

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Appeal (DB) No. 341 of 2015

Arising Out of PS. Case No.-73 Year-2010 Thana- Gopalpur District- West Champaran

Bachan Sah Son of Late Jodhan Sah, Resident of village- Kadamwa, P.S.
Gopalpur, District West Champaran.

... .. Appellant

Versus

The State of Bihar

... .. Respondent

with

Criminal Appeal (DB) No. 946 of 2014

Arising Out of PS. Case No.-73 Year-2010 Thana- Gopalpur District- West Champaran

Yamuna Sah @ Jamuna Sah son of Late Bhikhari Sah, resident of village -
Kadamwa, Police Station - Gopalpur, District - West Champaran.

... .. Appellant

Versus

The State of Bihar

... .. Respondent

with

Criminal Appeal (DB) No. 313 of 2015

Arising Out of PS. Case No.-73 Year-2010 Thana- Gopalpur District- West Champaran

Ainul Dhobi son of Late Dosh Mohammad Dhobi, Residing at Village-
Kadamwa, P.S- Gopalpur, District- West Champaran.

... .. Appellant

Versus

The State of Bihar

... .. Respondent

Appearance :

(In Criminal Appeal (DB) No. 341 of 2015)

(In Criminal Appeal (DB) No. 313 of 2015)

(In Criminal Appeal (DB) No. 946 of 2014)

For the Appellants	:	Mr. Santanu Sagar, Adv. Mr. Rishikesh Ojha, Adv. Mr. Anil Kumar Mishra, Adv.
For the Respondent/State	:	Mr. Mayanand Jha (A.P.P.) Mr. Ajay Mishra (A.P.P.)



CORAM: HONOURABLE MR. JUSTICE RAKESH KUMAR
and
HONOURABLE MR. JUSTICE ARVIND SRIVASTAVA
ORAL JUDGMENT
(Per: HONOURABLE MR. JUSTICE RAKESH KUMAR)

Date : 29-01-2018

In aforesaid three appeals, all the appellants were convicted and sentenced in Trial No. 71 of 2010 (arising out of Gopalpur P.S. Case No. 73 of 2010) and as such, all the three appeals were heard together and are being disposed of by this common judgment.

2. Appellant Bachan Sah (in Cr. Appeal DB No. 341/15) has been convicted under Section 22(C) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the 'NDPS Act') and sentenced to undergo rigorous imprisonment for 10 years with fine of Rs. 1,00,000/- (one lac). In default of payment of fine, the appellant Bachan Sah was further directed to undergo imprisonment for six months, whereas, two appellants i.e. Yamuna Sah @ Jamuna Sah (in Cr. Appeal DB No. 946/14) and Ainul Dhobi (in Cr. Appeal DB No. 313/15) were also convicted for offence under Section 22 (C) of the NDPS Act and both have been directed to undergo rigorous



imprisonment for 12 years with fine of Rs. 1,20,000/- (one lac & twenty thousand) each. In default of payment of fine, they were further directed to undergo imprisonment for 8 months. All the appellants have been convicted and sentenced by Sri Rakesh Pati Tiwari, learned Additional District and Sessions Judge – VI, Bettiah, West Champaran in Trial No. 71 of 2010.

3. Short fact of the case is that on 02-07-2010 at 11.40 hrs., Sub-Inspector of Police Sri Priyavrat (P.W.2), officer incharge of Gopalpur Police Station recorded his self-written statement at the house of Yamuna Sah @ Jamuna Sah (appellant in Cr. Appeal DB No. 946/14) in village – Kadamwa, P.S. - Gopalpur (West Champaran). In the self-written statement, he recorded that on 02-07-2010, in morning at 9:50 AM, he received secret information that in village Kadamwa near bank of a river, Ainul Dhobi (appellant in Cr. Appeal DB No. 313/15), Bachan Sah (appellant in Cr. Appeal DB No. 341/15) and some other nearby residents, with a view to smuggle *Ganja*, had concealed the same in their houses. After making sanaha entry no. 31, the informant with following persons proceeded in a police jeep with home-



guard driver Vijay Pandey (P.W.5) to verify the said information:-

- (1) A.S.I. of Police Nathuni Paswan (not examined),
- (2) Constable Ram Lal Ram (not examined),
- (3) Constable Dev Kumar Sah (not examined),
- (4) Constable Satrughan Bhagat (P.W.1),
- (5) S.A.P. Constable Chandradeo Prasad (P.W.4),
- (6) S.A.P. Constable Rajveer Singh (P.W.3), and
- (7) S.A.P. Constable Swarn Singh (not examined)

