

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.404 of 2016

Arising Out of PS. Case No.-28 Year-2013 Thana- VIJAYEPUR District- Gopalganj

1. Parshuram Bind and Anr S/o Hari Bind, Resident of Village- Chore Tola Dewrwan, P.S.- Gopalpur Dist- Gopalganj.
2. Sarvanand Ram Son of Late Raghunandan Ram, Resident of Village- Ratanpura, P.S.- Yadopur, Dist- Gopalganj.

... .. Appellants

Versus

The State Of Bihar Through B.P. Alok

... .. Respondent

Appearance :

For the Appellants	:	Mr. Ansul, Adv. Mr. Abhinav Ashok, Adv. Mr. Aditya Pandey, Adv. Ms Sagarika, Adv. Mr. Navneet Kumar, Adv. Ms Shashi Bala Verma, APP
For the Respondent	:	Ms Shashi Bala Verma, APP

CORAM: HONOURABLE MR. JUSTICE ASHWANI KUMAR SINGH
and
HONOURABLE MR. JUSTICE ARVIND SRIVASTAVA

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE ASHWANI KUMAR SINGH)

Date : 25-02-2021

Heard Mr. Ansul, learned counsel for the appellants
and Ms Shashi Bala Verma, learned Additional Public
Prosecutor of the State.

2. The appellants have preferred the present appeal
against the judgment and order dated 29.02.2016 and
05.03.2016 respectively passed by the learned 1st Additional
Sessions Judge, Gopalganj in Trial Case No. 42 of 2013 arising
out of Vijayepur P.S. Case No. 28 of 2013 whereby they have



been held guilty of the offences punishable under Section 20(b) (ii)(C) of the Narcotic Drugs and Psychotropic Substances Act (for short 'NDPS Act') and sentenced to undergo R.I. for 12 years and to pay a fine of Rs.1,00,000/- each and on failure to pay the amount of fine to undergo imprisonment for a further period of three years.

3. The first information report (for short 'FIR') of Vijaipur P.S. Case No. 28 of 2013 was registered on 28.02.2013 at 2:30 p.m. on the basis of written statement of Station House Officer of Vijayepur Police Station Mr. B.P. Alok. He had recorded his self-statement on 28.02.2013 at 5:00 a.m. at village Dobhal on Gangachapar Majhbaliya main road. In his written statement, he has recorded that he received an information from Sub-Inspector of Police (for short 'SI') Mr. H.N.Singh at 2:30 a.m. on 28.02.2013 to the effect that one white Indigo CS car bearing registration No. UP32BE-8398 loaded with Ganja is likely to pass through Majhbaliya Bazar to Mushahari Bazar in the night. The information so received was entered into station diary entry and an information in this regard was sent to the Sub-Divisional Police Officer (for short 'SDPO') Mr. Anand Kumar Pandey. The SI H.N.Singh, who was on night patrolling duty, was directed to be vigilant and await for the Indigo car. He



took Chowkidar Pawan Kumar Singh and Ram Pyare Gond and proceeded to Gangachapar Majhbaliya main road where the SI H.N.Singh, who was on patrolling duty, was present from before. They all kept waiting for the white Indigo car regarding which the information was received to pass. At around 3:30 a.m. the SDPO also reached there. Immediately after his arrival, a white Indigo car was seen coming towards them. On seeing the police patrolling party, two persons, who were sitting inside the car came out and started fleeing away. The police patrolling party apprehended them after a brief foot pursuit.

4. It is further stated in the self written statement by Mr. B.P. Alok that in order to verify the prior information received by the police, a search of the suspected car was made in presence of two independent witnesses, namely, Gorakh Ram and Dwarika Gond and from the dickey of the car, two white coloured plastic bags containing 25 packets of Ganja each and a red coloured polythene bag containing two bundles of Ganja were recovered. At the place of search of the vehicle itself, ASI Rajesh Kumar Hansda brought weighing machine from Sanjay Gupta. The recovered Ganja from the dickey of the Indigo car was weighed. Total weight of 50 packets Ganja found from the white coloured plastic bags was 50 kg and the total weight of



Ganja recovered from two packets found from red coloured polythene bag was 16 kg. The contents of all the bags were mixed and three samples of 250 gm each were drawn. They were marked as S-1, S-2 and S-3. The samples were sealed and labelled before the independent witnesses, who signed on them and the signature of the accused persons was also taken on the same.

