

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.3835 of 2018

Arising Out of PS. Case No.-157 Year-2016 Thana- UDWANTNAGAR District- Bhojpur

Santosh Paswan, Son of Late Subhash Paswan, Resident of Village- Bampali
Milki Tola, Dhanpura, Bagwan, Police Station- Udwant Nagar, District-
Bhojpur.

... .. Appellant/s

Versus

The State Of Bihar

... .. Respondent/s

with

CRIMINAL APPEAL (SJ) No. 4043 of 2018

Arising Out of PS. Case No.-157 Year-2016 Thana- UDWANTNAGAR District- Bhojpur

Noor Hassan S/o Md. Sahadat, R/o Village- Dhanpura, Ara, P.S.- Ara Town,
District- Bhojpur.

... .. Appellant/s

Versus

The State Of Bihar

... .. Respondent/s

with

CRIMINAL APPEAL (SJ) No. 893 of 2019

In

CRIMINAL APPEAL (DB) No.1227 of 2018

Arising Out of PS. Case No.-157 Year-2016 Thana- UDWANTNAGAR District- Bhojpur

RAJ KISHORE PASWAN Son of Suresh Paswan @ Suresh Ram, Resident of
Village-Bampali Milki Tola, P.S.-Udwantnagar, District-Bhojpur at Ara
(Bihar).

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

Appearance :

(In CRIMINAL APPEAL (SJ) No. 3835 of 2018)

For the Appellant/s : Mr. Surendra Kumar Mishra, Adv.

Mr. Arun Kumar Singh, Adv.

For the Respondent/s : Mr.Sri Sujit Kumar Singh

(In CRIMINAL APPEAL (SJ) No. 4043 of 2018)

For the Appellant/s : Mr.Ravindra Kumar, Adv.

For the Respondent/s : Mr.Sri Zeyaul Hoda

(In CRIMINAL APPEAL (SJ) No. 893 of 2019)



For the Appellant/s : Mr.Ashok Kumar
For the Respondent/s : Mr.Abhay Kumar

CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
ORAL JUDGMENT

Date : 21-10-2019

Since all these three appeals originate against common judgment of conviction dated 30.07.2018 and order of sentence dated 01.08.2018 passed by the learned Additional Sessions Judge VIth, Bhojpur at Ara in connection with NDPS Case No. 7 of 2016, arising out of Udwanthnagar P.S. Case No. 157/2016, whereby and whereunder appellants, namely, Raj Kishore Paswan, Santosh Paswan and Noor Hassan have been found guilty for an offence punishable under Section 20(b)(ii)(c) of the NDPS Act and each one has been sentenced to undergo R.I. for ten years as well as to pay fine appertaining to Rs. 1 lac, in default thereof, to undergo S.I. for one month, additionally, on account thereof, have been heard analogously and are being disposed of by a common judgment.

Rajiv Kumar (PW-3) recorded his self-statement on 03.04.2016 at about 11:45 hrs. at Asni Pool, disclosing therein that after getting confidential information with regard to transportation of narcotic substance (*Ganja*) over a car bearing Registration No. CG-04PC/1658, a raiding party was constituted and cordoned the road. After seeing the vehicle, they signalled to stop and thereafter,



they have found the vehicle occupied by three persons, who disclosed their name on interrogation as, Raj Kishore Paswan, Santosh Paswan as well as Noor Hassan. It has further been alleged that in presence of Jai Shankar Kumar, Pawan Chaudhary, the aforesaid persons were searched out. Driver, who disclosed his identity as Santosh Paswan, was found in possession of Samsung mobile and cash appertaining to Rs. 1,000/-, from the possession of Noor Hassan, who was sitting by the side of driver, a mobile of Sansui mark as well as cash appertaining to Rs. 500/- was recovered, from the possession of Raj Kishore Paswan, who was sitting on rear seat, mobile of Samsung brand as well as cash appertaining to Rs. 1,100/- was found, followed with respective seizure-list. It has also been disclosed that during search, there was smell of *Ganja* whereupon, vehicle was searched and 83 rectangular bundles were found, out of which, two bundles weighing 2kg. each, rest 1kg each, totalling 85 kg and for that, a separate seizure-list was prepared. It has also been disclosed that the aforesaid persons disclosed Arwal Singh as well as Chhotu Mistry to be the owner of the *Ganja* and further, they are actively involved in *Ganja* trade. Accordingly, the *Ganja*, vehicle along with three accused persons brought to police station.



