

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.3220 of 2017

Arising Out of PS. Case No.-8 Year-2014 Thana- GOPALPUR District- West Champaran

1. Meena Devi, Wife of Motilal Patel.
2. Pramila Devi, Wife of Bhuti Sah, Both Resident of Village-Saharsawa, P.S. Gopalpur, District-West Champaran.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s	:	Mr. Bashishtha Narayan Mishra-Advocate Mr. S. N. Rai-Advocate Mr. B. K. Mishra-Advocate
For the Respondent/s	:	Mr. Bipin Kumar-A.P.P.

CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
ORAL JUDGMENT

03-07-2019

Against the judgment of conviction and order of

sentence dated 12.10.2017 whereby and whereunder both the appellants namely Meena Devi and Pramilla Devi have been found guilty for an offence punishable under Section 20(b)(ii)(c) of the N.D.P.S. Act and each one has been sentenced to undergo R.I. for ten years as well as to pay fine appertaining to Rs. One Lac, under Section 22(c) of the N.D.P.S. Act and sentenced to undergo R.I. for ten years as well as to pay fine appertaining to Rs. One Lac, under Section 23(c) of the N.D.P.S. Act and sentenced to undergo R.I. for ten years as well as to pay fine appertaining to Rs. One Lac and in default thereof, to undergo R.I. for one year, additionally, with a further direction to run the sentences concurrently, with a further direction with regard to



set off against the period having undergone during course of trial by the learned 5th Additional Sessions Judge, West Champaran at Bettiah in Trial No.33 of 2014, instant memo of appeal has been filed while acquitting for an offence punishable under Section 414 Cr.P.C.

2. On getting confidential information with regard to transportation of Ganja (contra band goods) from Nepal, a raiding party was constituted by the informant, O/c of Gopalpur P.S. and then, at Shivaghat bridge, the informant along with other police officials ambushed. After sometime, one tractor came occupied by two ladies and a man excluding driver, which was intercepted and during course of search, with the help of Constable Chhaya Ram (PW-2), from the possession of Meena Devi, 13 yellow packets having been wrapped with her body has been found and seized while from the possession of Pramilla Devi, six packets containing yellow substance were seized duly wrapped with her body and for that, on query, they both made inculpatory extra-judicial confessional statement that the aforesaid substance happens to be Charas and on account of poverty, they both acceded to become carrier at the instance of one Rajendra Pal. Accordingly, seizure list was prepared. Both the accused persons including driver and one more person from



whose possession, nothing was recovered, were arrested.

3. After institution of Gopalpur P. S. Case No.08 of 2014, investigation commenced during course of which, as is evident, the seized articles (samples) were sent to F.S.L. and got the F.S.L. Report, examined the witnesses, inspecting the place of occurrence and then, concluding the investigation, chargesheet has been submitted against the two appellants, facilitating the trial, meeting with the 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. However, nothing has been adduced in defence.

5. In order to substantiate its case, prosecution has examined altogether nine PWs, who are PW-1, Rafikur Rehman, PW-2, Constable Chhaya Ram, PW-3, Constable Bhikari Rai, PW-4, Mahendra Sah, PW-5, Daroga Yadav, PW-6, Kishun Pal, PW-7, Pankaj Rai, PW-8, Khedan Das and PW-9, Constable Upendra Yadav. Side by side, also exhibited the Exhibit-1, seizure list, Exhibit-2, written report, Exhibit-3, formal F.I.R., Exhibit-4, endorsement over self-statement, Exhibit-5, C.D., Exhibit-6, F.S.L. Report.



6. From the evidence available on the record, more particularly that of PW-1, informant during cross-examination at Para-15 had stated that the seized articles were kept at Thana Malkhana bearing serial no.2/ 2014. In likewise manner, I.O. (PW-7) at Para-21 had stated that the seized material exhibit is kept at Thana Malkhana. However, from the evidence available on the record, it is apparent that so alleged seized articles have not been produced in Court as material exhibit. In the case of *Vijay Jain v. State of Madhya Pradesh* as reported in *(2013) 14 SCC 527*, the Hon'ble Apex Court has occasion to see the impact of non production of material exhibit during course of trial and has dealt with in following way:-

“9. Para 96 of the judgment of this Court in Noor Aga case (2008) 16 SCC 417 on which the learned counsel for the State very strongly relies is quoted hereinbelow: (SCC p. 464)

“96. Last but not the least, physical evidence relating to three samples taken from the bulk amount of heroin was also not produced. Even if it is accepted for the sake of argument that the bulk quantity was destroyed, the samples were essential to be produced and proved as primary evidence for the purpose of establishing the fact of recovery of heroin as envisaged under Section 52-A of the Act.”

