

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.1448 of 2017**

Arising Out of PS. Case No.-156 Year-2012 Thana- CHOUTARWA District- West
Champaran

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Junaid Alam, Son of Nazir Miyan, Resident of Village- Murali Tola, P.S.
Bhelahi, District- East Champaran.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

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Appearance :

For the Appellant/s : Mr. Ram Adya Singh-Advocate
For the Respondent/s : Mr. Sujit Kumar Singh -A.P.P.

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**CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
ORAL JUDGMENT**

04-07-2019

Appellant Junaid Alam has been found guilty for an offence punishable under Section 20(b)(ii)(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, 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 and in default thereof, to undergo R.I. for one year, with a further direction to run the sentences concurrently with a further direction that the period having undergone during course of trial will be subject to set off in accordance with Section 428 of the Cr.P.C. by the 5th Additional Sessions Judge, West Champaran at Bettiah relating to trial No.56 of 2012.

2. A.S.I. Nagendra Singh (PW-8) recorded his



self-statement on 11.08.2012 disclosing therein that while he along with other police personnels were engaged in vehicle checking, a motorcycle came, whereupon signaled to stop. As soon as it stopped, pillion rider ran away, however, driver was apprehended. On search, packets having wrapped with his thigh, arm has been found. On interrogation, the accused has disclosed to be Charas. Furthermore, on query, the accused disclosed his identity as Junaid Alam, appellant/ accused and also disclosed identity of his accomplice as Feku Mukhiya, son of Moti Mukhiya, village-Murli Tola Bhilahi, P.S.-Bhilahi, District-East Champaran at Motihari), accordingly, seizure list was prepared.

3. After registration of Chautarba P. S. Case No.156 of 2012, investigation commenced and after concluding the same, chargesheet has been submitted, facilitating the trial, meeting with 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, neither oral nor documentary evidence has been adduced on behalf of defence.

5. In order to substantiate its case, prosecution has examined altogether 12 witnesses, who are PW-1, Anzar Ahmad, PW-2, Dhananjay Rai, PW-3, Lal Bachan Prasad, PW-



4, Naresh Singh, PW-5, Jitendra Mahto, PW-6, Sanjay Musahar, PW-7, Sahdeo Mahto, PW-8, Nagendra Singh, PW-9, Ramjee Sah, PW-10, Bhagan Sah, PW-11, Chhotey Lal Choudhary and PW-12, Akshay Lal Mishra. Side by side, the prosecution has also exhibited as Exhibit-1, endorsement over self-statement of PW-8, Exhibit-2, signature of informant, Exhibit-2/1, signature below endorsement, Exhibit-2/A, signature over formal F.I.R., Exhibit-3, seizure list, Exhibit-3/A, signature of the PW-8 along with seizure list witnesses, Exhibit-4, F.S.L. Report. As stated above, nothing has been adduced on behalf of defence.

6. Heard learned counsel for the appellant as well as learned Additional Public Prosecutor and also gone through the record. From perusal of the record, it is evident that there happens to be two categories of the witnesses. All the independent witnesses have not supported the case of the prosecution while all the officials have supported the case of the prosecution. In midst thereof, it is also evident that two seizure list witnesses namely Amit Kumar and Sadhan Chandra have not been examined. There happens to be no explanation at the end of the prosecution over their non-examination. Furthermore, it is also evident that PW-1 as well as PW-2 have not been cross-examined at the end of the appellant, who have during



their evidence categorically stated with regard to recovery of Charas out of physical search of the appellant. Exhibit-4, F.S.L. Report also suggest that the articles, which were sent to Forensic Science Laboratory has been found to be Charas. In the aforesaid background, now the other part of this case is to be seen. PW-3, PW-4 and PW-8, they have categorically stated during course of vehicle checking a motorcycle came, they signaled to stop, motorcycle stopped, pillion rider succeeded in his escape while driver was apprehended and during course of his physical search, there happens to be recovery of so many packets wrapped with his thigh, arm and the same was seized. PW-8, informant under Para-15 of his cross-examination has admitted that he has got knowledge with regard to the requirements as prescribed under law, which are to be followed during course of physical search of an accused and that his physical search is to be carried out before Magistrate or Gazetted Officer, if he so desires. In Para-16, he has admitted that he has not incorporated in his self-statements or in the diary that aforesaid mandatory provision has been complied with, nor during course of evidence deposed likeso.

7. Apart from this, when the evidence of remaining police officials have been gone through, it is apparent



that they have not uttered a word on that very score that means to say, there happens to be clear cut violation of Section 50 of the N.D.P.S. Act.

8. In Constitution Bench Decision ***reported in (2011) 1 SCC 609, Vijay Singh Chandubha Jadeja vs. State of Gujarat***, it has been observed that non-compliance of Section 50 of the N.D.P.S. Act during course of physical search is hazardous to the prosecution and recently, the same has been followed in ***SK Raju alias Abdul Haque alias Jagga v. State of West Bengal reported in 2019 CRI.L.J. 407 (SC)***, wherein 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*”), (2011) 1 SCC 609, 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. Now, coming to another aspect, which relates with the activity of the official, who seized the narcotic substance. ***Under Order No.1/88, 1/89***, there happens to be specific direction as well as necessary guidelines have been laid down in what manner the narcotic substance is to be dealt with how there should be sampling, compliance of Sub-section-2 of Section 52(A) of the N.D.P.S. Act. When the aforesaid guidelines are taken together with the evidence of the witnesses, it is apparent that none had stated that seized narcotic substance (Charas) was sealed at the spot and before sealing, samples were prepared, which were also sealed. The informant (PW-8) in his examination-in-chief did not depose on that very score. In Para-22 of his cross-examination, he has stated that at the P.O., packets were not opened. Accused himself disclosed the items to be Charas. When the evidence of PW-4, I.O. has been gone



through, in his examination-in-chief, he has not disclosed anything, save and except, he had filed a petition before the District & Sessions Judge on 29.09.2012 and on the same day, he got order, but from the Exhibit-4, it is evident that it was sent to F.S.L. on 25.09.2012 through special messenger. When his evidence is taken and considered over the question of sampling, from Para-26, there happens to be cross-examination on that very score. At Para-26, he has stated that seized articles were kept in Malkhana before transmitting to F.S.L. In Para-27, 28, he has stated that he had not incorporated the same in the case diary, who had kept it in Malkhana and articles were deposited in Malkhana. In Para-33 read with Para-37 wherein he has not mentioned nor any document has been placed to suggest that sample was prepared after taking some parts from all the packets. In Para-36, he has admitted that he had not mentioned in the case diary whether seized articles were sealed or not. It is also evident from the lower Court record that so alleged seized articles have not been produced in Court and on that very score, the Hon'ble Apex Court has taken serious view as observed in ***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.

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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.”

10. In the aforesaid facts and circumstances of the case, the judgment impugned did not find favour, whereupon is set aside. Appeal is allowed. Appellant is under custody, hence is directed to be released forthwith, if not wanted in any other.

(Aditya Kumar Trivedi, J)

Vikash/-

AFR/NAFR	A.F.R.
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