5. On the basis of the aforestated self written statement, Mr. B.P. Alok, the Police sub-inspector-cum-S.H.O. registered a formal FIR under Sections 8, 20 and 22 of the NDPS Act against the appellants and handed over the investigation of the case to S.I. H.N. Singh.

6. On completion of investigation, the investigating officer found the allegations made in the FIR to be true and sent up the appellants for trial for the offences punishable under Sections 8, 20 and 22 of the NDPS Act. After taking cognizance of the offence and supplying the requisite documents to the accused persons in terms of Section 207 of the Cr.P.C, the trial court framed charges under Sections 20 and 22 of the NDPS Act against the appellants for having found in possession of 66 kg Ganja from the dickey of Tata Indigo car in contravention of Section 8 of the NDPS Act.



7. Since the appellants did not plead guilty, they were put on trial.

8. The prosecution examined nine witnesses in order to prove its case and exhibited seizure list (Ext.-1), fardbeyan (Ext.-2) and the report of Forensic Science Laboratory (Ext.-3).

9. Out of nine witnesses examined on behalf of the prosecution, P.W.2 B.P. Alok was the S.H.O. of Vijayapur Police Station, P.W.7 H.N.Singh was the investigating officer of the case, P.W.1 Rajesh Kumar Hansda, P.W.5 Satya Narayan Ram, P.W.6 Pradeep Kumar Yadav and P.W.8 Ramanuj Kumar were the members of the patrolling party whereas P.W.3 Ram Pyare Gond, P.W.4 Pawan Kumar Singh were the Chowkidars, who had gone together with the S.H.O. B.P. Alok after receipt of information from SI H.N.Singh to the place where the Indigo car was intercepted and on search recoveries of Ganja were made. P.W.9 Seema Patel was the Senior Scientific Officer of the Forensic Science Laboratory (for short 'FSL'). She had tested the samples sent to the FSL in connection with the instant case and submitted her report.

10. P.W.1 Rajesh Kumar Hansda stated in his deposition that at the relevant time he was posted in Vijayapur Police Station. He stated that his senior officer D.P.Yadav, who



was there on patrolling duty informed him over phone to bring weighing machine. On his instruction, he went to the shop of one Sanjay Gupta and brought the weighing machine. He stated that the seized Ganja was weighed and was found to be 66 kg. In cross-examination, he stated that he was informed by Mr. D.P. Yadav and the S.H.O. B.P. Alok that Ganja was recovered from the Indigo car and the accused persons, who were arrested, were occupying the car. He admitted that in his presence Ganja was not recovered from the accused persons. He also admitted that the packets of Ganja were closed and were not opened in his presence.

11. P.W.2 Mr. B.P. Alok reiterated the facts stated in his written statement in his examination-in-chief. He stated that the seizure list was prepared at the place of seizure itself over which he and the investigating officer H.N.Singh had put their signature. He proved his signature on the seizure list, which was marked as Ext.-1. He also proved his self statement, which was marked as Ext.-2. In cross-examination, he admitted that he did not draw sample separately from different packets containing Ganja. He also admitted that though the Indigo car was seized, he could not locate the owner of the car. He denied the defence suggestion that he had instituted a false case. He also denied that



no incriminating article was recovered from the car in question.

12. P.W.3 Ram Pyare Gond, Chowkidar and member of the raiding party stated in his deposition that from the car in question two bags containing Ganja were recovered. He failed to identify the accused persons. He admitted in his cross-examination that Ganja was not weighed in his presence.

13. P.W.4 Pawan Kumar Singh, another Chowkidar and member of the raiding team supported the prosecution case as narrated in the FIR. However, in cross-examination, he admitted that in his presence samples of Ganja were not drawn at the place of occurrence. He also stated that he cannot say that any weighing machine was brought at the place of occurrence.

14. P.W.5 Satya Narayan Ram, a Hawaldar and member of the raiding party stated in his deposition and in cross-examination that Ganja was weighed at the police station. He admitted in his cross-examination that no seizure list was prepared at the place of occurrence. He further admitted that the signature of the accused was taken on the seizure list at the police station.

15. P.W.6 Pradeep Kumar Yadav, a constable and a member of the raiding party did not say anything about the drawing of sample at the place of seizure in his deposition. He



admitted during cross-examination that the SDPO had not come at the place of seizure. He has stated that the seizure list was prepared at the place of seizure itself.

