

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.821 of 2016

Arising Out of PS. Case No.-35 Year-2013 Thana- BHANGHA District- West Champaran

Nagendra Sah, Son of Sri Rajbanshi Sah, Resident of Village-Inarwa Tola,
P.S.-Inarwa, District-West Champaran.

... .. Appellant/s

Versus

1. State of Bihar.
2. The Union of India through the Inspector General, S.S.B. Frontier Head Quarter, Patna .

... .. Respondent/s

Appearance :

For the Appellant/s	:	Mr. Bashishta Narayan Mishra, Adv. Mr. Braj Kishore Mishra, Adv.
For the Respondent/s	:	Mr. Z. Hoda, APP

CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
ORAL JUDGMENT

Date : 22-11-2019

The appellant Nagendra Sah has been found guilty for an offence punishable under Section 20(b) (ii) (C) of the NDPS Act as well as under Section 22(c) of the NDPS Act and for that directed to undergo R.I. for 10 years as well as to pay fine appertaining to Rs.1,00,000/- and in default thereof, to undergo S.I. for one year, additionally independently, respectively, with a further direction to run the sentences concurrently, with a further direction that the period having undergone be set off in accordance with Section 428 of the Cr.P.C. by the judgment of conviction dated 03.08.2016 and the order of sentence dated 09.08.2016 passed by the 6th Additional District and Sessions Judge, West



Champanan at Bettiah in NDPS Trial No.08 of 2014 arising out of Bhangaha P.S. Case No.35 of 2013.

2. Ashish Kumar Dwivedi (PW-5), S.I. of SSBE, Narkatiyaganj recorded his self statement on 31.08.2013 divulging the fact that after getting an information from his source with regard to passing of smugglers carrying narcotic substance from Nepal to India, instructed the armed personnel to be vigilant while they proceeded for day patrolling. During course thereof, they have seen one motorcycle coming from Nepal territory and as soon as intruded inside the Indian territory and covered a distance of 550 yards they signaled to stop. On search, nothing incriminating has been found from the physical possession of the accused but, on search of dickey, 12 packets of *Hasis (Charas)* have been found. After examining through digital weighing machine 5.800 Kg of *Charas* was found and for that, it has been alleged that the apprehended accused confessed his guilt, disclosed his identity as Nagendra Sah, son of Rajwanshi Sah of Village- Inarwa Tola, PO- Inarwa, District West Champaran and also disclosed that aforesaid Charas was handed over to him by Sadish Mian of Village- Pipdari, P.O.- Sekha, District Parsa (Nepal) to hand it over, and for that provided mobile no.8294664214 to be called for its delivery and, as a carrier he got Rs.1200/-. Accordingly seizure list, arrest



memo etc. were prepared including the inculpatory extra judicial confessional statement, superior officials have been informed and then, accused along with the seized articles, all the relevant documents, written report were produced before the Bhangaha Police Station, on the basis of which Bhangaha Police Station Case No.35 of 2013 was registered, investigated, followed with submission of charge-sheet, facilitating the trial, meeting with ultimate result, subject matter of instant appeal.

3. Defence case, as is evident from the mode of cross-examination as well as the statement recorded under Section 313 of the Cr.P.C. is that of complete denial. However, nothing has been adduced in defence.

4. In order to substantiate its case, prosecution has examined altogether 7 PWs, who are Rajesh Kumar (PW-1), Arjun Basak (PW-2), Harnandan Naskar (PW-3), Banwari Lal Jat (PW-4), Ashish Kumar Dwivedi (PW-5), Pramod Prasad (PW-6) and Dafadar Yasin Gadi (PW-7) as well as has also exhibited Exhibit-1, signature of PW-3 over the seizure list, Exhibit-2, written report, Exhibit 2/A, forwarding note, Exhibit-3, signature of PW-5 over the inculpatory judicial extra confessional statement of Nagendra Sah, Exhibit-4, seizure list, Exhibit-5, arrest memo, Exhibit-6, production cum seizure list, Exhibit 7, formal FIR, Exhibit 8, FSL



report, material Exhibit-1, seized *Charas* has also been produced. As stated above, nothing has been adduced on behalf of the defence.

