

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.2186 of 2019**

Arising Out of PS. Case No.-718 Year-2016 Thana- BETTIAH CITY District- West
Champaran

MD. SAHEB, male, aged about 30 years, S/o Md. Jamalu, R/o village-
Naurangabagh, P.S.- Bettiah Town, Distt.- West Champaran.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s	:	Mr. Radha Mohan Singh-Advocate Mr. Akhilesh Kumar-Advocate
For the Respondent/s	:	Mr. Binod Bihari Singh-A.P.P.

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

19-08-2019

This appeal has been listed under the heading for orders. However, after going through the judgment impugned in consonance with the evidence available on the record, it has been found appropriate to decide the appeal on its merit than to hear the prayer for bail.

2. Appellant Md. Saheb has been found guilty for an offence punishable under Section 21(b) of the N.D.P.S. Act and sentenced to undergo R.I. for six years as well as to pay fine appertaining to Rs.50,000/- and in default thereof, to undergo S.I. for one year and six months, additionally, with a further direction that the period having undergone during course of trial be set off in accordance with Section 428 of the Cr.P.C. vide judgment of conviction dated 18.04.2019 and order of



sentence dated 24.04.2019 passed by the Sessions Judge-cum-Special Judge, West Champaran at Bettiah relating to Trial No.17 of 2017, CIS No.-NDPS-12 of 2017 arising out of Town P. S. Case No.718 of 2016.

3. Bimlendu Kumar (PW-3), O/c of the Town Police Station recorded his self-statement on 26.12.2016 at about 7.55 A.M. at the house of Md. Saheb (appellant) divulging the fact that after receiving confidential information with regard to indulgence of Md. Saheb in an illegal activity (selling of smack) information was given to superior police official and then, after constituting raiding party, came at Mohalla Naurangabagh where conducted raid at the house of Md. Saheb on the basis of proper identification by spy. He knocked, whereupon one person came out, who on query, disclosed his identity as Md. Saheb. After taking consent over search of his house, they began to search. During course thereof, yellow colour plastic sachet was recovered from his jacket, which he was wearing at that very moment, containing powder of soil colour. On query, Md. Saheb disclosed that it happens to be a smack weighing about 200 gm, having been provided by Aslam of Raxaul. Accordingly, he was apprehended, search-cum-seizure list was prepared.



4. After registration of Town (Bettiah) P. S. Case No.718 of 2016, investigation commenced and concluded by way of submission of chargesheet followed with conduction of trial, meeting with the ultimate result, subject matter of instant appeal.

5. 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. However, nothing has been adduced in defence.

6. In order to substantiate its case, prosecution has examined altogether six PWs, who are PW-1, Md. Zafaruddin, PW-2, Amarnath Singh, PW-3, Bimlendu Kumar, PW-4, Manoj Kumar Singh, PW-5, Jitendra Prasad Singh and PW-6, Rajeev Kumar. Side by side, also exhibited as Exhibit-1, seizure list, Exhibit-2, written consent given by the accused/appellant, Exhibit-3, self-statement of the informant, Exhibit-3/1, endorsement over self-statement, Exhibit-4, formal F.I.R. and Exhibit-5, F.S.L. Report.

7. After going through the evidence of the respective PWs, it is evident that there happens to be violation of mandatory provisions of law at the end of the prosecution at the time of search and seizure as well as over preparation of



sample and that being so, the impugned judgment happens to be non-sustainable in the eye of law.

8. The learned lower Court though admitted that there happens to be non-compliance of mandatory provisions of Section 50 of the N.D.P.S. Act at the time of making search and seizure, but at Para-15, after referring Section 50 of the Act observed that in the background of Sub-section-5 of Section 50 of the Act, the search-cum-seizure could not be said to be in utter violation and further, also referred the Gazette Notification dated 20.04.2010, whereunder the police officials being Head Constable and above has been authorized to exercise the power and perform duties so specified in accordance with Section 42 as well as Section 67 of the Act. The perception of the learned lower Court appears to be no more under controversy. In *Vijaysinh Chandubha Jadeja vs. State of Gujarat reported in (2011)1 SCC 609*, the Constitution Bench held after considering earlier Constitution Bench relating to *State of Punjab v Baldev Singh* (“*Baldev Singh*”), (1999) 6 SCC 172, *Karnail Singh vs. State of Haryana reported in (2009)8 SCC 539*, observed as follows:-

“29. In view of the foregoing discussion, we are of the firm opinion that the object with which 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 in so far 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 a 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 (1974) 2 SCC 33:

“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 (2000) 1 SCC 707 and Prabha Shankar Dubey (2004) 2 SCC 56, 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's case (1999) 6 SCC 172. 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 (1974) 2 SCC 33 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.”

9. Apart from this, Sub-section-5 happens to be available only in a circumstance where the officials so engaged in exercising power under Section 42 of the Act has reason to believe that by the time, the person is brought before the Gazetted Officer/ Magistrate, there is a risk in getting the narcotic/ contraband goods siphoned. From the evidence available on the record, it is apparent that no such disclosure is at the end of the prosecution. Furthermore, as per evidence, it is crystal clear that consent was obtained for search of the house and not of physical search. So, there would have been proper compliance of Section 50(1) of the Act.

