

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.2053 of 2019

Arising Out of PS. Case No.-97 Year-2008 Thana- SUGAULI RAIL P.S. District- West
Champaran

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UMESH SAH, aged about 30 years, Gender- Male, S/o Kari Sah R/o village-
Chatiya Diar, P.S.- Malahi Bazar, District- East Champaran, Motihari

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

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Appearance :

For the Appellant/s : Mr. Ranjeet Kumar, Adv.

For the Respondent/s : Mr. Syed Ashfaque Ahmad, APP

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
ORAL JUDGMENT

Date : 05-11-2019

For the purpose of consideration of prayer for bail when the record has been gone through, it has been found that on account of inherent defect persisting on the record it looks appropriate to hear the appeal on its merit than to keep the matter pending furthermore. Accordingly, heard learned counsel for the appellant as well as learned A.P.P.

Appellant Umesh Sah has been found guilty for an offence punishable under section 20(b)(ii)B of the N.D.P.S.Act and sentenced to undergo R.I. for six years as well as to pay fine appertaining to Rs.50,000/- and in default thereof, to undergo imprisonment for one and half years with a further direction that the period having undergone during course of trial be set off in accordance with Section 428 Cr.P.C. by the Sessions Judge cum Special Judge, N.D.P.S.Act, West Champaran at Bettiah vide



judgment of conviction dated 3.4.2019 and order of sentence dated 5.4.2019 relating to Trial No. 07/2009 arising out of Sugauli Rail P.S.Case No. 97/2008.

Shivpujan Ram, O/C of Rail Police, Bettiah recorded his self statement on 17.12.2008 at about 10.15 A.M. disclosing therein that during course of patrolling while he alongwith other police personnel was on Platform No.1, got confidential information with regard to presence of two persons having an attache full of Ganja. Accordingly, they proceeded towards the destination but the aforesaid two persons, seeing the police coming towards them, ran alongwith attache. One person managed to succeed in fleeing away while the other, who was carrying the attache, was apprehended, who on interrogation disclosed his identity as Umesh Sah (appellant). Furthermore, on query he disclosed that the person who absconded is named as Munna Sah who has taken away the key and so, he is unable to open the attache. Then, thereafter, in presence of two witnesses, namely, Mahesh Sah and Subhan Mian, lock of attache was broken and opened. Ganja was found inside which on weighing happen to be 16 Kgs. (7+7+2) for which Umesh Sah has further disclosed that he has got no paper to justify the possession.



The aforesaid self statement led registration of Sugauli Rail P.S.Case No. 97/2008 followed with investigation as well as submission of charge sheet keeping the investigation pending against co-accused Munna Sah, facilitating the trial, meeting with 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 Cr.P.C. is that of complete denial.

Altogether five witnesses have been examined on behalf of the prosecution in order to substantiate its case and those are P.W.1 Mahesh Sah, P.W. 2 Subhan Mian, P.W.3 Shivpujan Ram, P.W.4 Suresh Prasad Singh and P.W.5 Banke Prasad. Side by side has also exhibited Ext.1 signature of the seizure list witness, Ext.2 seizure list, Ext.3 self statement of the informant, Ext.4 formal F.I.R., Ext.5 inculpatory extra-judicial confessional statement of Umesh Sah and Ext.6 F.S.L. report.

From the nature of the evidence having adduced on behalf of the prosecution, it is evident that P.W.1 and P.W.2 are seizure list witnesses. Out of them P.W.2 has turned hostile while P.W.1 corroborated the same. P.W.3 is the informant. During the course of evidence, as is evident, he has corroborated his earlier statement, that means to say, during course of



patrolling alongwith other police personnel at Platform No.1 got confidential information regarding presence of two persons alongwith an attache carrying Ganja, whereupon they proceeded towards them, who, seeing them, escaped carrying an attache. One person succeeded in his escape while other was apprehended alongwith the attache. On demand, the person who was apprehended, denied to have key in his possession, whereupon in presence of P.W.1 and P.W.2 lock was broken and on search Ganja was found weighing 16 Kgs. (2 packets 7 Kgs. each and 1 packet 2 Kgs.). Accordingly, seizure list was prepared. Recorded his self statement. Interrogated the accused. Then thereafter returned back to the police station alongwith the accused as well as seized Ganja. During cross-examination, it is evident that nothing substantial has been at the end of the accused/ appellant.

