

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.1121 of 2016

Arising Out of PS.Case No. -1 Year- 2013 Thana -ARARIA District- ARRARIA

=====

Dular Chand Tanti @ Dular Chand Sharma Son of Late Girdhari Tanti @ Late
Girdhari Sharma Resident of Village-Permanandpur, P.S. Muffasil, District
Khagaria

.... Appellant/s

Versus

The State of Bihar

.... Respondent/s

with

=====

Criminal Appeal (SJ) No. 1261 of 2016

Arising Out of PS.Case No. -1 Year- 2013 Thana -ARARIA District- ARRARIA

=====

Vikash Kumar, S/o Sri Kamleshwari Singh, R/o village - Lohainagar, P.S.
Begusarai (Muffasil), District - Begusarai

.... Appellant/s

Versus

The State of Bihar

.... Respondent/s

with

=====

Criminal Appeal (SJ) No. 1222 of 2016

Arising Out of PS.Case No. -1 Year- 2013 Thana -ARARIA District- ARRARIA

=====

Ajay Kumar Patel Son of Late Suresh Patel, Resident of Village- Rasokh, P.S.-
Morkahi, District- Khagari

.... Appellant/s

Versus

The State of Bihar

.... Respondent/s

with

=====

Criminal Appeal (SJ) No. 1368 of 2016

Arising Out of PS.Case No. -1 Year- 2013 Thana -ARARIA District- ARRARIA

=====

Md. Ijhar Son of Md. Islam resident of Village- Rasokh, P.S. Morkahi, District-
Khagaria.

.... Appellant/s



Versus

The State of Bihar

.... Respondent/s

with

=====

Criminal Appeal (SJ) No. 1159 of 2016

Arising Out of PS.Case No. -1 Year- 2013 Thana -ARARIA District- ARRARIA

=====

Birbal Kumar Son of Sri Mohan Yadav Resident of Village-Teldiha, P.S.-Tikapatti,
District-Purnea

.... Appellant/s

Versus

The State of Bihar

.... Respondent/s

=====

Appearance :
(In CR. APP (SJ) No.1121 of 2016)
For the Appellant/s : Mr. Prityunjay Kumar, Advocate
For the State : Mr. Parmeshwar Mehta, APP
(In CR. APP (SJ) No.1261 of 2016)
For the Appellant/s : Mr.
For the Respondent/s : Mr.
(In CR. APP (SJ) No.1222 of 2016)
For the Appellant/s : Mr. Niranjan Kumar, Advocate
Mr. Santosh Kumar, Advocate
For the State : Mr. Parmeshwar Mehta, APP
(In CR. APP (SJ) No.1368 of 2016)
For the Appellant/s : Mr. Ajay Kumar Thakur, Advocate
Mr. Ritwaj Raman, Advocate
For the State : Mr. Parmeshwar Mehta, APP
(In CR. APP (SJ) No.1159 of 2016)
For the Appellant/s : Mr. Bhola Prasad, Advocate
For the State : Mr. Parmeshwar Mehta, APP

=====

CORAM: HONOURABLE MR. JUSTICE ASHUTOSH KUMAR

ORAL JUDGMENT

Date: 31-01-2018

All the appeals have been heard together and are
being disposed off by this common judgment.