Thus in para 96 of the judgment in Noor Aga case



(2008) 16 SCC 417 this Court has held that the prosecution must in any case produce the samples even where the bulk quantity is said to have been destroyed. The observations of this Court in the aforesaid paragraph of the judgment do not say anything about the consequence of non-production of the contraband goods before the court in a prosecution under the NDPS Act.

10. On the other hand, on a reading of this Court's judgment in Jitendra case (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 (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.

11.....

12. We are thus of the view that as the prosecution has not produced the brown sugar before the Court and has also not offered any explanation for non-production of the brown sugar alleged to have been seized from the appellants and as the evidence of the witnesses (PW 2 and PW 3) to the seizure of the materials does not establish the seizure of the brown sugar from the possession of the appellants, the judgment of the trial court convicting the appellants and the judgment of the High Court maintaining the conviction are not sustainable.”

7. It is further evident from the record, more particularly from the fard-bayan as well as from the evidence of PW-1, PW-2 that during course of physical search, 13 packets having duly wrapped with the body were seized from Meena Devi while six packets duly wrapped with the body, were found from the body of Pramilla Devi. That means to say, on account of physical search of both the ladies, recovery has been alleged. On account thereof, there is clear cut application of Section 50 of N.D.P.S. Act, requiring personal search to be carried out before the Gazetted Officer or Magistrate that too, the concerned official has to divulge in such way, that the Court



should be able to infer that strict compliance of Section 50 has been carried out.

8. In ***SK Raju alias Abdul Haque alias Jagga v. State of West Bengal reported in 2019 CRL.L.J. 407 (SC)***, it has observed:-

“10. [Section 50](#) of the Act deals with conditions under which search of persons shall be conducted. It states:

“50. Conditions under which search of persons shall be conducted.—

(1) When any officer duly authorised under section 42 is about to search any person under the provisions of section 41, section 42 or section 43, he shall, if such person so requires, take such person without unnecessary delay to nearest Gazetted Officer of any of the departments mentioned in section 42 or to the nearest Magistrate.

(2) If such requisition is made, the officer may detain the person until he can bring him before the Gazetted Officer or the Magistrate referred to in sub-section (1).

(3) The Gazetted Officer or the Magistrate before whom any such person is brought shall, if he sees no reasonable ground for search, forthwith



discharge the person but otherwise shall direct that search be made.

(4) No female shall be searched by anyone excepting a female.

(5) When an officer duly authorised under [section 42](#) has reason to believe that it is not possible to take the person to be searched to the nearest Gazetted Officer or Magistrate without the possibility of the person to be searched parting with possession of any narcotic drug or psychotropic substance, or controlled substance or article or document, he may, instead of taking such person to the nearest Gazetted Officer or Magistrate, proceed to search the person as provided under section 100 of the Code of Criminal Procedure, 1973 (2 of 1974).

(6) After a search is conducted under sub-section (5), the officer shall record the reasons for such belief which necessitated such search and within seventy-two hours send a copy thereof to his immediate official superior.”

*According to [Section 50\(1\)](#), an empowered officer should necessarily inform the suspect about his legal right, if he so requires, to be searched in the presence of a gazetted officer or a magistrate. In *Vijaysinh Chandubha Jadeja v State of Gujarat* (“*Vijaysinh*”),¹⁰ a Constitution Bench of this Court interpreted [Section 50](#) thus:*