P.W.4 is one of the Constables, who was alongwith P.W.3 and on that very score, he corroborated the testimony of P.W.3, informant.

P.W.5 is Banke Prasad, the Investigating Officer. He during examination-in-chief has stated that on 17.12.2008 he was posted at Bettiah Rail P.S. On that day, the Officer In-charge entrusted investigation of Rail P.S. Case No. 57/2008.



Accordingly, he took up investigation. Recorded further statement of the informant. Recorded statement of both the seizure list witnesses. Inspected the place of occurrence which happens to be Platform No.1 and then detailed the same. He had also recorded statement of Constable Suresh Prasad, Hira Singh, Yugal Kishore Sharma and others. He had also recorded inculpatory extra-judicial confessional statement of the accused. After taking order from the court he got Ganja examined. Then has exhibited the relevant documents. Then stated that after concluding investigation, submitted charge sheet. During cross-examination he has stated at para-12 that he had not recorded statement of any of the independent witness having present over Platform No.1.

From the evidence available on record, it is evident that there happens to be slackness at the end of the accused/ appellant during course of cross-examination of the witnesses, more particularly P.W.3 the informant as well as P.W.5 the I.O. However, it is the bounden duty of the prosecution to prove its case beyond all reasonable doubt. The mental culpability having in accordance with section 35 as well as 54 of the N.D.P.S.Act is an additional factor but is to be taken recourse of when there happens to be proper compliance of mandatory provisions of the



law. From the evidence, it is apparent that the informant P.W.3 has not spoken a word with regard to sealing, sampling of the seized Ganja at the spot nor at the police station on the specified date. In likewise manner, P.W.5 the I.O. has also kept silence. He has not stated whether sample was prepared and if so, on which date. The most surprising feature is that the aforesaid seized Ganja has not been produced before the court during the course of trial.

The Hon'ble Apex Court in the case of **Mohinder Singh v. State of Punjab**, reported in AIR 2018 SC 3798 has held as follows :-

"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 Patna High Court CR. APP (SJ) No.623 of 2016 dt.16-08-2019 necessity of production of 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 v. 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."

With regard to mode of the seizure and sampling, there happens to be circular issued by the Central Government bearing Order No. 1/88 as well as 1/89 and the same has properly been considered by the Apex Court in the case of **Union of India v. Mohanlal & anr.**, reported in (2016)3 SCC 379, and for better appreciation the relevant para is quoted below:



“12. 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.]”

13. 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. 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. 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. Be that as it may, a conflict between the statutory provision governing taking of samples and the standing order issued by the Central Government is evident when the two are placed in juxtaposition. There is no gainsaid that such a conflict shall have to be resolved in favour of the statute on first principles of interpretation but the continuance of the statutory notification in its present form is bound to create confusion in the minds of the authorities concerned instead of helping them in the discharge of their duties. The Central Government would, therefore, do well, to re-examine the matter and take suitable steps in the above direction.

14. Mr. Sinha, learned Amicus, argues that if an amendment of the Act stipulating that the samples be taken at the time of seizure is not possible, the least that ought to be done is to make it obligatory for the officer conducting the seizure to apply to the Magistrate for drawing of samples and certification etc. without any loss of time. The officer conducting the seizure is also obliged to report the act of seizure and the making of the application to the superior



