

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.271 of 2016**

Arising Out of PS. Case No.-296 Year-2013 Thana- RAXAUL District- East Champaran

Sita Devi, wife of Sikandar Thakur, resident of Village- Birganj Chhapkahiya,
P.S. Birganj District- Parsa (Nepal).

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s : Mr. Baban Roy-Amicus Curiae
For the Respondent/s : Mr. Bipin Kumar-A.P.P.

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

09-08-2019

None appears on behalf of appellant, on account thereof, Sri Baban Roy, learned counsel has been requested to assist the Court as an Amicus Curiae.

2. Appellant Sita Devi has been found guilty for an offence punishable under Section 20(b)(ii)(c) of the N.D.P.S. Act and sentenced to undergo R.I. for ten years as well as to pay fine appertaining to Rs. One Lac and in default thereof, to undergo R.I. for six months, additionally, under Section 23(c) of the N.D.P.S. Act and sentenced to undergo R.I. for ten years as well as to pay fine appertaining to Rs. One Lac and in default thereof, to undergo R.I. for six months, additionally, with a further direction to run the sentences concurrently, with a further direction that the period having undergone during course of trial be set off in accordance with Section 428 of the Cr.P.C. vide



judgment of conviction dated 22.12.2015 and order of sentence dated 23.12.2015 passed by the 1st Additional Sessions Judge-cum-Special Judge, N.D.P.S. Act, East Champaran at Motihari relating to N.D.P.S. Case No.154 of 2013, arising out of Raxaul P. S. Case No.296 of 2013.

3. Rumpa Grain, S.I. of S.S.B., 13 Battalion, Mahila Platoon-E, filed written report on 06.10.2013 addressed to O/c Raxaul disclosing therein that having been informed by the Inspector S.S.B. Swaraj Kamal that a female is expected to pass carrying narcotic substance regarding whom, detailed physical feature whereupon, they came into action by way of constituting a raiding party and ambushed the way. After seeing a woman resembling with the physical feature so furnished, was signaled to stop and then, she has been offered an option to have her physical search in presence of Gazetted Official, however, shown inclination to be searched by them. Thus, she was taken to S.S.B. Vehicle bearing No.WB-73C-6044 along with two witnesses namely Pramila Devi as well as Kumari Nidhi and during course of physical search, a Dupatta has been found tied with her waist. After untie the same, it has been found that aforesaid Dupatta has properly been sewed. After removing the stitch, some articles were found black in colour. They have



tested with the kit and found to be charas. They have also taken weight and it was 3 k.g. On interrogation, she disclosed her identity as Sita Devi, wife of Sikandar Thakur, village-Birganj Chhapkahiya, P.S. Birganj, District-Parsa (Nepal). A mobile set has also been recovered from her. Accordingly, seizure list was prepared, a copy thereof, has been served upon the accused. On interrogation, she also disclosed that she was a carrier engaged on consideration of Rs.1500/- by Om Prakash Yadav. The aforesaid articles was to be handed over to aforesaid Om Prakash Yadav. The statement of the accused has properly been recorded and then after preparing written report along with seizure list, statement of the accused purported to be in accordance with Section 67 of the Act, the proforma of notice purported to be served in accordance with Section 50 of the Act along with accused have been placed before the O/c Raxaul, who after registering Raxaul P. S. Case No.296 of 2013, prepared production-cum-seizure list, independently, followed with entrustment of the investigation to PW-7, Manoj Kumar Singh No.2, who conducted the same and then, chargesheet was submitted by PW-5, Rajan Kumar Pandey, who took charge on transfer of PW-7. Accordingly, trial commenced and concluded by way of recording the verdict of guilt followed with sentence,



hence this appeal.

4. 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 of the occurrence. However, neither oral nor documentary evidence has been adduced.

5. Altogether seven PWs have been examined at the end of the prosecution in order to substantiate its case, who are PW-1, Rumpa Grain, PW-2, Mekalar Archana, PW-3, Meera Kumari, PW-4, Dolli Kumari, PW-5, Roshan Kumar Pandey, PW-6, Manoj Kumar Singh and PW-7, Manoj Kumar Singh No.2 as well as has also exhibited, Exhibit-1, notice for search, Exhibit-2, proforma of seizure report, Exhibit-3, proforma of intercepted goods, Exhibit-4, proforma for apprehension, Exhibit-5, Kabulnama of Sita Devi, Exhibit-6, fard-bayan of the informant, Exhibit-7, signature of Rumpa Grain on the seizure list, Exhibit-7/1, signature of witnesses on the seizure list, Exhibit-8, formal F.I.R., Exhibit-6/1, pristankan on the written statement, Exhibit-7/2, seizure list, receiving report marked X for identification, receiving receipt (Exhibit-11), receiving receipt of F.S.L. (exhibit-9), signature on receipt of F.S.L. (Exhibit-9/1) and F.S.L. report no.243/14 dated 31.03.2014



(Exhibit-10). As stated above, nothing has been adduced in defence.

