

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.2859 of 2018

Arising Out of PS.Case No. -268 Year- 2016 Thana -SIKARPUR District-
WESTCHAMPARAN(BETTIAH)

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Chhotu Rao @ Manishek Rao, Son of Mithlesh Rao, Resident of Village- Babu
Parsauni, P.S.- Chautarwa, District- West Champaran.

..... Appellant

Versus

The State of Bihar.

..... Respondent

with

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Criminal Appeal (SJ) No. 2873 of 2018

Arising Out of PS.Case No. -268 Year- 2016 Thana -SIKARPUR District-
WESTCHAMPARAN(BETTIAH)

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Vinay Sharma, Son of Late Nageshwar Sharma, Resident of Village- Hardiya
Chowk, Narkatiaganj, Police Station- Shikarpur, District- West Champaran.

..... Appellant

Versus

The State of Bihar.

..... Respondent

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Appearance :

(In CR. APP (SJ) No.2859 of 2018)

For the Appellant : Mr. Satyavrat Verma, Advocate
Mr. Shashank Chandra, Advocate

For the State : Mr. Sujit Kumar Singh, APP

(In CR. APP (SJ) No.2873 of 2018)

For the Appellant : Mr. Manoj Kumar, Advocate

For the Respondent : Mr. Sujit Kumar Singh, APP

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CORAM: HONOURABLE MR. JUSTICE ASHWANI KUMAR SINGH

ORAL JUDGMENT

Date: 24-09-2018

Heard Mr. Satyavrat Verma and Mr. Manoj Kumar,
learned advocates for the appellants and Mr. Sujit Kumar Singh,
learned Additional Public Prosecutor for the State.

2. These two appeals are directed against the common



judgment of conviction and order of sentence dated 26.05.2018 and 30.05.2018 respectively passed by the learned District and Sessions Judge-cum-Special Judge, NDPS Act, West Champaran, Bettiah in Trial No. 22 of 2016/ CIS No.-NDPS- 02 of 2018 arising out of Shikarpur P. S. Case No. 268 of 2016 whereby and whereunder each of the appellants has been convicted for the offence punishable under Section 20(b)(ii)(C) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short 'the NDPS Act') and sentenced to undergo rigorous imprisonment for a term of 10 years with fine of Rs.1,00,000/-(one lakh) and in default of payment of fine to further undergo imprisonment for two years.

3. The first information report (for short 'the FIR') of the case was instituted on 19.06.2016 at 08.15 a.m. on the basis of self-statement of Sub-Inspector of Police-cum-SHO, Shikarpur Police Station, Binod Kumar Singh wherein it is stated *inter alia* that on 19.06.2016, at 7.15 a.m., he received secret information that in Narkatiaganj near Pokhara Chowk, 2-3 miscreants are strolling with some illegal substance in a polythene packet and their activities are doubtful. On receipt of such information, he made an entry in the station diary and proceeded towards the place of occurrence with other police personnel after informing the Block Development Officer, Narkatiaganj. On seeing the police party, the miscreants



started fleeing away. The raiding team chased and caught hold of two of them while one succeeded in fleeing away. In presence of the Block Development Officer, Narkatiaganj and two independent witnesses, the apprehended accused persons were interrogated and they disclosed their names as Chhotu Rao and Vinay Sharma. They also disclosed the name of the third miscreant, who had managed to escape, as Kundan Tiwari. Thereafter, on search, 1 Kg. *Charas* like substance wrapped in yellow polythene and kept in plastic bag was recovered from each of the accused. On query, they could not give any satisfactory reply regarding possession of the substance. On further inquiry, they disclosed that they along with Kundan Tiwari trade in illegal business of *Charas* for higher income. They also disclosed that they were on their way to go to Gorakhpur by train.

