijay Bahadur Singh, P.W. 7 and Rohit Srivastawa, P.W. 8 have also supported the prosecution version.

33. Thus from the perusal of the evidence on record, it appears that all the requirements under the N.D.P.S. Act, 1985 has been complied with. But for the preparation of the inventory, everything was done in quick succession



and there does not appear to be any reason to doubt that what is stated to have been seized at the place of occurrence is only the handy work of NCB staff. There also does not appear to be any issue of mistaken identity. With the statement of the appellants recorded under Section 67 of the N.D.P.S. Act, 1985, the argument raised on their behalf that nothing was recovered from their possession loses all its significance. No doubt, nothing was recovered from their possession, because before they could receive the consignment of narcotics, all three were arrested namely the appellants and the person who had brought the consignment to be delivered to them.

34. Unlike the confession before the police, the statement under Section 67 of the N.D.P.S. Act, 1985, is admissible and in the absence of any proof of the fact that the aforesaid statement was given under duress or coercion, there is no difficulty in taking aid of the aforesaid section.

35. From the impugned judgement also, it appears that the court below did not solely rely upon the confession recorded under Section 67 of the Evidence Act, but has collated the same with other evidence of unimpeachable character.

36. The contention raised on behalf of the appellants that in the absence of the deposition of independent



persons, or seizure list witnesses, the prosecution case ought not to have been accepted, is not correct.

37. The Supreme Court of India as well as this High Court has, times without number, held that the examination of independent witnesses is not an indispensable requirement and such non-examination is not always and necessarily fatal to the prosecution case.

38. In the present case, an attempt was made by the members of the raiding team to make available independent persons, who had put their signature on the documents showing search and seizure but because of their being stray persons, they could not be brought before the court for their evidence. Their non-examination would have caused prejudice to the appellants if the other evidence with respect to their guilt were lacking, but not otherwise. There is no element of any kind of animosity between the raiding team and the appellants and the recovery of intermediate quantity of *Ganja* in the circumstances, as has been brought about through the evidence of witnesses, completely establishes the offences under Sections 20 (b) (ii) (B) and 29 of the N.D.P.S. Act, 1985 as against the appellants.

39. There is also nothing in the evidence to suggest that the samples were torn or destroyed or handled by unauthorized persons in the interregnum.



40. No doubt, the first complaint is not on record but from the deposition of the other witnesses who have testified / proved the other facts of the case, it becomes evident that the modification in the complaint by the superior officers at NCB was only cosmetic and not with respect to any material particulars.

41. The next argument raised on behalf of the appellants that the confession under Section 67 of the Evidence Act could not be taken into account for convicting the appellants, is not tenable.

42. Provisions of Section 67 of the N.D.P.S. Act, 1985 are reproduced hereinbelow for ready reference:

"67. Power to call for information, etc. - Any officer referred to in section 42 who is authorized in this behalf by the Central Government or a State Government may, during the course of any enquiry in connection with the contrvention of any provisions of this Act, -

(a) call for information from any person for the purpose of satisfying himself whether there has been any contravention of the provisions of this Act or any rule or order made thereunder;

(b) require any person to produce or deliver any document or thing useful or relevant to the enquiry;

(c) examine any person acquainted with the facts and circumstances of the case.



43. In the case of Kanhaiyalal Vrs. Union of India [2008 AIR SCW 627], the Supreme Court of India exposted that a parallel may be drawn between the provisions of Section 67 of the N.D.P.S. Act, 1985 and Sections 107 and 108 of the Customs Act and to a large extent, Section 32 of the Prevention of Terrorism Act, 2002 as well as Section 15 of the Terrorist and Disrupted Activities (Prevention) Act, 1987. These are all special Acts meant to deal with special situations and circumstances. While the provisions the TADA Act are more stringent and excludes from its purview the provisions of Section 24 to 27 of the Evidence Act with regard to confession made before a police officer, the provisions relating to statements made during enquiry under Customs Act and N.D.P.S. Act are less stringent and continues to attract the provisions of the Evidence Act.

44. In the case of the aforesaid enactments, initially an enquiry is contemplated during which a person may be called upon to provide any information relevant to the enquiry as to whether there has been any contravention of the provisions of the Act or any rule or order made thereunder. At that stage, the person concerned is not an accused although he may be said to be in custody. But on that basis of the statements made by him, he could be made an accused subsequently. What is relevant is



whether the statement had been made by him during the enquiry, prior to his arrest or after he has been formally charged with the offence and made accused. As long as such statement is made at a time when the accused is not under arrest, the bar under Sections 24 to 27 of the Evidence Act would not operate nor would the provisions of Article 20 (3) of the Constitution of India be attracted. It is only after a person is placed in the position of an accused that the bar imposed under the aforesaid provisions will come into play. However, the bar would definitely operate if such statement is not given voluntarily but under threat or compulsion. A Court ought to satisfy itself that such statements have been made voluntarily and at a time when the person making such statement had not been made an accused in connection with the alleged offence.

