

**IN THE HIGH COURT OF JUDICATURE AT PATNA  
CRIMINAL APPEAL (SJ) No.334 of 2019**

Arising Out of PS. Case No.-172 Year-2014 Thana- RAMNAGAR District- West Champaran

Md. Afroj Alam @ Md. Afaroj Alam @ Afroj Alam Son of Late Sham  
Mohamad Mian R/o Bhiswa, P.S.- Langadi, District- Palsa Nepal, at present  
R/o Village- Sirisiya, P.S.- Bhairoganj, District- West Champaran.  
... .. Appellant/s

Versus

The State Of Bihar ... .. Respondent/s

with

**CRIMINAL APPEAL (SJ) No. 5 of 2019**

Arising Out of PS. Case No.-172 Year-2014 Thana- RAMNAGAR District- West Champaran

Ramesh Sah S/o Late Dharichan Sah R/vill-Sonkhar, P.S-Ram Nagar, Distt.-  
West Champaran.  
... .. Appellant/s

Versus

The State Of Bihar ... .. Respondent/s

**Appearance :**

(In CRIMINAL APPEAL (SJ) No. 334 of 2019)

For the Appellant/s : Mr.Bimlesh Kumar Pandey, Adv.

For the Respondent/s : Mr.Binod Bihari Singh, APP

(In CRIMINAL APPEAL (SJ) No. 5 of 2019)

For the Appellant/s : Mr. N.A. Shamsi, Adv.

Mr.Syed Ehteshamuddin, Adv.

For the Respondent/s : Mr. Bipin Kumar, APP

**CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI  
ORAL JUDGMENT**

**01-08-2019**

Criminal Appeal (SJ) No. 334/2019 wherein,

Md. Afroj Alam @ Md. Afaroj Alam @ Afroj Alam is the  
appellant and Criminal Appeal (SJ) No. 05/2019 wherein,

Ramesh Sah is the appellant, have been found guilty for an

offence punishable under Section 20-(b) (ii) (c) of the NDPS

Act, and each one has been sentenced to undergo RI for ten

years as well as to pay fine appertaining to Rs. 1,00000/-, in

default thereof, to undergo SI for two years additionally with a

further direction that period having undergone during course of

trial be set off in accordance with Section 428 CrPC, vide



judgment of conviction dated 27.11.2018 and order of sentence dated 03.12.2018 passed by District & Sessions Judge-cum-Special Judge, NDPS Act, West Champaran, Bettiah relating to Trial No. 09/2015 arising out of Ramnagar PS Case No. 172/2014, on account thereof, have been heard together and are being disposed of by a common judgment.

2. Bindeshwari Kumar Singh (PW 1), O/C of Ramnagar PS recorded his self statement on 28.08.2017 at Harinagar Railway Station Road in front of Jhunjhunwala Petrol pump disclosing therein that on the same day at about 2:30 PM, he got confidential information with regard to intrusion of 2-3 smugglers from Nepal carrying narcotic substance and are proceeding towards Railway Station whereupon, he talked with senior police officials and then, as per instruction, constituted a raiding party and reached near petrol pump. While they reached there, they have seen two motorcycles parked over open Railway land having presence of three persons, out of whom, one was talking over mobile. Seeing the police official, they tried to slip in a suspicious manner whereupon, they were cordoned and then, the person over motorcycle bearing Registration No. BRO5D-7731, on interrogation disclosed his identity as Ramesh Sah and the pillion rider disclosed his name



as Md. Afroj Alam having *Jhola*. Another person sitting over another motorcycle having no registration number disclosed his identity as Raj Kishor Raut(full address). They all failed to produce papers relating to respective motorcycles. Furthermore, in presence of Md. Kayamuddin as well as Binay Kumar Srivastava, *Jhola* was searched where from seven packets each containing ½ Kilogram out of which two packets were open since before, were seized, which they disclosed to be *Charas* and they also disclosed weight to be 8 ½ Kilograms. They have also disclosed the same to be carried from Nepal. Then their bodies were also searched, during course thereof, mobile phone along with other items were seized and for that, seizure list was prepared. During interrogation, they have also disclosed that the aforesaid items were to be given to one Md. Naseeb of Rajasthan as per instruction of Mehendra.

3. After registration of Ramnagar PS Case No. 172/2014, investigation commenced and concluding the same, charge-sheet has been submitted followed with the trial meeting with ultimate result, subject matter of instant appeal.

4. The defence case as is evident from the mode of cross-examination as well as statement recorded under Section 313 CrPC is that of complete denial. However, neither



oral nor documentary evidence has been adduced in defence.

