

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.154 of 2018

Arising Out of PS.Case No. -19 Year- 2007 Thana -RAXAUL RAIL P.S. District-
WESTCHAMPARAN-(BETTIAH)

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Rajkishore Sah, s/o Late Ramdeo Sah, R/o Village- Balbaria, P.S.- Mainatand,
District- West Chamapran.

.... Appellant/s

Versus

1. The State of Bihar.
2. The Union of India through Zonal Director Narcotics Control Bureau, Patna.

.... Respondent/s

with

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Criminal Appeal (SJ) No. 275 of 2018

Arising Out of PS.Case No. -19 Year- 2007 Thana -RAXAUL RAIL P.S. District-
WESTCHAMPARAN-(BETTIAH)

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Keshaw Das, Son of Late Narad Das, Resident of Village- Chautani, P.S.-
Chatauni, District- East Champaran (Motihari).

.... Appellant/s

Versus

The State of Bihar

.... Respondent/s

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Appearance :
(In CR. APP (SJ) No.154 of 2018)
For the Appellant/s : Mr. Bimlesh Kumar Pandey-Advocate
For the Respondent/s : Smt. Abha Singh-A.P.P.
For the Union : Mr. Manoj Kumar Singh- Advocate
(In CR. APP (SJ) No.275 of 2018)
For the Appellant/s : Mr. Mukesh Kumar-Advocate
Mr. Shivjee Singh-Advocate
For the Respondent/s : Smt. Abha Singh-A.P.P.

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
ORAL JUDGMENT

Date: 27-04-2018

Cr. Appeal (S.J.) No.154 of 2018 wherein Rajkishore
Sah is the appellant and Cr. Appeal (S.J.) No. 275 of 2018 wherein
Keshaw Das is the appellant, have been analogously heard and are



decided by a common judgment as both the appeals originate against the common judgment of conviction dated 18.11.2017 and order of sentence dated 24.11.2017 passed by the Additional Sessions Judge-6th, West Champaran at Bettiah in Trial No.05 of 2008 arising out of Raxaul Rail P.S. Case No.19 of 2007 whereby and whereunder both the appellants have been found guilty for an offence punishable under Section 20(b)(ii) C of the N.D.P.S. Act and each one has been sentenced to undergo R.I. for ten years as well as to pay fine appertaining to Rs.1,00,000/- and in default thereof, to undergo R.I. for one year, under Section 22(C) of the N.D.P.S. Act and each one has been sentenced to undergo R.I. for ten years as well as to pay fine appertaining to Rs.1,00,000/- and in default thereof, to undergo R.I. for one year, with a further direction to run the sentences concurrently.

2. Though it happens to be not so relevant, but for the purpose of giving a sermon to the learned lower Court, it looks prudent to suggest that trial should be conducted in accordance with law, patiently and not in haphazard manner. From perusal of the L.C. Record, it is evident that PW-4 was examined on 16.03.2010 and his evidence was deferred at the request of accused, who never came up for further cross-examination nor any step was taken to procure his presence. In likewise manner, it is also evident that at an earlier



occasion, prosecution case was closed on 23.09.2011, on which date statement of accused was recorded under Section 313 of the Cr.P.C. and then, the learned lower Court took four adjournments in getting the argument concluded and then, 25.10.2011 was date fixed for judgment. It is evident that no judgment was delivered on 25.10.2011, instead thereof, there happens to be one petition at the end of accused that they have to argue on the legal point, whereupon judgment was deferred. It is further evident that again two dates have been eschewed and then, on 18.11.2011 was the date fixed for judgment, on which date, again the judgment was not passed and instead thereof, the Court had observed out of 15 chargesheet witnesses, only four have been examined. For getting the appearance of remaining witnesses, the Superintendent of Police, Rail, Muzaffarpur was directed to produce the remaining witnesses wherein he failed. Therefore, again the judgment was deferred directing the office to inform the Superintendent of Police Rail. Whether aforesaid order was passed under guise of Section 311 of the Cr.P.C., is a matter of concern as the learned lower Court had not opined to deal with the matter in accordance therewith. In case, aforesaid provision has not been taken up, then in that event, as the Subordinate Criminal Court lacks power of inherent jurisdiction on account thereof, the subsequent proceeding could be seen as contrary to the spirit of law. Be that as it may, since



thereafter the matter has been allowed to run in casual manner and then, on 17.04.2012 as is evident again, the case has been fixed for judgment, which could not be passed on 23.04.2012, on account of death of one of the member of the bar namely Navi Rasul and on subsequent date i.e. 04.05.2012, PW-5 has been examined. The subsequent order sheet suggest that on account of apathy at the end of learned lower Court, the matter continued to linger for such long period and lastly, reached at the destination through the judgment impugned. Aforesaid activity suggests that the then learned Presiding Officer had no command over trial, nor he was concerned with the manner whereunder trial sailed. As such, office is directed to communicate the then Presiding Officer individually.

