

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.95 of 2018

Arising Out of PS. Case No.-36 Year-2015 Thana- JADOPUR District- Gopalganj

Sunil Kumar Sahni S/o Sudama Sahni, Vill- Yadavpur (Purana Tola), P.S.-
Yadopur, Dist- Gopalganj.

... .. Appellant

Versus

The State Of Bihar

... .. Respondent

with

CRIMINAL APPEAL (SJ) No. 3493 of 2017

Arising Out of PS. Case No.-36 Year-2015 Thana- JADOPUR District- Gopalganj

Rajulal Gupta S/o Banshidhar Gupta, R/o Village- Rampur Sitalhari, P.S.-
Sahebganj, District- Muzaffarpur.

... .. Appellant

Versus

The State Of Bihar

... .. Respondent

Appearance :

(In CRIMINAL APPEAL (SJ) No. 95 of 2018)

For the Appellant/s : Mr.Dhirendra Kumar, Adv.
Mr. Harendra Prasad, Adv.
Mr. Mahesh Prasad, Adv.

For the Respondent/s : Md. Shyed Ashfaque Ahmad, A.P.P.

(In CRIMINAL APPEAL (SJ) No. 3493 of 2017)

For the Appellant/s : Mr.Vindya Kesri Singh, Sr. Adv.
Mr. Birendra Kumar Singh, Adv.

For the Respondent/s : Ms. Abha Singh, A.P.P.

CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
ORAL JUDGMENT

Date : 04-09-2019

Appellant Rajulal Gupta (Cr.Appeal No. 3493/2017) and

Sunil Kumar Sahni (Cr.Appeal No. 95/2018) have conjointly been

found guilty for offence punishable under section 20(b)C of the

N.D.P.S.Act as well as under section 22(c) of the N.D.P.S.Act and

under both count each of them has been sentenced to undergo R.I.



for 10 years as well as to pay fine appertaining to Rs.one lakh independently but, there happens to be no direction that in default of payment of fine what will be the ultimate result, with a further direction to run the sentences concurrently and further, the period having undergone during the course of trial be set off in accordance with Section 428 Cr.P.C. by the judgment of conviction dated 19.9.2017 and order of sentence dated 6.10.2017 passed by the Addl. Sessions Judge I cum Special Judge, N.D.P.S., Gopalganj in Trial No. 33/2015 arising out of Jadopur P.S.Case No. 36/2015, on account thereof both the appeals have been heard conjointly and are being disposed of by a common judgment.

The case of the prosecution as is found projected on the basis of self statement recorded by Amit Kumar Singh (P.W.5), S.I. of Jadopur P.S. on 21.5.2015 divulging therein that in the preceding night he alongwith Hawaldar Umesh Kumar Prasad (P.W.1), Constable Santosh Kumar (P.W.2), Gulam Murtaja (P.W.3), Deepak Kumar (P.W.4) alongwith the driver gone in night patrolling, on 21.5.2015 at about 4.30 A.M.. When they came near Chatur Bagaha Dhala, they have seen one truck having been parked. One Bolero Jeep of silver colour was behind the truck. As soon as they have seen the police jeep, the occupant of the Bolero Jeep driven away and managed to escape therefrom. Three persons



being occupants of the truck have jumped out from the cabin of the truck and unsuccessfully tried to escape but they were apprehended at the spot itself. On query, they all disclosed their identity as Rajulal Gupta, son of late Banshidhar Gupta, of village Rampur Sitwahi, P.S. Sahebganj, District Muzaffapur, Sunil Sahni, son of Sudama Sahni, of village Jadopur Puraina Tola, P.S. Jadopur, District Gopalganj and Pintu Prodhan, son of Bhuleshwar Prodhan of village Godawan, P.S. Barkut, District Deogord (Orissa). They on query also disclosed that there happens to be Ganja in the truck. They have also disclosed that the owner of the truck happens to be Hasinder Yadav on whose instance Ganja has been transported from Orissa to this place. It has also been disclosed by him that 40 Kg. 700 grams of Ganja happens to be in a box of the cabin of the truck while 160 Kgs. of Ganja had already been carried away over the Bolero. Accordingly, a requisition was made by him to Jadopur P.S. for transmitting the seizing materials, weighing machines and in likewise manner, to the administration for deputation of an Executive Magistrate for the purpose of search, seizure and sample. After arrival of the Magistrate, the search and seizure was made, Ganja was taken out from the box of the cabin and on weight it was 40 Kg. 700 grams, sample was prepared, sealed and having identified as S1, S2