5. In order to substantiate its case the prosecution has examined altogether six PWs who are PW-1, Bindeshwari Kumar Singh, PW-2, Ashok Kumar Kundu, PW-3, Tapas Pal, PW-4, Santosh Kumar Singh, PW-5, Raj Kishore Singh and PW-6, Lakhan Lal Yadav. Side by side, has also exhibited Ext-1, Signature of Raju Yadav, Assistant Commandant, Ext-2, Written petition, Ext-2/a, endorsement on written petition, Ext-3, Confessional statement of the accused, Ext-4, FIR, Ext-5, Seizure List and, Ext-6, FSL report. As stated above nothing has been adduced on behalf of defence.

6. While assailing the judgment impugned, learned respective counsels have stated that learned lower court has failed to appreciate the niceties of the mandatory provisions of law whereupon, ignoring the same, has recorded the finding and that being so, happens to be illegal, cryptic as a result of which, is fit to be set aside. To substantiate such plea, it has been submitted that had there been search confined to the *Jhola* only, then in that circumstance, there would not have been application of Section 50 of the NDPS Act but, as soon as physical search was intended (in this case has been done), Section 50 of the NDPS Act would come into play and then in



that circumstance, it was incumbent upon the police officials to have affirmative disclosure with regard to the right of the accused in having his search in the presence of Gazetted official/Magistrate. As the same has been violated, therefore, the judgment impugned would not survive. Furthermore, it has also been submitted that apart from the fact that there happens to be disclosure that after receiving of confidential information, the matter was discussed with the superior officials would not be compliance of Section 42 (2) of the NDPS Act in its strict sense because of the fact that Section 42 (2) of the NDPS Act would be applicable only after the whole process of search and seizure is exhausted and that happens to be the spirit of law divulging from plain reading thereof in order to ward off case of unnecessary unnecessary harassment.

7. Furthermore, it has also been submitted that when evidence of PWs are properly scrutinized, it is evident that there happens to be utter violation at their end during course of search and seizure and in likewise manner, over the preparation of the sample. It has also been submitted that nothing has been done in accordance with Order No. 1/88, 1/89. Apart from the fact that the prosecution has produced material exhibits before the Court but, failed to connect the aforesaid items to be items



relating to present case. So, the cumulative effects did not justify the judgment impugned, whereupon, is fit to be set aside.

8. On the other hand, learned APP while controverting the submissions having been made on behalf of respective counsels for the appellants, has submitted that there was no physical search in its continuity rather, firstly, *Jhola* was searched out wherefrom recovery of *Charas* was made. Then thereafter, the physical search was made and during course thereof, nothing was found from their physical possession and so, Section 50 of the NDPS Act was not at all attracted. Both two happens to be distinct incidents commanding from different sphere. As such, submissions having at the end of learned counsel for the appellants, has got legal force. Also submitted that Section 42(2) of the NDPS Act was already complied with on account of having a specific disclosure at the end of the informant right from initial version that just after getting confidential information, he talked with superior officials. Even during cross-examination, PW-1 was not tested on that very score rather he was cross-examined on the score that you have not mentioned the official status of that superior officials and the mobile/telephone number. So, there happens to be compliance of 42(2) of the NDPS Act. Furthermore, it has also been



submitted that material exhibit has been produced with an explanation which has not been challenged by the defence. Then it has been submitted that so far manner of sampling and seizure is concerned, there happens to be some slackness but, having the seized material exhibited before the court, is indicative of the fact that seizure has been made and the sample having been examined by the FSL happens to be derivative of the material exhibits and so, could be considered not an illegality rather irregularity. So, the judgment of conviction and sentence recorded by the learned lower court is fit to be confirmed.

9. It is needless to say that times without number the Hon'ble Apex Court has put emphasis that being stringent law, the prosecution is under obligation to perform all the mandatory requirements strictly. On account of continuing lapses with regard to the methodology to be adopted during course of seizure and sampling under the NDPS Act, the Central Government has issued Order No. 1/88, 1/89 and the same has been properly acknowledged. Apart from others, in the case of *Union of India v. Mohanlal & Anr* reported in (2016) 3 SCC 379, wherein the Apex Court explained the course with regard to seizure as well as sampling in following way:-



***Seizure and sampling:***

12. Section 52-A(1) of the NDPS Act, 1985 empowers the Central Government to prescribe by a notification the procedure to be followed for seizure, storage and disposal of drugs and psychotropic substances. The Central Government have in exercise of that power issued Standing Order No. 1/89 which prescribes the procedure to be followed while conducting seizure of the contraband. Two subsequent standing orders one dated 10.05.2007 and the other dated 16.01.2015 deal with disposal and destruction of seized contraband and do not alter or add to the earlier standing order that prescribes the procedure for conducting seizures. Para 2.2 of the Standing Order 1/89 states that samples must be taken from the seized contrabands on the spot at the time of recovery itself. It reads:

“2.2. All the packages/containers shall be serially numbered and kept in lots for sampling. Samples from the narcotic drugs and psychotropic substances seized, shall be drawn on the spot of recovery, in duplicate, in the presence of search witnesses (Panchas) and the person from whose possession the drug is recovered, and a mention to this effect should invariably be made in the panchnama drawn on the spot.”

