

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.1085 of 2016**

Arising Out of PS. Case No.-217 Year-2011 Thana- BRAHMPURA District- Muzaffarpur

Barun Kumar Verma @ Prince Kumar Verma, s/o Vinod Kumar Verma, r/m-
Sikandarpur Dhobighat, P.S. Town, District-Muzaffarpur.

... .. Appellant/s

Versus

The State Of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s : Mr. Ravi Ranjan, Adv.

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

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

Date : 20-11-2019

Appellant, Barun Kumar Verma @ Prince Kumar Verma, has been found guilty for an offence punishable under Section 20(b)(ii)(b) of the NDPS Act and sentenced to undergo R.I. for ten years as well as to pay fine appertaining to Rs. 1 lac, in default thereof, to undergo S.I. for two years, additionally, vide judgment of conviction dated 21.09.2016 and order of sentence dated 26.09.2016 passed by the learned Additional Sessions Judge Ind-cum-Special Judge (NDPS), Muzaffarpur in connection with Brahampura P.S. Case No. 217/2011, Trial No. 02/2016.

Sunil Kumar (PW-4), O.C. of Brahampura P.S., recorded his self-statement on 22.12.2011 at about 3:00 P.M. at Lakshmi Chowk, disclosing therein that he along with ASI Vikash Kumar Singh, Arij Ehkam, Dhananjay Kumar, Samrath Singh, police



constables proceeded in day patrolling and during course thereof, they began to check vehicle. During course thereof, they saw a motorcycle being ridden by three persons who, seeing the police sped away but were apprehended and, interrogated, who disclosed their identity as Manoj Prasad @ Manoj Gupta @ Shambhu Gupta @ Shambhu Sahni, Pradeep Sah, Barun Kumar Verma @ Prince Kumar Verma. So many persons assembled there, out of whom, two persons, namely, Bharat Kumar, s/o Sukhdeo Mahto (PW-1) and Rajesh Sah, s/o Sukhdeo Sah (not examined) were picked up as seizure-list witness in whose presence, they were searched out and, from the physical possession of Manoj Prasad, one mobile as well as *Charas* weighing 500gm, Pradeep Sah, a mobile and *Charas* weighing 250gm and Barun Kumar Verma @ Prince Kumar Verma, a mobile and *Charas* weighing 250gm were recovered and seized, as per seizure-list as they failed to give legal document in order to justify their possession. They also failed to produce relevant document relating to possession of motorcycle. Accordingly, sample was prepared at the spot, sealed having signature of the respective seizure-list witness, accused, informant himself. The remaining parts were also sealed. Then thereafter, accused along with articles have been brought to Police Station.

It is further evident that though registration of F.I.R. of Brahampura P.S. Case No. 217/2011 was after arrival at the Police



Station but, investigation was entrusted to one of the member of the raiding party, namely, Vikash Kumar Singh at the spot itself by the informant O/c, who conducted investigation and, after his transfer Mukesh Kumar Sharma (PW5) proceeded therewith, followed with submission of charge-sheet, facilitating the trial, meeting with the ultimate result, subject-matter of the instant appeal.

Defence case as is evident from the mode of cross-examination as well as statement recorded under Section 313 of the Cr.P.C. is that of complete denial. However, nothing has been adduced in defence.

In order to substantiate its case, prosecution has examined altogether 6 P.Ws., who are, PW. 1 – Bharat Kumar, PW2- Vikash Kumar Singh, PW3- Md. Arij Ahkam, PW4- Sunil Kumar (informant), PW5- Mukesh Kumar Sharma and PW6- Dhananjay Kumar. It is manifest that prosecution has also exhibited Ext.1- signature of seizure-list witness, Ext. 1/1-seizure-list, Ext.2- self-statement of informant, Ext.3- Formal F.I.R., Ext.4- F.S.L. report. As stated above, nothing has been adduced at the end of defence.

Heard learned counsel for the appellant as well as learned Addl. P.P. Also gone through the record.