3. PW-5, Parmod Kumar, who on the alleged date and time of occurrence was Officer-in-Charge of the Raxaul Rail P.S. recorded his self-statement alleging inter alia that on an information that smugglers are to carry the Ganja through Sadbhawna Express to Delhi made Station Diary Entry and then, proceeded to conduct raid during course thereof, found a person staying over stair of Platform No.2 having a bag in suspicious circumstances, who was interrogated and then, bag was searched wherefrom two packets of Ganja were seized. After weighing the same, one packet found to be of five kilograms while the other one of two kilograms and for that, search-



cum-seizure list was prepared. On further interrogation, he disclosed that his associate is also on the platform having Ganja, whereupon another accused was apprehended along with bag at the instance of former, who had disclosed his identity as Keshaw Das and on interrogation, later disclosed his identity as Raj Kishore Sah and on search, from the bag which he was carrying, two packets of Ganja weighing five kilograms each (total 10 k.g.) were seized and for that, search-cum-seizure list was prepared in presence of two witnesses namely Dadan Mahto and Taplal Mahto. On interrogation, they also disclosed that they are carrier of Suresh, who had himself concealed Ganja in the A.C. Bogie of Sadbhawna Express, whereupon search was made and during course thereof, four packets of Ganja, three weighing five k.g. each and one, three k.g. were seized and for that, search-cum-seizure list was prepared.

4. After registration of Rail Raxaul P.S. Case No.19 of 2007, investigation was taken up and concluded by way of submission of chargesheet, facilitating the trial, meeting with the ultimate result, subject matter of instant appeal.

5. Defence case, as is evident from mode of cross-examination as well as statement recorded under Section 313 of the Cr.P.C. is that of complete denial. However, neither oral nor documentary evidence has been adduced in defence.



6. In order to substantiate its case, prosecution had examined altogether seven PWs, who are PW-1 Dadan Mahto, PW-2, Binod Das, PW-3, Arbind Kumar, PW-4, Ram Gyan Sharma, PW-5, Parmod Kumar, PW-6, Ramashankar Chaudhary and PW-7, Ajay Kumar Singh. Side by side, had also exhibited as Exhibit-1, signature of PW-1, Exhibit-1/2, signature of informant over search-cum-seizure list relating to recovery made from Sadbhawna Express, Exhibit-2, signature of informant relating to recovery from the possession of Raj Kishore Sah, Exhibit-3, signature of informant relating to recovery from the possession of Keshaw Das, Exhibit-4, written report, Exhibit-5, signature of informant over inculpatory extra-judicial confessional statement of Raj Kishore Sah, Exhibit-6, formal F.I.R. and Exhibit-7, F.S.L. Report (which ought to have been properly exhibited, but due to slackness at the part of the prosecuting agency as well as at the end of the Court, the same has not been done). As stated above, neither ocular nor documentary evidence has been adduced on behalf of defence.

7. PW-1, the witness over search and seizure on account of carelessness at the end of the Court as well as prosecuting agency could not properly be tackled and that happens to be reason behind that in spite of his signature over all the relevant search-cum-seizure list, neither the same has not been properly exhibited, save and except



relating to the recovery having from the train nor his attention had been drawn towards recovery of narcotic substance from the possession of accused as well as from A.C. Bogie of the train and so, his only one signature relating to search-cum-seizure list relating to A.C. Bogie of the train has been exhibited. However, during course of cross-examination, he had stated that nothing was recovered in his presence.

8. PW-2 and PW-3 have not supported the case of the prosecution, whereupon they were declared hostile. PW-4, a police personnel, who was one of the member of the raiding party had deposed that under the leadership of Officer-in-Charge, they proceeded and came over Platform No.2, where Sadbhawna Express was standing. Two persons were apprehended and on search, from both of them, Ganja was recovered. On interrogation, they disclosed their identity as Keshaw Das as well as Raj Kishore Sah. He had further stated that from the possession of Keshaw Das, seven kilograms of Ganja was seized while from the possession of Raj Kishore Sah, ten kilograms of Ganja was seized and for that, search-cum-seizure was prepared. Then thereafter, they came back to police station. Identified the accused. During course of cross-examination at Para-4, he had stated that both the accused were apprehended from a bogie of the train. Thereafter this witness never turned up for further



cross-examination as his evidence was deferred.