4. On 19.06.2016 itself, in presence of two independent witnesses, namely, Kedar Paswan and Awadhesh Sharma, the informant prepared seizure-list. After search and seizure was carried out, the accused persons were arrested and were produced before the court from where they were remanded to judicial custody.

5. After institution of the FIR, the SHO of Shikarpur Police Station handed over investigation of the case to an Assistant Sub-Inspector of Police, namely, Birendra Singh, who took over the investigation, recorded the statements of witnesses and, on



completion of investigation submitted report, vide Charge-Sheet No. 409 of 2016 dated 06.08.2016.

6. On receipt of police report, vide order dated 17.08.2016, the learned Special Judge took cognizance of the offences punishable under Sections 20(b)(ii)(C) and 22(c) of the NDPS Act finding a *prima facie* case to be made out against the appellants and one another.

7. After complying with the mandatory requirements of Section 207 of the Code of Criminal Procedure, charges under Sections 20(b)(ii)(C) and 22(c) of the NDPS Act were explained to the accused persons by the trial court on 28.09.2016 to which they pleaded not guilty.

8. In course of trial, the prosecution examined altogether 8 witnesses. Out of whom, P.W. 1 and P.W. 2 are seizure-list witnesses, P.W. 3 to P.W. 7 are police personnel and P.W. 8 is a formal witness, who had produced the seized substance before the court.

9. Apart from oral testimony, the prosecution also proved certain documents in course of trial, Ext. 1 and 1/A are the signatures of the witnesses on seizure-list, Ext. 2 is the seizure-list, Ext. 3 is the self-statement of the informant, Ext. 4 is the formal FIR, Ext. 5 to 5/2 are forwarding report of the accused persons after their arrest, Ext. 6



is the endorsement made by the informant on the FIR whereby the investigation of the case was handed over to ASI Birendra Singh and Ext. 7 is the report of Forensic Science Laboratory (for short 'FSL').

10. P.W. 1 Kedar Paswan and P.W. 2 Awadhesh Sharma, the two independent witnesses of the seizure-list clearly stated in their deposition that their signature was taken on blank-sheet of paper forcibly at the police station. At this stage, they were declared hostile. The prosecution cross-examined them, but their cross-examination is of no help to the case of the prosecution.

11. P.W. 3 Shyam Bahadur Thakur stated in his deposition that on 19.06.2016, he was posted as an ASI in Shikarpur Police Station. On that day, at about 8 a.m., the SHO Binod Kumar Singh told him that near Pokhara Chowk, three persons have been noticed strolling in suspicious manner. The SHO constituted a raiding team and they proceeded towards Pokhara Chowk after entering the information in the station diary. The moment, they reached Pokhara Chowk, the miscreants tried to escape by running away but, on chase, two of them were apprehended and one managed to flee away. The apprehended accused disclosed their names as Chhotu Rao and Vinay Sharma. On search of their person carried out by the SHO in presence of the Block Development Officer and the independent witnesses *Charas* like substance wrapped in polythene was



recovered from each of them, which was seized. Thereafter, the arrested accused persons were brought to the police station and the seized substance was weighed. Each of the polythene packet recovered from the miscreants contained 1 Kg. *Charas* like substance.

12. P.W. 4 Nand Kishor Kumar, another Assistant Sub-inspector of Police has also deposed in the same manner. However, he told that while trying to escape, accused persons were carrying *Charas* like substance in yellow polythene in their hand.

13. P. W. 5 Sahid Anwar Ansari, another member of the raiding team stated that recoveries were made from polythene packet kept in a plastic bag from the possession of the two apprehended accused. However, nothing has been stated with regard to seizure of the plastic bag.

14. P. W. 6 Binod Kumar Singh, SHO of Shikarpur Police Station, who was heading the raiding team on the relevant date and time of occurrence has also stated in his statement that upon search of the arrested accused persons, recovery of 1 Kg. *Charas* wrapped in yellow colour polythene kept in a plastic bag was made from each one of them.

