

IN THE HIGH COURT OF JUDICATURE AT PATNA

CRIMINAL APPEAL (DB) No.471 of 2016

Arising Out of PS. Case No.-3 Year-2007 Thana- GOVERNMENT OFFICIAL COMP.

District- Patna

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Guddu Kumar S/o- Sri Santo Singh, Resident of Village- Jhajhiyat, P.S.-Pupri,
District- Sitamarhi, State- Bihar

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

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Appearance :

For the Appellant/s : Mr. Uday Kumar, Advocate.

For the Respondent/s : Mr. Anjani Kumar Sharan, A.S.G.

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CORAM: HONOURABLE MR. JUSTICE RAKESH KUMAR

and

HONOURABLE MR. JUSTICE PRAKASH CHANDRA

JAISWAL

C.A.V. JUDGMENT

**(Per: HONOURABLE MR. JUSTICE PRAKASH CHANDRA
JAISWAL)**

Date : 15-03-2019

Heard learned counsel for the appellant and learned

APP for the State on this criminal appeal.

2. This criminal appeal has been preferred against the Judgment and Order of conviction dated 30.06.2014 and Order of sentence dated 15.07.2014 passed by 1st Additional Sessions Judge, Patna in Special Case No. 24 of 2007 whereby the learned trial court acquitted the accused Satish Bhatia and Aruna Malhotra from all the charges levelled against them while convicted the accused Guddu Kumar under Sections 20(b)(ii)(c) and 25 of the N.D.P.S. Act and sentenced him to undergo R.I.



for 15 years and also slapped him with the fine of Rs.1 lac under Section 20(b)(ii)(c) of the N.D.P.S. Act and further sentenced him to undergo R.I. for 15 years and also slapped him with the fine of Rs. 1 lac under Section 25 of the N.D.P.S. Act and in default of payment of fine to further undergo imprisonment for two years. Both the sentences were directed to run concurrently.

3. Factual matrix of the case is that Custom Hqrs. Unit Case No. 03 of 2007, Special Case No. 24 of 2007 was instituted against the accused Guddu Kumar on the basis of the complaint filed by the complainant Durga Chawdhary, Inspector of Customs (Prev), Patna with the allegation in succinct that on tip off about transporting ganja on the Truck bearing Registration No. HR-47A-4105, officers of the Customs Hqrs, Patna after constitution of a raiding party rushed in verification of the information and intercepted aforesaid Truck at Pahari near Gandhi Setu, Patna on 19.04.2007. On making query, driver of the truck namely Guddu Kumar refused to have any contraband in the truck. Then two independent witnesses were requested to be present for conducting search of the truck. The truck along with the driver and the witnesses was taken to nearby Transport Nagar for thorough search as it was difficult to search at the roadside due to congregation of the



crowd. Further allegation is that the truck was a close door container under lock and key of driver. Taking the key from the driver, the truck was searched in presence of the driver and the independent witnesses and on search three bundles each containing two packets total weighing 60 Kg ganja worth Rs.1,20,000/-, kept concealed under the Real Apple Juice packets loaded on the aforesaid truck was recovered. Sample of the ganja was drawn before two independent witnesses and the accused and sample was sent for its examination to the General Manager, Government Opium and Alkaloid Works, Ghazipur, U.P. which confirmed the seized contraband to be ganja vide its report dated 16.07.2007. Vehicle and packets of real apple juice were also seized for concealment of the aforesaid contraband. After completing the formalities, said driver namely Guddu Kumar was apprehended on 19.04.2007 at 4 PM. Subsequently, certification of the seized ganja, truck and packets of the real apple juice was made by Judicial Magistrate on 28.05.2007. Driver of the truck confessed his guilt in the occurrence.

4. During investigation, it was found that the seized truck was hailing to one Smt. Aruna Malhotra and Satish Bhatia is owner of transport company namely M/s HBGC Logistics, Faridabad and Delhi.



5. On the basis of the complaint petition filed by the complainant, learned Sessions Judge, Patna took cognizance of the offence and transferred the case to the Court of Additional Sessions Judge-VI, Patna for trial and disposal.

