

**IN THE HIGH COURT OF JUDICATURE AT PATNA**  
**CRIMINAL APPEAL (SJ) No.4853 of 2018**

Arising Out of PS. Case No.-90 Year-2011 Thana- Bhagalpur Kotwali District- Bhagalpur

Madan Das, son of Late Tarni Das, resident of Village- Mirjapur, P.S.- Sabour,  
District- Bhagalpur.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

**Appearance :**

For the Appellant/s : Mr.Manoj Kumar Jha, Adv.

For the Respondent/s : Mr. Zeyaul Hoda, APP

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

**Date : 25-07-2019**

1. Madan Das has been found guilty for an offence punishable under Section 20 of the NDPS Act and sentenced to period already undergone as well as to pay fine appertaining to Rs.2000/- in default thereof to undergo S.I. for two months, additionally, vide judgment of conviction and order of sentence dated 20.11.2018 passed by Seventh Additional Sessions Judge, Bhagalpur, in Trial No.2/2017 arising out of Kotwali (Tilkamanjhi) P.S. Case no.90/2011.

2. Superintendent of Jail, namely, Jitendra Kumar (PW.4) filed written report on 17.02.2011 disclosing therein that appellant/accused Madan Das a Home Guard Constable has been apprehended with 40 sachets of Ganja. On query, he confessed to have purchased it from Md. Jamal and was going to handover to Kari.

3. After registration of Kotwali (Tilkamanjhi) P.S. Case no.90/2011 investigation commenced and concluded by way of



submission of charge sheet 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, neither ocular nor documentary evidence has been adduced.

5. Altogether six PWs have been examined on behalf of prosecution, PW.1-Ram Naresh Sharma, PW.2-Sanjeev Kumar, PW.3-Birendra Kumar Roy, PW.4-Jitendra Kumar, PW.5-Nand Kumar Singh and PW.6-Bijay Prasad Singh as well as has also exhibited, Ext.1-Signature of PW.1 over seizure list, Ext.1/1-Signature of PW.2 over seizure list, Ext.1/2-signature of PW.3 over seizure list, Ext.1/4-Signature of PW.5 over the seizure list, Ext.2-Seizure list, Ext.3-confessional statement of appellant/accused, Ext.4-Letter attached with FSL report, Ext.4/1-FSL Report, Ext.5-Formal FIR.

6. Heard learned counsel for the appellant, learned APP as well as also gone through the judgment impugned.

7. From perusal of the judgment more particularly paragraph-14, it is evident that learned lower court has found following defects on the record (a) seizure list does not contain signature of the appellant /accused, (b) non-compliance of Section 42 but, the same has been ignored in the background of the fact that it might be a genuine mistake and further, considering the place of search and seizure could not attract applicability of Section 42 of the Cr.P.C.



8. When the seizure list has been gone through, it is evident that it speaks about something strange as, at column no.3 containing the heading name of the person who produced, bore two names, the first one Sanjeev Kumar and second Birejdra Kumar and so far witnesses are concerned, (column no.4) names of Ram Naresh Sharma and Nand Kumar Singh have been mentioned. Production of two persons suggest joint possession which ought not to be more particularly in the background of the fact that either the senior most official should have produced or the person under him. Be that as it may, the aforesaid eventuality has got some sort of relevance when the evidence of relevant witnesses have been gone through. Before coming to the evidence, it is needless to say that appellant/accused is a Home guard constable and was deployed at central jail since one year back.

9. PW.1, Ram naresh Sharma has claimed that he had searched out accused Madan Das, Home Guard Constable and during course thereof, he had searched out 40 sachets of *ganja* whereupon he had informed the concerned official namely, Sanjeev Kumar, Jailor. PW.2 has stated that Ram Naresh, Bacchu Singh and Nand Kumar Singh have searched out Madan Das and during course thereof 40 sachets of *ganja* was seized. PW.5 has claimed that as directed by Head Constable, Ram Naresh Sharma, he had done frisking and during course thereof, from the bag (Jhola) of Madan Das 40 sachets of *ganja* was seized. PW.3 had stated that after hearing uproar that *ganja* has been recovered from the possession of a Home Guard he rushed and



then found Ram Naresh Sharma (PW.1), Nand Kumar Singh (PW.5) and Indranath Singh (not examined) have produced the Madan Das before Jailor Sanjeev Kumar. That means to say the prosecution is not consistent who had made frisking of appellant/accused Madan Das followed with recovery and this cast serious doubt over authenticity of the prosecution case.

**10.** Apart from this, when the evidence of I.O. PW.6 has been minutely gone through, it is evident that he has spoken a word over sealing of seized *ganja* at the spot and in likewise manner preparation of sample, having signature of witnesses along with accused thereupon. But contradiction thereto, none of the witnesses have stated that sealing/sampling of the seized *ganja* was ever done in their presence. PW.6 has not spoken, though during course of evidence he has stated that on transfer he had handed over charge to the then O/c on 21.02.2011, till then neither any prayer was made before the Sessions Judge for procurement of an order relating to examination of the seized *ganja* nor the same was produced. From Ext.4/A, it is evident that order was procured on 02-04-2011 and although, the same was transmitted through special messenger C/746 Chandra Shekhar Prasad but it was received at the office of FSL Laboratory on 25.05.2011 without any explanation. It is also evident from the record that during course of trial the material exhibit has not been produced nor there happens to be an explanation in a way that the same has been



destructured even then, the destruction report should have been in accordance with Section 52A of the NDPS Act.

**11.** In *Mohinder Singh v. State of Punjab* reported in *AIR 2018 SC 3798*, it has been held:

“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 nonproduction 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."

12. Giving anxious consideration to the facts and circumstances as enumerated herein-above inconsonance with the legal principle so propagated by the Apex Court so referred did not justify the finding so recorded by the learned lower court. Consequent thereupon, same is set aside. Appeal is allowed.

(Aditya Kumar Trivedi, J)

Prakash Narayan

|                   |            |
|-------------------|------------|
| AFR/NAFR          | AFR        |
| CAV DATE          | NA         |
| Uploading Date    | 30.07.2019 |
| Transmission Date | 30.07.2019 |