bearing signature of the seizure list witness (P.W.2, P.W.3), the police personnel as no one could dare to come forward as a seizure list witness. The remaining Ganja was also sealed after proper wrapping. The accused persons also disclosed the names of the occupants of Bolero Jeep as Hasinder Yadav, Bhabhuti Yadav and Sri Ram Singh and two unknown.

After registration of Yadopur P.S. Case No. 36/2015 investigation proceeded, concluded and so many charge sheets on account of appearance of the accused in different stages, have been filed facilitating the trial and so far the appellants are concerned, they alongwith Sri Ram Singh have been proceeded under the present trial meeting with ultimate result, subject matter of the instant appeals.

Defence as is evidence from the mode of cross examination as well as statement recorded under section 313 Cr.P.C. is that of complete denial. However, oral evidence has been adduced in defence, though C.C. of judgment of Tr.No. 5/2016 has been filed without having been exhibited.

Prosecution, in order to substantiate its case has examined altogether 8 P.Ws., who are P.W. Umesh Kumar Prasad, P.W. Santosh Kumar, P.W.3 Gulam Murtuza, P.W.4 Deepak Kumar, P.W.5 Amit Kumar Singh, P.W.6 Ram Mohan Rai, P.W. 7



Rajendra Ram and P.W.8 Lal Bahadur Sah, side by side, also exhibited seizure list (Ext.1), Fard Beyan (Ext.2), Formal F.I.R. (Ext.3), signature of the Executive Magistrate, P.W.7 as Ext.4 and FSL report as Ext.5. The prosecution has also produced the material exhibit and the same happen to be material Ext.I, material Ext.II. As stated above, ocular evidence has been adduced but C.C. of judgment of Tr.No. 5/2016 has been filed though not exhibited.

The learned respective Senior Counsels assailing the judgment of conviction and sentence have submitted that during the course of trial, in order to maintain uniformity mainly in the judgment there should have been judgment of acquittal as Tr.No. 5/2016 be applicability of parity. To justify such plea, it has been submitted that the owner of the truck, namely, Hasinder Yadav has been proceeded independently on the basis of supplementary affidavit having been filed against him under Trial No. 5/2016 and vide judgment dated 18.7.2017 he had already been acquitted. In the aforesaid background it has been submitted that even if the prosecution case is accepted to be true, then in that circumstance, being the owner of the vehicle through which the contraband goods have been transported would not have been spared once, the evidence conclusively proves the carrier having loaded with the contraband goods. Acquittal of the appellant is indicative of the



fact that the contraband goods were not at all transported by the aforesaid vehicle and, in the aforesaid facts and circumstances of the case, the finding so recorded by the court concerned with regard to the owner of the vehicle is bound to adversely affect not only upon the prosecution case rather, also nullify the finding so recorded by the learned lower court. Consequent there upon, the judgment impugned on this sole ground is liable to be set aside.

In addition thereto, it has also been submitted that there should have been positive concrete evidence at the end of the prosecution with regard to independent activity of each of the appellant during the course of commission of crime so that, the Court be in a position to infer the mental culpability so much so with regard to having within their certain knowledge that they are carrying the contraband goods intentionally, knowingly in order to attract prosecution in terms of Section 35. Unless and until the prosecution succeeds in substantiating such legal requirement then and then only, the appellants are to be convicted, sentenced otherwise, the finding so recorded by the learned lower court would fail.

To buttress such plea, it has been submitted that there happens to be simple divulgence at the end of the prosecution that these accused persons just jumped from the cabin of the truck



without having proper identification with regard to activity of each of the appellant as a result of which the prosecution evidence lacks in proper identification of the accused/ appellants and so, there happens to be paucity of evidence at the end of the prosecution with regard to mental culpability in consonance with conscious knowledge to the effect that in the cabin of the truck there happens to be contraband goods concealed in a secret box so present. As such, the judgment impugned could not survive.