2. The appellants have been convicted under



Sections 22/24 of the Narcotic Drugs & Psychotropic Substances Act,1985 as well as under Section 25(1-b) a, 26(1)/35 of the Arms Act by judgment dated 28.10.2016 passed by the 1st Additional Sessions Judge-cum-Special Judge(N.D.P.S) Act in Special(N.D.P.S.) Case No. 01 of 2013, arising out of Araria P.S. Case No. 01 of 2013 and by order dated 29.10.2016, they have been sentenced to undergo rigorous imprisonment for ten years, to pay a fine of rupees one lakh and in default of payment of fine, to further suffer simple imprisonment for one year for the offences under Sections 22/24 of the Narcotic Drugs & Psychotropic Substances Act,1985. Appellants Vikash Kumar (Cr. Appeal No. 1261 of 2016) and Birbal Kumar (Cr. Appeal No. 1159 of 2016) have additionally been sentenced to undergo rigorous imprisonment for three years for the offences punishable under Sections 25(1-b) a, 26(1) of the Arms Act. They have also been directed to pay a fine of rupees five thousands each. Appellants Dular Chand Tanti @ Dular Chand Sharma (Cr. Appeal No. 1121 of 2016), Ajay Kumar Patel (Cr. Appeal No. 1222 of 2016) and Md. Ijahar (Cr. Appeal No. 1368 of 2016) have been sentenced to undergo rigorous imprisonment for three years and fine of rupees five thousands each for the offences punishable under Sections 25(1-b) a, 26(1)/35 of the Arms Act. In default of payment of fine, the appellants have been directed to suffer simple imprisonment for one year. The sentences



have been ordered to run concurrently.

3. The appellants are alleged to have been occupying a Scorpio vehicle from where 440 grams of brown sugar was recovered. From the possession of appellants Vikash Kumar and Birbal Kumar, firearm weapons were also allegedly recovered.

4. The prosecution case is based on the basis of self statement of Sub-Inspector of Police Mukesh Kumr Saha (P.W 4) who has alleged that on the relevant date, he was posted as Officer in-charge of Araria Town Police Station. On 01.01.2013, at about 10 O' clock in the day, he received confidential information that one Scorpio vehicle bearing Registration No. BR 34P 1901 is about to enter Araria town and narcotic drugs are being transported in the aforesaid vehicle. On such information, a police team was constituted on the orders of the Superintendent of Police.

5. The police team went to NH 57 at Village Kushiya Gaon and found that the Scorpio vehicle with the same registration number referred to above was parked in front of a petrol pump run in the name and style of A.T.S Fuel. The occupants of the vehicle, on seeing the police party, began to run away but five of them (appellants) were apprehended. Two of the miscreants managed to effect their escape. After recording of the formalities, it has been alleged by P.W. 4 that a search of the vehicle was made and from



beneath the seat of the vehicle, a black coloured bag on which “Double Bichchhu Brand” made in Afganistan, Brown sugar, mfg. 2009, Exp-2015, poison 15%, Batch No. 72, power 75%, 01 pound 440 grams, wabf-com, was inscribed. Inside the aforesaid bag, brown sugar weighing about 440 grams and wrapped in a white plastic packet, was found.

6. From the possession of the appellant Vikash Kumar, one country made pistol and three live cartridges were recovered. From the possession of appellant Birbal Kumar also, one loaded country made pistol and two live cartridges were recovered. No satisfactory answer could be given by the appellants regarding the recovery of narcotic drugs and firearms. The incriminating materials recovered were seized and a seizure list was prepared and the appellants were made to sign on the seizure list. On the basis of the aforesaid self statement, Araria Town P.S Case No. 01 of 2013 dated 01.01.2013 was instituted for investigation for the offences under Sections 22/24 of the Narcotic Drugs & Psychotropic Substances Act, 1985 and Sections 25(1-b)/26(1)/35 of the Arms Act.

7. The police, after investigation, submitted charge-sheet whereupon cognizance was taken and the case was committed to the Special Court for trial.

8. The Trial Court, after examining five



witnesses on behalf of the prosecution and none on behalf of the defence, convicted and sentenced the appellants as aforesaid.

9. While assailing the judgment and order of conviction and sentence passed by the Trial Court/Special Court, the learned advocates appearing for the appellants submitted that none of the procedural requirements under the Narcotic Drugs & Psychotropic Substances Act, 1985 were followed at the time of registration of the F.I.R. Apart from that, it was stressed upon by the learned counsels that no sample was drawn from the narcotics which was allegedly recovered and there is also no record of the same being sent to the Central Forensic Science Laboratory (in short CFSL) for ascertaining whether the incriminating article recovered, fell in the category of narcotics.