On way, he informed local Dafadar Sk. Aalim (P.W.6), with instruction, to reach at the place of occurrence. The informant with Armed Force at 10:30 AM reached village – Kadamwa, which was situated near the bank of a river, where Dafadar Sk. Aalim (P.W.6) also reached. In view of information, in presence of local independent witnesses namely Birendra Sah (P.W.7) and Amerika Sah (P.W.8), both residents of village – Kadamwa, P.S.- Gopalpur, he searched premises of Bachan Sah (appellant in Cr.Appeal DB No. 341/2015), Ainul Dhobi (appellant in Cr.Appeal DB No. 313/2015), Yamuna Sah @ Jamuna Sah (appellant in Cr.Appeal DB No. 946/2014) and also premises of two or three other person after following the procedure of search. The informant further stated in his self written statement that from the hut of Bachan Sah (appellant in Cr.Appeal DB No. 341/15), he recovered about 39 kg. of



Ganja wrapped in polythene, which were kept in six bundles of clothes. At that very time, male and female members were found absent. Thereafter, in presence of aforesaid witnesses, the seizure list was prepared at 10:45 AM. Subsequently, the premises of his neighbour Mishri Sah was also searched, but nothing could be found there. During search, a hut type premises of Ainul Dhobi (appellant in Cr. Appeal DB No. 313/15) was also examined and there also, 20 bundles of *Ganja*, kept in different bags, were found and total 130 Kg. of *Ganja* was shown to be recovered from the said place of Ainul Dhobi. Accordingly, in respect of recovery of said *Ganja* from the so called premises of Ainul Dhobi (appellant in Cr.Appeal DB No. 313/15), a seizure list, in presence of witnesses, was prepared at 11:10 AM. Thereafter, they again proceeded towards the hut of Yamuna Sah @ Jamuna Sah (appellant in Cr.Appeal DB No. 946/14) and on search, there also he found 20 bundles of *Ganja*, total 130 kg. wrapped in polythenes. There also inmates were not found. Accordingly, a seizure list was prepared in presence of Birendra Sah (P.W.7) and Amerika Sah (P.W.8). The informant further recorded in its self-written statement that on deep enquiry, it



transpired that Ainul Dhobi (appellant in Cr.Appeal DB No. 313/15), Bachan Sah (appellant in Cr.Appeal DB No. 341/15) and Yamuna Sah (appellant in Cr.Appeal DB No. 946/14) were involved in smuggling of *Ganja*. It was clarified that since owners of premises were absent, from which, *Ganja* was recovered, seizure list could not be handed over to anyone, only signature of said two witnesses were obtained.

4. On the basis of said written report of Sri Priyavrat, officer incharge of Gopalpur Police Station, a formal F.I.R., vide Gopalpur P.S. Case No. 73 of 2010, was registered under Sections 20 and 22 of the NDPS Act against all the three appellants. The formal F.I.R. was lodged on the same date i.e. 02-07-2010 at 2:15 PM. After registering F.I.R., police investigated the case and finding the case true against appellants, on 14-10-2010, chargesheet was submitted under Sections 20 & 22 of the NDPS Act and thereafter, on 29-10-2010, cognizance order was passed. On 11-04-2011, jointly charge was framed against all the three appellants for commission of offence under Section 22(C) of NDPS Act. Accordingly, the case was numbered as Trial No. 71 of 2010.



5. To prove its case, the prosecution examined altogether nine witnesses. Out of nine witnesses, P.W.1 Satrudhan Bhagat, P.W.3 Rajveer Singh and P.W.4 Chandra Dev Prasad, who were Constable/S.A.P. Constable, were member of the raiding party. P.W.2 Priyavrat was the officer incharge of Gopalpur Police Station and on his self-written statement, F.I.R. was lodged. P.W.5 Vijay Pandey was the driver of the jeep of the raiding party. P.W.6 Sk. Aalim was Dafadar of the locality, whereas, P.W.7 Birendra Sah and P.W.8 Amerika Sah were examined as witnesses to the seizure list and P.W.9 Umesh Prasad Singh had conducted investigation and submitted chargesheet. During trial, F.S.L. report was got exhibited on the prayer of the prosecution, vide order dated 04-01-2012 and it was got marked, as Ext. 1.

6. After conclusion of the prosecution evidence, on 21-10-2014, evidences and circumstances, which were brought on record against three appellants, were explained and their statement under Section 313 of the Code of Criminal Procedure, 1973 (for short "Cr.P.C.") was recorded in which they denied charges.