6. Charge against the accused Guddu Kumar was framed under Sections 20(b)(ii)(c), 25 and 29 of the N.D.P.S. Act while charge against the accused Satish Bhatia and Aruna Malhotra was framed under Sections 25 and 29 of the N.D.P.S. Act. Charges were read over and explained to them by the Court to which they pleaded not guilty and claimed to be tried.

7. To substantiate its case, in ocular evidence, the prosecution has examined altogether five prosecution witnesses namely, complainant Durga Choudhary, Inspector of Customs, Patna as PW-1, Abhash Kumar, Inspector of Customs and member of the raiding party as PW-2, Hargovind Lashkar, Superintendent of Custom as PW-3, Satyadeo Rai, A.S.I. and another member of the raiding party as PW-4 and Ravindra Kumar, witness of the seizure list and Panchnama as PW-5. Prosecution has also filed and proved some documents by way of documentary evidence in the case.

8. Statement of the accused persons was recorded under Section 313 of the Code of Criminal procedure. The case



of the defence is complete denial of the occurrence claiming themselves to be innocent. Accused persons neither adduced any ocular nor documentary evidence in buttress of their case.

9. After hearing the parties and perusing the record, the learned trial court passed the aforesaid Judgment and Order of conviction and sentence as detailed in the earlier paragraph.

10. Being aggrieved and dissatisfied with the aforesaid Judgment and Order of conviction and sentence, convict Guddu Kumar has preferred this Criminal Appeal.

11. The point for consideration in this case is, as to whether the prosecution has been able to bring home the charges levelled against the appellant beyond all reasonable doubts or not.

12. It is submitted by learned counsel for the appellant that the seizure list witness is not the independent witness as as per the account of PW-5 Ravindra Kumar he is the staff of income tax department. It is also submitted that seizure list has not been made in accordance with law. It is further submitted that sample was not drawn from the seized contraband and sealed by the seizing authority at the place of occurrence. The said sample was also not produced before the Court and no explanation has been assigned by the prosecution for its non-



production before the Court. Moreover permission of the court has also not been taken for sending the sample for its chemical examination. Moreover, seized contraband was also not produced before the Court. It is further submitted that the interrogatory statement of the appellant recorded under Section 67 of the N.D.P.S. Act was not recorded on the date of apprehension of the appellant on 19.04.2007 rather on the next date i.e. on 20.04.2007 and scribe of the interrogatory statement has not been examined by the prosecution. It is also submitted that as per the chemical examination report, the sealed sample dated 26.04.2007 was received for its chemical examination on 28.04.2007 which means that the sample was drawn on 26.04.2007 but voluntary and interrogatory statements of the appellant adumbrate the factum of drawing of sample and sealing of the same on 19.04.2007 which creates serious doubt about the sanctity and credibility of the said statements. It is also submitted that there has been seven days delay in drawing the sample from the alleged seized contraband and prosecution has not established as to where the aforesaid contraband was kept and whether it was kept in the safe custody during the aforesaid period which creates serious doubt about the prosecution case and also about the chemical examination report. Prosecution has



failed to establish that the said examination report is of the sample prepared from the alleged seized contraband. Thus, the prosecution has utterly and miserably failed to substantiate the prosecution case and bring home the charges levelled against the appellant beyond all reasonable doubts by adducing consistent, trustworthy, reliable and worth credence evidence. Hence, aforesaid judgment and order of conviction and sentence passed against the appellant is liable to be set aside and the appellant is entitled to be acquitted.

13. On the other hand, learned APP for the State advocating the correctness and validity of the impugned Judgment and Order of conviction and sentence submitted that the complainant, members of the raiding party and the independent witness have fully established the prosecution case, appellant has also confessed his guilt under Section 67 of the N.D.P.S. Act and learned trial court correctly appreciating the facts and evidence available on record has rightly passed the impugned Judgment and Order of conviction and sentence which is liable to be upheld and this criminal appeal is shorn of merit and is liable to be dismissed.