After registration of Udwanthnagar P.S. Case No. 157/2016, investigation commenced and after concluding the same, charge-sheet has been submitted, facilitating the trial, meeting with the ultimate result, subject-matter of the instant appeal.

Defence case as is evident from the mode of cross-examination as well as statement recorded under Section 313 of the Cr.P.C. is of complete denial. It has further been pleaded that they have been purposely, intentionally victimized. One D.W. has also been examined on behalf of Noor Hassan.

In order to substantiate its case, prosecution has examined altogether 5 P.Ws., who are, PW. 1 -Hawaldar Vijay Sharma, PW2- Constable Ajay Kumar, PW3- Rajiv Kumar (informant), PW4- Constable Pramod Kumar, PW5- S.I. Vijay Kumar Singh (I.O.). Side by side has also exhibited self-statement-Ext. 1, Seizure-list-Ext. 2, Charge-sheet- Ext. 3, Supplementary charge-sheet-Ext. 4, FSL report (Calcutta)-Ext. 5 and FSL Report (Patna)-Ext. 6. It is further evident that seized materials have been produced in Court and has been marked as Ext.-X (although it would not have been as, all the 83 packets should have been separately marked as an Exhibit). It is further evident that one D.W., namely, Chandan Kumar Sharma, has also been examined on behalf of one of the appellants, namely, Noor Hassan.



Heard learned counsel for the appellants as well as learned Addl. P.P. and gone through the record.

After perusal of the entire Lower Court Record, it is evident that PW1, PW2, PW3 and PW4 have stated during course of their examination-in-chief that after signalling the vehicle to stop, vehicle stopped. They found three persons inside the vehicle, who are appellants. They were searched out but nothing incriminating was found from their physical possession. However, from the dickey of the vehicle, 85 kg of *Ganja* has been seized. The most crucial aspect which adversely affect on the prospect of the prosecution case is that none of the witnesses including PW5, the I.O., has stated that sample was prepared at the spot, sealed in presence of seizure-list witnesses having signature of the seizure-list witnesses, accused, police official and, in likewise manner sealing of all the 83 packets. I.O. (PW5) has stated during his cross-examination at para 8 that the seized article is kept at the Malkhana. He had got no occasion to see and inspect during course of investigation. He had simply seen the sample which was handed over to him.

When PW 1 to 4 did not speak with regard to preparation of sample, how sample was prepared and handed over to PW 5 (I.O.). In likewise manner, when PW 5 has not claimed to have prepared sample then, in that circumstance how the sample was produced is a matter of concern and speaks a lot with regard to underneath



activities. This has got additional support from the fact which is coming out from the evidence of PW 3 (informant) who had exhibited the material (Ext.-X) but, during course of cross-examination at para 2, has stated that nothing has been ascribed over the packet, more particularly, the P.S. Case No. There happens to be no seal over the packet belonging to him or anybody else. There happens to be no description over the packet wherein those packets were kept. Nor the aforesaid packets were sealed. There happens to be no description thereupon relating to particular case. At para 3 he has stated that there happens to be no signature of the accused persons over any of the packet.

In *Union of India Vs. Mohanlal and Anr.* reported in *2016(3) SCC 379*, it has been held:

Seizure and sampling

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 has in exercise of that power issued Standing Order No. 1 of 1989 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 16-1-2015 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



Standing Order No. 1 of 1989 states that samples must be taken from the seized contraband 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(1) as amended by Act 16 of 2014, deals with disposal of seized drugs and psychotropic substances. It reads:

Section 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 52-A(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-sections (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.”

Considering the materials available on record, as discussed hereinabove, it is abundantly clear that the activity so adopted at the end of the prosecution is found in utter contravention of the mandatory provisions of law in consonance with the direction laid



down by the Hon’ble Apex Court in the case of *Mohanlal* (supra). Furthermore, by such lapses not only the process of sampling became doubtful rather absence of any mark/seal over the remaining part of *Ganja*, also disconnect its identity being residue of the instant case. Consequent upon, the judgment impugned is set aside. All the three appeals are allowed. Appellants, who are under custody, hence, are directed to be released forthwith, if not wanted in any other case.

(Aditya Kumar Trivedi, J)

rakhi/-

AFR/NAFR	AFR
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