7. Sri Santanu Sagar, learned counsel assisted by Sri Rishikesh Ojha, learned counsel for the appellants in all the aforesaid three appeals, after placing entire evidence, has argued that prosecution though had not established its case beyond all reasonable doubt, the learned Trial Judge incorrectly has passed judgment of conviction and sentence. It was firstly argued that the entire prosecution case is fit to be disbelieved on the point that the prosecution has proceeded in complete violation of Section 42(1) of the NDPS Act. It has been argued that the officer incharge, who was Sub-Inspector of Police, though had deposed that he had received secret information regarding concealment of *Ganja* at particular place and stated that he had recorded station diary entry, neither the said station diary entry was brought on record nor it was got exhibited and without complying the statutory provision, the officer incharge *suo motu* proceeded to the village of the appellants and thereafter, by way of committing several illegalities and irregularities had shown recovery of *Ganja* from three different places, not belonging to one person, but three different persons. He submits that in normal course, once it was a case of the prosecution that on



information from premises of three persons, contraband was recovered, the police officer would have registered separate cases, but in the present case, to the reasons best known to the officer incharge, he had drawn one F.I.R. He has also argued that false implication is further proved from the fact that though in the case, formal F.I.R. was shown to be drawn on 02-07-2010 at 14.15 hrs. (2:15 PM), without any explanation, the F.I.R. in the concerned court was received on 05-07-2010. He further, by way of referring to evidence of raiding party, submits that none of the witnesses have supported the prosecution case as to which material or contraband was recovered from which place, rather they have said that they had seen about 45 packets, which were loaded on the jeep. Even local Dafadar, who was examined as P.W.6 Sk. Aalim, has not supported the prosecution case as to whether any contraband was found or recovered in his presence from either of the appellants. By way of referring to evidence of P.W.7 and P.W.8 Birendra Sah and Amerika Sah respectively, who were shown as seizure list witnesses, it has been argued that in the case, prosecution has miserably failed to establish seizure itself. P.W.7 Birendra Sah in his evidence though



identified his signature on the seizure list, which was marked as Ext. 3/1, he made categorical statement that Daroga Ji had obtained his signature on a blank paper and in paragraph – 2, this witness further stated that Daroga Ji had obtained his signature after stopping the jeep in the village. Though, he was prosecution witness and stated the fact, which was contrary to the prosecution case, this witness was not declared hostile. Another seizure list witness P.W.8 Amerika Sah, since had not supported false case of the prosecution, he was declared hostile. It has further been argued that the prosecution case is liable to be set aside merely on the ground that during trial, seized articles were not at all produced, save and except bringing on record F.S.L. report. Even seizure list, which was shown to be prepared from the seized *Ganja*, is not indicative as to whether said seizure was prepared on the basis of samples of *Ganja* recovered from any of the packets shown to be recovered from the premises of the appellants. Learned counsel for the appellants has placed heavy reliance on a recent judgment of the Apex Court, reported in **2017 SCC OnLine SC 1505 (Gorakh Nath Prasad vs. State of Bihar)** and submits that in case, relating to NDPS Act, non-



production of the seized articles fatal to the prosecution and as such, in view of non-production of seized articles itself, the entire case is liable to be set aside.

8. Sri Mayanand Jha, learned Addl. Public Prosecutor tried to justify the judgment of conviction and sentence on the plea that it is true that during trial some mistake was committed by the prosecution, but fact remains that huge quantity of *Ganja* was recovered from the premises of three appellants and considering recovery of huge quantity of *Ganja* as well as evidence of P.W.2, the judgment impugned requires no interference.

9. Besides hearing learned counsel for the parties, we have also perused the entire evidence i.e. oral and documentary and after going through the same, *prima facie*, we are satisfied that the learned Trial Judge has committed error in passing judgment of conviction and sentence. On examining the evidence of so-called star witness of prosecution i.e. P.W.2, it is evident that the prosecution had not established its case beyond all reasonable doubt. Once the officer incharge (P.W.2) had appeared for being examined as a witness, it was duty on his part to come with the relevant



document, particularly; in view of the fact that in his self-written report, he had disclosed that he had received secret information regarding concealment of *Ganja* in a village and thereafter, he made station diary entry. Once, it was case of the P.W.2 that he had recorded station diary entry at the time of his evidence, it was duty on his part to produce such station diary entry and get it exhibited, however; same was not produced and as such, it appears to be glaring case of violation of Section 42(1) of the NDPS Act. This witness during his evidence has proved seizure list relating to *Ganja* recovered from appellant Bachan Sah (in Cr.Appeal DB No. 341 of 2015), which was marked as **Ext. 2**, seizure list of *Ganja* recovered from Ainul (appellant in Cr.Appeal DB No. 313 of 2015) as **Ext. 3** and seizure list of *Ganja* recovered from Yamuna Sah (appellant in Cr.Appeal DB No. 946 of 2014) as **Ext. 4**. He also proved his self-written statement, which is the basis of the formal F.I.R. and marked as **Ext. 5** and formal F.I.R. was got proved as **Ext. 6**. He also proved his endorsement on self-written statement, which was marked as **Ext. 5/1**. In his evidence, though he stated that after finding huge quantity of *Ganja* at three different places, he