16. P.W.7 H.N. Singh, the sub-inspector-cum-investigating officer of the case stated in his deposition that he was tipped off about transportation of Ganja in a white Indigo car bearing registration no. UP32BE-8398 while he was on patrolling duty. He immediately informed the S.H.O. regarding it on phone. He has corroborated the prosecution case as stated in the FIR. He stated that he was part of the raiding team, which had intercepted the car and arrested the accused persons. He further stated that he sent the samples to FSL, Patna. He did not mention the date on which the samples were sent. He stated during cross-examination that he is not aware that a witness to the occurrence cannot be the investigating officer of the case. He denied the defence suggestion that he had made faulty investigation.

17. P.W.8 Ramanuj Kumar was also a member of the raiding party. He stated in his deposition that when the Indigo car was intercepted, the accused persons were sitting inside the car, but when the raiding team carried on search of the car, they started to flee. They were apprehended after foot pursuit. He



stated that only two packets were recovered from the dickey of the car containing 32-33 kg Ganja each. He further stated that after opening the packets, three samples of 2.5 gm each were drawn and the rest of the Ganja was sealed. He stated in cross-examination that he cannot say whether any independent person was present at the place of seizure. He also failed to describe the boundary of the place of seizure. He stated that he cannot say the duration of time taken in completing the formality at the place of seizure. He could not name the villages situated near the place of seizure.

18. P.W.9 Seema Patel, a Senior Scientific Officer, FSL, Patna stated in her deposition that she received three cartons relating to Vijayapur P.S. Case No. 28 of 2013, which were covered by clothes and sealed. She got them marked as A, B and C. They contained some dry pressed greenish brown coloured flowering and fruiting vegetable substances. She proved the FSL report, which was marked as Ext.-3.

19. After examination of the aforesaid nine prosecution witnesses, the prosecution case was closed. The trial court examined the appellants and recorded their statements under Section 313 of the Cr.P.C in the following manner :-

Question :- Have you heard the evidence of



witnesses ?

Answer :- Yes.

Question :- The evidence against you is that on 28.02.2013 at about 2.30 in the night during search of the dickey of Tata Indigo car bearing registration no. UP32BE-8398 made at village Dobhal in Gangachapar Majhbaliya main road near Tinmuhani, in two white coloured plastic bags 25 packets each and from a red coloured polythene bag two bundles of Ganja were recovered and the total weight of Ganja kept in white plastic bags was around 50 kg and the total weight of Ganja kept in red coloured polythene bag was about 16 kg regarding which you neither produced any document nor offered any satisfactory explanation?

Answer :- I am innocent.

20. After recording of the statements of the appellants under Section 313 of the Cr.P.C, the defence did not adduce any oral or documentary evidence and defence case was closed. Thereafter, the parties led their oral arguments pursuant to which the impugned judgment of conviction and order of sentence were passed by the trial court.



21. Assailing the impugned judgment of conviction and order of sentence passed by the trial court, Mr. Ansul, learned counsel appearing for the appellants submitted :-

(i) The station diary entry alleged to have been made pursuant to the receipt of information from the investigating officer of the case H.N. Singh by the S.H.O.-cum-informant B.P. Alok has deliberately been withheld, which has caused great prejudice to the case of the defence.

(ii) Though the S.H.O. in his self written statement states that after receipt of the information, he had informed the SDPO Anand Kumar Pandey, neither the written report sent to SDPO was proved nor the SDPO Anand Kumar Pandey was examined as a prosecution witness during trial. His non-examination has caused great prejudice to the defence case.

(iii) The two independent witnesses, namely, Gorakh Ram and Dwarika Gond, who are witnesses to the alleged seizure of Ganja, were not examined during trial. Their non-examination has greatly prejudiced the case of the defence.

(iv) Neither the contraband Ganja was produced as material exhibit during trial nor any evidence was led regarding its disposal in terms of Section 52-A of the NDPS Act.



(v) The prosecution did not adduce any evidence regarding safe custody of the seized Ganja. It failed to produce Malkhana register. It also failed to examine the Malkhana incharge in order to prove that the seized Ganja was kept in safe custody.

(vi) The witnesses examined during trial have contradicted each other on vital points. They have not corroborated the prosecution case in material particular.

(vii) The FSL report as reproduced in the deposition of P.W.9 Seema Patel does not mention the description of sample. It also does not mention that the cover was sealed with an impression of seal.