5. Heard learned counsel for the appellant, learned Additional Public Prosecutor as well as also gone through the lower court record including the judgment impugned.

6. From the judgment impugned more particularly paragraphs 16, 17, 18 and 19, it is evident that the learned lower court has found as well as observed that there happens to be proper compliance of Section 42(2) of the NDPS Act on account of having proper disclosure at the end of PW-5, the informant that he had informed his superior official soon after recovery. It has also been observed by the learned lower court that material exhibit has been produced in court. It has also been observed that the inculpatory extra judicial confessional statement could be recorded by the investigating officer as is so empowered under section 67 of the NDPS Act, consequent thereto the inculpatory extra judicial confessional statement having at the end of the accused could be relied upon and, in the aforesaid background, the court would take presumption against him in terms of Sections 35 and 54 of the NDPS Act and that happens to be the reason behind recording of judgment of conviction and order of sentence against the appellant.



7. Times without number, it has been observed by the Apex Court that prescribing stringent punishment as well as some sort of privilege providing to the court to infer against an accused in terms of Section 35 as well as Section 54 of the NDPS Act, it has been observed that for having such presumption properly surfaced, the prosecution has to substantiate its case and in likewise manner, all the mandatory provisions should be strictly carried out.

8. From the evidence having adduced on behalf of the prosecution, it is evident that they all have substantiated, corroborated that accused was apprehended along with the motorcycle bearing Registration No.BR-22-9869 and, during course of search from the dickey 12 packets of *Charas* have been seized weighing 5.800 Kg but, none of the witness has stated that it was sealed at the spot nor that sample was prepared at the spot. Not only this, when the evidence of I.O. (PW-6) has properly been scrutinized, it is evident that he has not stated that after production of *Charas*, where he had kept the same as, he failed to say that it was kept in the *Thana Malkhana* or somewhere else. Furthermore, he also failed to say how many samples were prepared as 12 packets of *Charas* were seized. Contrary to it, in paragraph 6 of his examination-in-chief he has simply stated that seized material was



produced on 21.12.2013 in the court, whereupon got an order for its examination at FSL which he sent on 23.02.2014, again failed to disclose in whose custody the aforesaid *Charas* were during the intervening period. From Exhibit-8, the FSL report the aforesaid factual aspect is found duly supported. Apart from this, the aforesaid PW-6 during course of his cross-examination at paragraph 11 has stated that the seized article was produced before him in sealed condition but, he had not mentioned the same in the production cum seizure list nor the same is incorporated in the seizure list. In paragraph 12 he has stated that it was sealed after keeping the same in yellow colour bag but, again the same has not been corroborated any of the witness.

9. The most surprising feature is, from the evidence of PW-7, who came to produce the material exhibit, it is evident that nothing has been spoken at his end nor the court has put any remark to the effect that *Charas* was in sealed condition, kept in the yellow bag. It is also lacking from his evidence that the aforesaid materials were brought by him from *Thana Malkhana* and, each of the packet has got any specific mark including that of at the end of the informant or at the end of the I.O.



10. Although, the matter is still subjudice before the Hon'ble Apex Court, in **Union of India v. Mohan Lal** as reported in **(2016) 3 SCC 379** wherein it has been 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 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 10-5-2007 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 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 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.

11. Consequent thereupon, it is crystal clear that there happens to be violation of compliance of mandatory provisions of law and that being so, the finding of the learned lower court as referred to hereinabove would not be sustainable. On the other



hand, the finding so recorded by the learned lower court is found inappropriate on account of non-compliance of mandatory provisions of law giving the finding a nullity and that being so, the judgment of conviction and order of sentence so recorded by the learned lower court is hereby set aside.

12. The appeal is allowed. The appellant is under custody hence is directed to be released forthwith, if not wanted in any other case.

(Aditya Kumar Trivedi, J)

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AFR/NAFR	NAFR
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