14. From perusal of the record, it appears that to substantiate its case, the prosecution has examined five



witnesses in the case. Out of them, PW-1 Durga Choudhary happens to be the complainant, member of the raiding party and Investigating Officer of the case, PW-2 Abhash Kumar and PW-4 Satyadeo Rai are the members of the raiding party, PW-3 Hargovind Lashkar, Superintendent of Custom, Patna who had constituted the raiding party and sent the raiding party on raid and PW-5 Ravindra Kumar happens to be staff of the income tax department and witness of the seizure list and Panchnama. Though from perusal of testimonies of aforesaid witnesses, it appears that they have made an abortive bid to support the prosecution case by giving statement in consonance to the prosecution case as adumbrated in the complaint but from perusal of the voluntary statement of the appellant recorded on 19.04.2007 marked as Exhibit-2 and his interrogatory statement recorded under Section 67 of the N.D.P.S. Act on 20.04.2007 marked as Exhibit-4, it appears that the factum of preparation of sample from the seized contraband and its sealing has been adverted in the aforesaid statements, but from perusal of the Chemical Examination Report marked as Exhibit-7, it appears that the sample prepared on 26.04.2007 was received in the office of General Manager, Government Opium and Alkaloid Works, Ghajipur, U.P. for its Chemical Examination on



28.04.2007 while the certificate given by Judicial Magistrate, Civil Court, Patna marked as Exhibit-6 indicates that the sample of ganja weighing approx. 30 gm and sample of Real Apple Juice 1 litre pack were drawn out of the seized articles before him and were sealed with government seal in his presence on 28.05.2007. Thus in view of the aforesaid aspect of the case, three different dates of drawing sample and its sealing came into light as as per the voluntary statement of the appellant (Exhibit-2) and his interrogatory statement (Exhibit-4), sample was prepared and sealed on 19.04.2007, as per Chemical Examination Report (Exhibit-7), sample was prepared and sealed on 26.04.2007 while as per the certificate (Exhibit-6) given by Judicial Magistrate, Civil Court, Patna, Sample was drawn and sealed on 28.05.2007 which creates serious doubt about drawing of sample and its sealing from the seized contraband.

15. Though in voluntary statement of the appellant (Exhibit-2) recorded on 19.04.2007 and his interrogatory statement recorded on 20.04.2007, factum of drawing sample from the seized contraband and its sealing is found adverted but from perusal of the Panchnama marked as Exhibit-3 and seizure memo marked as Exhibit-1, it appears that the aforesaid



Panchnama and seizure memo were prepared on 19.04.2007 but in the said Panchnama and seizure memo, aforesaid factum of drawing sample from the seized contraband and its sealing is not found adumbrated. Aforesaid aspect of the case also creates serious doubt about drawing of sample from the seized contraband and its sealing at the time of its seizure.

16. From perusal of the testimony of the witnesses, it appears that though the complainant Durga Chawdhary (PW-1) has not stated about drawing of sample from the seized contraband and its sealing in his examination-in-chief but in his cross-examination he has stated that the sample of the seized contraband was prepared and was sent to Ghajipur for its chemical examination. PW-2 Abhash Kumar has stated in his examination-in-chief that after seizure of the ganja and its weighing, the sample was prepared and it was sealed, but PW-4 Satyadeo Rai who happens to be the member of the raiding party and PW-5 Ravindra Kumar who happens to be the witness of seizure list and Panchnama and PW-3 Hargovind Lashkar who happens to be superintendent of Customs, Patna have not whispered about drawing of sample from the seized contraband and its sealing either at the place of occurrence or anywhere else. Thus in view of the aforesaid contradictory statement of



the witnesses and three different dates of drawing sample and its sealing which has come in the documentary evidence filed by the prosecution as discussed by me hereinabove and adumbration of the factum of the preparation of the sample and its sealing in the voluntary and interrogatory statement of the appellant preceding to preparation of sample and not mentioning the factum of preparation of sample and its sealing in the seizure memo and Panchnama creates serious doubt about drawing of the sample from the seized contraband and its sealing.