From perusal of the Record, it is manifest that at initial stage there were three accused persons, namely, Manoj Prasad, Pradeep Sah and Barun Kumar Verma (appellant) but, as is evident



in due course of time, Manoj Prasad, Pradeep Sah disappeared whereupon, trial has been separated. Consequent thereupon, the appellant, Barun Kumar Verma, on account of being under custody, faced the trial.

From perusal of the judgment impugned in consonance with the evidence coupled with the relevant exhibits, it is apparent that prosecution could not be able to substantiate its case and the reason is:

(A) From perusal of the evidence of PW2- Vikash Kumar Singh, PW3- Md. Arij Ahkam, PW4- Sunil Kumar and PW6- Dhananjay Kumar, it is evident that Vikash Kumar Singh (PW2) was one of the members of the raiding party. As per cross-examination of PW2, it is evident that at that very time, there were ten ASI at the Police Station, on account thereof, informant should have avoided to entrust investigation to one of the member of the raiding party as, being a member of the raiding party, his conduct could not be considered to be impartial.

(B) Be that as it may, from the evidence of all the witnesses, it is apparent that sample was prepared, sealed bearing signature of seizure-list witness, accused, informant himself at the spot but, no such sample has been exhibited in the court. It would not be out to say in the background of the fact that although the requisition so made and the signature of the District & Sessions



Judge-cum-Special Judge, Muzaffarpur having thereupon has not been made an exhibit but, the FSL Report having ascribed over back of the aforesaid requisition (Ext.-4), divulges signature of Sessions Judge dt. 20.03.2012, that means to say, about three months after alleged occurrence but, when column V has been gone through, it is evident that date of dispatch of sample has been shown as 22.12.2011. That means to say, much prior to signature of the learned Sessions Judge and in likewise manner, when has minutely been gone through, it is evident that the sealed sample packet had been transmitted to the FSL, vide memo no. 379 dated 17.03.2012, again before the date of signature by the learned Sessions Judge. That means to say, there happens to be some sort of disputation which, the prosecution was under obligation to explain. From the evidence of all the witnesses, more particularly, PW2 (part I.O.) and PW5 (another part I.O.), it is crystal clear that they all utterly failed.

(C) On the other hand, from the evidence so adduced on behalf of prosecution, it is crystal clear that during course of vehicle checking, three persons having over a motorcycle came, who sped away seeing the police, who were apprehended. It is evident that from physical possession of Manoj Prasad, recovery of 500gm of *Charas*, Pradeep Sah, 250gm *Charas* and Barun Kumar Prasad, 250gm of *Charas* have been recovered. There happens to be no disclosure at the end of any of the prosecution witnesses that any of



the member of the raiding party had offered the accused to be searched out in presence of a Magistrate or a Gazetted Officer nor they had spoken/identified any of them to be a Gazetted Officer. In ***Vijaysinh Chandubha Jadeja Vs. State of Gujarat*** reported in ***(2011)1 SCC609***, a constitution Bench of the Apex Court re-examined two earlier constitution Bench decision in ***State of Punjab Vs. Baldev Singh*** reported in ***(1999) 6 SCC 172***, ***Karnail Singh V. State of Haryana*** reported in ***(2009) 8 SCC 539*** and concluded:

28. We shall now deal with the two decisions, referred to in the referral order, wherein “substantial compliance” with the requirement embodied in Section 50 of the NDPS Act has been held to be sufficient. In *Prabha Shankar Dubey* a two Judge Bench of this Court culled out the ratio of *Baldev Singh* case on the issue before us, as follow: (*Prabha Shankar Dubey* case, SCC p.64, para 11)

“11. ... What the officer concerned is required to do is to convey about the choice the accused has. The accused (suspect) has to be told in a way that he becomes aware that the choice is his and not of the officer concerned, even though there is no specific form. The use of the word ‘right’ at relevant places in the decision of *Baldev Singh* case seems to be to lay effective emphasis that it is not by the grace of the officer the choice has to be given but more by way of a right in the ‘suspect’ at that stage to be given such a choice and the inevitable consequences that have to follow by transgressing it.”