“The mandate of Section 50 is precise and



clear, viz. if the person intended to be searched expresses to the authorised officer his desire to be taken to the nearest gazetted officer or the Magistrate, he cannot be searched till the gazetted officer or the Magistrate, as the case may be, directs the authorised officer to do so ... In view of the foregoing discussion, we are of the firm opinion that the object with which right under [Section 50\(1\)](#) of the NDPS Act, by way of a safeguard, has been conferred on the suspect, viz. to check the misuse of power, to avoid harm to innocent persons and to minimise the allegations of planting or foisting of false cases by the law enforcement agencies, it would be imperative on the part of the empowered officer to apprise the person intended to be searched of his right to be searched before a gazetted officer or a Magistrate. We have no hesitation in holding that in so far as the obligation of the authorised officer under Sub-section (1) of [Section 50](#) of the NDPS Act is concerned, it is mandatory and requires a strict compliance. Failure to comply with the provision would render the recovery of the illicit article suspect and vitiate the conviction if the same is recorded only on the basis of the recovery of the illicit article from the person of the accused during such search. Thereafter, the suspect may or may not choose to exercise the right provided to him under the said provision ... We are of the opinion



that the concept of “substantial compliance” with the requirement of [Section 50](#) of the NDPS Act introduced and read into the mandate of the said Section in Joseph Fernandez (supra) and Prabha Shankar Dubey (supra) is neither borne out from the language of Sub- section (1) of [Section 50](#) nor it is in consonance with the dictum laid down in Baldev Singh's case (supra).” The principle which emerges from Vijaysinh is that the concept of “substantial compliance” with the requirement of [Section 50](#) is neither in accordance with the law laid down in Baldev Singh, nor can it be construed from its language. [Reference may also be made to the decision of a two judge Bench of this Court in Venkateswarlu]. Therefore, strict compliance with [Section 50\(1\)](#) by the empowered officer is mandatory. [Section 50](#), however, applies only in the case of a search of a person. In Baldev Singh, the Court held “on its plain reading, [Section 50](#) would come into play only in the case of a search of a person as distinguished from search of any premises, etc.” In State of Himachal Pradesh v Pawan Kumar (“Pawan Kumar”),¹¹ a three judge Bench of this Court held that the search of an article which was being carried by a person in his hand, or on his shoulder or head, etc., would not attract [Section 50](#). It was held thus:

“In common parlance it would be said



that a person is carrying a particular article, specifying the manner in which it was carried like hand, shoulder, back or head, etc. Therefore, it is not possible to include these articles within the ambit of the word “person” occurring in [Section 50](#) of the Act ...After the decision in Baldev Singh, this Court has consistently held that [Section 50](#) would only apply to search of a person and not to any bag, article or container, etc. being carried by him.”

In Parmanand (AIR 2014 SC 1384) on a search of the person of the respondent, no substance was found. However, subsequently, opium was recovered from the bag of the respondent. A two judge Bench of this Court considered whether compliance 11 (2005) 4 SCC 350. with [Section 50\(1\)](#) was required. This Court held that the empowered officer was required to comply with the requirements of [Section 50\(1\)](#) as the person of the respondent was also searched. [Reference may also be made to the decision of a two judge Bench of this Court in Dilip v State of Madhya Pradesh]12. It was held thus:

“Thus, if merely a bag carried by a person is searched without there being any search of his person, [Section 50](#) of the NDPS Act will have no application. But if the bag carried by him is



searched and his person is also searched, [Section 50](#) of the NDPS Act will have application.”

Moreover, in the above case, the empowered officer at the time of conducting the search informed the respondent that he could be searched before the nearest Magistrate or before the nearest gazetted officer or before the Superintendent, who was also a part of the raiding party. The Court held that the search of the respondent was not in consonance with the requirements of [Section 50\(1\)](#) as the empowered officer erred in giving the respondent an option of being search before the Superintendent, who was not an independent officer. It was held thus:

“We also notice that PW 10 SI Qureshi informed the respondents that they could be searched before the nearest Magistrate or before the nearest gazetted officer or before PW 5 J.S. Negi, the Superintendent, who was a part of the raiding party. It is the prosecution case that the respondents informed the officers that they would like to be searched before PW 5 J.S. Negi by PW 10 SI Qureshi. This, in our opinion, is again a breach of [Section 50\(1\)](#) of the NDPS Act. The idea behind taking an accused to the nearest Magistrate or the nearest gazetted officer, if he so requires, is to give him a chance of being searched in the presence of an independent officer.