6. Heard learned Amicus Curiae as well as learned Additional Public Prosecutor.

7. Gone through the record. From perusal of the record, it is evident that PW-1 is the informant, PW-2, PW-3 and PW-4 are the Mahila Constable of the S.S.B. as well as member of the raiding party, PW-5 is the part I.O., PW-6 is the Officer-in-Charge and PW-7 is the main I.O. That means to say, both of seizure list witnesses have not been examined and prosecution did not intend to explain about their non-examination. In likewise manner, from the evidence of PW-1, PW-2, PW-3, PW-4, PW-5, PW-6 and PW-7, it is apparent that any step was taken up at their end in sealing the seized articles at the spot, preparation of sample at the spot have not been divulged. PW-6, O/c though had prepared production-cum-seizure list wherefrom it is evident that articles were produced by the informant in presence of PW-2 as well as PW-4, but he also during course of his evidence failed to disclose that he had put his seal over the articles so produced before him and then, got it deposited in the Thana Malkhana. That means to say, there has been complete violation of Section 55 of the N.D.P.S. Act whereunder the O/c



of Police Station is to take charge of and keep the seized articles in safe custody under his seal pending the orders of the Magistrate, and in likewise manner, has to prepare the sample and again, will affix his seal. When the evidence of PW-7, the main I.O., who was entrusted with the investigation after registration of the case gone through, it did not speak with regard to handing over custody of seized articles nor having the same deposited in the Thana Malkhana and the worst thing is, during cross-examination at Para-3, he has stated that when investigation was entrusted to him, F.I.R., relevant documents including seizure list, production-cum-seizure list have been handed over to him, but with regard to seized article, it was disclosed that same has been deposited in the Malkhana. Seized article was not handed over to him. When the evidence of PW-5, the Part I.O., who took investigation on 25.12.2013, on account of transfer of PW-7, gone through the case diary and then, submitted chargesheet after transmitting the seized article to the F.S.L. Patna as well as Kolkata. During course of cross-examination at Para-2, he has stated that seized article was handed over to him by the O/c. At Para-4, he has stated that sample was prepared since before, which was sent by him to F.S.L. on 28.12.2014. This witness was recalled to have the



receipt of the F.S.L. exhibited. So far evidence of PW-6, O/c is concerned, completely cipher over the same.

8. Now, coming to evidence of PW-1 to PW-4, it is evident that they are consistent over receipt of the confidential information, constitution of raiding party, apprehension of the appellant/ accused and on physical search, recovery of three kilograms of charas, but they have not uttered a word with regard to sealing of the seized article and in likewise manner, preparation of the sample at the spot have signature of PW-1 along with signature of seizure list witnesses as well as accused.

9. In *Vijaysinh Chandubha Jadeja vs. State of Gujarat reported in (2011)1 SCC 609*, the Constitution Bench held after considering earlier Constitution Bench relating to *State of Punjab v Baldev Singh* (“Baldev Singh”), (1999) 6 SCC 172, *Karnail Singh vs. State of Haryana reported in (2009)8 SCC 539*, observed as follows:-

“29. In view of the foregoing discussion, we are of the firm opinion that the object with which right under [Section 50\(1\)](#) of the NDPS Act, by way of a safeguard, has been conferred on the suspect, viz. to check the misuse of power, to avoid harm to innocent persons and to minimise the allegations of planting or foisting of false cases by the law enforcement agencies, it would be imperative on the part of the empowered officer to apprise the person



intended to be searched of his right to be searched before a gazetted officer or a Magistrate. We have no hesitation in holding that in so far as the obligation of the authorised officer under sub-section (1) of [Section 50](#) of the NDPS Act is concerned, it is mandatory and requires a strict compliance. Failure to comply with the provision would render the recovery of the illicit article suspect and vitiate the conviction if the same is recorded only on the basis of the recovery of the illicit article from the person of the accused during such search. Thereafter, the suspect may or may not choose to exercise the right provided to him under the said provision.

.....

32. We also feel that though [Section 50](#) gives an option to the empowered officer to take such person (suspect) either before the nearest gazetted officer or the Magistrate but in order to impart authenticity, transparency and creditworthiness to the entire proceedings, in the first instance, an endeavour should be to produce the suspect before the nearest Magistrate, who enjoys more confidence of (1974) 2 SCC 33 the common man compared to any other officer. It would not only add legitimacy to the search proceedings, it may verily strengthen the



prosecution as well.”