It has also been submitted that it has consistently been held by the Apex Court that the N.D.P.S. Act prescribes stringent punishment on account thereof, there should be strict compliance of the mandatory provisions of law. From perusal of the initial prosecution version alongwith the evidence of the witnesses, it is apparent that none of the mandatory provisions has been followed in its strict sense whereupon, the finding, so recorded by the learned lower court, could not survive, thus is fit to be set aside.

On the other hand, learned Addl. P.P. while refuting the submissions made on behalf of learned respective counsels, has submitted that from the judgment impugned it is evident that the learned lower court had minutely gone through the evidence brought up on record and further, also traced out the proper compliance of mandatory provisions of law having at the end of



the prosecution and so, the judgment impugned attracts no interference.

It is the case of the prosecution that they have got no prior information with regard to transportation or storage of Ganja. It was sheer chance that during the course of returning from night patrolling, a truck was found parked at Chatur Bagha Dhala having a Bolero jeep behind it and the occupants thereof, seeing the police jeep driven away the vehicle. In same sequence three persons jumped out from the cabin of the truck, who were apprehended and in the aforesaid background certainly, Section 43 of the NDPS Act would be applicable and in that circumstance, the mandatory requirement in accordance with Section 42(2) of the NDPS Act could not be applicable. Further more, it is also evident from the 2nd provision as enumerated under section 57 of the NDPS Act, as is evident happens to be directive in nature though, from the evidence available on record, it is evident that he had made requisition to the Sub-divisional Officer for deputation of an Executive Magistrate in order to effectuate search and seizure of a truck and P.W.7 Rajendra Ram was deputed and in whose presence, the aforesaid activity was taken. It is also evident from the order sheet that the appellants alongwith Pinku Pradhan were produced before the learned Sessions Judge on 22.5.2015 and on



which date, they were remanded on the basis of initial prosecution version containing the seizure list relating to recovery of Ganja.

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.”

With regard to applicability of Section 43 in the present facts and circumstances of the case has also been considered by the Apex Court in the case of *Sk. Raju v. State of Bengal*, reported in 2019 Cr.L.J. 407.

“5. Section 42 of the Act deals with the power of entry, search, seizure and arrest without warrant or authorization. It reads thus:

42. Power of entry, search, seizure and arrest without warrant or authorisation.--

(1) Any such officer (being an officer superior in rank to a peon, sepoy or constable) of the departments of central excise, narcotics, customs, revenue intelligence or any other department of the Central Government including para-military forces or armed forces as is empowered in this behalf by general or special order by the Central Government, or any such officer (being an officer superior in rank to a peon, sepoy or constable) of the revenue, drugs control, excise, police or any other department of a State Government as is empowered in this behalf by general or special order of the State Government, if he has reason to believe from personal knowledge or information given by any person and taken down in writing that any narcotic drug, or psychotropic substance, or controlled substance in respect of which an offence punishable under this Act has been committed or any document or other Article which may



furnish evidence of the commission of such offence or any illegally acquired property or any document or other Article which may furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act is kept or concealed in any building, conveyance or enclosed place, may between sunrise and sunset,--

(a) enter into and search any such building, conveyance or place;

(b) in case of resistance, break open any door and remove any obstacle to such entry;

(c) seize such drug or substance and all materials used in the manufacture thereof and any other Article and any animal or conveyance which he has reason to believe to be liable to confiscation under this Act and any document or other Article which he has reason to believe may furnish evidence of the commission of any offence punishable under this Act or furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act; and

(d) detain and search, and, if he thinks proper, arrest any person whom he has reason to believe to have committed any offence punishable under this Act:

Provided that in respect of holder of a licence for manufacture of manufactured drugs or psychotropic substances or controlled substances granted under this Act or any Rule or order made thereunder, such power shall be exercised by an officer not below the rank of sub-inspector:

Provided further that if such officer has reason to believe that a search warrant or authorisation cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place at any time between sunset and sunrise after recording the grounds of his belief.