10. Furthermore, it is also evident that right from the initial version of the prosecution has kept mum over sampling of the seized heroine that remained even during course of trial, save and except coming out from the evidence of PW-6 (I.O.) that on 16.01.2017, he procured an order from the Court for getting the sample of the seized article tested at F.S.L. Laboratory, which was transmitted on 19.01.2017. During cross-examination at Para-4, he has stated that at the time of entrustment of the investigation, he was handed over with seized article. It was in sealed condition, but he is not recollecting the mark of the seal. He kept the same in Malkhana. He took out on



13.01.2017. The articles was produced in same condition before the Court. He had not prepared sample independently, though he had prayed before the Court. Seal was broken by the Judicial Magistrate. Court had taken out sample. Court had sealed the same. In Para-5, he has stated that he had not put his own seal over the sample rather the same contained signature of the Court, rest articles were sealed by the Court. He had not put his signature. He had deposited the same in Court. The evidence of the I.O. is not supported with the order sheet.

11. Under the N.D.P.S. Act, there happens to be no such provision nor the Court indulges in preparation of sample. Moreover, the Government of India vide Order No.1/88, 1/89 laid down the guidelines for preparation of sample and the same has been considered by the Apex Court in ***Union of India v. Mohanlal and another reported (2016) 3 SCC 379***, it has been held:-

“12. [Section 52-A\(1\)](#) of the NDPS Act, 1985 empowers the Central Government to prescribe by a notification the procedure to be followed for seizure, storage and disposal of drugs and psychotropic substances. The Central Government have in exercise of that power issued Standing Order No. 1/89 which prescribes the procedure to be followed



while conducting seizure of the contraband. Two subsequent standing orders one dated 10.05.2007 and the other dated 16.01.2015 deal with disposal and destruction of seized contraband and do not alter or add to the earlier standing order that prescribes the procedure for conducting seizures. Para 2.2 of the Standing Order 1/89 states that samples must be taken from the seized contrabands on the spot at the time of recovery itself. It reads:

“2.2. All the packages/containers shall be serially numbered and kept in lots for sampling. Samples from the narcotic drugs and psychotropic substances seized, shall be drawn on the spot of recovery, in duplicate, in the presence of search witnesses (Panchas) and the person from whose possession the drug is recovered, and a mention to this effect should invariably be made in the panchnama drawn on the spot.”

13. Most of the States, however, claim that no samples are drawn at the time of seizure. Directorate of Revenue Intelligence is by far the only agency which claims that samples are drawn at the time of seizure, while Narcotics Control Bureau asserts that it does not do so. There is thus no uniform practice or procedure being followed by the



States or the Central agencies in the matter of drawing of samples. This is, therefore, an area that needs to be suitably addressed in the light of the statutory provisions which ought to be strictly observed given the seriousness of the offences under the Act and the punishment prescribed by law in case the same are proved. We propose to deal with the issue no matter briefly in an attempt to remove the confusion that prevails regarding the true position as regards drawing of samples.

14. [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.”

15. 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.

16. 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.

17. 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.”

12. Furthermore, it is also evident that seized article has not been produced in Court nor there happens to be any explanation. In ***Mohinder Singh v. State of Punjab*** reported in ***AIR 2018 SC 3798***, the Apex Court has held as follows:-

“12. For proving the offence under the [NDPS Act](#), it is necessary for the prosecution to establish that the quantity of the contraband goods allegedly seized from the possession of the accused and the best evidence would be the court records as to the production of the contraband before the Magistrate and deposit of the same before the Malkhana or the document showing destruction of the contraband.

13. *[In Vijay Jain v. State of Madhya Pradesh](#) (2013)*

14 *SCC 527, this Court reiterated the necessity of*



production of contraband substances seized from the accused before the trial court to establish that the contraband substances seized from the accused tallied with the samples sent to the FSL. It was held that mere oral evidence to establish seizure of contraband substances from the accused is not sufficient. It was held as under:-

“10. On the other hand, on a reading of this Court’s judgment in [Jitendra v. State of M.P.](#) (2004) 10 SCC 562, we find that this Court has taken a view that in the trial for an offence under the [NDPS Act](#), it was necessary for the prosecution to establish by cogent evidence that the alleged quantities of the contraband goods were seized from the possession of the accused and the best evidence to prove this fact is to produce during the trial, the seized materials as material objects and where the contraband materials alleged to have been seized are not produced and there is no explanation for the failure to produce the contraband materials by the prosecution, mere oral evidence that the materials were seized from the accused would not be sufficient to make out an offence under the [NDPS Act](#) particularly when the panch witnesses have turned hostile. Again, in [Ashok v. State of M.P.](#) (2011) 5 SCC 123, this Court found that the alleged narcotic



powder seized from the possession of the accused was not produced before the trial court as material exhibit and there was no explanation for its non-production and this Court held that there was therefore no evidence to connect the forensic report with the substance that was seized from the possession of the appellant.”

13. That being so, the judgment impugned did not justify its sustenance, whereupon 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)

Vikash/-

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