

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Appeal (SJ) No.1561 of 2018

Arising Out of PS. Case No.-57 Year-2015 Thana- KOILWAR District- Bhojpur

-
1. Rakesh Chaudhary, son of Bhikhari Chaudhary
 2. Vinod Kumar Sah, son of Vishwanath Sah Both resident of Village- Chhotka Bishupur, P.S. Sahpur(Karnemapur O.P.), District- Bhojpur.
 3. Guddu Kumar, son of Suresh Ram Singh, resident of Village- Suraundha Colony Koilwar, P.S. Koilwar, District Bhojpur.

... .. Appellant/s

Versus

The State of Bihar.

... .. Respondent/s

Appearance :

For the Appellants	: Mr. Ajay Thakur, Advocate. Ms. Swati Sinha, Advocate. Mr. Md. Imteyaz Ahmad, Advocate.
For the Respondent	: Ms. Abha Singh, APP.

CORAM: HONOURABLE MR. JUSTICE ASHUTOSH KUMAR
ORAL JUDGMENT

Date : 25-08-2018

Heard learned counsel for the appellants and the State.

2. The appellants have been convicted under Section 20(b)(ii)(C) of the narcotics Drugs and Psychotropic Substance Act, 1985 vide judgment dated 16.02.2018 passed by the learned 2nd Additional Sessions Judge, Bhojpur (Arrah) in connection with N.D.P.S. Case No. 02 of 2015 and by order dated 26.02.2018, they have been sentenced to undergo R.I. for 10 years, to pay a fine of Rs. 1,00,000/- and in default of payment of fine to further suffer imprisonment for one year.



3. The appellants are said to be in possession of 110 Kgs of Ganja which was being carried on a pick-up van.

4. The prosecution case is based on the written report/ self-statement of Sanjay Kumar (P.W. 1), the then officer-in-charge of Koilwar police station on 05.03.2015. He has alleged that while his team along with the Executive Magistrate on deputation (Block Development Officer), Koilwar was on patrolling duty, he received secret information that narcotics is being transported on a white pick-up van which is coming from Koilwar side and proceeding towards Babura. On such information, a seize was laid near Daulatpur Boring. At that time, a white coloured pick-up van was spotted coming from the side of Koilwar. On seeing the police party, the vehicle was driven on high speed. However the vehicle was intercepted. Three persons who were sitting on the vehicle disclosed their names as Sanjay Kumar, Guddu Kumar and Manoj Kumar Sah respectively. The vehicle was loaded with jack fruits which was covered by dry straw. On removing the jack fruits, white plastic packet was spotted which on being opened was found to be filled with Ganja. No satisfactory answer could be given about the aforesaid narcotic substance by the arrested accused persons. They are said to have stated before the police that they in conjunction



with one Krishna Singh of Barhra dealt in sale and purchase of narcotics and the aforesaid consignment was being taken to the house of aforesaid Krishna Singh. In front of the Executive Magistrate and constables of SAP viz. Lalan Tiwari and Murari Prasad who have been examined as P.W. 2 and P.W. 6 respectively, the narcotics was weighed and the entire weight of consignment was found to be 110 kgs. A seizure list of the narcotics as well as of the vehicle was prepared which was signed by the Executive Magistrate as also by P.Ws. 2 and 6. A copy of the seizure list was handed over to all the three accused persons, who put their signature over the same. From the seized narcotics, sample of 50 gms each was drawn in front of the Executive Magistrate which was kept in an envelope and sealed.

5. On the basis of the aforesaid written report, Koilwar P.S. Case No. 57 of 2015 dated 05.03.2015 was registered for investigation for the offences under Sections 20(b)(ii)(C) and 22 of the narcotics Drugs and Psychotropic Substance Act, 1985.

6. During the course of investigation, it was found that two of the accused persons had disclosed wrong names and after enquiry, their names were found to be that of the appellants. The police, after investigation,



submitted charge-sheet whereupon cognizance was taken and the case was committed to the special court for trial.

7. The learned trial court, after examining seven witnesses on behalf of the prosecution, convicted and sentenced the appellants as aforesaid.

8. While assailing the judgment and order of conviction and sentence Mr. Ajay Thakur, learned counsel for the appellants assisted by Ms. Swati Sinha submitted that the mandatory provision contained in Section 42(2) of the N.D.P.S. Act has not at all been complied with. The other major contention raised on behalf of the appellants is that neither the narcotics was produced before the court nor the destruction report was submitted. In that view of the matter, the *corpus delicti* was not proved and hence the judgment and order of conviction was not sustainable in the eyes of law.