(2) Where an officer takes down any information in writing Under Sub-section (1) or



records grounds for his belief under the proviso thereto, he shall within seventy-two hours send a copy thereof to his immediate official superior.

Section 43 of the Act confers powers on the empowered officer to seize a substance and arrest a suspect in a public place. It provides thus:

43. Power of seizure and arrest in public place.-- Any officer of any of the departments mentioned in Section 42 may--

(a) seize in any public place or in transit, any narcotic drug or psychotropic substance or controlled substance in respect of which he has reason to believe an offence punishable under this Act has been committed, and, along with such drug or substance, any animal or conveyance or Article liable to confiscation under this Act, any document or other Article which he has reason to believe may furnish evidence of the commission of an offence punishable under this Act or any document or other Article which may furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act;

(b) detain and search any person whom he has reason to believe to have committed an offence punishable under this Act, and if such person has any narcotic drug or psychotropic substance or controlled substance in his possession and such possession appears to him to be unlawful, arrest him and any other person in his company.

Explanation.-- For the purposes of this section, the expression "public place" includes any public conveyance, hotel, shop, or other place intended for use by, or accessible to, the public.

6. We are unable to accept the submission made by the learned Counsel for the Appellant that Section 42 is attracted to the facts of the present case. In *State of Punjab v. Baldev Singh* ("Baldev Singh"), (1999) 6 SCC 172 Chief Justice Dr. A.S. Anand speaking for a Constitution Bench of this Court, held:

The material difference between the provisions of Section 43 and Section 42 is that whereas Section 42 requires recording of reasons for belief and for taking down of information received in writing with regard to the commission of an offence before conducting search



and seizure, Section 43 does not contain any such provision and as such while acting Under Section 43 of the Act, the empowered officer has the power of seizure of the Article etc. and arrest of a person who is found to be in possession of any Narcotic Drug or Psychotropic Substances in a public place where such possession appears to him to be unlawful.

In *Narayanaswamy Ravishankar v. Assistant Director, Directorate of Revenue Intelligence*, (2002) 8 SCC 7 a three judge Bench of this Court considered whether the empowered officer was bound to comply with the mandatory provisions of Section 42 before recovering heroin from the suitcase of the Appellant at the airport and subsequently arresting him. Answering the above question in the negative, the Court held:

In the instant case, according to the documents on record and the evidence of the witnesses, the search and seizure took place at the airport which is a public place. This being so, it is the provisions of Section 43 of the NDPS Act which would be applicable. Further, as Section 42 of the NDPS Act was not applicable in the present case, the seizure having been effected in a public place, the question of non-compliance, if any, of the provisions of Section 42 of the NDPS Act is wholly irrelevant.

In *Krishna Kanwar (Smt.) Alias Thakuraeen v. State of Rajasthan*, : (2004) 2 SCC 6081 a two judge Bench of this Court considered whether a police officer who had prior information was required to comply with the provisions of Section 42 before seizing contraband and arresting the Appellant who was travelling on a motorcycle on the highway. Answering the above question in the negative, the Court held:

Section 42 comprises of two components. One relates to the basis of information i.e.: (i) from personal knowledge, and (ii) information given by person and taken down in writing. The second is that the information must relate to commission of offence punishable under Chapter IV and/or keeping or concealment of document or Article in any building,



conveyance or enclosed place which may furnish evidence of commission of such offence. Unless both the components exist Section 42 has no application. Sub-section (2) mandates, as was noted in Baldev Singh case that where an officer takes down any information in writing Under Sub-section (1) or records grounds for his belief under the proviso thereto, he shall forthwith send a copy thereof to his immediate official superior. Therefore, Sub-section (2) only comes into operation where the officer concerned does the enumerated acts, in case any offence under Chapter IV has been committed or documents etc. are concealed in any building, conveyance or enclosed place. Therefore, the commission of the act or concealment of document etc. must be in any building, conveyance or enclosed place.