15. P. W. 7 Birendra Singh, the investigating officer, stated that on 19.06.2016 when he was posted as an ASI in Shikarpur



Police Station, he was handed over investigation of the case. He was also handed over the seized substance in a sealed condition. He kept the seized substance in the *Malkhana*, recorded the statement of the informant and other witnesses, inspected the place of occurrence and on completion of investigation submitted charge-sheet in the case. He further stated that the sample of the seized substance was sent to the FSL, Muzaffapur. He proved the FSL report, which was marked as Ext. 7.

16. In cross-examination, he admitted that he cannot say that the seized substance was *Charas*. He also admitted that he cannot say as to whether or not entries were made in *Malkhana* register regarding the substances in question. He said that he does not know the meaning of the word 'inventory'. He accepted that he is not aware of the provisions of the NDPS Act. He admitted that he did not record the statement of Block Development Officer, Narkatiaganj in course of investigation. He further admitted that there is nothing on record on the basis of which he could say that sample taken from the seized substance for examination by the FSL was sealed. He also admitted that there is no mention of the name of the accused persons on the sample drawn from the seized article. He conceded that prior to submission of charge-sheet, neither the FSL report was received nor the same was submitted before the court.



17. P. W. 8 Sanjay Kumar had produced the seized substance in the court. In cross-examination, he admitted that on the sealed packet, there is no signature of any officer. He also admitted that even serial number of *Malkhana* register is not mentioned on the sealed packet. He stated that he has not brought the *Malkhana* register in the court. He further admitted that there is no mark of identification on the sealed packet. He stated that substance was handed over to him by the *Malkhana* incharge. He stated that there is no signature of *Malkhana* incharge on the substance produced in the court.

18. Mr. Satyavrat Verma and Mr. Manoj Kumar, learned advocates appearing for the appellants submitted that the finding of guilt recorded by the trial court is perverse. The trial court has failed to appreciate the evidence in correct perspective. It failed to appreciate that at the time of search and seizure, neither Gazetted Officer was present nor the appellants were produced before any Magistrate for compliance of the mandatory provisions of Sections 43 and 50 of the NDPS Act. Before conducting search and seizure, the police officer did not specifically inform the appellants whether they wanted to be searched in presence of a Magistrate or a Gazetted Officer. They submitted that the relevant provisions of Sections 52, 53, 55 and 57 of the NDPS Act governing the procedure to be



followed by the police after seizure of contraband have totally been ignored by the investigating officer and without appreciating these deficiencies in the prosecution case, the trial court has erroneously convicted and sentenced the appellants.

19. *Per contra*, Mr. Sujit Kumar Singh, learned Additional Public Prosecutor for the State submitted that though P.W. 1 and P.W. 2 turned hostile, all other witnesses examined on behalf of the prosecution are consistent. They have narrated in one voice the manner in which the recoveries were made and search and seizure were carried out. According to him, the sample of contraband was sent to the FSL and the opinion of the expert also goes to suggest that the seized substances from possession of the appellants were *Charas*. He pleaded that the witnesses examined on behalf of the prosecution have withstood the test of the cross-examination and no illegality can be found with the findings recorded by the court below whereby the appellants have been held guilty for the charge under Section 20(b)(ii)(C) of the NDPS Act.

20. Having heard the parties and perused the record, when I appreciate the evidences laid on behalf of the prosecution, I find that there is no clarity in the case of the prosecution as to whether the recoveries of the alleged contraband were made from plastic bag or from polythene packet. The witnesses examined on behalf of the



prosecution have spoken differently. P. W. 3 Shyam Bahadur Thakur stated that *Charas* like substance wrapped in polythene packet was recovered from the possession of each of the appellants whereas P.W. 4 has stated that while trying to escape by running away each of the accused persons were carrying *Charas* like substance in yellow polythene packet and P.W. 5 and P. W. 6 have stated that recoveries were made from polythene packet kept in plastic bag from possession of each of the accused. Thus, there are three different stories being narrated by the members of the raiding team with regard to recovery of the alleged contraband.

