

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Appeal (SJ) No.3122 of 2017
Arising Out of PS. Case No.-7 Year-2000 Thana- SIKARPUR
District- West Champaran

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RINKU KUMAR CHAUBEY @ RINKU CHAUBEY Son of Ram
Kailash Chaubey, Resident of Village-Musaharwa, P.S.-Sathi,
District-West Champaran.

... .. Appellant/s

Versus

The State Of Bihar

... .. Respondent/s

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Appearance :

For the Appellant/s :	Mr. Yogesh Chandra Verma, Sr Adv Mr. Ansul, Mrs. Prem Shella Pandey Advocates.
For the Respondent/s	Mr. Bipin Kumar, APP

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
ORAL JUDGMENT

29-01-2019

Vide judgment of conviction dated 11.08.2017

and order of sentence dated 24.08.2017 passed by 6th Additional
Sessions Judge, West Champaran, Bettiah in Trial No. 08/2008
whereby and whereunder, appellant, Rinku Kumar Chaubey @
Rinku Chaubey has been found guilty for an offence punishable
under Section 20(b), (II) (C) of the NDPS Act and sentenced to
undergo RI for 10 years as well as fine of Rs. 1 Lakh, in default
thereof, to undergo RI for 1 year, under Section 23(C) of the
NDPS Act and sentenced to undergo RI for 10 years as well as
fine of Rs. 1 Lakh, in default thereof, to undergo RI for 1 year,



with a further direction to run the sentences concurrently, the instant appeal has been preferred at his end.

2. Ram Narayan Chaudhary, (PW 3) recorded his self statement on 12.01.2000 disclosing therein that after registering Sanha No. 265 dated 12.01.2000, he along with other police officials so named therein proceeded in patrolling and during course thereof, when they reached near Bazar Samiti Chowk, they had seen one person in suspicious circumstance who, seeing the police ran away, chased, apprehended and on search in presence of two witnesses namely, Shashi Kumar and Panna Lal Kumar, a country made loaded pistol, cartridges were recovered from his physical possession and for that, seizure list was prepared. It has further been disclosed that the appellant in his inculpatory extra judicial confessional statement, admitted that he had escaped from police custody on 23.12.1999, then gone to Nepal, brought Charas and the same has been kept in the hut belonging to Rajendra Sah which he could show whereupon, was accompanied by the police officials and as per his discloser four biscuits each weighing 250 Grams was recovered and for that, seizure list was prepared. The accused was taken into custody .

3. After registration of Shikarpur PS Case



No.07/2000, investigation commenced and after concluding the same, charge-sheet was submitted, facilitating the trial meeting with the ultimate result, subject matter of the instant appeal.

4. 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, nothing has been adduced in defence.

5. Altogether three Pws have been examined on behalf of prosecution out of whom, PW-1, Basir Alam as formal witness, PW-2, Binod Kumar Singh, a Chowkidar and PW-3, Ram Narayan Chaudhary, the informant. Side by side has also exhibited, Fardbeyan, Ext-1, Seizure List, endorsement over self statement, Ext-1/1, Ext-2, Formal FIR, Ext-3, FSL report, Ext-4.

6. As stated above, nothing has been adduced in defence.

7. From the record, it is evident that I.O. has not been examined. On account of non examination of I.O. certain things remained unexplained. The same is to be considered in the background of the evidence having been adduced on behalf of prosecution.

8. PW-2 has stated that he was one of the members of the raiding party. When they reached at Bazar



Samiti Chowk, they had seen one person who seeing the police ran away, chased, apprehended and in presence of seizure list witnesses when he was searched out, fire arm, cartridges were recovered from his possession. Further, he disclosed that after bringing Charas from Nepal, he concealed it in a hut whereupon, the police officials took him to that place where as per his disclosure four biscuits each weighing 250 Grams were recovered for which seizure list was prepared. All of them took the seized article as well as accused to the police station. Claimed identification of the accused. During cross-examination at para-4, he has stated that seizure was made in presence of two independent witnesses, namely, Shashi Kumar and Panna Lal Kumar. In para-5, he has stated that the hut was of Rajendra Sah. It was fenced from all sides having door affixed at eastern side. In para-6, he has stated that the appellant had disclosed that it happens to be Charas. He had seen the Charas. In para-7, he has stated that it was near the Chowk. So many shops were there but none of the shopkeepers was called. In para-9, he has stated that seized Charas was not weighed. It was sealed in a cloth. Then at para-15, there happens to be contradiction.

