

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.495 of 2018

In
CRIMINAL APPEAL (DB) No.25 of 2018

Arising Out of PS. Case No.-155 Year-2016 Thana- BHAGWANPUR District- Begusarai

Raj Kumar @ Raj Kumar Singh @ Kakari Jha @ Kakari Singh, son of Late
Harinandan Singh, R/o village-Mokhtiyarpur, P.S.-Bhagwanpur, District-
Begusarai.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s	:	Mr. Ajay Kumar Thakur, Adv. Mr. Nilesh Kumar, Adv. Ms Swati Sinha, Adv.
For the Respondent/s	:	Mr. Sujit Kumar Singh, APP.

CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
ORAL JUDGMENT

Date : 18-07-2019

1. Appellant, Raj Kumar @ Raj Kumar Singh @ Kakari Jha @ Kakari Singh has been found guilty for an offence punishable under Section 20(b)(ii)(C) of the NDPS Act and sentenced to undergo R.I. for ten years as well as to pay fine appertaining to Rs.1,00,000/- in default thereof, to undergo R.I. for two years vide judgment of conviction dated 28.11.2017 and order of sentence dated 30.11.2017 passed by the Additional Sessions Judge, Ist -cum- Special Judge, NDPS, Begusarai in NDPS Case No.12/2016 arising out of Bhagwanpur P.S. Case No.155/2016.

2. Gunjan Kumar (PW.4), Officer-in-charge of Bhagwanpur P.S. recorded his self-statement on 15.07.2016



disclosing therein that after receiving confidential information with regard to indulgence of Kakari Jha in dealing with Ganja, a raiding party was constituted and house of appellant was raided. It is further evident that at the time of conduction of raid, none was present. However, house was searched and from a veranda where there was heap of straw, three plastic bags were recovered and on search, the Ganja packets weighing 10+10+10+5 Kg. (totalling 35 Kg.) were recovered for which, as the local people failed to cooperate and declined to become seizure list witness, in presence of Shambhu Chaudhary and Rajesh Kumar Aman (member of the raiding party) seizure list was prepared, self-statement was recorded. As there was no family member on account thereof, a copy of the seizure list was pasted over the house. They returned back along with seized Ganja.

3. After registration of Bhagwanpur P.S. Case No.155/2016 investigation commenced and concluded by way of submission of charge sheet, followed with trial meeting with ultimate result, subject matter of instant appeal.

4. Defence case as is evident from mode of cross-examination as well as statement recorded under Section 313 of the Cr.P.C. is that of complete denial. Furthermore, it has been pleaded that appellant/accused has been victimized on account of



local politics, otherwise there happens to be no legal evidence to connect the alleged P.O. belonging to the house of the appellant. However, neither ocular nor documentary evidence has been on behalf of appellant.

5. In order to substantiate its case prosecution has examined altogether nine PWs who are PW.1-Upendra Kumar, PW.2-Birendra Rai, PW.3-Ramesh Kumar, PW.4-Gunjan Kumar, informant, PW.5-Shambhu Chaudhary, PW.6-Syd. Washim Haidar, PW.7-Pankaj Kumar, PW.8-Ram Bharose Paswan, PW.9-Bijay Kumar Singh. Side by side has also exhibited, Ext.1 Series-Signature of the seizure list witness, Ext.2-Seizure List, Ext.3-Self-statement of the informant, Ext.3/1-Endorsement over the self-statement, Ext.3/2-Formal FIR, Ext.4-Malkhana No.15 of Malkhana Register, Ext.5 is signature of Pankaj Kumar deputed as Magistrate on seizure list, Ext.6-FSL report. The prosecution has also exhibited material Ext.I to IV-Four packets of Ganja. As stated above, there happens to be complete silence at the end of the defence.