9. The other ancillary grounds which has been raised by the learned counsel for the appellants is that the deposition of witnesses with respect to the manner of drawing sample and sealing of the same is different and even though P.W. 1 has stated that the narcotics was kept in the *Malkhana*, there is no corresponding proof of such deposit of the narcotics in the *Malkhana*. In support of the aforesaid contention, it has been argued that there is no evidence of any *Malkhana* in-charge or *Moharrir* to prove



the fact that the narcotics was kept in the *Malkhana*. From the deposition of witnesses, it has further been argued that it does not come out clearly as to when the samples were drawn; where were those samples kept and finally when those were sent for chemical examination. Even the FSL report does not refer to the manner and mode of the packing of the seal. On the aforesaid grounds, it was urged that it could not be established that the appellants were caught/apprehended with the aforesaid narcotics and that the sample which were tested positive by the FSL were the samples which were drawn from place of occurrence from the seized narcotics.

10. In order to test the correctness of the aforesaid contentions, it would be necessary to briefly refer to the deposition of witnesses.

11. Sanjay Kumar/P.W. 1 has supported the prosecution version in as much as he has stated that on such secret information that narcotics is being carried from one place to another, a seize was laid in between Koilwar and Babura. A vehicle coming from the Koilwar side was spotted and was later intercepted. From the vehicle, 11 plastic packets were found containing Ganja. The same were seized in front of the Executive Magistrate. After bringing the weighing balance from the neighbouring shops, it was weighed. Every packet was of 10 kgs; thus



the total quantity of narcotics was found to be 110 kgs. 50 gms of sample from each of those packets were drawn which were separately sealed. Initially, P.W. 1 had stated that the seizure list was prepared by him but in the same breath he later stated that Suman Kumar/P.W. 3 had prepared the seizure list which was signed by the Executive Magistrate as well as the members of the police party/SAP. He has proved the written report (Ext. 1). In his cross-examination, he has admitted that the entire process of seizing and sealing the narcotics took around 45 minutes. The samples which were drawn at the place of search and seizure were kept in 22 envelopes. This means that the samples were drawn from all the 11 packets. In every packet, 25 gms of the narcotics was kept. On further query, it was stated by P.W. 1 that the weighing balance was brought from a neighbouring shop. The seized article was kept in the *Malkhana* along with the sample. The corresponding entry was also made in the *Malkhana*. He had put his personal seal on the sample along with the Executive Magistrate. From the deposition of the aforesaid witnesses, it cannot be gathered that the information which was received by him regarding transshipment of the narcotics was reduced in writing and sent to the superior police officer. Even with the presence of the Executive Magistrate with the raiding team, it was necessary and



mandatorily required that P.W. 1 reduced the aforesaid information in writing and sent it to the superior officer in compliance with the provisions of Section 42(2) of the N.D.P.S. Act, 1985. From the deposition of P.W. 1, it does not also appear that such compliance was done even later.

12. Lalan Tiwari/P.W. 2 was member of the raiding team who has also signed on the seizure list. He has proved his signature on the seizure list (Ext. 2). During his cross-examination, he has stated that the narcotics was sealed in presence of the Executive Magistrate and the envelope in which the samples were kept were sealed by P.W. 1. He has further stated that the Executive Magistrate put her personal red coloured mark over the samples.

13. Suman Kumar/P.W. 3 during his cross-examination has stated that since it was the time of Holi festival, some of the shops in the neighbourhood of the place where the search was made was closed. Some of the shops however was stated to be open, from where the weighing balance was brought. The envelope in which the samples were kept were brought from Jamalpur Bazar. However, he did not know who had brought the weighing balance and from where. The narcotics was, after being sealed, put on the same van and brought to the police station. Thereafter P.W. 3 claims to have gone off to his



duty. However, he has also stated that the narcotics was given to the in-charge of the *Malkhana*.

14. Learned counsel for the appellants however has submitted that this statement cannot be accepted as according to the P.W. 3, the narcotics was put on the pick-up van and was brought to the police station. Thereafter P.W. 3 was not there to have made a statement that the narcotics was given to the in-charge of the *Malkhana*. Thus, even the statement of P.W. 3 that the narcotics mentioned in the *Malkhana* register is of no value. He has also admitted that he had put his personal seal over all the 22 envelopes in which the samples were kept.