17. From perusal of the record, it appears that the appellant Guddu Kumar was apprehended by the police on 19.04.2007 at 11 A.M., but his interrogatory statement under Section 67 of the N.D.P.S. Act (Exhibit-4) was recorded on the following day i.e. on 20.04.2007 i.e. after one day of his apprehension. PW-3 Hargovind Lashkar has stated in Para-1 of his examination-in-chief that he had recorded the interrogatory statement of the accused Guddu Kumar on 20.04.2007. PW-1 Durga Chowdhary has stated in Para-1 of his examination-in-chief that on the following day interrogatory statement of the accused was recorded by the Superintendent of Customs, Patna (PW-3). The aforesaid aspect of the case and statements of PW-1 and PW-3 indicates that there has been inordinate delay of one



day in recording the interrogatory statement of the appellant and the prosecution has not ascribed any plausible explanation for the aforesaid delay in recording the interrogatory statement of the appellant which creates serious doubt about the credibility and sanctity of the interrogatory statement of the appellant.

18. The voluntary statement of the appellant (Exhibit-2) was prepared on 19.04.2007 and his interrogatory statement was prepared on 20.04.2007 and from perusal of the aforesaid statements, it appears that the factum of drawing sample from the seized contraband and its sealing is adumbrated in the aforesaid statements, but as discussed by me hereinabove, the Chemical Examination Report (Exhibit-7) indicates that the sample was drawn and sealed on 26.04.2007 while the certificate of the Judicial Magistrate marked as Exhibit-6 indicates that the aforesaid sample was drawn and sealed from the seized contraband before him on 28.05.2007. So million dollar question arises as to how the factum of drawing sample from seized contraband and its sealing was adumbrated in the aforesaid voluntary and interrogatory statement of the appellant recorded prior to the drawing of sample and its sealing. Aforesaid aspect of the case creates serious doubt about the credibility and sanctity of the aforesaid two statements of the



appellant.

19. PW-1 Durga Chowdhary in Para-7 of his cross-examination has stated that he has not deposited the sample in the court and has also not taken permission of the Court for sending the sample for its chemical examination. PW-4 Satyadeo Rai in Para-11 of his cross-examination has stated that the seized article is not present before him in the Court today i.e. on the day of recording his statement before the Court. Record of learned lower court also does not indicate that the seized contraband was ever produced before the Court. Thus from perusal of the aforesaid aspect of the case and the record, it appears that neither the seized contraband and its sample was produced before the Court nor any permission of the Court was taken for sending it for its chemical examination.

20. Hon'ble Apex Court in **Noor Aga Vs. State of Punjab & Anr.** Reported in (2008) 16 SCC 417 has been pleased to observe that physical evidence relating to three samples taken from the bulk amount of heroin was also not produced before the Court. Even if it is expected 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.

21. Hon'ble Apex Court in Jitendra and Anr. Vs. State of M.P. reported in **(2004) 10 SCC 562**, has further been pleased to observe that in the trial of the 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 material 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.

22. Hon'ble Apex Court in Ashok alias Dangra Jaiswal Vs. State of Madhya Pradesh reported in **(2011) 5 SCC 123** has been pleased to rule that alleged narcotic powder seized from the possession of the accused were not produced before the trial court as a material object and there was no explanation for its non-production and therefore there was no evidence to connect the forensic expert report with the drug or the substance that was seized from the possession of the



accused.

23. From perusal of the certificate of the Judicial Magistrate, Patna (Exhibit-6), it appears that the sample from the seized contraband was drawn before him and was sealed in his presence on 28.05.2007 while the aforesaid contraband is said to have been seized on 19.04.2007. So as per the aforesaid certificate of the Judicial Magistrate, Patna, the sample was drawn and sealed after one month nine days of its seizure and no evidence has been adduced by the prosecution as to where the aforesaid seized contraband was kept for such a long span of time of one month and nine days and as to whether said contraband was kept in safe custody or not during the aforesaid period. Albeit Chemical Examination Report furnished by General Manager, Government Opium and Alkaloid Works, Ghajipur, U.P. marked as Exhibit-7 indicates that on chemical examination of the sample, it was found to be ganja. But prosecution has utterly and miserably failed to substantiate that the sample of that very contraband which was allegedly seized from the possession of the appellant was sent for its chemical examination and on its chemical examination the same was found to be ganja.