6. Heard learned counsel for the appellant as well as learned APP. Gone through the record.

7. From perusal of the record, it is evident that prosecution has sailed with this trial in peculiar way. Although



appellant remained under custody during the trial from the relevant order sheet it is evident that he was present in dock during course of examination of witness but, none of the witness has claimed identification of the appellant. Identification in court is the substantive piece of evidence which could have been. In absence thereof, it is difficult to accept the version of the prosecution more particularly over proper identification of the appellant as an accused.

8. Now comes the proper identification of the house where raid was conducted. In the self-statement of the informant, PW.4 there happens to be specific disclosure that the members of the raiding party have conducted raid at the house of the accused lying by the side of the road. When the evidence on this score has been gone through, it is evident that (a) PW.1 during his examination-in-chief had stated that he had not gone inside the house. When the house premises has been searched out, from the Bhusa recovery was made. During cross-examination at para-6, he had stated that the house where raid was conducted lies adjacent to road where there, (b) from the evidence of PW.2 when they gone inside the house, during course of search from Bhusa Kothari 35 Kg. Ganja was recovered. At para-5 of the cross-examination he had stated that they have got no knowledge with regard to



ownership of the building where they have conducted raid, (c) PW.3 at para-2 had stated that they have gone inside the house and searched and during course thereof, from heap of straw five packets of Ganja were recovered. During cross-examination at para-7, he had stated that they have conducted raid at only one house. How the house was identified, he has got no knowledge. They were not knowing whose house it happens to be, (d) PW.4 had stated during his examination-in-chief that they have arrived at a house situated by the side of a road and then, cordoned it followed with search and seizure (para-1) while during course of cross-examination at para-13 he had stated that he had not seen Kakari Jha. He had got no occasion to visit the place of Kakari Jha and then at para-14 had said that some of the local people had shown the house of the Kakari Jha. He had not disclosed the identity of that person, (f) PW.5 had stated that they have reached at the house of Kakari Jha wherefrom recovery was made while during cross-examination at para-6 he had stated that he does not know anybody of village-Mokhtiyarpur, (g) PW.6 during course of examination-in-chief had stated that after reaching at village-Mokhtiyarpur they had conducted raid at a house and during course thereof, the items as per seizure list was recovered while during course of cross-examination he had stated at para-8 they



have gone inside the house. No male member was present. Two females were present. They have not inquired from them save and except disclosing the purpose for which they have come inside, (h) PW.7 during course of examination-in-chief had stated that they have reached at village-Mokhtiyarpur and during course of search from the alleged house recovery as per seizure list was made while during course of cross-examination at para-5 he had stated that he does not know the accused personally nor his house. At para-12 he had stated that there was only one lady occupant of the house where raid was conducted. He had not seen any male member. At para-6 he had stated that Chowkidar had identified the house to be that of appellant/Raj Kumar, PW.9, the I.O. in para-2 of his examination-in-chief had detailed the place of occurrence to be the house of Raj Kumar Jha but, during course of cross-examination at para-7 he had stated that he was not the member of the raiding party. At para-14 he had stated that he knew Raj Kumar Singh since before but he was not knowing his house since before. At para-15 he had stated that at the instance of Haidar (PW.6) he had inspected the place of occurrence but, he had not tried to properly investigate over the ownership of the house in question.



9. It is evident from the record that during course of examination of PW.4 the informant, material exhibit has been produced and the same happens to be an exhibit of the record. When the material exhibit has been produced (in a bag having kept in four separate packet) the PW.4 on that very score at para-6 of his examination-in-chief had also exhibited the photocopy of the Malkhana register. During course of cross-examination, as is evident, all the packets were taken out which bore P.S. case number and when his attention has been drawn towards the same, he had admitted that though P.S. case number is written over the same but, the same is not in his pen. No other source has been disclosed to connect the material exhibit with the present case under reference and the only source, as is evident, is with regard to script having over the packet by way of mentioning the P.S. case number that too, in the handwriting of others. How it could be, prosecution has not disclosed. No evidence is there nor there is remark of the P.O. during course of inspection of material exhibit that it was in sealed condition.