(viii) The sample does not mention the details of weight of samples received so as to connect the same with the samples sent.

(ix) The FSL report merely states that the sample was Ganja, but it does not mention about the details of the tests on which the aforesaid finding had been reached.

(x) There is total non-compliance of Section 42(2), 57 and 55 of the NDPS Act.

(xi) The prosecution has alleged seizure of two white coloured plastic bags containing 25 packets each and a red



coloured polythene bag containing 2 packets, but only three samples were taken and that too by mixing the materials seized from those packets and, thus, the seizure of 52 packets of contraband could not be proved.

(xii) The attention of the accused persons was not drawn to the inculpatory piece of evidence to give them opportunity to offer an explanation. Hence, the circumstances not put to the accused in their examination under Section 313 of Cr.P.C cannot be used against them.

22. Per contra, Ms Shashi Bala Verma, learned counsel appearing for the State submitted :-

(i) The prosecution has proved its case beyond reasonable doubts by leading cogent evidence.

(ii) The trial court has appreciated the facts and law in correct perspective. The reasons assigned by the trial court for arriving at the conclusion of guilt are neither bad nor perverse.

(iii) The police patrolling party had acted upon the tip off received by it regarding the transportation of consignment of Ganja in a white Indigo car pursuant to which the Station Diary Entry was made and the car was intercepted and on search the consignment was recovered from the dicky of the car, which was being occupied by the appellants.



(iv) The search and seizure was made in accordance with law and as such even if the confidential information received from the investigating officer by the S.H.O. was not transmitted to the immediate superior officers in terms of Section 42 of the NDPS Act, the same would not vitiate the trial.

(v) The case of the prosecution would not fall merely because seizure list witnesses were not examined during trial. The seizure list was proved by the prosecution during trial and, thus, non-examination of seizure list witnesses has caused no prejudice to the defence case.

(vi) The expert report submitted by P.W.9 cannot be faulted with merely because the manner of test has not been disclosed or weight of the samples received was not disclosed.

(vii) The mandatory provisions of law were duly complied with during investigation by the police.

(viii) There cannot be any adverse inference due to non-examination of the SDPO.

23. We have heard the rival submissions made on behalf of the parties and carefully perused the materials on record.

24. Firstly, we would like to deal with the scope and significance of examination of appellants under Section 313 of



the Cr.P.C. The purpose of enquiry report and to examine the accused under Section 313 of the Cr.P.C. is to meet the requirement of principle of natural justice that no one should remain unheard.

25. In this regard, it would be apt to reproduce Section 313 of the Cr.P.C:-

“313. Power to examine the accused.

(1) In every inquiry or trial, for the purpose of enabling the accused personally to explain any circumstances appearing in the evidence against him, the Court-

(a) may at any stage, without previously warning the accused, put such questions to him as the Court considers necessary;

(b) shall, after the witnesses for the prosecution have been examined and before he is called on for his defence, question him generally on the case: Provided that in a summons- case, where the Court has dispensed with the personal attendance of the accused, it may also dispense with his examination under clause (b).

(2) No oath shall be administered to the accused when he is examined under subsection (1).

(3) The accused shall not render himself liable to punishment by refusing to answer such questions, or by giving false answers to



them.

(4) The answers given by the accused may be taken into consideration in such inquiry or trial, and put in evidence for or against him in any other inquiry into, or trial for, any other offence which such answers may tend to show he has committed.”

26. The plain reading of Section 313 of the Cr.P.C. would demonstrate that the question under clause (1)(a) is discretionary. It empowers the court to put such questions to the accused as the court considers necessary for the purposes of enabling him personally to explain any circumstances appearing in the evidence against him at any stage without previously warning. However, clause (1)(b) empowers the court to question the accused generally on the day after the witnesses for the prosecution have been examined and before he is called upon for his defence. It casts a duty on court to give an opportunity to the accused to explain the incriminating material against him.

27. In *State of U.P. Vs. Mohd. Iqram & Anr*, since reported in *AIR 2011 SC 2296*, the Supreme Court held :-

“Attention of the accused must specifically be drawn to inculpatory pieces of evidence to give him an opportunity to offer an explanation if he chooses to do so. Court is under legal obligation to put all incriminating



circumstances before accused to solicit his response. This provision is mandatory in nature and casts an imperative duty on the court and confers a corresponding right on the accused. Circumstances not put to the accused in his examination under section 313, cannot be used against him.”