24. From perusal of the record, it appears that the



sample for its chemical examination was received in the Government Opium and Alkaloid Works, Ghajipur, U.P. on 28.04.2007, but the report was prepared on 11.07.2007 i.e. after 02 months 14 days and there is no explanation for the aforesaid delay which also creates serious doubt about the prosecution case.

25. From perusal of the testimony of the witnesses, it appears that the complainant called two independent local witnesses and taking the truck, accused and the witnesses from the place of occurrence to the Transport Nagar seized contraband from the aforesaid truck and prepared seizure memo and Panchnama before the independent witnesses in the said Transport Nagar, but from perusal of the record, it appears that PW-5 does not happen to be independent local witness of the occurrence rather he happens to be staff of the income tax department and was called by the complainant to become seizure list witness and another seizure list witness namely Bhola Kumar has not been examined by the prosecution. Aforesaid aspect of the case indicates that the aforesaid truck was not searched and contraband was not seized before the local independent witnesses in utter violation of the law regarding search and seizure.



26. From perusal of the testimony of the witnesses, complaint petition, voluntary and interrogatory statement of the appellant, seizure memo and Panchnama, it appears that the seized contraband was neither sealed at the place of occurrence nor at the office of Transport Nagar as neither in the aforesaid documents, aforesaid facts has been mentioned nor any of the witnesses examined by the prosecution has whispered about sealing of the seized contraband. Though PWs-1 and 2 have simply stated about drawing of sample and sealing of the sample drawn from the seized contraband but PW-4 who happens to be member of the raiding party, PW-5 who is a witness of seizure memo and Panchnama and PW-3 who happens to be Superintendent of Custom have even not stated about sealing of any item at anywhere.

27. Offence punishable under the NDPS Act and punishment provided therefor is very stringent and stern, so the strict provisions have been provided in the said Act. So that there may not be chance of false implication. In such view of the matter, the compliance of the provision which are mandatory in nature has to be considered seriously and non-compliance of such requirement will give rise to grave doubt.

28. Section 55 of the NDPS Act provides it as a



mandatory requirement that after search and seizure, the seized article will be sealed by the officer, who seized it and concerned Officer-in-Charge of the police station will take charge of the seized article. Section 55 of the NDPS Act further provides that in case sample of seized narcotic article is taken then the same will be sealed by person seizing it and the Officer-in-Charge of the police station taking charge of the seized article. Thus, the basic and mandatory requirement of sealing of the article in view of provision of Section 55 of the NDPS Act at the time when it was handed over to the custom office has not been proved. The time of sealing of the article has not been proved. Since any sealing of the article was not proved at the time of seizure nor any exact date and time has been proved in taking of the sample by the informant grave doubt is entertained over the matter that actual article, which was seized has been the subject matter of the act of taking sample and the examination by the F.S.L. Hence, the appellant is entitled to benefit of doubt.

29. In the facts and circumstances of the case and in view of the discussions made by me hereinabove, I find and hold that the prosecution has utterly and miserably failed to substantiate the prosecution case and bring home the charges levelled against the appellant beyond all reasonable doubts by



adducing consistent, convincing, reliable and worth credence evidence. Hence, the impugned judgment and order of conviction and sentence passed by the learned trial court against the appellant is set aside and the appellant is acquitted of the charges levelled against him. As the appellant is in custody, he is directed to be released forthwith, if not wanted in any other case.

30. Accordingly, this criminal appeal is allowed.

(Prakash Chandra Jaiswal, J.)

Rakesh Kumar, J: I agree.

(Rakesh Kumar, J)

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AFR/NAFR	AFR
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