officer in writing so that there is a certain amount of accountability in the entire exercise, which as at present gets neglected for a variety of reasons. There is in our opinion no manner of doubt that the seizure of the contraband must be followed by an application for drawing of samples and certification as contemplated under the Act. There is equally no doubt that the process of making any such application and resultant sampling and certification cannot be left to the whims of the officers concerned. The scheme of the Act in general and Section 52-A in particular, does not brook any delay in the matter of making of an application or the drawing of samples and certification. While we see no room for prescribing or reading a time frame into the provision, we are of the view that an application for sampling and certification ought to be made without undue delay and the Magistrate on receipt of any such application will be expected to attend to the application and do the needful, within a reasonable period and without any undue delay or procrastination as is mandated by sub-section (3) of Section 52A (supra). We hope and trust that the High Courts will keep a close watch on the performance of the Magistrates in this regard and through the Magistrates on the agencies that are dealing with the menace of drugs which has taken alarming dimensions in this country partly because of the ineffective and lackadaisical enforcement of the laws and procedures and cavalier manner in which the agencies and at times Magistracy in this country addresses a problem of such serious dimensions.

STORAGE:

15. The Narcotic Drugs and Psychotropic Substances Act, 1985 does not make any special provision regulating storage of the contraband substances. All that Section 55 of the Act envisages is that the officer in charge of a Police Station shall take charge of and keep in safe custody the



seized article pending orders of the Magistrate concerned. There is no provision nor was any such provision pointed out to us by learned counsel for the parties prescribing the nature of the storage facility to be used for storage of the contraband substances. Even so the importance of adequate storage facilities for safe deposit and storage of the contraband material has been recognised by the Government inasmuch as Standing Order No.1/89 has made specific provisions in regard to the same. Section III of the said Order deals with "Receipt of Drugs in Godowns and Procedure" which inter alia provides that all drugs shall invariably be stored in "safes and vaults" provided with double locking system and that the agencies of the Central and the State Governments may specifically designate their godowns for storage purposes and such godowns should be selected keeping in view their security angle, juxtaposition to courts etc. We may usefully extract paras 3.2 to 3.9 comprising Section III supra at this stage for ready reference:

"3.2. All drugs invariably be stored in safes and vaults provided with double-locking system. Agencies of the Central and State Governments, may specifically, designate their godowns for storage purposes. The godowns should be selected keeping in view their security angle, juxtaposition to courts etc. 3.3 Such godowns, as a matter of rule, shall be placed under the over-all supervision and charge of a Gazetted Officer of the respective enforcement agency, who shall exercise utmost care, circumspection and personal supervision as far as possible. Each seizing officer shall deposit the drugs fully packed and sealed in the godown within 48 hours of such seizure, with a forwarding memo indicating NDPS Crime No. as per Crime and Prosecution (C & P Register) under the new law, name of the accused, reference of test memo, description of the drugs, total no. of packages/containers etc. 3.4 The seizing officer, after



obtaining an acknowledgement for such deposit in the format (Annexure-I), shall hand acknowledged over such to the Investigation Officer of the case along with the case dossiers for further proceedings.

3.5 The officer-in-charge of the godown, before accepting the deposit of drugs, shall ensure that the same are properly packed and sealed. He shall also arrange the packages/containers (case-wise and lot-wise) for quick retrieval etc. 3.6 The godown-in-charge is required to maintain a register wherein entries of receipt should be made as per format at Annexure-II.

3.7 It shall be incumbent upon the Inspecting Officers of the various Departments mentioned at Annexure II to make frequent visits to the godowns for ensuring adequate security and safety and for taking measures for timely disposal of drugs. The Inspecting Officers should record their remarks/observations against Col. 15 of the Format at Annexure-II.

3.8 The Heads of the respective enforcement agencies (both Central and State Governments) may prescribe such periodical reports and returns, as they may deem fit, to monitor the safe receipt, deposit, storage, accounting and disposal of seized drugs.

