

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Appeal (SJ) No.1248 of 2017

Arising Out of PS. Case No.-47 Year-2015 Thana- GAYA RAIL P.S. District- Gaya

Neeraj Kumar, Son of Yogendra Singh, Resident of Village- Kauriya, P.S.-
Konch, District- Gaya.

... .. Appellant/s

Versus

The State Of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s	:	Mr. Ajay Kumar Thakur-Advocate Mr. Ritwaj Raman-Advocate Mr. Udbhav-Advocate
For the Respondent/s	:	Mr. Bipin Kumar-A.P.P.

CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
ORAL JUDGMENT

23-01-2019

Appellant Neeraj Kumar has been found guilty

for an offence punishable under Section 20 of the N.D.P.S. Act and sentenced to undergo R.I. for eight years as well as to pay fine appertaining to Rs.50,000/- and in default thereof, to undergo R.I. for two years, additionally, under Section 22 of the N.D.P.S. Act and sentenced to undergo R.I. for eight years as well as to pay fine appertaining to Rs.50,000/- and in default thereof, to undergo R.I. for two years, additionally, with a further direction to run the sentences concurrently vide judgment of conviction dated 14.02.2017 and order of sentence dated 20.02.2017 passed by the 1st Additional Sessions Judge-cum-Special Judge, N.D.P.S. Act, Gaya in N.D.P.S. Case No.13 of 2015, arising out of Gaya Rail P.S. Case No.47 of 2015.



2. O/c Rail P. S. Gaya namely Raj Kumar (PW-2)

recorded his self-statement on 15.05.2015 at about 8.00 P.M. divulging the fact that while he along with A.S.I. Taslim Khan, A.S.I. Lalan Kumar Singh, Hawaldar Ajit Kumar, Constable Md. Shamshad Alam, Constable Gaya Prasad were on duty, during course thereof, Bhubneshwar New Delhi Rajdhani Express came over Platform No.1. Soon thereafter, he was confidentially informed with regard to possession of Ganja by a person being in Coach No.A-2, Berth No.43, whereupon they have gone there, found one Trolley bag 24” and an Air (Pithu) bag, whereupon the same was opened and from the trolley bag, seven packets each containing 2 k.g., total-14 k.g. and from air bag, three packets each one containing 2 k.g., total-6 k.g., total-20 k.g. Ganja were found, seized. And for that, in presence of witnesses Raja Kumar and Nageshwar Prasad, seizure list was prepared. Furthermore, Mithu Sao and his wife, who were on Birth No.44 and 45 disclosed that the aforesaid bag belongs to Neeraj Kumar, occupying birth No.43. A person, who was sitting, was interrogated and during course thereof, disclosed his identity as Neeraj Kumar, S/o Yogendra Singh of village-Kauriya, P.S.-Konch, District-Gaya. On personal search, from his possession, one ticket bearing P.N.R. No.6140941845 dated



15.05.2015, transition ID No.100000231620680, Voter ID Card, ID No.XXZ1650787, mark sheet issued by Magadh University were seized. Further on query, he failed to disclose/ explain possession of the Ganja, whereupon has been booked.

3. After registration of Gaya Rail P.S. Case No.47 of 2015, investigation was entrusted to one of the member of raiding team namely Md. Taslim (PW-3), who conducted investigation, got the seized article examined by the F.S.L., Kolkata and after receiving the report as well as concluding the investigation submitted chargesheet, whereupon trial commenced and concluded in a manner, subject matter of instant 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. It has further been asserted that it happens to be a case of mistaken identity. However, nothing has been adduced in course of defence.

5. In order to substantiate its case, prosecution has examined altogether eight PWs, who are PW-1, Lalan Kumar Singh, PW-2, Raj Kumar, PW-3, Taslim, PW-4, Hawaldar Ajit Kumar, PW-5, Gaya Prasad, PW-6, Md. Shamshad Alam, PW-7, Raja Kumar and PW-8, Nageshwar



Kumar as well as has also exhibited, Exhibit-1, seizure list, Exhibit-2, written report, Exhibit-3 series, signature of seizure list witnesses, Exhibit-4, F.S.L. Report. As stated above, nothing has been adduced in defence.

6. Gone through the evidences available on the record. After perusal of the same, it is evident that PW-7 and PW-8, who have been stamped as a seizure list witnesses have not supported the factum of search and seizure. However, they admitted their presence over seizure list and so, it could not be said that on account of their denial, their status as a seizure list witness would be ignored.