15. Rest of the prosecution witnesses are only members of the police team and their deposition need not be referred to.

16. The Investigating Officer of this case has been examined as P.W. 7. He has stated that the FIR was registered on the self-statement of P.W. 1. He took up the investigation and thereafter entered the written statement in the case diary. He had examined the Executive Magistrate and members of the raiding team. He has testified to the fact that two of the accused persons disclosed wrong names and only after enquiry and it was found that the appellants no. 1 and 2 were the persons who were found occupying the pick-up van. The seized



Ganja was marked 'A'. The sample was sent to FSL after obtaining permission from the court. The sample was sent on 18.03.2015 for being tested in the FSL. In his cross-examination, however P.W. 7 has categorically stated that whatever was seized by P.W. 1 was not given to him and for the first time he had seen the sealed samples on 12.03.2015. The envelopes referred to above contained the seal of the Executive Magistrate. In what manner was the sample sent to Patna and Kolkata for being tested was not known to P.W. 7. He also did not remember at the time of his deposition whether the samples were signed by the seizure list witnesses.

17. Thus from the deposition of P.W. 7 also, it cannot be ascertained that the seized narcotics was placed in the *Malkhana*. The *Malkhana* in-charge/ Moharrir has not been examined at the trial. Thus, the evidence of P.W. 7 that he had not received the consignment from P.W. 1 and there being no corresponding proof of the fact that the same was kept in the *Malkhana*, it is difficult to accept the prosecution version that the narcotics was kept in the *Malkhana*.

18. The aforesaid defects could have been ignored if the narcotics would have been produced before the trial court as material exhibit. That also not having



been done, the main ground/ basis for convicting and sentencing the appellants stands falsified.

19. The FSL report dated 25.08.2015 (Ext. 5) reflects that the sample was dispatched on 18.03.2015 which was received in the laboratory on 07.04.2015. However, the column regarding the mode in which the parcel was found to be packed on receipt and the description of seal has been left blank. Thus, it is difficult to accept that only those samples were sent for chemical/forensic examination which were drawn at the place of occurrence and which were placed in the *Malkhana*. In the absence of any corresponding proof of the consignment and the samples being kept in the *Malkhana*, the contents of Ext. 5 cannot be read against the appellants.

20. In ***Gorakh Nath Prasad vs The State of Bihar, AIR 2018 SC 704***, the Supreme Court after relying on ***Jitendra and Anr. vs State of M.P. AIR 2003 SC 4236*** and ***Ashok alias Dangra Jaiswal vs State of M.P. AIR 2011 SC 1335*** has held that if the prosecution does not produce the material exhibit before the court, it would be difficult to sustain the charge against the appellants and in that event benefit of doubt will have to be given to the appellants.



21. In the present case, the evidence is only of the police witnesses. There is no check/proof of the fact that the seized narcotics was properly and safely kept. Even the destruction report has not been placed before the trial court.

22. Apart from what has been said, it also need be reiterated that Section 42(2) of the N.D.P.S. Act, 1985 is a mandatory provision and non-compliance of the same vitiates the prosecution version. In ***Abdul Rashid Ibrahim Mansuri Vs. State of Gujarat (2000) 2 SCC 513***, the Supreme Court had held that compliance of Section 42 (2) of the Act is mandatory and failure to take down the information in writing and sending a report forthwith to the immediate superior officer would cause prejudice to the accused. However, in ***Sajan Abraham vs. State of Kerala 2001 (6) SCC 692*** the aforesaid provision of the N.D.P.S. Act was not held to be mandatory and even the substantial compliance was stated to be sufficient for the purpose. Because of the conflicting opinion over the issue, the matter was referred to the Larger Bench/ Constitution Bench in ***Karnail Singh Vs. State of Haryana 2009 (4) PLJR SC 128***. In Karnail Singh (supra) the Apex Court has held that if there is total non-compliance with the requirements of sub Section 1 and 2 of Section 42, the same would not be permissible.



Even the delayed compliance with satisfactory explanation about the delay would be accepted to be a compliance under Section 42 of the Act. In the present case there has been no compliance at all.

23. In that view of the matter and for the reasons aforestated, the judgment and order of conviction dated 16.02.2018 passed in connection with N.D.P.S. Case No. 02 of 2015 and order of sentence dated 26.02.2018 is set aside.

24. The appeal is allowed. The appellants are acquitted of all charges.

25. The appellants are in custody. They are directed to be released forthwith, if not required in any other case.

26. A copy of the judgment be communicated to the Superintendent of the concerned jail for information, compliance and record.

(Ashutosh Kumar, J)

krishna/-

AFR/NAFR	NA
CAV DATE	NA
Uploading Date	28.08.2018
Transmission Date	28.08.2018