However, while gauging whether or not the stated requirements of Section 50 had been met on facts of that case, finding similarity



in the nature of evidence on this aspect between the case at hand and *Joseph Fernandez* the Court chose to follow the views echoed in the latter case, wherein it was held that the searching officer's information to the suspect to the effect that "if you wish you may be searched in the presence of a gazetted officer or a Magistrate" was in substantial compliance with the requirement of Section 50 of the NDPS Act. Nevertheless, the Court indicated the reason for use of expression "Substantial compliance" in the following words: (*Prabha Shankar Dubey* case, SCC p. 64, para 12)

"12. The use of the expression 'substantial compliance' was made in the background that the searching officer had Section 50 in mind and it was unaided by the interpretation placed on it by the Constitution Bench in Baldev Singh case. A line or a word in a judgment cannot be read in isolation or as if interpreting a statutory provision, to impute a different meaning to the observations:"

It is manifest from the afore-extracted paragraph that *Joseph Fernandez* does not notice the ratio of *Baldev Singh* and in *Prabha Shankar Dubey*, *Joseph Fernandez* is followed ignoring the dictum laid down in *Baldev Singh* case.

29. In view of the foregoing discussion, we are of the firm opinion that the object with which the 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 insofar 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 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.

30. As observed in Presidential Poll, In re:(SCCp. 49, para 13)

“13. ... It is the duty of the courts to get at the real intention of the legislature by carefully attending (to) the whole scope of the provision to be construed. ‘The key to the opening of every law is the reason and spirit of the law, it is the animus imponentis, the intention of the law maker expressed in the law itself, taken as a whole’.”

31. We are of the opinion that the concept of “substantial compliance” with the requirement of Section 50 of the NDPS Act introduced and read into the mandate of the said section in *Joseph Fernandez and Prabha Shankar Dubey* is neither borne out from the language of sub-section (1) of Section 50 nor it is in consonance with the dictum laid down in *Baldev Singh* case. Needless to add that the question whether or not the procedure prescribed has been followed and the requirement of Section 50 had been met, is a matter of trial. It would neither be possible nor feasible to lay down any absolute formula in that behalf.

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 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.”

(D) Furthermore, from the evidence available on record, it is apparent that material exhibit has not been produced in Court nor, one of the sample which might have been retained by the investigating officer has been brought up. In order to substantiate that sample was prepared at the spot having signature of the accused, seizure-list witnesses as well as the informant should have been produced. In order to ward off any kind of suspicion to the effect that whole exercise happens to be cooked up story. On that very score, the Hon'ble Apex Court consistently held right from Jitendra case reported in *AIR 2003 SC 4236*, Noor Aga case reported in *2008 AIR SCW 5964*, Vijay Jain case reported in *(2013) 14 SCC 527* and more recently in Mohinder Singh case reported in *AIR 2018 SC 3798* that non-production of material exhibit in court will be treated as serious infirmity in the prosecution case. Recently, in *State of Rajasthan V. Sahi Ram* reported in *AIR 2019 SC 4723*, it has been held that even there happens to be absence of production of material exhibit in the court but, if the prosecution succeeds in substantiating its case of recovery of contraband goods, then in that circumstance, non-production of material exhibit would not cast any kind of dent in the



prosecution case. In order to search out the same, when the evidence of the witnesses have minutely been gone through, it is evident that non-examination of one of the seizure-list witness, non attracting attention of PW1, another seizure-list witness on the score that search and seizure was made in his presence coupled with the fact that whatsoever oral evidences have been led at the end of the prosecution, appears to be suspicious in the background of the signature of the Sessions Judge, containing the date 20.03.2012 while the seized article, as per Ext.-4, is found already transmitted under letter no. 379 dated 17.03.2012 speaks a lot, creating serious doubt over the genuineness of the prosecution version.

Accordingly, the judgment of conviction and order of sentence recorded by the learned lower court is set aside. Appeal is allowed. Appellant is under custody, hence, is directed to be released 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	25.11.2019
Transmission Date	25.11.2019