7. Now, remains the evidence of police officials, who were part and parcel of the raiding party. They have consistently deposed that while they were on patrolling Bhubneshwar New Delhi Rajdhani Express came over Platform No.1. Just thereafter, PW-2, Raj Kumar (informant) was confidentially informed with regard to presence of Ganja with a passenger at Coach No.A-2, Seat No.43, whereupon they all have gone, found the bag and air bag. Search it out and altogether 20 k.g. (seven packets from trolley bag and three packets from Pithu bag, each weighing 2 k.g.) were seized, for which seizure list was prepared. But so far process of search and



seizure are concerned, version of the prosecution is found in variance amongst PW-1, PW-2, PW-3 at one side and PW-4, PW-5, PW-6 at other side. **PW-1** has stated that when they have reached, they have seen the bag and air bag over seat no.43, having presence of a lad by its side, who on query said nothing. Then was duly interrogated, whereupon accepted to be the owner of the aforesaid bag. More or less, PW-2 and PW-3 have stated like so. During cross-examination, PW-1 at Para-3 has stated that birth no.43 was upper birth. Seizure was effected there from. None had caught hold the bag/ air bag. **PW-2** at Para-5 of his cross-examination has stated that birth no.43 was upper birth. The articles were kept beneath the lower birth. There was no sign over the seized bag. Again disclosed that the spouse, who were sitting in front seat had disclosed that this bag belongs to the person, who was sitting at upper birth, whereupon the person, who was sitting at upper birth was apprehended and searched out. In Para-6, he has stated that nothing was recovered from physical possession of that boy. Nothing has been recovered from the bag in order to affix identity of the boy to be the owner of the aforesaid bag. **PW-3**, a member of raiding party as well as an I.O. during his examination-in-chief alone, has stated that accused has confessed his guilt during course of



interrogation, but the same has not been exhibited, however, has not deposed over merit of the case rather he has deposed as an I.O. of the case.

8. **PW-4** in his examination-in-chief, has stated that on account of support, the accused along with the trolley bag was taken outside the bogie, opened, whereupon Ganja was found. During cross-examination at Para-2, he has stated that he had also gone near the accused along with other police officials and he had found the trolley bag beneath head of the occupant of the birth, who was the accused. But he is unable to disclose the exact location of the air bag. **PW-5** has stated in his examination-in-chief that beneath the birth no.43, they have located one trolley bag as well as air bag and on interrogation, they came to know that the same belongs to the person, who was sitting over birth no.43, whereupon he was taken out, interrogated and during course thereof, disclosed his identity as Neeraj Kumar, taken to G.R.P. Station where bag was opened and then, Ganja was found inside the same. During cross-examination at Para-3, he has stated that the trolley bag and air bag were beneath the lower birth. On query, Neeraj Kumar himself claimed to be the owner of the bag. Neeraj Kumar was sitting there. **PW-6** has stated that the trolley bag and air bag



was found beneath the seat no.43. On query, none had claimed to be owner of the said bag, whereupon as per direction of the Bara Babu, both the bags were taken out, then opened and after finding the bag containing 20 k.g. of Ganja, they again came inside the bogie, found one person, who was sleeping, was woke up, interrogated and then, he was taken into custody. During cross-examination at Para-4, he has stated that birth no.43 was middle birth. Bag was not kept at over birth no.43 rather it was beneath the lower birth, passengers were there. They were interrogated, but he is unable to say, what they have stated whether they have been taken outside the bogie or not.

9. From the evidence available on the record as stated above, it is abundantly clear that prosecution has not been able to substantiate connectivity in between the appellant as well as seized Ganja that means to say, appellant was travelling with the seized bag. As per evidence of PW-2, it is evident that the passengers having in front of seat disclosed/ identified the appellant to be owner of the aforesaid two bags. On account thereof, appellant was apprehended. More surprising feature is aforesaid two witnesses, passengers were not examined by the I.O. during course of investigation nor during course of investigation, I.O. taken effort to trace out connectivity in legal



way. Furthermore, though seizure list contains description of P.N.R. No. of the ticket, but had not examined Ticket Collector/ Conductor to ascertain proper identity of appellant having seat no.43 reserved in his name.

10. The other illegality a is evident from the record itself is that neither PW-2 (informant) has stated that he took the Ganja, kept it in sealed condition at Maalkhana nor he stated that he after sealing the Ganja, entrusted the same to PW-3, Md. Taslim, I.O. nor there happens to be such disclosure at the end of PW-3. That means to say, where the Ganja had gone, is not at all found from the evidence of any of the PWs. Apart from this, it is also evident from the evidence of the witnesses that they are complete silent over sampling sealing at the P.O. From the record, it is evident that a prayer was made before the learned Sessions Judge/ Special Judge on 19.05.2015 for sampling and for that, a Judicial Magistrate was deputed on 21.05.2015, in whose presence sample was prepared on 25.05.2015, but I.O. (PW-3) had not disclosed nor on account of non-examination of the said Magistrate, it has come up that the Ganja which was produced, was the actual case property and its condition, that means to say, was sealed and if so sealed, carrying whose seal. In likewise manner, how sample were



prepared and whose seal was affixed over the sample as save and except the seal of the F.S.L., no other seal has been made an exhibit. Prosecution also failed to disclose with regard to proper compliance of Section 42(2) of the Act. In the background of aforesaid deficiency, non-production of the Ganja during course of trial is severe jolt to the prosecution. 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.”

11. That being so, the judgment of conviction and sentence recorded by the learned lower Court is set aside. Appeal is allowed. Appellant is under custody, whereupon is directed to



be released forthwith if not wanted in any other case.

(Aditya Kumar Trivedi, J)

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AFR/NAFR	A.F.R.
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