7. An empowered officer Under Section 42(1) is obligated to reduce to writing the information received by him, only when an offence punishable under the Act has been committed in any building, conveyance or an enclosed place, or when a document or an Article is concealed in a building, conveyance or an enclosed place. Compliance with Section 42, including recording of information received by the empowered officer, is not mandatory, when an offence punishable under the Act was not committed in a building, conveyance or an enclosed place. Section 43 is attracted in situations where the seizure and arrest are conducted in a public place, which includes any public conveyance, hotel, shop, or other place intended for use by, or accessible to, the public.

8. The Appellant was walking along the Picnic Garden Road. He was intercepted and detained immediately by the raiding party in front of Falguni Club, which was not a building, conveyance or an enclosed place. The place of occurrence was accessible to the public and fell within the ambit of the phrase "public place" in the explanation to Section 43. Section 42 had no application."



Further more, one has to see whether the appellants were carrying mental culpability in carrying the Ganja as an occupant of the truck and on this very score two sections are relevant to be quoted below. The first one is Section 35 which deals with presumption of culpable mental state and the second one is Section 54 presumption against possession:

“35. Presumption of culpable mental state.

(1) In any prosecution for an offence under this Act which requires a culpable mental state of the accused, the Court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution. Explanation. In this section culpable mental state includes intention, motive knowledge of a fact and belief in, or reason to believe, a fact.

(2) For the purpose of this section, a fact is said to be proved only when the court believes it to exist beyond a reasonable doubt and not merely when its existence is established by a preponderance of probability.

54. Presumption from possession of illicit articles. In trials under this Act, it may be presumed, unless and until the contrary is proved, that the accused has committed an offence under this Act in respect of

- (a) any narcotic drug or psychotropic substance or controlled substance;
- (b) any opium poppy, cannabis plant or coca plant growing on any land which he has cultivated;



(c) any apparatus specially designed or any group of utensils specially adopted for the manufacture of any narcotic drug or psychotropic substance or controlled substance; or

(d) any materials which have undergone any process towards the manufacture of a narcotic drug or psychotropic substance or controlled substance, or any residue left of the materials from which any narcotic drug or psychotropic substance or controlled substance has been manufactured, for the possession of which he fails to account satisfactorily.”

It is needless to say, that the prosecution has to substantiate its case but, once proper evidence comes on record then in that circumstance, the Court will presume unless and until rebutted by a person and that is the gist of these two sections which could be under the banner of reverse burden. So, first of all the evidence of the prosecution is to be seen whether it succeeded in substantiating its case and in likewise manner, obligation having at the end of the appellants, being properly discharged.

In order to proceed over the issue as referred hereinabove, first of all evidence of P.W.5 is taken. Admittedly he happens to be the Officer In-charge, the informant of this case. During his examination-in-chief he has stated that in the night of 30.5.2015 at about 10.30 P.M. he alongwith Hawaldar, constables proceeded in night patrolling. In the morning of 31.5.2015 when



they reached at Chatur Bagha Dhala, they have found one truck parked. One Bolero was also parked behind it. The occupant of the Bolero seeing the police jeep, driven away. Simultaneously, three persons jumped out from the truck and were to flee but, unfortunately been apprehended and who, on query disclosed their identity as Raju Lal Gupta, Sunil Sahni (appellants) and Pinku Pradhan. On query, they have also disclosed the name of the occupant of the Bolero jeep as Sri Ram Singh, Bibhuti Yadav, Hasinder Yadav and two other unknown. After that, they have also disclosed regarding the presence of Ganja in the truck and on account thereof, requisition was sent to the S.D.O. for deputation of an Executive Magistrate as well as also to the Police Station for providing to weigh, seal materials. They have also disclosed that they have carried the Ganja from Orissa. The aforesaid Ganja has been sent by Ramashish Yadav. They have also disclosed that there was 18 bags of Ganja out of which 16 bags have been taken away and the remaining is in the box. In presence of the Magistrate, they have searched out the box having in the cabin wherefrom the Ganja weighing 10 kgs.(1 packet), 10 kgs.200 grams (2 packets) and 10 kgs. 300 grams (1 packet) have been seized and for that seizure list was prepared in presence of the two seizure list witnesses, Contable Santosh Kumar and Gulam Murtuza, as the