10. In ***Mohan Lal vs. State of Punjab*** reported in ***2019 CRI.L.J. 420***, it has been held:-

“8. The view taken by the High Court that Under Section [55](#) of the NDPS Act, that PW-1 was empowered to keep the case property and sample in his individual safe custody is completely erroneous on the face of it. The provision reads as follows:

“55. Police to take charge of articles seized and delivered-

An officer-in-charge of a police station shall take charge of and keep in safe custody, pending the orders of the Magistrate, all articles seized under this Act within the local area of that police station and which may be delivered to him, and shall allow any officer who may accompany such articles to the police station or who may be deputed for the purpose, to affix his seal to such articles or to take samples of and from them and all samples so taken shall also be sealed with a



*seal of the officer-in-charge of
the police station.*

*A plain reading of the provision makes it
manifest that it is the duty of the police officer to
deposit the seized material in the police station
malkhana.*

*9. Standing Order No. 1 of 88 issued by the
Narcotics Control Bureau in Clause 1.13 reads as
follows:*

*“Mode and time limit for dispatch of
sample to Laboratory.*

*The samples should be sent either by
insured post or through special messenger
duly authorised for the purpose. Dispatch of
samples by registered post or ordinary mail
should not be resorted to. Samples must be
dispatched to the Laboratory within 72 hours
of seizure to avoid any legal objection.*

(Emphasis added)

*The Drug Law Enforcement-Field Officer's
Hand Book issued by the Narcotics Control Bureau
also provides that:*

“28. Were the seized goods and



samples deposited in the Malkhana at the earliest opportunity after seizure, an acknowledgement receipt obtained from the Malkhana-in-Charge?

(emphases added)

29. Were the samples sent to the designated laboratory for analysis and report within 72 hours of seizure?

In Noor Aga v. State of Punjab, : (2008) 16 SCC 417, under the NDPS Act, it was held:

“91. The logical corollary of these discussions is that the guidelines such as those present in the Standing Order cannot be blatantly flouted and substantial compliance therewith must be insisted upon for so that sanctity of physical evidence in such cases remains intact. Clearly, there has been no substantial compliance with these guidelines by the investigating authority which leads to drawing of an adverse inference against them to the effect that had such evidence been produced, the same would have gone against the prosecution.”

11. From the evidence, it is evident that seized



article has not been produced before the Court and that has been taken a serious note of by the Apex Court in ***Gorakh Nath Prasad vs. State of Bihar reported in (2018) 2 SCC 305***, it has been held:-

“7. The remaining prosecution witnesses being police officers only, it will not be safe to rely upon their testimony alone, which in any event cannot be sufficient evidence by itself either with regard to recovery or the seized material being Ganja. No explanation has also been furnished by the prosecution for non-production of the Ganja as an exhibit in the trial. The benefit of doubt will, therefore, have to be given to the Appellant and in support of which learned Senior Counsel Shri Rai has relied upon [Jitendra and Another vs. State of M.P.](#), (2004)10 SCC 562, and reiterated in [Ashok alias Dangra Jaiswal vs. State of Madhya Pradesh](#), (2011) 5 SCC 123, as follows:

“12. Last but not the least, the alleged narcotic powder seized from the possession of the accused, including the appellant was never produced before the trial court as a material exhibit and once again there is no explanation for its non-production. There is, thus, no evidence to connect the forensic report with



the substance that was seized from the possession of the appellant or the other accused.

*13. It may be noted here that in [Jitendera v. State of M.P.](#), (2004) 10 SCC 562, on similar facts this Court held that the material placed on record by the prosecution did not bring home the charge against the accused beyond reasonable doubt and it would be unsafe to maintain their conviction on that basis. In *Jitendra* (supra), the Court observed and held as under:-(SCC pp. 564-65, paras 5-6)*

‘5. The evidence to prove that charas and ganja were recovered from the possession of the accused consisted of the evidence of the police officers and the panch witnesses. The panch witnesses turned hostile. Thus, we find that apart from the testimony of Rajendra Pathak (PW 7), Angad Singh (PW 8) and Sub-Inspector D.J. Rai (PW 6), there is no independent witness as to the recovery of the drugs from the possession of the accused. The charas and ganja alleged to have been seized from the possession of the accused were not



even produced before the trial court, so as to connect them with the samples sent to the Forensic Science Laboratory. There is no material produced in the trial, apart from the interested testimony of the police officers, to show that the charas and ganja were seized from the possession of the accused or that the samples sent to the Forensic Science Laboratory were taken from the drugs seized from the possession of the accused.....

6.The best evidence would have been the seized materials which ought to have been produced during the trial and marked as material objects. There is no explanation for this failure to produce them. Mere oral evidence as to their features and production of panchnama does not discharge the heavy burden which lies on the prosecution, particularly where the offence is punishable with a stringent sentence as under the [NDPS Act](#). In this case, we notice that panchas have turned hostile so the panchnama is nothing but a document written by the police officer concerned.....”

12. Consequent thereupon, the judgment



impugned did not justify its prevalence and accordingly, is set aside. Appeal is allowed. Appellant is under custody, hence is directed to be released forthwith if not wanted in any other case. The first and last page of the judgment be handed over to the learned Amicus Curiae for needful.

(Aditya Kumar Trivedi, J)

Vikash/-

AFR/NAFR	A.F.R.
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