28. In *Naval Kishore Vs. State of Bihar*, since reported in *(2004) 7 SCC 502*, the Supreme Court observed that the opportunity of examination under section 313 given to the accused is part of a fair trial and if it is done in a slipshod manner, it may result in imperfect appreciation of evidence. In the said case, the Supreme Court further observed that the practice of putting the entire evidence against the accused in a single question and giving an opportunity to explain the same is improper as the accused may not be in a position to give a rational and intelligent explanation.

29. In *Tara Singh Vs. The State of Punjab* since reported in *AIR 1951 SC 44*, the Supreme Court held as under :-

“... it is not sufficient compliance to string together long series of facts and ask the accused what he has to say about them. He must be questioned simply and separately about each material circumstance which is intended to be used against him. The



questioning must be fair and framed in a form which an ignorant and illiterate person may be able to appreciate and understand. Even if the accused is not illiterate, his mind is apt to be perturbed when he is facing a trial of murder. Therefore, it is required that each material circumstance should be put simply and separately in a way that an illiterate person can appreciate and understand. Even when an accused person is not illiterate, his mind is apt to be perturbed when he is facing a charge of murder. He is therefore in no fit position to understand the significance of a complex question. Fairness therefore requires that each material circumstance should be put simply and separately in a way that an illiterate mind, or one which is perturbed or confused, can readily appreciate and understand.”

30. Having regard to the statutory requirements of Section 313 of the Cr.P.C and the ratio laid down by the Supreme Court prescribing the proper mode to be adopted by the court for recording the statement of the accused persons under Section 313 of the Cr.P.C, when we look to the present case, we find that the attention of the accused persons was not drawn to explain the following incriminating circumstances while examining them under Section 313 of the Cr.P.C:-

(a) When the Indigo car was intercepted, the accused



persons were sitting inside the car and on seeing the police party they alighted from the vehicle and started fleeing away.

- (b) They were chased and were apprehended after foot pursuit.
- (c) The seized contraband was weighed at the place of seizure itself.
- (d) The contents of all the packets seized from the dickey of the car were mixed and three samples of 250 gms each were drawn at the place of seizure.
- (e) The samples were marked as S-1, S-2 and S-3 and were sealed before two independent witnesses.
- (f) The sealed samples were labeled at the place of seizure in presence of two independent witnesses and their signature was obtained on those labels.
- (g) The seizure list was prepared at the place of seizure and a copy of the same was handed over to the accused persons.
- (h) The accused persons put their signature on the seizure list.
- (i) The samples were sent to the FSL for test.
- (j) The test report confirmed that the seized material



was Ganja.

31. We further find that except asking from the accused persons that on 28.02.2013 at about 2.30 in the night in course of search from the dickey of Tata Indigo car bearing registration no. UP32BE-8398 at village Dobhal in Gangachapar Majhbaliya main road near Tinmuhani in two white coloured plastic bags 25 packets each and from a red coloured polythene bag two bundles of Ganja were recovered total weight of which was found to be 66 kg for which they could not offer satisfactory explanation nothing else was asked from them while examining them under Section 313 of the Cr.P.C. The other incriminating circumstances, as noted above, associated against them were not specifically explained by the trial court.

32. Apparently, the trial court has examined the accused appellants under Section 313 of the Cr.P.C in a slipshod manner. Several incriminating circumstances associated against them were not explained in order to seek their explanation. It has rightly been argued by the learned counsel for the appellants that the circumstances not put to the accused persons in their examination under Section 313 of the Cr.P.C cannot be used against them.

33. Coming back to the appreciation of evidence, we



find that the witnesses examined on behalf of the prosecution are not consistent. We have seen that P.W.1 Rajesh Kumar Hansda has stated in his deposition that he had brought the weighing machine from the shop of one Sanjay Gupta and the seized Ganja was weighed at the place of seizure itself and was found to be 66 kg. He also admitted that the packets of Ganja were closed and were not opened at the place of seizure. He admitted that he was informed by one D.P. Yadav and the S.H.O. that Ganja was recovered from the Indigo car and the accused persons, who were arrested were occupying the said car. When we compare his testimony with that of P.W.2 B.P. Alok, the S.H.O. and P.W.7 H.N. Singh, the sub-inspector-cum-investigating officer of the case, we find that their testimonies are not in alignment with each other. P.W.2 and P.W.7 have contradicted P.W.1 by stating that the seizure list was prepared at the place of seizure and the signature of the accused persons was taken over it at the place of seizure itself. They have also stated that the Ganja packets were opened at the place of seizure and the contents were mixed and, thereafter, three samples were drawn at the place of seizure itself.