local persons declined to become seizure list witness. Accordingly, the accused persons have been taken to custody. Further more, it has also been disclosed that the sample from all the packets were taken out intermingled and then kept in three sachets over which they put identification mark as S1, S2 and S3 (each containing 10 grams). Further more, the remaining Ganja was independently seized. The signature of all the accused, seizure list witnesses, Magistrate and he himself was over the sealed sample, Ganja then returned back to the Thana where the accused was put under lock up. Sealed articles were kept in Malkhana. On the basis of Fard Beyan/ self statement which he recorded at the spot itself, a substantial case has been instituted and then thereafter the investigation has been entrusted to Ram Mohan Rai (P.W.6). Exhibited all the relvant documents, identified the accused.

During cross-examination at para-5 he has stated that the seized article was Ganja as per his knowledge. There happens to be plant of Ganja but he is unable to disclose the Botanical name of the plant. In para-6 he has stated that the truck was seized over the Dhala. People were living in a hut by the South to Bandh. Near about the Dhala 2-3 huts were there. In para-7 he has stated that after hearing murmuring, 15-20 persons assembled. In para-8 he has stated that he had sealed the articles but, he had not sent the



sample for examination. He had seized, sealed the articles and in consonance therewith, the case was registered. In para-9 he denied the suggestion that he has got no knowledge with regard to facts of this case. It is false to say that he had not seen anybody fleeing. It is wrong to say that he has deposed false.

P.W.7 is the Magistrate. He during his examination-in-chief has stated that on 21.5.2015 he was Executive Magistrate at Gopalganj Sub-division. On that day, in the morning hour he received an order of the S.D.M. to go to the place of occurrence for the purpose of seizure on account of apprehension of a truck carrying contraband. Thereafter, he came at Chatur Bagha Dhala where he had seen one truck parked having presence of police officials. Three persons were there apprehended by the police since before Ganja was there. It was 40 Kgs. He is not remembering how many packets were there. Seizure list was prepared in his presence whereupon he had also put his signature, identified the same accused also.

During cross-examination, he has stated that he is not remembering whether Ganja was kept outside the truck. He had not seen Ganja after opening the packets. In para-3 he has stated that he remained there for an hour but he is unable to disclose the exact time. He is not remembering the exact time. On preparation



of seizure list, save and except the aforesaid formality he had not done anything. Then has denied the suggestion that no recovery was made in his presence rather, he acted in a manner as directed by the police.

P.W. 3 and P.W.4 are apart from the seizure list witnesses police constable. During their examination-in-chief they have stated that in the preceding night they had gone to night patrolling under leadership of O/C and during the course of returning, when they reached at Chatur Bagha Dhala they have found one truck parked having a Bolero jeep behind the same. The occupant of the Bolero jeep managed to escape seeing the police jeep. Three persons also jumped out from the truck and tried to escape but were apprehended. The truck was checked and during course thereof, three bags of Ganja was seized for which, seizure list was prepared over which they have put their signature including that of the accused, Magistrate Sahab. Then thereafter they came at the police station with the accused, seized article. They have identified the accused in dock. During course of the cross-examination, it is apparent that nothing substantial has been save and except P.W.2 at para-7 has stated that the seizure list was prepared by the Officer In-charge at about 5 A.M. Who had put signature over the same he



is not remembering, Magistrate has come at the police station but he had not seen the Magistrate.

P.W. 1 and P.W.4 were also member of the patrolling party who during course of the examination-in-chief have substantiated the case of the prosecution and further, apprehension of the accused while they had jumped out from the truck and further, after having disclosure at their end with regard to presence of Ganja in the box having in the cabin, the O.C. had informed the concerned officials for deputation of a Magistrate and after arrival of a Magistrate search was conducted, bags were taken out from the cabin, opened, four packets of Ganja were seized weighing 40 Kgs, 500 grams. Seizure list was prepared in presence of the Magistrate over which accused, Santosh Gulam, the Magistrate have put their signature. Identified the accused. It has also been disclosed to the effect that the sample was prepared and then remaining Ganja as well as sample were sealed at the spot having signature of all concerned alongwith accused.

