

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.1045 of 2018

Arising Out of PS. Case No.-431 Year-2016 Thana- SAHARSA District- Saharsa

Md. Shamshad son of Late Hamid resident of Machhali Market, Saharsa, P.S.
- Saharsa, District – Saharsa. ... Appellant/s

Versus

The State Of Bihar .. Respondent/s

Appearance :

For the Appellant/s : Mr. N.K. Agrawal, Sr. Advocate.
Mr. Diwakar Upadhyaya,
Mr. Ashok Kumar Jha,
Mr. Bidhu Raman,
Ms. Preety Kunwar, Advocates.
For the Respondent/s : Mr. Zeyaul Hoda

CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
ORAL JUDGMENT

22-10-2019

During course of hearing of prayer for bail which has been revived on account of having been refused vide order dated 15.05.2018, considering apart from others, criminal antecedent whereupon the learned counsel for the appellant has submitted that though at the stage of consideration of prayer for bail, in depth scrutiny is forbidden but, on account of violation of mandatory provisions of law, the judgment impugned, would not survive, whereupon, the matter has been heard on merit.

2. Heard learned counsel for the appellant as well as learned APP.

3. Vide judgment of conviction dated 22.02.2018 and order of sentence dated 27.02.2018, appellant Md. Shamshad has been found guilty for an offence punishable under Section 20(ii) (b) of the NDPS Act and sentenced to undergo RI for 10 years as well as to pay fine of Rs. 60,000/- in default thereof, to undergo SI for 1 year and 6 months



additionally, under Section 22 of the NDPS Act and sentenced to undergo RI for 10 years as well as to pay fine appertaining to Rs. 60,000/-, in default thereof, to undergo SI for 1 years 6 months, additionally with a further direction to run the sentences concurrently by the 1st Additional Sessions Judge-cum-Special Judge, NDPS Saharsa in connection with Special Case No. 04/2016 arising out of Sadar Saharsa PS Case No. 431/2016.

4. Sanjay Kumar Singh (PW 8) recorded his self statement at the house of Md. Shamshad on 20.05.2016 lying at Fish Market, Saharsa disclosing therein that during course of night patrolling, he received confidential information regarding storage/concealment of Ganja by Md. Shamshad, whereupon, his house was raided in presence of two persons namely, Md. Zakir and Durgesh Das. During course of search, a plastic bag has been recovered beneath the bed and after opening the same, 10 Kilograms of Ganja has been found for which Shamshad has got no explanation, nay he produced any document justifying the possession. Consequent thereupon, seizure list was prepared, a copy thereof, was furnished and in token thereof, Shamshad put his signature. Then thereafter, recorded his self statement and then brought the accused along with seized Ganja to the police station.



5. After registration of Sadar Saharsa PS Case No. 431/2016, investigation commenced and after concluding the same, charge-sheet has been submitted, facilitating the trial meeting with ultimate result, subject matter of instant appeal.

6. 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. There also happens to be additional ground that he has been falsely implicated at the instance of his enemies who were aggrieved on account of having entrance of appellant with Md. Gulab under an agreement to sell his house and on that very score, three DWs have been examined.

7. In order to substantiate its case, the prosecution has examined altogether ten PWs who are PW-1, Md. Ehsan, PW-2, Md. Parvez, PW-3, Upendra Paswan, PW-4, Baby Kumari, PW-5, Kamlesh Singh, PW-6, Meena Kumari, PW-7, Devendra Mahto, PW-8, Sanjay Kumar Singh, PW-9, Durgesh Das and PW-10, Md. Zafir. Side by side, has also exhibited Ext-1, Seizure list, Ext-1/1, and ½, Signatures of Durgesh Das and Md. Zakir upon Seizure list, Ext-2, Self statement of Sanjay Kumar Singh, Ext-3, Signature of Sanjay Kumar Singh on Formal FIR, Ext-4, FSL Application Nos. 1193/2016, Ext-5,



Formal FIR, Ext-6, articles kept in plastic box, Ext-7, application of Kolkata Chemical Laboratory.

8. Defence has also examined three DWs, DW-1, Md. Gulab, DW-2, Durgesh Das and DW-3, Md. Zakir.

9. The most surprising feature is that PW-9, Durgesh Das has been examined as DW-2 which ought not to be as, had there been some sort of grievance at the end of the appellant, he would have recalled the aforesaid PW-9 for further cross-examination in defence and in likewise manner, the court should not have allowed examination of DW-3, once he was examined as PW-9 rather may have allowed recall during course of defence.