34. Further, we also find that P.W.2 and P.W.7 have been contradicted by P.W.4 and P.W.5 on the point of



preparation of seizure list and drawing of samples at the place of seizure itself. P.W.4, a chowkidar and also a member of the raiding party stated in his deposition that in his presence the samples of seized Ganja were not drawn at the place of seizure. He also stated that he cannot say that any weighing machine was brought at the place of seizure whereas P.W.5 has admitted in his cross-examination that the seized Ganja was weighed at the police station and that no seizure list was prepared at the place of seizure. P.W.5 also admitted in cross-examination that his signature was taken at the police station.

35. We further find inconsistencies in the FIR and the evidence of P.W.2, P.W.7 and P.W.8 in respect of the quantity of Ganja drawn as sample. It is mentioned in the FIR that three samples of 250 gms each were drawn from the seized contraband, which were sent to the FSL for test. The said statement has been corroborated by P.W.2 and P.W.7 in their testimony, but P.W.8 Ramanuj Kumar, a member of the raiding party, stated in his deposition that three samples of only 2.5 gm each were drawn from the seized contraband and the rest of the Ganja was sealed.

36. We further find from the deposition of expert witness P.W.9 Seema Patel as also the FSL report marked as



Ext.-3 that weight of the samples sent to the FSL has not been mentioned. Thus, it remains a mystery as to what quantity of Ganja was drawn as sample and sent to the FSL for test.

37. We also find that the consistent case of the prosecution is that from the dickey of the car two white coloured plastic bags containing 25 packets Ganja and in a red coloured polythene bag containing two bundles of Ganja were recovered, but, surprisingly, P.W.8 has given a different version. He has stated in his deposition that from the dickey of the car only two bundles each containing 32-33 kg Ganja were recovered.

38. We find that the seal has not been produced in the court. There is no definite statement with regard to sealing by any witness. It was the S.H.O. and the investigating officer, who were responsible for keeping the samples in safe custody. They have neither produced the seal nor the Malkhana register during trial. There is nothing on record to show as to who and where the samples of contraband were kept between the date of seizure on 28.02.2013 and the date of their transmission to the FSL that is 07.05.2013 and thereafter.

39. We further find that there is nothing on record to suggest that 66 kg Ganja was actually recovered or kept



anywhere in the custody of the S.H.O. or the Malkhana incharge. The seized Ganja was never produced before the court. It is not even the case of the prosecution that the seized Ganja was disposed of in terms of Section 52-A of the NDPS Act. Thus, the story of seizure of 66 kg Ganja itself becomes highly doubtful.

40. In *Ashok Vs. State of M.P.*, since reported in *(2011) 5 SCC 123*, the Supreme Court opined that in the trial it was necessary for the prosecution to establish by cogent evidence that the alleged quantities of *charas* and *ganja* were seized from the possession of the accused. The Supreme Court held that the best evidence would have been the seized materials which ought to have been produced during the trial and marked as material objects. In the said case, it was observed that there is no explanation for this failure to produce them and mere oral evidence as to their features and production does not discharge the heavy burden which lies on the prosecution, particularly where the offence is punishable with a stringent sentence as under the NDPS Act. The Supreme Court also noted in the said case that panchas had turned hostile so the panchnama was nothing but a document written by the police officer concerned.

41. Here in the present case also, the so called two



independent seizure list witnesses were not examined during trial. The seized Ganja was not produced before the court. There is no explanation for this failure. The mere oral evidence by the members of the raiding party to the quantity of Ganja seized would not discharge the heavy burden which lies on the prosecution. The present case is squarely covered by the ratio laid down by the Supreme Court in *Ashok Vs. State of M.P* (Supra).

42. Having noticed the aforesaid inconsistencies in the testimony of witnesses, when we look to the compliance of Section 42 of the NDPS Act, we find that P.W.2 consistently stated that on receipt of the tip off from the P.W.7, he informed the SDPO on telephone and the SDPO reached at the place of occurrence, but no other witness stated about either informing the SDPO or his arrival at the place of occurrence. On the contrary, P.W.6 has contradicted the P.W.2 B.P. Alok by admitting in his deposition that the SDPO had not come at the place of occurrence. In any view of the matter, there is nothing on record to suggest that any written information was forwarded by the P.W.2 after receipt of the information regarding transportation of Ganja by an Indigo car.