During cross-examination P.W.1 at para-5 has reiterated and further disclosed that the accused alongwith seizure list witnesses and the Magistrate, O.C. all have put signature over the sealed Ganja, sample. P.W.4 at para-5 has stated that he is not remembering the registration number of the truck and the Bolero.



He has further stated that he has not seen what was inside the packet.

P.W.6 is the I.O. who, during his examination-in-chief has stated that on 21.5.2015 he was A.S.I. posted at Yadopur P.S. on which date he was entrusted with the investigation of this case. After taking over investigation, first of all he had examined the informant and recorded his further statement, sent the seized sample to F.S.L., recorded the statement of the witnesses including that of the Executive Magistrate. All have supported the case of the prosecution. Then had submitted charge sheet against Raju Lal Gupta, Sunil Sahni and Pinku Pradhan, keeping the investigation pending against others. Rest investigation was conducted by others as he was transferred. Identified the accused. Then has produced material exhibit in sealed condition, also carrying seal of FSL Muzaffarpur and the same has been made as material Ext.I. Material Ext.II happens to be the remaining Ganja. During cross-examination at para-6 he has stated that 300 grams Ganja were sealed as a sample. Then thereafter, there happens to be cross-examination over the place of occurrence over which he has said that cowshed of different persons are there by the side at the place where seizure was made. In para-8 he has stated that he had tried to take their statement but, none of them shown inclination. He is



unable to say whether any accused has got relationship in the locality or not. However, he has stated that the house of one accused lies near about while the house of others is at a distance of 100 K.Ms. and the third one is at a distance of 3 K.Ms. In para-9 he has stated that the material exhibit has been brought up by the present police officials of Jadopur Police Station. Then he has denied the suggestion that without conducting proper investigation he had submitted charge sheet. On behalf of the others, he in para-11 has stated that on being entrusted with the investigation the F.I.R., accused, seized material articles, sample were given to him. He had not verified the same. He had not interrogated the accused. He had sent the specimen signature at the police station.

P.W.8 is part I.O. who had submitted charge sheet against one Sri Ram Singh. As stated above, nothing has been adduced at the end of the appellant.

From the evidence, as discussed hereinabove, it is abundantly clear that the seized sealed material exhibit has been produced by P.W.6, the I.O. during the course of his evidence and he was not at all cross-examined at the end of the appellant at least over challenging propriety of the seal. P.W.5 the informant and P.W.7 the Magistrate coupled with the evidence of P.Ws. 3 and 4, the seizure list witnesses are corroborative to each other and that



being so, recovery is not at all found under controversy and in likewise manner, process of preparation of the sample, sealing thereof at the spot and so, there happens to be proper compliance of Order No. 1/88 and 1/89.

Now, coming to the status of the appellants, as has been submitted at the end of the appellants that mere jumping from the truck would not make them liable nor there happens to be any legal presumption against them. Certainly, that evidence would have survived had there been complete silence at the end of the prosecution. It is needless to say, that the witnesses have stated that on query the appellants have disclosed that they have carried Ganja from Orissa having been loaded by one Ramashish Yadav, also disclosed that 18 bags were there out of which 16 bags were taken away on the Bolero while 2 bags was there in the cabin and in presence of P.W.7 the Magistrate, cabin was searched out and two bags were taken up wherefrom 4 packets of Ganja were searched out weighing more than 40 Kgs.. Further, activity of the accused/ appellant could also be perceived. They have not asserted that they were not known to each other. They have not denied that they were not on truck, they have not denied that seeing the police, they have not jumped from the truck. That part speaks a lot more particularly with regard to mental culpability and in the aforesaid



background, the presumption would be in terms of Section 35 read with 54 of the N.D.P.S.Act which, the appellants were under obligation to rebut, wherein they failed.

Consequent thereupon, the judgment impugned needs no interference. As such, these appeals lack merit and are accordingly dismissed.

The appellants are in custody which they will remain till saturation of the period of sentence.

(Aditya Kumar Trivedi, J)

Surendra/-

AFR/NAFR	NAFR
CAV DATE	NA
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