13. Most of the States, however, claim that no samples are drawn at the time of seizure. Directorate of Revenue Intelligence is by far the only agency which claims that samples are drawn at the time of seizure, while Narcotics Control Bureau asserts that it does not do so. There is thus no uniform practice or procedure being followed by the States or the Central agencies in the matter of drawing of samples. This is, therefore, an area that needs to be suitably addressed in the light of the statutory provisions which ought to be strictly observed



given the seriousness of the offences under the Act and the punishment prescribed by law in case the same are proved. We propose to deal with the issue no matter briefly in an attempt to remove the confusion that prevails regarding the true position as regards drawing of samples.

14. Section 52A as amended by Act 16 of 2014, deals with disposal of seized drugs and psychotropic substances. It reads:

Section 52A: Disposal of seized narcotic drugs and psychotropic substances.

(1) The Central Government may, having regard to the hazardous nature of any narcotic drugs or psychotropic substances, their vulnerability to theft, substitution, constraints of proper storage space or any other relevant considerations, by notification published in the Official Gazette, specify such narcotic drugs or psychotropic substances or class of narcotic drugs or class of psychotropic substances which shall, as soon as may be after their seizure, be disposed of by such officer and in such manner as that Government may from time to time, determine after following the procedure hereinafter specified.

(2) Where any narcotic drug or psychotropic substance has been seized and forwarded to the officer-in-charge of the nearest police station or to the officer empowered Under Section 53, the officer referred to in Sub-section (1) shall prepare an inventory of such narcotic drugs or psychotropic substances containing such details relating to their description, quality, quantity, mode of packing, marks, numbers or such other identifying particulars of the narcotic drugs or psychotropic substances or the packing in which they are packed, country of origin and other particulars as the officer referred to in Sub-



section (1) may consider relevant to the identity of the narcotic drugs or psychotropic substances in any proceedings under this Act and make an application, to any Magistrate for the purpose of-

(a) certifying the correctness of the inventory so prepared; or

(b) taking, in the presence of such Magistrate, photographs of such drugs or substances and certifying such photographs as true; or

(c) allowing to draw representative samples of such drugs or substances, in the presence of such Magistrate and certifying the correctness of any list of samples so drawn.

(3) When an application is made Under Sub-section (2), the Magistrate shall, as soon as may be, allow the application.

(4) Notwithstanding anything contained in the Indian Evidence Act, 1872 (1 of 1872) or the Code of Criminal Procedure, 1973 (2 of 1974), every court trying an offence under this Act, shall treat the inventory, the photographs of [narcotic drugs, psychotropic substances, controlled substances or conveyances] and any list of samples drawn Under Sub-section (2) and certified by the Magistrate, as primary evidence in respect of such offence.]

15. It is manifest from Section 52A(2)(c) (supra) that upon seizure of the contraband the same has to be forwarded either to the officer in-charge of the nearest police station or to the officer empowered Under Section 53 who shall prepare an inventory as stipulated in the said provision and make an application to the Magistrate for purposes of (a) certifying the correctness of the inventory (b) certifying photographs of such drugs or substances taken before the Magistrate as true and (c) to draw representative samples in the presence of the Magistrate and certifying the correctness of the



list of samples so drawn.

16. Sub-section (3) of Section 52-A requires that the Magistrate shall as soon as may be allow the application. This implies that no sooner the seizure is effected and the contraband forwarded to the officer in charge of the Police Station or the officer empowered, the officer concerned is in law duty bound to approach the Magistrate for the purposes mentioned above including grant of permission to draw representative samples in his presence, which samples will then be enlisted and the correctness of the list of samples so drawn certified by the Magistrate. In other words, the process of drawing of samples has to be in the presence and under the supervision of the Magistrate and the entire exercise has to be certified by him to be correct.

17. The question of drawing of samples at the time of seizure which, more often than not, takes place in the absence of the Magistrate does not in the above scheme of things arise. This is so especially when according to Section 52-A(4) of the Act, samples drawn and certified by the Magistrate in compliance with Sub-section (2) and (3) of Section 52-A above constitute primary evidence for the purpose of the trial. Suffice it to say that there is no provision in the Act that mandates taking of samples at the time of seizure. That is perhaps why none of the States claim to be taking samples at the time of seizure.