21. I further find that right from the beginning, the case of the prosecution case is that the Block Development Officer, Narkatiaganj was informed by the informant before proceeding towards the place of occurrence and at the time of search and seizure, he was present. Curiously enough, the Block Development Officer has not been made a witness in this case. The investigating officer has admitted in cross-examination that he never recorded his statement in course of investigation.

22. Even if, I assume that the Block Development Officer being a Gazetted Officer was present at the place of occurrence when search and seizure was carried out, there is no evidence that the officer, who carried the search and seizure, informed the accused



persons of their right to be searched in presence of a Gazetted Officer or a Magistrate.

23. Under the normal criminal jurisprudence a person is presumed to be innocent unless proved guilty. However, the NDPS Act, which seeks to achieve control of illegal trade in narcotics, which has a detrimental effect on the society, contains stringent provisions. Section 35 of the NDPS Act presumes culpable mental state on the part of the accused. The onus lies on the accused to prove the fact that he had no such mental state. It is well accepted position in law that stringent provisions require strict interpretation. Therefore, the provisions of the NDPS Act, which have been held to be directory by the courts, have been held to have their own relevance in given facts available in a case to the extent of vitiating the prosecution case.

24. Sub-section (1) of Section 50 of the NDPS Act provides that when the empowered officer is about to search any suspected person, he shall, if the person to be searched so requires, take him to the nearest Gazetted Officer or the Magistrate for the purpose. Under sub-section (2), it is laid down that if such request is made by the suspected person, the officer, who is to take the search, may detain the suspect until he can be brought before such Gazetted Officer or the Magistrate. It is manifest that if the suspect expresses the desire



to be taken to the Gazetted Officer or the Magistrate, the empowered officer is restrained from effecting the search of the person concerned. He can only detain the suspect for being produced before the Gazetted Officer or the Magistrate, as the case may be.

25. In **Vijaysinh Chandubha Jadeja vs. State of Gujarat [(2011) 1 SCC 609]**, a Constitution Bench of the Supreme Court agreed with the views of earlier Constitution Bench in the case of **State of Punjab vs. Baldev Singh [(1999) 6 SCC 172]** wherein it was held that provisions of sub-section (1) of Section 50 make it imperative for the empowered officer to inform the person concerned about the existence of his right that if he so requires, he shall be searched before a Gazetted Officer or a Magistrate and failure to inform the suspect about the existence of his said right would cause prejudice to him, 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 the person during a search conducted in violation of the provisions of Section 50 of the NDPS Act.

26. In **Vijaysinh Chandubha Jadeja vs. State of Gujarat**



(Supra), the Constitution Bench in para-29 held as under :-

“29... we are of the firm opinion that the object with which right under Section 50(1) of the NDPS Act, by way of a safeguard, has been conferred on the suspect, viz. to check the misuse of power, to avoid harm to innocent persons and to minimise the allegations of planting or foisting of false cases by the law enforcement agencies, it would be imperative on the part of the empowered officer to apprise the person intended to be searched of his right to be searched before a gazetted officer or a Magistrate. We have no hesitation in holding that in so far as the obligation of the authorised officer under sub-section (1) of Section 50 of the NDPS Act is concerned, it is mandatory and requires a strict compliance. Failure to comply with the provision would render the recovery of the illicit article suspect and vitiate the conviction if the same is recorded only on the basis of the recovery of the illicit article from the person of the accused during such search. Thereafter, the suspect may or may not choose to exercise the right provided to him under the said provision.”

27. The Constitution Bench further held in para-32 as under:-

“32. We also feel that though Section 50 gives an



option to the empowered officer to take such person (suspect) either before the nearest gazetted officer or the Magistrate but in order to impart authenticity, transparency and creditworthiness to the entire proceedings, in the first instance, an endeavour should be to produce the suspect before the nearest Magistrate, who enjoys more confidence of the common man compared to any other officer. It would not only add legitimacy to the search proceedings, it may verily strengthen the prosecution as well.”

