

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.3512 of 2018

Arising Out of PS. Case No.-93 Year-2016 Thana- UDWANTNAGAR District- Bhojpur

Suhel Ahamad @ Suhail Ahamad, son of Late Ashfaq Ahmad, Resident of Village- Garahani, Police Station- Charpokhari, District- Bhojpur at Ara.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

with

CRIMINAL APPEAL (SJ) No. 3476 of 2018

Arising Out of PS. Case No.-93 Year-2016 Thana- UDWANTNAGAR District- Bhojpur

Washim @ Chhotu, S/o Md. Badruddin Badadin Alee, R/o Vill.- Garahani, P.S.- Charpokhari, District- Bhojpur at Ara.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

Appearance :

(In CRIMINAL APPEAL (SJ) No. 3512 of 2018)

For the Appellant/s : Mr. Bindhyachal Singh-Advocate
Mr. Vipin Kumar Singh-Advocate
Mr. Manish Prakash-Advocate

For the Respondent/s : Mr. Syed Ashfaq Ahmad-A.P.P.

(In CRIMINAL APPEAL (SJ) No. 3476 of 2018)

For the Appellant/s : Mr. Bindhyachal Singh-Advocate
Mr. Vipin Kumar Singh-Advocate
Mr. Manish Prakash-Advocate

For the Respondent/s : Mr. Abhay Kumar-A.P.P.

CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
ORAL JUDGMENT

25-07-2019

Cr. Appeal (S.J.) No.3512 of 2018 wherein Suhel

Ahamad @ Suhail Ahamad is the appellant and Cr. Appeal (S.J.)

No.3476 of 2018 wherein Washim @ Chhotu is the appellant,

have been found guilty for an offence punishable under Section



20(b)II)(b) of the N.D.P.S. Act and each one has been directed to undergo R.I. for five years as well as to pay fine appertaining to Rs.25,000/- and in default thereof, to undergo S.I. for three months, additionally, with a further direction to set off the period having undergone during course of trial in accordance with Section 428 of the Cr.P.C. by the 6th Additional Sessions Judge, Bhojpur at Ara in N.D.P.S. Case No.02 of 2016 arising out of Udwanthnagar P. S. Case No.93 of 2016 vide judgment of conviction dated 04.07.2018 and order of sentence dated 07.07.2018, on account thereof, heard analogously and are being decided by a common judgment.

2. As is evident from the self-statement of Rajiv Kumar (PW-4), the then O/c of Udwanthnagar P.S. recorded on 30.01.2016 over Arrah-Sahar road near Bhagwanpur Bridge divulging therein that today the team came to the police station and informed that Ganja is to be carried by an Alto Car as well as Bolero Jeep, whereupon after informing the superior officials, a raiding party team was constituted and then, they ambushed at Arrah-Sahar road near Bhagwanpur bridge. First of all, they seen Alto car, which was signaled to stop and the occupant thereof, who are the appellants, were apprehended. On interrogation, they disclosed that they are simply escorting,



Ganja is being carried on Bolero Jeep, which is just following. After sometime, the Bolero Jeep was perceived, which was also signaled to stop and accordingly, the driver Sonu Kumar was apprehended. It has further been disclosed that on checking, from the dickey of Alto car, five packets of Ganja was seized while from the Bolero Jeep, 30 packets of Ganja was seized weighing 32.350 kilograms.

3. After registration of Udwanthnagar P. S. Case No.93 of 2016, investigation commenced and concluded by way of submission of chargesheet, facilitating the trial, meeting with the ultimate result, subject matter of instant appeal.

4. The learned counsel for the appellants has disclosed at the present moment that co-accused Sonu Kumar has been declared Juvenile and on account thereof, the trial has been bifurcated and sent to Juvenile Justice Board for adjudication.

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. Furthermore, one DW has also been examined.

6. Altogether five PWs have been examined on behalf of prosecution in order to substantiate its case and those



are PW-1, Kumar Saurav, S.I., PW-2, Constable Pappu Kumar, PW-3, Krishnamohan Chaudhary, PW-4, Rajiv Kumar and PW-5, Vijay Kumar Singh, I.O. Side by side, has also exhibited as Exhibit-1, 2, 2/1, 2/2 signature of Rajiv Kumar, Krishnamohan Chaudhary, Jaishankar, Magistrate and Circle Officer over seizure list, self-statement as Exhibit-3, arrest memo of Washim @ Chhotu, Suhail Ahamad and Sonu Kumar as Exhibit-4,5,6, respectively, test memo as Exhibit-7, 7A and 8 respectively, chargesheet as Exhibit-9, forwarding as Exhibit-10, application for getting the sample examined by the F.S.L. as Exhibit-11. As is evident, one DW Raju Pandit has been examined on behalf of defence.

7. Heard learned counsel for the appellant as well as learned Additional Public Prosecutor. From perusal of the L.C. Record, it is evident that seized ganja has not been produced. There happens to be no description at the end of any of the prosecution witnesses that seized Ganja was subject to destruction. In likewise manner, none had disclosed that it has been deposited in the Thana Malkhana. That being so, neither the destruction report in accordance with Section 52A of the N.D.P.S. Act nor the seized ganja in its primary form has been produced in Court. The Hon'ble Apex Court in *Mohinder*



Singh v. State of Punjab reported in AIR 2018 SC 3798 has held as follows 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.”

8. Apart from this, from the evidence available on



the record, it is apparent that none of the witnesses have stated including that of informant (PW-4) and I.O. (PW-5) that seized articles were sealed at the spot, nor there happens to be evidence at the end of any of the witnesses that sample was prepared and sealed at the spot. From the evidence of PW-5, it is evident that he had simply mentioned the fact during his examination-in-chief that on 15.03.2016, he had filed a petition before the District & Sessions Judge, Bhojpur at Ara asking for permission for getting the ganja examined by the F.S.L. and the same was allowed on the same day. That means to say, there happens to be approximately one and half months delay in making the aforesaid prayer and that too, without having any kind of disclosure relating to preparation of sample. Moreover, the informant (PW-4) as well as I.O. (PW-5) have not uttered a word with regard to preparation of sample. That means to say, there has been utter violation of the Circular issued under ***Order No.1/88 and 1/89.***

9. Apart from this, it is evident that there happens to be no disclosure at the end of the prosecution with regard to identity of both the seized vehicles whether it was a public transport/ taxi, then in that circumstance, it was a private vehicle. Seizure from the private vehicle on a public road is to



be governed in terms of Section 42 of the N.D.P.S. Act and under such circumstance, there should be proper compliance of Section 42(2) of the N.D.P.S. Act.

10. The Hon'ble Apex Court in **Sk Raju alias Abdul Haque alias Jagga vs. State of West Bengal reported in 2019 CRI.L.J. 407**, it has been observed:-

“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.”

11. Even considering the version of the prosecution found to be have a substance over recovery of



Ganja in such huge quantity, but on account of lapses at the end of the prosecution during course of compliance of mandatory provisions of the law, virtually made the prosecution crippled and that being so, the judgment impugned suffers from severe illegality, whereupon is set aside. Both these appeals are allowed. Both the appellants are under custody, hence are directed to be released forthwith if not wanted in any other case.

(Aditya Kumar Trivedi, J)

Vikash/-

AFR/NAFR	A.F.R.
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