

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.584 of 2016

Arising Out of PS. Case No.-3 Year-2013 Thana- BHANGHA District- West Champaran

Ramesh Kumar Sah @ Ramesh Sah, Son of Motilal Sah, Resident of Village-
Chailaha Babu Tola, P.S. Banjaria, District- East Champaran, Motihari.

... .. Appellant/s

Versus

The State Of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s	:	Mr. Mukesh Kumar, Advocate Mr. Shivjee Singh, Advocate Mr. Sanjeev Kumar Jha, Advocate
For the Respondent/s	:	Mr. S.A. Ahmad, APP

CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
ORAL JUDGMENT

Date : 18-09-2019

The 3rd Additional Sessions Judge-cum-Special Judge,

NDPS Act, West Champaran at Bettiah vide judgment of conviction dated 14.06.2016 and order of sentence 21.06.2016 found appellant Ramesh Kumar Sah@ Ramesh Sah guilty of an offence punishable under Section 20(b) (ii) (c), (of NDPS Acts) 22(c), 23(c) of the NDPS Act and sentenced to undergo R.I. for 10 years as well as pay a fine of Rs. 2,00,000/- and in default of payment thereafter to undergo S.I. for 1 year, additionally, under each head with a further direction to run the sentences concurrently, with a further direction that the period having undergone during the course of trial will be set off in accordance with Section 428 of the Cr.P.C. relating to Trial No. 46 of 2013, NDPS Case No.03 of 2013 arising out of Bhangaha P.S. Case No. 03 of 2013.



2. Naresh Kumar Jangir (P.W. 1), Assistant Commandant 27 Battallian, SSB, filed a written report on 13.01.2013 before the O/c Bhangaha P.S. divulging therein that while he alongwith Komal Singh (not examined), Constable Sanjeev Sharma (P.W. 2), Constable P.Raghu (P.W. 3), Constable Manjesh Patel (not examined), Constable Piraji Balodana (not examined), Constable Lingraj Sahu(P.W. 5), constable Amit Kumar Singh (P.W. 8) Constable Devendra Singh Tomar (P.W.6), Constable Shubhajeet Pal (not examined), Constable Saroj Kumar Yadav, (P.W. 7), Constable Sandeep Pawar (not examined), constable Birendra Rajak (not examined), Constable Kalu Ram (not examined) were on night duty and, were sitting near a mango orchard outside village Bahari, he received a confidential information with regard to expected movement of smugglers with ganja whereupon, they became attentive and ambushed the area. At about 3 am, they perceived one Mahindra Pickup van which was signalled to stop but, the driver did not respond properly, whereupon, was forced to stop. Thereafter, the driver tried to escape but was apprehended who, on interrogation disclosed his identity as Ramesh Kumar Sah. Furthermore, on search of the vehicle 37 bags of ganja, weighing 830 kg were seized. Further, Ramesh Kumar Sah divulged that the vehicle belong to Raju Mian of village Lakhaura



who has ordered to carry the ganja from Nepal border to Motihari. It has further been disclosed that from the owner-book, the vehicle is found registered in the name of Sri Ramlal Sah, S/o Sri Bharat Sah of village Gorawa Patwara. So many papers relating to transfer of ownership has been found. On search of the driver, one mobile set V 1120 model has been found along with Rs. 190/- in cash. Accordingly, statement of driver was recorded and after medical examination the accused statement, seizure memo of vehicle, 830 kg of ganja along with written report have been produced before the officer In-charge, Ajit Kumar Singh of Bhagaha P.S. (P.W.8).

3. After registration of Bhangaha P.S. Case No. 03 of 2013, investigation proceeded and after concluding the same followed with submission of charge-sheet facilitating the trial meeting with the ultimate result subject matter of this appeal.

4. Defense as is evident mode of cross-examination as well as statement of accused recorded under Section 313 of the Cr.P.C. is of total denial. However, nothing has been adduced in defence.

5. In order to substantiate this case, altogether 8 P.Ws. have been examined at the end of the prosecution who are P.W. 1, Naresh Kumar Jagir, P.W. 2 Santosh Kumar Sharma, P.W. 3 P.



Raghu, P.W. 4 Amit Kumar Singh, P.W. 5 Ling Raj Singh, P.W. 6 Devendra Singh Tomar, P.W. 7 Saroj Kumar Yadav, P.W. 8 Ajit Kumar Singh, side by side has also exhibited. Ext. 1- Signature of informant (P.W. 1) on the written report, Ext. 1/A- Endorsement of S.H.O. on the written report, Ext.2- Confessional statement of appellant accused, Ext 3- Signature of Amin Mian on the seizure list, Ext. 3/A- Signature of SHO Ajit Kumar Singh on the seizure list, Ext. 4- Signature of SHO on the proforma of seizure list, Ext. 5- F.S.L. report, Ext. 6-F.I.R. registered by SHO, Bhangaha Police Station. As stated above nothing has been adduced on behalf of defence.

