

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.371 of 2019

Arising Out of PS. Case No.-299 Year-2016 Thana- RAMNAGAR District- West Champaran

Jhotil Rai, age- 45 year (M), son of Late Dhirau Rai, resident of Village -
Raili Bazar, Ramnagar, P.S.- Ramnagar, Distt-West Champaran.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

with

CRIMINAL APPEAL (SJ) No. 338 of 2019

Arising Out of PS. Case No.-299 Year-2016 Thana- RAMNAGAR District- West Champaran

1. Sanjay Dubey aged- 30 year (M), son of Virivan Dubey, resident of Mohalla - Dr. Kiran Shankar Jha Road, Railey Bazar, Ramnagar, PS - Ramnagar, Distt- West Chamapran.
2. Khalid Mohammad @ Daulat Miyan age- 50 year (M), son of Nathu Ansari, resident of Village - Dhorahan , P.S. - Ramnagar, Distt- West Champaran.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

Appearance :

(In CRIMINAL APPEAL (SJ) No. 371 of 2019)

For the Appellant/s : Mr. Umesh Chandra Verma, Adv.

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

(In CRIMINAL APPEAL (SJ) No. 338 of 2019)

For the Appellant/s : Mr. Umesh Chandra Verma, Adv.

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

CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
ORAL JUDGMENT

Date : 09-09-2019

During course of consideration of prayer for bail when the record has been gone through, it has been found appropriate to dispose of both the appeals instead of keeping the file pending and adjudicate upon the prayer of bail.



As such, the matter is being decided at the present moment itself.

Against the judgment of conviction dated 12.12.2018 an order of sentence dated 19.12.2018, convicting the appellants Sanjay Dubey, Jhotil Rai and Khalid Mohammad @ Daulat Miyan for an offence punishable under Section 21(b) of the NDPS Act whereunder each one has been sentenced to undergo R.I. for a term of Three Years as well as the fine pertaining to Rs. 25,000/- each in default thereof to undergo Imprisonment for six months each additional by the learned District & Sessions Judge-cum-Special Judge, NDPS Act, West Champaran at Bettiah in connection with Trial No. 16/2017, CIS No. NDPS-11/2017 arising out of Ramnagar P.S. Case No. 299/2016.

Vijay Chaudhary (P.W.2), ASI of Ram Nagar Police Station recorded his self statement disclosing therein that on 25.12.2016 while he along with armed police Constable Om Prakash Ram, Rajeshwar Dixit, Paras Sharma, another A.S.I. Anirudh Kumar Pandit were on evening patrolling and as soon as reached near Bhagat Singh Chowk, they received confidential information with regard to selling of narcotic substance (Smack) at a fruit shop near Ambedkar Chowk. After receiving the information, he has informed his superior officials and then, they



reached at the fruit shop and thereafter by introducing themselves, he also disclosed that he has got confidential information with regard to keeping and sale of narcotic substance (Smack). It has also been disclosed that neither there happens to be Gazetted Officer nor Magistrate so, if he has got any objection then the same could be made available. On a disclosure made by the shop keeper that he has got no objection, they have searched the shop as well as also made physical search and then, it has been disclosed that from the right pocket of *Kurta* of the shop keeper, one plastic packet (yellow colour) has been recovered wherefrom 16 sachets have been seized. On query, he disclosed to be smack. Sample was prepared and both were sealed. The shop keeper was asked to produce relevant documents to justify the possession but, he failed to prove. Accordingly, he has been arrested. On query, he disclosed his name as Jhotil Rai S/o Ghirao Rai. On query, he also disclosed that so many persons are connected in the aforesaid business and further, identified one Khalid Mohammad @ Daulat Miyan of village Dhokraha and Sanjay Dubey of Raili Bazar.

Accordingly, they have gone to the place of Sanjay Dubey and his place was also searched. During course thereof, from pocket of his pant, the similar kind of sachets were recovered and for that sample was prepared. All were sealed. Then thereafter,



they came to the place of Khalid Mohammad and there also during course of search similar kind of packet were taken out. Sample was prepared. All the articles were sealed. It has also been disclosed that while they were engaged in preparing seizure list, the aforesaid Khalid Mohammad @ Daulat Miyan escaped therefrom.

After registration of Ram Nagar P.S. Case No. 299 of 2016, investigation commenced and, after concluding the same charge-sheet was submitted facilitating the trial, meeting with the ultimate result, subject matter of instant appeal.

Defence case as is evident from the mode of cross-examination as well as statement recorded under Section 313 of Cr.P.C is that of complete denial. But D.Ws. have also been examined on this score.

In order to substantiate its case, prosecution has examined altogether 6 PWs who are PW- 1 Anirudh Kumar Pandit, PW-2 Vijay Chaudhary, PW-3 Vinay Mishra, P-4 Om Prakash Ram, PW-5 Rajeshwar Dixit & PW-6 Paras Sharma.

Side by side, prosecution has also exhibited Ex.1 series signature of respective witnesses, Ex. 2 written report, Ex.2/A signature of the informant, Ex. 3 series arrest memo. Ex. 4



endorsement over written record, Ex. 5 formal FIR, Ex. 6 FSL report, Ex. 7 series witnesses signature over seizure list.

In likewise manner, defence has also examined four witnesses, who are DW-1 Satya Narayan Rai, DW-2 Shankar Sah, DW-3 Manjar Alam & DW-4 Umesh Sah.

Heard learned counsel for the appellants as well as learned Additional PP.

Gone through the record.

It is evident from the record that Umesh Sah and Chanchal Prasad stood as a seizure list witness against the appellant Sanjay Dubey, Shankar Sah and Manjar Alam against Khalid Mohammad @ Daulat Miyan and Deepak Kumar, Sikandar Sah against appellant Jhotil Rai. None of them have been examined. That means to say none of the independent witnesses has been examined and whoever been, are the police personnel.

It is further evident that during course of trial, the material exhibit has not been exhibited. Earlier view has been reiterated recently by the Apex Court in the case of **Mohinder Singh v. State of Punjab** reported in **AIR 2018 SC 3798** for better appreciation the relevant para is quoted below:-

“12. For proving the offence under the NDPS Act, it is necessary for the prosecution to establish that the quantity of the contraband goods



allegedly seized from the possession of the accused and the best evidence would be the court records as to the production of the contraband before the Magistrate and deposit of the same before the Malkhana or the document showing destruction of the contraband.

13. In *Vijay Jain v. State of Madhya Pradesh* (2013) 14 SCC 527, this Court reiterated the necessity of production of contraband substances seized from the Accused before the trial court to establish that the contraband substances seized from the Accused before the trial court to establish that the contraband substances seized from the Accused tallied with the samples sent to the FSL. It was held that mere oral evidence to establish seizure of contraband substances from the Accused is not sufficient. It was held as under:

“10. On the other hand, on a reading of this Court’s judgment in *Jitendra vs. State of M.P.* (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 v. State of M.P. (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.”

That means so the case of the prosecution suffers from inherent defect/lacuna.

As a result thereof, the judgment impugned would not survive, accordingly is set aside. Both the appeals are allowed.

Appellants, who are under custody, are directed to be released forthwith if not wanted in any other case.

(Aditya Kumar Trivedi, J)

Anjula/-

AFR/NAFR	NAFR
CAV DATE	NA
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