10. Now coming over compliance of mandatory provisions of the NDPS Act, it is evident from the evidence of all the PWs save and except the investigating officer, PW.8 that irrespective of recovery of the ganja for which seizure list was



prepared, the ganja was not at all sealed nor sample was prepared at the spot. On this score PW.4, informant during course of cross-examination at para-26 had stated that after opening of the plastic bag, the Ganja was found packed in a plastic packet. Neither the Ganja was sealed at the spot nor he had put any identification mark over the same. In likewise manner, PW.6 at para-12 had stated that the seized packets were not sealed at the spot nor any mark was put. PW.7 at para-18 had stated that aforesaid recovered ganja was not sealed at the spot. He has got no information whether aforesaid Ganja was sealed at police station or not. He had not directed the officer-in-charge to seal. When the evidence of PW.9, I.O. has been gone through he had simple stated during his examination-in-chief that after taking permission from the District & Sessions Judge he transmitted the sample for chemical examination. During course of cross-examination at para-9, he had stated that after having been entrusted to investigation, he received FIR, Seizure List along with seized article. He had stated that it was sealed but, it was not sealed in his presence. However, fairly admitted that he had not mentioned in the case diary that he received the seized Ganja in sealed condition. Again corrected that it was simply tied by a 'Sutali' having no sealed mark. He, on his own, had not sealed nor he had put any mark over the same rather



he simply produce the same before the court. Sample has been taken out in the court itself. Before that, he had not opened the wrapper. In para-11 he had stated that the seized ganja was produced on 16.07.2016 before the court that means to say a day after the seizure and then, got it to the police station. Sample was kept out separately. When the order dated 16.07.2016 has been gone through, it is evident therefrom that reference of sample is quite absent rather, the order happens to be "I.O. is permitted to sent seized ganja to Patna as well as Kolkata". In its continuity when Ext.6 has been gone through, it is evident that the alleged sample was sent through Chowkidar Umesh Paswan special messenger under memo no.5118 dated 19.07.2016 which was received at the office of FSL, Patna on 27.10.2016 and, when this information is taken together with the para-11 of PW.9, it is abundantly clear that sample was kept separately but where, it has not been disclosed and in likewise manner, in whose possession. Furthermore, it is evident from Ext.6 that one plastic jar having some greenish brown flowering and fruiting like vegetable substance was found, again happens to be in violation of the order no.1/88, 1/89 prescribing methodology how to prepare sample, in what manner it has to be sent to FSL laboratory. The aforesaid event has been taken into consideration by the Hon'ble Apex Court



in **Union Of India vs Mohanlal & Anr.** reported in (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 52-A as amended by Act 16 of 2014, deals with disposal of seized drugs and psychotropic substances. It reads:

“52-A.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.

18. 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.

19. 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.

11. So, from the evidence as has been discussed herein above, it is abundantly clear that irrespective of the fact that a raid was conducted at a house lying at village-Mokhtiyarpur wherefrom 35 Kg. of Ganja was allegedly recovered from a Veranda kept hidden inside heap of straw, even then, on account of non-identification of the house to be that of appellant in accordance with legal deformity during course of seizure by not sealing the same, non preparation of sample, coupled with the fact that none of the witness had claimed identification of appellant in dock, conjointly did not justify the finding recorded by the learned



lower court apart from the fact that there also happens to be utter violation of Section 42(2) of the NDPS Act as, none of the prosecution witnesses more particularly, PW.4, PW.9 have during course of their evidence disclosed that information with regard to recovery of ganja during course of conduction of raid was ever communicated to the superior officials more particularly in the background of the fact that the aforesaid recovery was without any warrant, from a house coming within the ambit of sub-section(1) of Section 42 of the NDPS Act. There happens to be finding of the Constitution Bench on that very score that belated compliance is permissible but, non-compliance is not permissible. As such the judgment 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.)

Prakash Narayan

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