10. From perusal of the self statement of the informant, PW-1, it is evident that there happens to be no disclosure with regard to preparation of sample at the spot and in likewise manner, sealing of the seized articles. The informant PW-1, even during course of evidence at para-11 has disclosed regarding recovery of *Charas* from *Jhola* while under para-12



has disclosed with regard to search of body of the accused, at para-14, disclosed regarding recording of self statement at the place of occurrence, at para-16, stated that they came to police station along with seized articles, apprehended accused, but had not deposed over sealing of the seized article and in likewise manner, preparation of the sample. During course of cross-examination at para-45, he has stated that they have unwrapped and seen the article. In para-46, he has stated that they have sealed only packet which was opened and then they put number over the same but, he has not mentioned in the written report. At para-48, he has stated that he had not taken out sample as that relates with job of Investigating Officer. Investigating Officer is PW-5. During examination-in-chief, he has simply stated at para-8 that seized article was sealed at the instance of the court and then taken to Thana Maalkhana. In para-10, he has stated that the sealed material exhibit was sent to Patna. In para-23, he has stated that seized article was produced before the court which has been incorporated in para-36 of the case diary but he has not mentioned the fact that whole quantity was produced. In para-24, he has stated that he received order on 29.08.2016 which was sent to 02.11.2016 and the delay has been explained. Again corrected that the sample was sent on 23.09.2014. Again



corrected at para 25 that there happens to be over-writing on that very score without having his initial. So far other witnesses are concerned, i.e. PWs 2, 3 and 4, they are so inconsistent over the issue whereupon, it looks difficult to accept their testimony over seizure and sample.

11. PW-4 at para-25 has stated that all the packets were taken out from the bag, all were sealed while PW-2 at para-16 has stated that he had seen the article on the table at the police station. So far PW-2 is concerned, he happens to be silent on that very score.

12. Now coming over evidence of PW-6, who produced the material exhibit has stated that he is producing material exhibit of Ramnagar PS Case No 172/2014. Seized articles are packed in plastic bag and sealed. He has taken out from Ramnagar Maalkhana. During cross-examination at para-6, he has stated that he has produced material exhibit in the same form in which it was kept at Maalkhana having inside plastic bag whereupon, there happens to be description of PS Case Number and M.R. No. 50/2014. At para-9, he has stated that packet was sealed. In para-16, he has stated that for the first time, packet was shown by opening in the court itself. It has also been disclosed that three packets are open. In para-20, it has



been disclosed that there happens to be no mark over the same having affixed by the court.

13. Thus from the evidence available on the record, it has become crystal clear that at the spot no proper exercise was done by the raiding party regarding sealing of the seized articles nor sampling has been done. Furthermore, it is also evident from the evidence of the informant that he was of the view that those events happen to be within the exclusive domain of the I.O. and as is evident from the evidence of the IO, from his examination-in-chief alone (para-8) that it was sealed before the court and so, there should have been proper identification with regard thereto, at least, satisfying that those seized articles were kept in a sealed condition in the Maalkhana wherefrom, it was taken out and produced before the court in sealed condition, seal was broken in presence of the court and then sample was taken out. There happens to be empowerment in terms of Section 55, more particularly, the Officer Incharge to be the custodian and further, the seized articles has to be under his seal during the intervening period. Again from the evident of PW-1 in consonance with the IO, PW-5, it is apparent that again there happens to be lapses at the end of the prosecution.

14. Although, during course of cross-



examination at para-24, there happens to be conflicting disclosure but from Ext-6, it is evident that the sample was sent through special messenger, SI, Raj Kishore Singh on 30.08.2014 vide Memo No. 2684 but it was received at the office of the FSL on 25.09.2014 and on that very score, there happens to be no explanation at the end of the prosecution in whose custody the aforesaid sample remained.

15. In the backdrop of aforesaid defects persisting on the record, it is manifest that there happens to be clear violation of the mandate of law as laid down by the Hon’ble Apex Court in the case of *Union of India v. Mohanlal* (supra). Consequent thereupon, the judgment impugned would not survive. Accordingly, the same is set aside. Both the appeals are allowed.

16. Since both the appellants are under custody, they are directed to be set at liberty forthwith if not wanted in any other case.

**(Aditya Kumar Trivedi, J)**

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| AFR/NAFR          | AFR        |
| CAV DATE          | N/A        |
| Uploading Date    | 02/08/2019 |
| Transmission Date | 02/08/2019 |