10. Now coming to the status of the witnesses, it is evident that PW-1, Md. Ehsan, PW-2, Md. Perwez, PW-9, Durgesh Das and PW-10, Md. Zafir have not supported the case of the prosecution, on account thereof, they all have been declared hostile. Moreover, PW-9 and 10 are the seizure list witnesses. PWs-3, 4, 6, 7 have simply stated that being members of raiding party, they have gone to the place under leadership of Sanjay Kumar Singh and from there, one person was apprehended whom they identified in the dock and a plastic bag was seized having Ganja therein. They have not uttered a word



with regard to sealing of Ganja, preparing sample at the spot, sealing of the same and so, save and except factum of so alleged recovery, their evidences happen to be worthless with regard to compliance of mandate of law.

11. Now remains the evidence of PW-5, Kamlesh, the I.O. of the case and PW-8, Sanjay Kumar Singh, informant. First of all, the evidence of Sanjay Kumar Singh is to be taken up in order to properly appreciate evidence of PW-5. PW-8 has stated that he after constituting a raiding party, had conducted raid at the house of accused, Md. Shamshad wherefrom a bag was found kept beneath a bed having Ganja weighing 10 Kilograms, so seized and for that, seizure list was prepared, and appellant, Shamshad was also arrested therefrom as he has failed to produce any paper justifying the possession. A copy thereof, was also served upon Md. Shamshad. (exhibited the same). He also recorded his self statement. (exhibited the same). Then thereafter, he had not spoken a word with regard to sealing of Ganja as well as preparation of sample at that very place. During cross-examination, as is evident from para-4, he had not weighed the seized Ganja at the spot. In para-5, he has stated that he had not prepared sample at the spot. He had not filled up FSL form. He is not remembering whether plastic bag was



sealed or not. He had not prepared recovery memo. He is not remembering whether on the plastic bag, signature of seizure list witnesses as well as accused were taken. He kept the seized Ganja in Thana Maalkhana.

12. PW-5 is the I.O. who has stated that after registration of case, he was entrusted with the investigation. He recorded further statement of the informant, Sanjay Kumar Singh as well as members of the raiding party. He had inspected the P.O. which happens to be the house of the accused, Shamshad lying at Fish Market and, then detailed the same. Disclosed the boundary of the house. He has further stated at para-5 that the accused has got criminal antecedent being accused in Sadar Saharsa PS Case No. 197/2014. He had sent the seized article for FSL examination at Patna as well as Kolkata respectively and then, submitted charge-sheet. During cross-examination at para-8, he has stated that he received bag in open condition. Informant had not filled up FSL form. After receiving bag from the informant, he kept the same in Maalkhana. There were two bags inside the plastic bag. He has further stated that he put his seal but he is unable to produce the same. Then has also stated under para-9 that at the time of forwarding the accused, he had not sent the seized article. He



had kept the article in Maalkhana without sealing. He had not procured attendance/signature of the accused and the witnesses over the seized bag. He has further stated that he procured order on 01.07.2016 and then, sent the sample to Patna on 15.07.2016 and to Kolkata on 10.08.2016. He had not mentioned the reason of delay. During midst thereof, where seized articles were kept, he had not mentioned in the diary. Then he has stated that he had got no sample. From the judgment impugned, it is also apparent that seized article has not been produced.

13. 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."

14. It has been reiterated recently, in the case of



Mohinder Singh v. State of Punjab reported in AIR 2018 SC

3798 and for better appreciation the relevant para is quoted below:-

“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.

15. Apart from this, in *Union of India v. Mohan Lal* as reported in **2016 (3) SCC 379** wherein the Apex Court has been reviewing the overall aspect of the NDPS Act, and for that necessary directions are being issued, also took notice over importance of sample, and how it could be prepared, observed as under:-,

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.



16. Because of the fact that there happens to be utter violation of mandate of law as laid down by the Hon’ble Apex Court as referred hereinabove, on account thereof, the judgment impugned would not survive. Hence, the judgment impugned is set aside. Appeal is allowed.

17. Appellant, Md. Shamshad is under custody, he is directed to be released forthwith if not wanted in any other case. In terms thereof, the I.A. petition is disposed of.

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(Aditya Kumar Trivedi, J)

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