9. PW-3 has stated that on the alleged date and time of occurrence while he along with other police officials



were on patrolling and as soon as reached Narkatiaganj Bazar Samiti Chowk, one person seeing the police escaped whereupon, was chased and then apprehended. In presence of seizure list witnesses, he was searched out and from his possession one country made loaded pistol along with cartridges were seized and for that seizure list was prepared. During inculpatory extra judicial confessional statement, the accused stated that he has managed to escape from the police custody and then had gone to Nepal and came with Charas which he has concealed in a hut which he could show whereupon all of them have gone to that place which happens to be the hut of Rajendra Sah and therefrom four biscuits of Charas each containing 250 Grams were seized and for that, seizure list was prepared. Then thereafter, accused along with seized articles, witnesses were taken to the police station. Recorded his self statement (Exhibited). During cross-examination, he has stated that near about Bazar Samiti Chowk, there happens to be large number of houses, huts of different persons. He has further stated that the arms which were recovered from the possession of accused, was sealed. His own seal was also affixed. Then has stated that he had gone through the Notification No. 80/1988. He has denied the suggestion that he was not at all competent to seize the



Charas. Then he has stated that as pointed out by the accused, hut was searched wherefrom recovery was made. He has further stated that it was hut of Rajendra Sah. Then has disclosed the boundary of the place of occurrence. He has further stated that he had seized Charas. He has further admitted that he had not mentioned the aforesaid facts in his self statement. Then has admitted that seized Charas is not available in the court. Then, has denied the suggestion.

10. From the evidence of PW-3, it is evident that he had not deposed over the issue whether after carrying the seized article along with accused to the police station, and after registration of a case the aforesaid seized articles were deposited in Thana Malkhana or was entrusted to the I.O. Furthermore, it is also evident from the evidence of PW-3, that he has not spoken with regard to institution of separate case regarding recovery of arms and ammunition. Due to non-examination of the I.O., the same has not been properly divulged at the end of the prosecution whether a separate case has been instituted or not. In the aforesaid background, grave deficiency is found over the prosecution case as, in spite of discloser right from the self statement of PW-3, supported by the evidence of PW-2 as well as seizure list was prepared for the recovery of arms and



ammunition also but, the aforesaid seizure list is not available on the record. Furthermore, it is also evident from the evidence of Pws-2 and 3 that they have not talked about the preparation of sample at the PO so, on which date and in what manner the sample was prepared, more particularly, in what condition, the same was produced before the learned Sessions Judge, remained unresolved. Furthermore, from Annexure-4, the FSL report, it is evident that there happens to be reference of dispatch letter dated 24.01.2000 which has been received at the end of office on 10.03.2000 and further, the same was carried through Special Messenger, Constable 340, Ramanand Singh. However, there happens to be no explanation with regard to delay and further, due to non examination of the IO, it remained unresolved. Furthermore, either in terms of Section 42(2) of the NDPS Act or in terms of Section 57 of the NDPS Act, the matter was to be reported before the Superior Officer within 72/48 hours but, as is evident, neither PW-2 nor PW-3 had spoken on that very score nay on account of non examination of IO the aforesaid theme has been brought on the record.

11. Apart from this, seized material exhibit has not been brought up on the record nor there happens to be evidence that it was destroyed in terms of Section 52 A of the



NDPS Act, even then, its sample was to be produced before the court.

12. In the case of *Vijay Jain v. State of Madhya Pradesh* as reported in (2013) 14 SCC 527, the Hon'ble Apex Court had occasion to see the impact of non production of material exhibit during course of trial and has dealt with in following way:-

9. Para 96 of the judgment of this Court in *Noor Aga case* (2008) 16 SCC 417 on which the learned counsel for the State very strongly relies is quoted hereinbelow: (SCC p. 464)

“96. Last but not the least, physical evidence relating to three samples taken from the bulk amount of heroin was also not produced. Even if it is accepted for the sake of argument that the bulk quantity was destroyed, the samples were essential to be produced and proved as primary evidence for the purpose of establishing the fact of recovery of heroin as envisaged under Section 52-A of the Act.”

Thus in para 96 of the judgment in *Noor Aga case* (2008) 16 SCC 417 this Court has held that the prosecution must in any case produce the samples even where the bulk quantity is said to have been destroyed. The observations of this Court in the aforesaid paragraph of the judgment do not say anything about the consequence of non-production of the contraband goods before the court in a prosecution under the NDPS



Act.

10. On the other hand, on a reading of this Court's judgment in *Jitendra case (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 (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.

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12. We are thus of the view that as the prosecution has not produced the brown sugar before the Court and has also not offered any explanation for non-production of the brown sugar alleged to have been seized from the



appellants and as the evidence of the witnesses (PW 2 and PW 3) to the seizure of the materials does not establish the seizure of the brown sugar from the possession of the appellants, the judgment of the trial court convicting the appellants and the judgment of the High Court maintaining the conviction are not sustainable.”

13. Consequent thereupon, the judgment impugned is set aside. Appeal is allowed.

14. Since appellant, Rinku Kumar Chaubey @ Rinku Chaubey is under custody, he is directed to be released forthwith if not wanted in any other case

(Aditya Kumar Trivedi, J)

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