9. PW-5 is the informant, who during course of examination-in-chief, had substantiated the case that means to say, the recovery, but again there happens to be lapses at the end of the Court as well as the prosecuting agency and on account thereof, seizure list in its entirety has not been exhibited. In likewise manner, the inculpatory extra-judicial confessional statement of Raj Kishore Sah, though only his signature has been exhibited. Be that as it may, he had substantiated the recovery, recording of inculpatory extra-judicial confessional statement, registration of the F.I.R. He had identified both the accused. During cross-examination at Para-8, he was very much innocent whereunder he had stated that he had got no idea with regard to N.D.P.S. Act and so, he had not informed his superior officials with regard to apprehension of the accused along with recovery of narcotics substance. Though, he had failed to disclose during course of examination-in-chief where he had kept the seized Ganja, though he happens to be Officer-in-Charge of the Rail P.S., at Para-10, he had stated that Ganja was kept at Malkhana. It was kept on the same day. In Para-12, he had stated that he had not sealed the seized Ganja. Memo of seal is also not available. In Para-15, he had stated that on his dictum, Munshi had prepared seizure list. He had not taken sample from the seized Ganja. He had not prepared arrest



memo. He is not knowing whether family members of accused persons were informed or not regarding their arrest.

10. PW-6, is the another member of the raiding party. He had stated that when they reached on Platform No.2 under the leadership of Officer-in-Charge, one person was apprehended by the side of A.C. Coach having a bag and from the bag, seven kilograms of Ganja was seized, who disclosed his identity as Keshaw Das. At his pointing out, one another person having a bag was apprehended from Platform No.2 itself. From the bag, ten kilograms of Ganja was seized. Then both of them were sternly interrogated, whereupon they disclosed concealment of Ganja in the A.C. Bogie, whereupon the same was searched and in course thereof, four packets, three containing five k.g. each and one containing three k.g. were seized for that, search-cum-seizure list was prepared. Identified the accused in dock. During cross-examination at Para13, he had stated that the seized Ganja was sealed in presence of Magistrate. Then, again stated that it was sealed since before its seizure. It was re-sealed. Then at Para-14, he had stated that sample was not taken out at the P.O. Then had said that sample was taken in presence of Magistrate. Then had stated that after production before the Magistrate, the seized Ganja was kept in Malkhana.

11. PW-7 is the Part I.O., who took charge on



27.11.2007 and then thereafter, he after getting order from the Court, sent the seized Ganja to Forensic Laboratory for examination. During cross-examination at Para-2, he had stated that seized article was produced before the Court and then thereafter, procured order for its examination by F.S.L. Then had stated that he had not incorporated in the case diary whether Ganja was sealed or not.

12. From the evidence available on the record, it is apparent that apart from negligency at the end of the prosecuting agency during conduction of trial, there also happens to be clear cut violation of mandate of law at the time of search and seizure, subsequent thereof, including at the stage of investigation and that has got a bearing over the fate of the instant prosecution. Admittedly, superior officials as required to be informed in accordance with Section 42(2) of the N.D.P.S. Act as well as under Section 57 of the N.D.P.S. Act have not complied with. In likewise manner, it is also an admitted fact that recovered Ganja was not sealed. It is also an admitted fact that no sample was prepared at the P.O. It is also an admitted fact that methodology for preparing the sample has not been stated by the witnesses. There happens to be paucity of evidence at the end of the prosecution whether Ganja was kept at Malkhana in sealed manner and if so, Malkhana register should have been exhibited to substantiate the same and lastly, the material exhibit has not been



produced in Court.

13. In the case of *Vijay Jain v. State of Madhya Pradesh* as reported in (2013) 14 SCC 527, the Hon'ble Apex Court had occasion to see the impact of non production of material exhibit during course of trial and has dealt with in following way:-

“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.”

14. Consequent thereupon, the judgment impugned could not survive as a result of which, same is set aside. Both the appeals are allowed. Both the appellants are under custody, hence are directed to be released forthwith if not wanted in any other case.

(Aditya Kumar Trivedi, J)

Vikash/-

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