28. It is to be noted that, in the present case, the place of occurrence is Pokhara Chowk situated 1 Km. away from the police station. According to the prosecution case, the Block Development Officer, Narkatiaganj was present at the place of search and seizure. There is nothing on record to suggest that the appellants were informed by the informant about the existence of their right to be searched before a Gazetted Officer or a Magistrate. The failure to inform them about the existence of their right has certainly caused prejudice to them in view of the ratio laid down by the Supreme Court in **Vijaysinh Chandubha Jadeja vs. State of Gujarat** (Supra). Merely, on this ground, the recovery of alleged *Charas* becomes suspect as a result of which the finding of guilt recorded by the court below is vitiated, as it is a gross case of conducting search



and seizure in complete violation of the mandatory provisions of Section 50 of the NDPS Act.

29. That apart, I find substance in the submission of learned counsel for the appellants that the relevant provisions of the NDPS Act, as provided under Sections 52, 53, 55 and 57, have completely been ignored by the investigating officer. The investigation conducted by the investigating officer was perfunctory. He has admitted in his cross-examination that he does not know the provisions of the NDPS Act. He also admitted that he does not know the meaning of the word 'inventory'. It is surprising as to how such an incompetent police officer was handed over investigation of such a sensitive case.

30. Coming to the facts of the present case, I find that the investigating officer has stated that the seized articles in sealed condition were handed over to him, which he had deposited in the *Malkhana*. But, curiously enough, neither *Malkhana* incharge has been examined nor *Malkhana* register has been produced to show as to when articles seized were deposited in the *Malkhana*. There is nothing on record to suggest that the articles seized were sealed and signed by the seizing authority. *Per contra*, the person, who has produced the seized articles before the Court has admitted that the sealed packet did not contain the signature of any officer.



31. There is set procedure as to how the sample of the seized articles is to be drawn and in which manner the same has to be sent to the FSL. However, in the present case, no procedure was followed. The investigating officer has admitted that there is no mention of the name of the accused on the samples drawn from the seized substance. Such drawing of sample is not permissible in law. Samples ought to have been drawn and sealed separately with proper mark of identification.

32. From perusal of Ext. 7, the FSL report, it would be evident that on 28.07.2016, six pieces of grey colour oval shaped solid resinous substances weighing about 151.3 gm seized from the appellants were received in the FSL. Upon examination, the resinous substance, as described above, were found to contain *Charas*. However, the description of the articles contained in parcel clearly goes to suggest that they were not sent even in sealed condition. The prosecution has not led any evidence whether the samples were sent to the FSL with proper intact seals. There is also nothing to show that narcotic was kept in seal cover in *Malkhana*. It is not known what happened to the remittance of the sample sent to the FSL. The original seal has not been produced in the court. The forensic expert has not been examined. All these infirmities create doubt about the bona fide and genuineness of the sample sent to the FSL.



33. I find that the procedure of investigation, search, seizure, sealing of contraband and sealing the sample have all been made contrary to the provisions of the NDPS Act. In such circumstances, the conviction of the appellants under the NDPS Act cannot be sustained.

34. Accordingly, impugned judgment of conviction and order of sentence dated 26.05.2018 and 30.05.2018 respectively passed by the learned District and Sessions Judge-cum-Special Judge, NDPS Act, West Champaran, Bettiah in Trial No. 22 of 2016/ CIS No.-NDPS- 02 of 2018 are set aside. The appellants, who are in custody, are directed to be released, forthwith, if they are not required in any other case.

35. In the result, both the appeals stand allowed.

(Ashwani Kumar Singh, J.)

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AFR/NAFR	NAFR
CAV DATE	NA
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