measured the same, but during trial, he had not bothered to speak as to from whom, he obtained weighing machine or what was the mode for measurement of the same. During trial, in paragraph – 16 of his evidence, he himself had said that the seized article was sealed in the police station. If he himself accepts that seized articles were sealed in the police station, what would be the sanctity of such seizure. Even the prosecution had not bothered to produce the scientific officer in respect of F.S.L. report. Only by way of making prayer before the Trial Judge, the said F.S.L. report was got exhibited and marked as **Ext. 1**. Neither P.W.2 (officer incharge) nor P.W.9 (investigating officer) had explained that the said F.S.L. report i.e. **Ext. 1** was pertaining to the same seized article or not. On this point, the prosecution is completely silent. The evidence of P.W.7 and 8, who were shown as witness to the seizure list, is itself fatal for entire prosecution case, as has been noticed by Hon'ble Apex Court in **Gorakh Nath Prasad's case (supra)**. There is apparent inconsistency in the prosecution case. The P.W.2 officer incharge in his evidence has stated that while proceeding to the village in question, he had informed local Dafadar to reach the place of occurrence,



but on examination of the evidence of P.W.5 Vijay Pandey driver of the jeep of raiding party, it appears that Dafadar was also accompanying the raiding party.

10. P.W.1 Satrudhan Bhagat, who was member of the raiding party, in his evidence has also stated that while the raiding party was conducting search in the premises, villagers were also there. However, during trial, none of the independent witnesses have come forward to support the prosecution case. Even except P.W.2, none of the witnesses have come forward to depose as to whether *Ganja* was recovered from premises of any of the appellants or not. This fact has also been supported by the driver i.e. P.W.5, besides evidence of P.W.1, 3 and 4.

11. P.W.6 Sk. Alim, who was the local Dafadar in paragraph 2 of his evidence, has deposed that in his presence houses of premises of none of the accused was searched nor anything was seized. Such evidence reflects itself about the approach of the prosecution.

12. Moreover, during the trial, save and except production of F.S.L. report, that too without any corroboration, the prosecution had not produced seized



articles and as such, there is no reason to allow their conviction and sentence to continue. Once, in the NDPS Act, there is stringent panel provision, in normal course, onus heavily lies on the prosecution to establish its case without any doubt. At this juncture, it would be better to quote paragraph 6 and 7 of the judgment of the Apex Court passed in **Gorakh Nath Prasad's case** (*supra*), which are as follows:-

“6. The NDPS Act provides for a reverse burden of proof upon the accused, contrary to the normal rule of criminal jurisprudence for presumption of innocence unless proved guilty. This shall not dispense with the requirement of the prosecution to having first establish a prima facie case, only whereafter the burden will shift to the accused. The mere registration of a case under the Act will not *ipso facto* shift the burden on to the accused from the very inception. Compliance with statutory requirements and procedures shall have to be strict and the scrutiny stringent. If there is any iota of doubt the benefit shall have to be given to the accused.

7. In the facts of the present case, the independent witnesses with regard to the search and seizure, P.W.2 and P.W.3, having turned



hostile deposing that their signatures were obtained on blank paper at the police station, the mere fact of a FSL report (Exhibit 8), being available is no confirmation either of the seizure or that what was seized was Ganja, in absence of the production of the seized item in Court has an exhibit. The non-production of the seized material is therefore considered fatal to the prosecution case. The issue whether there has been compliance with Section 42 and 50 of the NDPS Act loses its relevance in the facts of the case.”

13. In view of facts and circumstances as well as observation of the Hon'ble Apex Court, we are of the considered view that the impugned judgment of conviction and sentence is not sustainable.

14. Accordingly, the judgment of conviction and sentence dated 01.11.2014 and 06.11.2014 respectively passed by Sri Rakesh Pati Tiwari, learned Additional District & Sessions Judge - VI, Bettiah, West Champaran in Trial No. 71 of 2010 (arising out of Gopalpur P.S. Case No. 73 of 2010) is, hereby, set aside and all the aforesaid three appeals are allowed.

15. Since all the three appellants in the aforesaid



appeals are in jail, it is, hereby, directed to release them
forthwith, if not wanted in any other case.

(Rakesh Kumar, J.)

(Arvind Srivastava, J.)

Anay

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