10. The Investigating Officer of this case has also not been examined.

11. In order to appreciate the contentions of the appellants, it would be relevant to go through the relevant part of the deposition of Mukesh Kumar Saha (P.W.4), who is the informant of this case.

12. Before the Trial Court, the aforesaid P.W. 4, though supported the prosecution version but stated that from beneath the seat of the vehicle, a leather bag was recovered, on which it was



written “Double Bichchhu Brand”. Inside the aforesaid leather bag, 440 grams of Brown sugar was kept in a plastic packet. He has also deposed about the recovery of weapons from the possession of Vikash Kumar and Birbal Kumar. He has admitted in his deposition that he is not an expert of chemicals and that the seized packet of Brown sugar was sent for examination by the Investigating Officer. Thus, from his deposition, it becomes very clear that when he received the confidential information that narcotics is being carried in a Scorpio vehicle with a particular registration number, such information was never reduced in writing and sent to the superior Police Officer.

13. Hence, the mandatory provision of Section 42 of the Narcotic Drugs & Psychotropic Substances Act, 1985 stands completely violated, thus vitiating the entire prosecution version.

14. What further appears from the deposition of P.W. 4 is that there is no other evidence on record to even suggest that at any point of time, sample was drawn from the seized narcotics for the same to be sent to CFSL for its examination in order to ascertain that what was seized was a narcotic. An oral unsupported statement has been made by P.W. 4 that the narcotics so recovered was sent for chemical examination by the Investigating Officer of this case.

15. Be it noted that the Investigating Officer has not been examined and no explanation also has been offered for non-



examination of the Investigating Officer in this case.

16. In this context, the appellants have also drawn the attention of this Court to the seizure list (Exhibit-4) which indicates that it was effected in Araria Police Station Case No 5 or 6 of 2013. There could perhaps be an overwriting, but the genuineness of the seizure list could only have been ascertained on the examination of the Investigating Officer of this case.

17. Non-ascertainment of the seized article being narcotics completely vitiates the prosecution version of recovery of the narcotics from the vehicle in question. It further appears from the deposition of P.W. 4 that in front of two witnesses viz. Nitesh Kumar and Arun Kumar Sah, the recovery was effected. Curiously, Nitesh Kumar has not been examined and Arun Kumar Sah, another seizure list witness who has been examined as P.W. 1 has not supported the prosecution version and has been declared hostile.

18. Ramadhar Tiwari(P.W. 2) was part of the raiding team. He has stated before the Trial Court that from the possession of the appellants, firearm weapons and Brown sugar was recovered, but he also has not stated about either sampling at the spot or at any other time or the weighing of the said narcotics. His deposition is of no assistance to this Court for testing the correctness of the prosecution version.



19. Similarly Shiv Shankar Kumar (P.W. 3) has also not stated anything about drawing of sample, weighing of the narcotics or of the same having been sent for any chemical examination. He has also talked about his complete inexperience regarding identification of narcotics.

20. Shakti Prasad Singh (P.W. 5) is a formal witness.

21. Thus, so far as the charges under Sections 22/24 of the Narcotic Drugs & Psychotropic Substances Act, 1985 is concerned, it is seen that the mandatory provisions of Section 42 of the N.D.P.S Act has been completely breached. Section 42 of the Narcotic Drugs & Psychotropic Substances Act, 1985 is being reproduced here for the sake of completeness.

“42. Power of entry, search, seizure and arrest without warrant or authorization.-(1) Any such officer (being an officer superior in rank to a peon, sepoy or constable) of the departments of central excise, narcotics, customs, revenue intelligence or any other department of the Central Government including para-military forces or armed forces as is empowered in this behalf by general or special order by the Central Government, or any such officer (being an officer superior in rank to a peon, sepoy or constable) of the revenue, drugs control, excise, police or any other department of a State Government as is empowered in this behalf by general or special order of the State Government, if he



has reason to believe from personal knowledge or information given by any person and taken down in writing that any narcotic drug, or psychotropic substance, or controlled substance in respect of which an offence punishable under this Act has been committed or any document or other article which may furnish evidence of the commission of such offence or any illegally acquired property or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter V-A of this Act is kept or concealed in any building, conveyance or enclosed place, may between sunrise and sunset, -