45. In the case of Raj Kumar Karwal Vrs. Union of India & Ors., [1990 (2) SCC 409], the Supreme Court has held that the officers of the department of Revenue Intelligence who have been vested with the powers of the Officer Incharge of a police station under Section 53 of N.D.P.S. Act, 1985, are not police officers within the meaning of Section 25 of the Evidence Act. Therefore, a confession recorded by such officer is admissible in evidence.



46. The reason given by the Supreme Court of India in the aforesaid case for the afore-noted proposition is that under Section 53 of the N.D.P.S. Act, 1985, an officer of the Revenue Intelligence is not a police officer as in Chapter V of the Act, there is nothing to indicate that all the powers of Chapter XII of the Code, including the power to file the report under Section 173 thereof have been expressly conferred on such officers.

47. In Tofan Singh Vrs. State of Tamil Nadu, reported in 2013 AIR SCW 5740, the Supreme Court, however, was of the view that the aforesaid judgement in Kanhaiyalal Vrs. Union of India (supra) and Raj Kumar Karwal Vrs. Union of India (supra), there were no detailed discussion or reasons in support of the conclusion that a Revenue Intelligence Officer under 53 of the N.D.P.S. Act, 1985 is not a police officer and that there is nothing to suggest that the powers to file charge-sheet is not available with the officers of the Revenue Intelligence under Section 53 of the Act. The Supreme Court was of the view that the judgements in the aforesaid two cases required a re-look at the matter.

48. In Noor Aga Vrs. State of Punjab, reported in AIR 2009 Supplementary 852, both the judgements (Kanhaiyalal and Raj Kumar Karwal) were considered and it was held that officer under Section 53 of the Customs



Act is a police officer and would therefore attract the provision of section 25 of the Evidence Act.

49. No doubt, Abdul Rashid Vrs. State of Bihar, 2001 (9) SCC 578 and Noor Aga (supra) were cases under the Customs Act, but the reasons for holding custom officers as police officer would have significant parallel in the context of the N.D.P.S. Act, 1985 also.

50. The N.D.P.S. Act, 1985 is purely penal in nature as opposed to Custom Acts and the Central Excise Act, whose dominant object is to protect revenue of the State.

51. The N.D.P.S. Act with penal provision is mainly geared towards punishing the persons found offending those laws.

52. In the aforesaid judgement of Toofan Singh (supra), it was held by the Supreme Court that the crucial test to determine whether an officer is a police officer for the purpose Section 25 of the Evidence Act, the influence or authority that an officer is capable of exercising over a person from whom a confession is obtained is to be considered. A police officer would be one who is considered to be one in common parlance and is capable of exercising influence or authority over the person from whom a confession is obtained

53. However, eschewing the aforesaid discussion whether a Revenue Intelligence Officer is a police officer



within the meaning of Section 53 of the Act, this Court has examined and found the factual aspect viz no force of coercion was used for recording the statement of the appellants under Section 67 of the N.D.P.S. Act and that too, when they had not yet been made accused and that the aforesaid statement was not the sole basis of their conviction.

54. Under such circumstances, the argument raised on behalf of the appellants regarding non-admissibility of the statement recorded under Section 67 of the N.D.P.S. Act is required to be rejected.

55. For the aforementioned reasons, this Court does not deem it appropriate to interfere with the judgement of conviction recorded by the trial court.

56. The learned Advocates however have also addressed this Court on the sentence imposed upon the appellants.

57. Sentencing an accused in a criminal case is a difficult and complex decision. The gravity of the crime and the concept of proportionality as regards punishment have to be finally balanced.

58. For every offence / act, a stringent punishment may not be necessary. On the contrary, not always is a Court required to soft pedal the issue and treat an accused with leniency. The requirement of law obligates a court of



law to weigh the circumstances in which the crime has been committed, the conduct of the accused persons and other socio-economic and concomitant factors for sentencing an accused. One has to keep in mind that law regulates social interests and aims at reducing conflicting claims and demands.

59. In *Sevak Perumal Vrs. State of Tamil Nadu* [1991 (3) SCC 471], the Supreme Court has observed that Court will be failing in its duty if appropriate punishment is not awarded for a crime which is not only against an individual victim but also against society to which the criminal and the victim belong.

60. In the facts and circumstances, this Court is of the view that the appellants had not yet accepted the consignment of narcotics and in the nick of the time, they could have changed their mind of executing the crime by accepting the consignment. Before they could have done so, they were intercepted. Apart from this, the appellants are not said to be habitual offenders as there is no reference of any earlier conviction. It has also been submitted on behalf of the appellants that they are the bread providers to their families and with them in jail, their respective families are almost on the brink of starvation.



61. Seeing the totality of the circumstances, I am of the considered view that end of justice would be sufficiently met if the substantive sentences of the appellants are reduced to a period of five years for both the offences (concurrently) viz 20 (b) (ii) (B) and 29 of the N.D.P.S. Act and I direct accordingly. The amount of fine and the default clause shall, however, remain the same.

62. The appeal is partially allowed in as much as the judgement of conviction is upheld and maintained but the sentences imposed upon the appellants are reduced to a period of five years, with the amount of fine and the default clause remaining the same.

The appeals are thus disposed off accordingly.

(Ashutosh Kumar, J)

skm/-

AFR/NAFR	AFR
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