

IN THE HIGH COURT OF JUDICATURE AT PATNA

CRIMINAL APPEAL (SJ) No.1175 of 2017

Arising Out of PS. Case No.-37 Year-2012 Thana- KANGLI District- West Champaran

Sanjay Patel, son of Chandrika Patel @ Chandrika Raut, Resident of Village-
Inarwa, P.S.- Kangali, District- West Champaran.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s : Mr.Ram Adya Singh, Adv.
Mr. Arjun Prasad No.I, Adv.
For the Respondent/s : Mr.Sri Abhay Kumar, APP

CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI

ORAL JUDGMENT

Date : 03-07-2019

1. Vide judgment of conviction dated 16.03.2017 and order of sentence dated 23.03.2017 appellant Sanjay Patel has been found guilty for an offence punishable under Section 20(b) (ii)(c) of the NDPS Act and sentenced to undergo R.I. for ten years as well as to pay fine appertaining to Rs.1,00,000/- in default thereof to undergo S.I. for one year, additionally, under Section 22(c) of the NDPS Act sentencing to undergo R.I. for 10 years as well as to pay fine of Rs.1,00,000/- and in default thereof to undergo S.I. for a year, under Section 23(c) of the NDPS Act and sentenced to undergo R.I. for ten years as well as to pay fine appertaining to Rs.1,00,000/- in default thereof to undergo S.I. for



one year, additionally, with a further direction that the sentences should run concurrently, with a further direction that the period having undergone during course of trial will be set off in accordance with Section 428 of the Cr.P.C. by the Additional District & Sessions Judge-IIIrd, West Champaran, Bettiah in Trial No.48/2012 (NDPS Case No.58/2012) arising out of Kangali P.S. Case No.37/2012.

2. Mukesh Kumar (PW.2), Office-in-charge of Kangali Police Station while had gone to village-Maswas along with police party in order to maintain law and order on the eve of Mahaviri Jhanda, he was informed with regard to likelihood of passing of smugglers along with ganja. Accordingly, they proceeded therefrom, came at the orchard of Mithilesh Pandey and cordoned. At about 01:15, AM they perceived five persons coming having bundle over their respective heads whereupon, they pounced and during course thereof, all the smugglers began to flee after throwing the bundle. They all were chased and it is said that one person, Sanjay Patel (Appellant) was apprehended amongst them. Thereafter bundles were searched out, collected. After opening the same ganja has been found and so, seizure list was prepared in presence of two independent witnesses, namely, Mawal Mian and Imam Mian. Then thereafter, fardbeyan was



recorded. After institution of Kangali P.S. Case No.37/2012, investigation commenced and concluding the same, charge sheet has been submitted facilitating the trial, meeting with the ultimate result, subject matter of instant appeal.

3. 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.

4. In order to substantiate its case, prosecution has examined altogether six PWs who are PW.1-Nawal Kishor Kumar, PW.2-Mukesh Kumar, PW.3-Amod Kumar, PW.4-Umesh Yadav, PW.5-Munna Kumar, PW.6-Sidheshwar Prasad Verma. Side by side exhibited Ext.1-seizure list, Ext.1/1-signature of informant over seizure list, Ext.2-fardbeyan, Ext.2/1-endorsement over fardbeyan, Ext.3-formal FIR, Ext.4-inculpatory extra judicial confessional statement of appellant/accused and Ext.5-FSL report.

5. As stated above nothing has been adduced on behalf of defence.

6. Heard learned counsel for the appellant as well as learned APP. Gone through the evidences available on the record. After perusal of the same, it is evident that nothing has been recovered from physical possession of the appellant. Even



from the seizure list as is evident speaks about seizure of one quintal nepali ganja from different yellow colour plastic bags from the orchard of Mithilesh Pandey. It is further evident from the evidence that none of them had stated that appellant was carrying bundle over his head nor, during course of chase he threw bundle having ganja inside. It is further evident from the evidence of the witnesses that none had disclosed regarding source of light. All the witnesses have stated that it was dark night. All the members of the police party scattered during course of chase and so, were unable to say that appellant was one of the smugglers. It is the evidence that they chased and during course thereof, raised alarm whereupon villagers arrived and there was apprehension of one person who disclosed his identity as Sanjay Patel.

7. It is further evident from the evidence of PW.2, Mukesh Kumar, informant that he had not sealed ganja either at the place of occurrence or at the thana. He had not spoken with regard to preparation of sample. PW.6 is the I.O. he had not claimed that he sealed ganja after having entrusted with the investigation, rather he had simply stated at para-4 of his examination in chief that on 27.08.2012 he had filed petition before the District & Sessions Judge for getting the seized article (ganja) chemically examined by the FSL. That means to say, more



than a month after the alleged occurrence, such prayer was made. During cross-examination at para-10 he had stated that he had seen the ganja at the police station. In para-11 he had stated that he had not got opportunity to sealed the ganja. In para-12 he had stated that he had not mentioned in the case diary with regard to preparation of the sample. In para-13 he had stated that he had not mentioned in the case diary whether any sample was taken out or not. In para-14 he had further stated that he had not mentioned in the case diary where ganja was kept. PW.1,2,3,4 who are police personnel as well as chowkidar cipher on that very score. Moreover, ganja has not been produced in the court.

8. *In Vijay Jain v. State of Madhya Pradesh*

reported in **(2013) 14 SCC 527** it has been held:-

“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.”



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

(Aditya Kumar Trivedi, J.)

Prakash Narayan

AFR/NAFR	AFR
CAV DATE	NA
Uploading Date	04.07.2019
Transmission Date	04.07.2019