(a) enter into and search any such building, conveyance or place;

(b) in case of resistance, break open any door and remove any obstacle to such entry;

(c) seize such drug or substance and all materials used in the manufacture thereof and any other article and any animal or conveyance which he has reason to believe to be liable to confiscation under this Act and any document or other article which he has reason to believe may furnish evidence of the commission of any offence punishable under this Act or furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter V-A of this Act; and

(d) detain and search, and if he thinks proper, arrest any person whom he has reason to believe to have



committed any offence punishable under this Act:

[Provided that in respect of holder of a licence for manufacture of manufactured drugs or psychotropic substances or controlled substances, granted under this Act or any rule or order made thereunder, such power shall be exercised by an officer not below the rank of sub-inspector:

Provided further that if such officer has reason to believe that a search warrant or authorization cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place at any time between sunset and sunrise after recording the grounds of his belief.

(2) where an officer takes down any information in writing under sub-section (1) or records grounds for his belief under the proviso thereto, he shall within seventy-two hours send a copy thereof to his immediate official superior, within seventy-two hours send a copy thereof to his immediate official superior.”

22. None of the witnesses have testified to the fact that the information received by P.W. 4 was reduced in writing and sent to the superior Police Officer. What material exhibit was produced before this Court is not known as there is no evidence of drawing of sample or of keeping narcotics in safe custody.

23. Thus, it would be unsafe to rely upon the material exhibits placed before the Court as something which was



recovered from the possession of the accused persons/appellants.

24. From the possession of appellants Dular Chand Tanti @ Dular Chand Sharma (Cr. Appeal No. 1121 of 2016), Ajay Kumar Patel (Cr. Appeal No. 1222 of 2016) and Md. Ijahar(Cr. Appeal No. 1368 of 2016), no firearm weapon was recovered; hence their conviction under Sections 25(1-b) a, 26(1) with the aid of 35 of the Arms Act cannot be sustained as there is no material to suggest that they had the knowledge of the possession of the firearm by other co-accused persons.

25. In the result, the appeals of the aforementioned appellants viz. Dular Chand Tanti @ Dular Chand Sharma (Cr. Appeal No. 1121 of 2016), Ajay Kumar Patel (Cr. Appeal No. 1222 of 2016) and Md. Ijahar(Cr. Appeal No. 1368 of 2016) succeed and are allowed.

26. The appellants abovementioned are acquitted of all the charges.

27. So far as appellants Vikash Kumar (Cr. Appeal No. 1261 of 2016) and Birbal Kumar (Cr. Appeal No. 1159 of 2016) are concerned, there has been recovery of firearm weapons from them. Sanction was also obtained for their prosecution and the arms so recovered, were also placed before the Court as material exhibits. Thus, the conviction of the aforementioned appellants under



Sections 25(1-b) a, 26(1)/35 of the Arms Act is sustained. However, considering the circumstances of the case, this Court is of the view that interest of justice would be safely met, if the sentences imposed upon the aforementioned appellants under Sections 25(1-b) a, 26(1)/35 of the Arms Act is reduced to the period which they have already undergone in custody. Hence, their conviction under Sections 22/24 of the Narcotic Drugs & Psychotropic Substances Act, 1985 is set aside but their conviction under Sections 25(1-b) a, 26(1)/35 of the Arms Act is sustained. The sentences imposed upon them are reduced to the period of custody already undergone.

28. Their appeals are partially allowed.

29. All the appellants are in custody.

30. They are directed to be released forthwith, if not wanted in any other case.

31. Let a copy of the judgment be transmitted to the Superintendent of jail for compliance, record and needful.

(Ashutosh Kumar, J)

Shageer/-

AFR/NAFR	NAFR
CAV DATE	NA
Uploading Date	08/01/2018
Transmission Date	08/01/2018