3.9 Since the early disposal of drugs assumes utmost consideration and importance, the enforcement agencies may obtain orders for pre-trial disposal of drugs and other articles (including conveyance, if any) by having recourse to the provisions of sub-section (2) of Section 52A of the Act.” It is evident from a plain reading of para 3.2 (supra) that storage of all drugs in safes and vaults has been made mandatory and that agencies of the Central and the State Governments have been permitted to designate their godowns for storage purposes. It is also clear that keeping in view the importance of protecting the seized drugs against theft, substitution or pilferage the Central



Government has prescribed that such godowns shall be placed under the overall supervision and charge of a gazetted officer of the respective enforcement agencies who shall exercise utmost care, circumspection and personal supervision over the storage facilities. The provision contained in paras 3.5, 3.6, 3.7 and 3.8 also are aimed at ensuring that the godown or storage facility is satisfactory and those in- charge of the same are made accountable for its upkeep and effective management. Subsequent Notification including Notification dated 16th January, 2015 have in no way diluted the above requirement. The result is that there is a statutory framework which governs the storage of drugs and matters relating and incidental thereto. The question is whether the said statutory mechanism has been effectively implemented by the Central Government agencies and by the State Governments. Our answer regrettably is in the negative. It is evident from the responses received from the State and the Central Government agencies that no notified storage facility-godown has been established for storage of the seized drugs. Even the Narcotics Control Bureau has admitted to using mallkhana of the Courts for storage of the seized drugs in certain cases and in certain circumstances. The Customs and Central Excise Department and DRI have also stated that they have no designated storage facility for storage of contraband. The position in the States is no different. Due to non-availability of any designated godown-facility with adequate vaults and double lock system, the seized contraband is stored in police maalkhana which is a common storage facility for all kinds of goods and weapons seized in connection with all kinds of offences including those specified by the IPC. This is a totally unhappy and unacceptable situation to say the least. It is indeed unfortunate that even after a lapse of 26 years since Standing Order No. 1/89 was issued, the Central



Government or its agencies and the State Governments have paid little or no attention to the need for providing adequate storage facilities of the kind stipulated in Standing Order No. 1/89 with the necessary supervisory and other controls prescribed in Section III of the said order. The result is that while Standing Order No. 1/89 very early in point of time recognized the need for providing adequate and effective storage facilities by the States and the Central Government agencies, the failure on the part of the Central Government and the State Governments to provide for such storage has defeated, if not completely negated the very purpose underlying the said notification and the provisions made therein. There is as on date hardly any credible protection against theft, replacement, pilferage and destruction of the seized drugs on account of the wholly unsatisfactory and unscientific method of storage of drugs and psychotropic substances which at times hit the headlines in newspapers on account of what is often described by the agencies as “big catch” worth crores of rupees in the international market. What has defied our understanding is the neglect on the part of the Central Government and its agencies and the State Governments in realizing the importance of the storage facilities and in providing for the same to prevent hazardous and at times lethal substances with great potential to do harm to those who use the same from being replaced, pilfered, stolen or siphoned out on account of very poor supervision, control or invigilation over such storage facilities. The learned amicus has in that view very rightly argued that there is a complete failure on the part of the Central Government and its agencies as also the State Governments in taking adequate steps for providing proper storage facilities with proper system of supervision and control over the drugs that are stored in the same. It was contended by Mr. Sinha, and in our opinion rightly so, that the cumulative effect of the reports submitted by the States



and the Central agencies is that only 16% of the contrabands seized between 2002 to 2012 have been actually disposed of. What happened to the remaining 84% of such seizures is anybody's guess and if it is still lying in the police maalkhana, why has nobody ever bothered to apply for their disposal according to the procedure established by law is hard to fathom. The fact that the States and the Central Government agencies have accepted that no specific register is maintained by the State Police and that general maalkhana register alone is being maintained for the seized drugs shows the neglect of all concerned towards this important aspect and the cavalier manner in which the issue regarding storage of seized drugs is approached by them. Absence of periodical inspection of the storage facility and the absence of any record suggesting that any inspection has been carried out by any of the officers shows a complete failure bordering criminal negligence by officers who are supposed to be taking action in this regard but have failed to do so."

Consequent thereupon, the judgment impugned being deficient one on the above score, did not justify its legality, whereupon is set aside. The appeal is allowed. The appellant is under custody, hence is directed to be released forthwith, if not wanted in any other case.

(Aditya Kumar Trivedi, J)

Surendra/-

AFR/NAFR	NAFR
CAV DATE	NA
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