

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.576 of 2016

Arising Out of PS. Case No.-66 Year-2014 Thana- BALTHAR District- West Champaran

Jalaj Kumar son of Late Bishwanath Prasad resident of Village- Malahi Basar,
Police Station-Malahi, District-East Champaran

... .. Appellant/s

Versus

The State Of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s	:	Mr. Devendra Kumar, Mr. Syed Ehteshamuddin, Advocates.
For the Respondent/s	:	Mr. Zeyaul Hoda, APP

CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
ORAL JUDGMENT

18-09-2019

Appellant, Jalaj Kumar has been found guilty for an offence punishable under Section 20(b) (ii) (c), 22(c) and 23 (c) of the NDPS Act and sentenced to undergo RI for 10 years as well as to pay fine appertaining to Rs. One Lac, in default thereof, to undergo RI for one year respectively, with a further direction to run the sentences concurrently, with a further direction that the period having undergone during course of trial be set off in accordance with Section 428 CrPC, vide judgment of conviction dated 10.06.2016 and order of sentence dated 16.06.2016 passed by 6th Additional Sessions Judge-cum-Special Judge, NDPS, West Champaran at Bettiah, in connection with Trial No.06/2015 arising out of Balthar PS Case No. 66/2014.

2. PW-2, Ravindra Kumar, Head Constable, SSB filed a written report disclosing therein that through local



source, Company Commander of SSB (38th Battalion) got an informant with regard to smuggling of Narcotic Substance/Drugs to India from Nepal. Accordingly, a raiding party was constituted under his leadership and the security was beefed up, on the banks of Oran river. After some time, one person was found who, on being challenged, began to flee, whereupon, chased and apprehended. He was interrogated and during course thereof, disclosed his name as Jalaj Kumar son of Late Bishwanath Prasad resident of Village- Malahi Bazar, Police Station-Malahi, District-East Champaran. He was further told that if he so desires, his search would be facilitated either before two independent witnesses or before a Gazetted Officer. Over this, the aforesaid apprehended accused, shown his inclination to be searched out before two independent witnesses whereupon, he was searched in presence of Sk. Bundali as well as Md. Hassim and during course thereof, one mobile having AIRTEL SIM and Two Kilograms of Charas from a bag having over his back was recovered, seized regarding which he disclosed that he used to bring the aforesaid Charas from Kathmandu and supply it to Delhi, Ghaziabad as well as other different places.

3. Then thereafter, the accused, seized Charas



along with other documents were produced before Officer Incharge, Balthar PS over which, Balthar PS Case No. 66/2014 was registered commencing with an investigation and after concluding the same, charge-sheet has been submitted meeting with the ultimate result, subject matter of the instant appeal.

4. Defence as is evident from the mode of cross-examination as well as statement of the accused recorded under Section 313 of the CrPC is that of complete denial. It has also been submitted that he was apprehended by the SSB personnel who illegally demanded money and as he failed to pay the same, after two days of illegal confinement, he was produced before the Officer Incharge with false and frivolous allegation and to substantiate the same, appellant himself got examined as DW-1.

5. Altogether five PWs have been examined in order to substantiate its case, who are PW-1, Bikau Ram, part I.O. who had simply submitted charge-sheet, PW-2, Ravindra Kumar, Informant, PW-3, Noor Muhammad, a Constable, PW-4, Brindawan Pramanik, SSB Constable, PW-5-Manoj Kumar, SSB Constable. Side by side has also exhibited Ext-1, Signature of the witness on Section 50 NDPS Act, Ext-2, Signature of Informant on Seizure List, Ext-3, Signature of informant on



Fardbeyan, Ext-4, FSL report. As stated above, appellant himself got examined as DW-1.

6. It is evident from the written report itself that PW-2, Ravindra Kumar was a Head Constable. From para-17 of the judgment, it is evident that Central Government by virtue of notification no. 901(E) 20/04/2010 notified Head Constable or the Official Superior to the Head Constable of SSB to be competent to make search and seizure in accordance with Section 42. So, the sole question now remains on the score is, whether the whole process is governed under Section 42 of the Act. It is needless to say, that in order to attract Section 42 of the Act, firstly, the informant should be reduced in writing, and secondly, so directed by the Superior Officials and further, it did not relate with public place. As per prosecution version, these events are lacking. Even accepting for a moment, there happens to be no evidence on record to suggest that even delayed compliance has been with regard to Section 42(2) of the Act, mandatory in nature.

7. Furthermore, from the written report, it is evident that PW-2 was very much novice as to how the physical search is to be carried out and in whose presence. The mandatory law requires, it has to be carried out in presence of



Gazetted Officer of any Department or to the nearest Magistrate instead thereof, it has been disclosed as, is to be carried out in presence of two seizure list witnesses, that means to say, in utter violation of mandate of Section 50.

8. The Constitution Bench decision in the case of *Vijaysinh Chandubha Jadeja vs. State of Gujarat* as reported in *(2011)1 SCC 609* has held as follows:-

29. 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.

30. As observed In Re: Presidential Poll : (1974) 2 SCC 33, it is the duty of the courts to get at the real intention of the Legislature by carefully attending to the whole scope of the provision to be construed. "The key to the opening of every law is the reason and spirit of



the law, it is the animus imponentis, the intention of the law maker expressed in the law itself, taken as a whole."

31. 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). Needless to add that the question whether or not the procedure prescribed has been followed and the requirement of Section 50 had been met, is a matter of trial. It would neither be possible nor feasible to lay down any absolute formula in that behalf.

9. It is further evident that the alleged seized article has not been produced in the court. In likewise manner, I.O. has not been examined. The witnesses are very much consistent and clear that sample was neither prepared nor sealed at the place of occurrence. They are completely silent whether sample was prepared or not, whether seized Charas was kept, on which date it was sent to FSL.

10. The Hon'ble Apex Court in the case of *Mohinder Singh v. State of Punjab reported in AIR 2018 SC 3798* has observed as follows and for better appreciation the 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.

11. That being so, the judgment of conviction and order of sentence recorded by the learned lower court is set aside. Appeal is allowed.

12. Appellant is under custody, hence is directed to be released forthwith if not wanted in any other case.

(Aditya Kumar Trivedi, J)

perwez

AFR/NAFR	AFR
CAV DATE	N/A
Uploading Date	19.09.2019
Transmission Date	19.09.2019