Therefore, it was improper for PW 10 SI Qureshi to tell the 12 (2007) 1 SCC 450. respondents that a third alternative was available and that they could be searched before PW 5 J.S. Negi, the Superintendent, who was part of the raiding party. PW 5 J.S. Negi cannot be called an independent officer. We are not expressing any opinion on the question whether if the respondents had voluntarily expressed that they wanted to be searched before PW 5 J.S. Negi, the search would have been vitiated or not. But PW 10 SI Qureshi could not have given a third option to the respondents when [Section 50\(1\)](#) of the NDPS Act does not provide for it and when such option would frustrate the provisions of [Section 50\(1\)](#) of the NDPS Act. On this ground also, in our opinion, the search conducted by PW 10 SI Qureshi is vitiated.”

The question which arises before us is whether [Section 50\(1\)](#) was required to be complied with when charas was recovered only from the bag of the appellant and no charas was found on his person. Further, if the first question is answered in the affirmative, whether the requirements of [Section 50](#) were



strictly complied with by PW-2 and PW-4. ”

9. From the evidence available on the record, right from self-statement as well as from the evidence of PW-1 (informant), PW-2, PW-3, PW-9, they have not uttered a word even during course of examination-in-chief that before their physical search, Meena Devi and Pramilla Devi, they were given an option to be searched before the Magistrate or Gazetted Officer. Consequent thereupon, there also happens to be violation of Section 50 of the N.D.P.S. Act.

10. In likewise manner, there also happens to be violation of Section 42(2) of the N.D.P.S. Act, on account of non-disclosure of the fact at the end of PW-1 as well as other witnesses that the confidential information was written down and then, the same was communicated to the higher police official within the stipulated period. In ***Karnail Singh vs. State of Haryana reported in (2009)8 SCC 539***, the Constitution Bench has already observed that non-compliance of Section 42(2) of the N.D.P.S. Act is non-permissible. However, belated compliance could be accepted. As found, prosecution is completely silent on that very score.

11. Now, coming to the score of sampling, there happens to be peculiar kind of evidence, which suggest



something otherwise. Seizure list (Exhibit-1) did not divulge. **PW-1**, informant during his examination-in-chief had not disclosed the events, if any, having been taken at his end after recovery of so alleged articles followed with preparation of seizure list. However, during cross-examination at Para-9, he had stated that the seized articles was not sealed at the place of occurrence. In Para-11, he had stated that at the time of recovery of Charas, neither any Magistrate was present nor the superior police officials. He had not spoken a single word with regard to preparation of sample.

12. **PW-2**, Constable was engaged in search and seizure. At Para-4, had stated that the packets were not opened in her presence. Seizure list was not prepared in her presence. **PW-3**, during his examination-in-chief is silent, but in cross-examination at Para-5, he had stated that the packet was opened at the police station, it was Charas. In Para-6, had stated that it was not weighed in his presence. It was sealed at the police station, but he is unable to say. **PW-7**, I.O. during his examination-in-chief had not spoken whether the packet was sealed or not. He had not spoken whether sample was prepared or not. Though, had stated at Para-5 that after getting order from the District & Sessions Judge, the articles were sent to the F.S.L.



for examination. At Para-17, had stated that seized Charas was not sealed. He had sent the Charas. He had not sealed the Charas. **PW-9**, during his examination-in-chief remained silent on that very score, but at Para-5 on cross-examination had stated that the seized Charas was not sealed at the P.O. Furthermore, he had also stated that at the time of search and seizure, neither Magistrate nor higher police officials were present.

13. Thus, from the evidence available on the record as discussed herein above, it is abundantly clear that there happens to be fragrant violation of the mandatory provisions of law, more particularly that of Section 50 of the N.D.P.S. Act, Section 42(2) of the N.D.P.S. Act coupled with the fact that neither articles were sealed at the spot nor there was sampling at the spot. In this connection, when Exhibit-6 has been gone through (F.S.L. Report), it is evident that vide Memo No.1785 dated 27.05.2014 that means to say, approximately after four months of the date of occurrence, it was sent to the F.S.L. Laboratory, but the most surprising feature is that it was received on 05.06.2014 that too, when it was sent through Special Messenger. That means to say, at least intermediary period should have been explained at the end of the prosecution with regard to custody of the sample.



14. Consequent thereupon, the cumulative effect did not justify the finding recorded by the learned lower Court irrespective of so alleged recovery on account of inconsistency amongst the evidence of the witnesses as well as due to non-compliance of mandatory provisions of law. Accordingly, the judgment of conviction and sentence recorded by the learned lower Court is hereby set aside. Appeal is 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)

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