6. Heard learned counsel for the appellant and learned Additional Public Prosecutor. Gone through the record.

7. From the nature of the evidence having adduced on behalf of the prosecution, it is evident that P.W. 1, P.W. 2 and P.W. 7 are the member of the 27th SSB, Battalion. Informant, Assistant Commandant as has been disclosed by the learned A.P.P. happens to be the Gazetted Officer that means to say fulfills, one of the criteria so enumerated under Section 50 of the Act and, in likewise manner, the proper identification of the official competent to make physical search and seizure. It is further evident that while the prosecution party comprising P.W. 1 to 7 alongwith others (not



examined) were on duty, the informant (P.W. 1) has got confidential information with regard to expected movement of the smugglers. But, it has not been disclosed at their end whether the same was reduced in writing nor there happens to be any kind of explanation at their end with regard to any kind of hindrance in getting the aforesaid information reduced in writing. It is further evident that none has disclosed that the vehicle was a public carrier or private carrier. However, from the evidence of P.W. 8, at para 8 it is apparent that he had shown the place of occurrence to be a pitch road, that means to say a public place, that means to say Section 43 of the NDPS Act would apply with regard to search and seizure, whereupon, cumbersome mandatory provision so prescribed in accordance with Section 42 (2) of the NDPS Act is not at all found applicable.

8. Now coming to the facts of the case, it is evident that P.W. 1 to P.W. 7 are consistent over their presence at the mango orchard of village Baheri, in the night of 12/13.01.2013 including others being on duty and, during course thereof receipt of confidential information by P.W. 1, over passing of ganja by the smugglers and at 3.00 am on 13.01.2013, they have perceived one Mahindra pickup van, forced to stop, apprehension of the driver, on search 37 bags of ganja was seized weighing 830 kg. Though,



from personal search nothing has been found save and except Rs. 190/- as well as one mobile. But, the most surprising feature is that no seizure list was prepared at the spot nor sample was prepared rather, the written report suggest that seizure memo is proforma for seizure which contains the detail and, the same was handed over to the I/o and further the last column of the aforesaid seizure memo contains, handed over by at left side, taken over by at right side containing signature of informant (ext. 3) and the O.C.-cum-I.O. (P.W. 8) on the right side (ext.3/a) without having signature of the accused/appellant as well as, any of the witness. It is needless to say that as per Section 57 of the NDPS Act, the provisions of Criminal Procedure Code would apply relating to search and seizure including other eventualities so prescribed there under Section 100 Cr.P.C. deals with the mechanism how the search and seizure has to be carried out. Wherein, presence of two witnesses of the locality is required to justify the search and seizure.

9. Be that as it may, all the witnesses including I.O. (P.W.8) have consistently stated that at the time of search and seizure, though all the 37 sample packets were wrapped but, no description of each of the packet independently has been made (weight). It has also been admitted at their end that it was not sealed. It is also admitted at their end that no sample was prepared



at the spot. From evidence of P.W. 8, (I.O.), at paragraph 24, during course of cross-examination has stated that on 02.07.2013 he had filed an application before the Sessions Judge for allowing to prepare sample and, order of the Sessions Judge was procured by him on 10.08.2013. When the ext.5, the FSL report has been gone through, it is evident that the sample which was dispatched on 10.07.2013 through the special messenger, daffadar Yasin was received at the end of FSL, Patna, Bihar on 01.08.2013 and, there happens to be no explanation whereabouts of the sample during the intermediary period. Another surprising feature is the I.O. (P.W. 8) had admitted at para 23 that he had already submitted charge-sheet on 09.07.2011 that means to say, before transmission of the sample to the FSL. That means to say, the step having been taken at the end of the I.O. certainly was in accordance with Section 173 (8) of the Cr.P.C. and for that there happens to be no disclosure at the end of the I.O. regarding the effort having at his end in compliance of Section 173 (8) of the Cr.P.C. followed with submission of supplementary charge-sheets as it is about the further investigation.

10. Another feature visualizing from the L.C.R.. Though I.O. (P.W.8) has stated that he had deposited the seized ganja in the *malkhana* but, neither any *malkhana* register has been produced



nor to substantiate that the seized ganja was deposited in the *malkhana* and, on 10.07.2013 it was taken out from the *malkhana* to be produced before the learned Sessions Judge for preparation of the sample and then again the remaining of ganja was deposited in the *malkhana* under sealed condition nor, there happens to be disclosure at the end of P.W. 8 that ganja was produced before the learned Sessions Judge for the preparation of sample. As is evident from paragraphs 14,15,16,17,18 of the cross-examination of the P.W. 8. In paragraph 25, P.W. 8 admitted that he is unable to say whether sample was prepared after taking out from single packet or it was a mixture of ganja having been taken out from all the 37 packets.

11. Apart from this, as is evident, there happens no disclosure at the end of the prosecution that seized ganja was destroyed in accordance with Section 52 A of the NDPS Act and, the representative sample along with destruction report if any, photograph were there, and further, were produced nor, the seized ganja has been produced in court as a material exhibits. In the background of having at the end of the prosecution as discussed hereinabove, the non-production of seized ganja or the destruction report in accordance with Section 52 (A) of the NDPS Act as appearing in the case of **Mohinder Singh v. State of Punjab**



reported in AIR 2018 SC 3798 is found detrimental to the prosecution. For better appreciation, 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.



13. Consequent thereupon judgment of conviction and sentence as recorded by the learned lower court is hereby set aside. Appeal is allowed. Accused is in custody hence, he is directed to be released forthwith if not wanted in any other case.

(Aditya Kumar Trivedi, J)

khushbu/-

AFR/NAFR	AFR
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