43. Section 42 of the NDPS Act deals with power of entry, search, seizure and arrest without warrant or authorization. For application of Section 42 of the NDPS Act, it is necessary that the officer empowered thereunder, before exercise of his right, has reason to believe from personal knowledge or information received regarding the movement of narcotic drug or psychotropic substance. However, if the action is taken not upon his personal knowledge or information received, the requirements of Section 42 of the NDPS Act would not be applicable. Under Section 42(2) of the NDPS Act, such empowered officer, who takes down any information in writing or records the grounds under proviso to Section 42(1), is required to send a copy thereof to his immediate official superior within 72 hours.

44. In *Karnail Singh Vs. State of Rajasthan*, since reported in *(2000) 7 SCC 632*, the Supreme Court held that while total non-compliance of requirement of sub-sections (1) and (2) of Section 42 of the NDPS Act is impermissible, delayed compliance with satisfactory explanation about the delay will be acceptable compliance of Section 42 of the NDPS Act. The Constitution Bench of the Supreme Court by way of illustration



explained that if any delay resulted in the accused escaping or the goods or evidence being destroyed or removed, not recording in writing the information received, before initiating action, or non-sending a copy of such information to the official superior forthwith, may not be treated as violation of Section 42 of the NDPS Act. But if the information was received when the police officer was in the police station with sufficient time to take action, and if the police officer fails to record in writing the information received, or fails to send a copy thereof, to the official superior, then it will be a suspicious circumstance being a clear violation of Section 42 of the NDPS Act. Similarly, where the police officer does not record the information at all, and does not inform the official superior at all, then also it will be clear violation of Section 42 of the NDPS Act. Whether there is adequate or substantial compliance with Section 42 of the NDPS Act or not is a question of fact to be decided in each case.

45. Here in the present case, the case of the prosecution is that P.W.7 informed P.W.2 on phone about transportation of consignment of Ganja in a white Indigo car bearing registration no. UP32BE-8398. The said information was entered into the station diary and was communicated to the SDPO by the P.W.2. Thereafter, he proceeded to the place of occurrence along with



chowkidars (P.W.3 and P.W.4). The contentions of P.W.2 and P.W.7 in this regard have not been corroborated by the prosecution. Recording of information in writing itself has not been proved by the prosecution. The station diary entry has also not been proved by the prosecution during trial. The SDPO, who is said to have received the information, has not been examined during trial. Thus, it can safely be said that the prosecution has failed to prove that the information regarding transportation of consignment of Ganja received by the S.H.O. was transmitted in writing to any superior officer.

46. Hence, the procedural requirements as contemplated under Section 42(2) of the NDPS Act were not complied with at all.

47. Further, Section 57 of the NDPS Act provides that whenever any person makes any arrest or seizure under this Act, he shall, within forty-eight hours next after such arrest or seizure, make a full report of all the particulars of such arrest or seizure to his immediate official superior. In the instant case, there is nothing to suggest that the provisions prescribed under Section 57 of the NDPS Act were complied. We are of the opinion that the non-compliance of the provisions of Sections 42 and 57 of the NDPS Act has seriously prejudiced the case of



the defence.

48. In *Kishan Chand Vs. State of Haryana*, since reported in *(2013) 2 SCC 502*, the Supreme Court while dealing with compliance of provisions of Sections 42 and 57 of the NDPS Act opined that when there is total and definite non-compliance with such statutory provisions, the question of prejudice loses its significance. It will per se amount to prejudice. These are indefeasible, protective rights vested in a suspect and are incapable of being shadowed on the strength of substantial compliance.

49. In view of the discussions made above, it is evident that not only the witnesses examined during trial have contradicted each other on vital issues and the seized Ganja was never produced before the court but the statutory provisions of the NDPS Act have also not been complied with at all. There are serious infirmities on the basis of which the judgment of conviction and order of sentence passed by the trial court cannot be sustained. We, therefore, hold that the appellants are entitled to the benefit of doubt.

50. Accordingly, the appeal is allowed. The judgment of conviction dated 29.02.2016 and the order of sentence dated 05.03.2016 passed by the learned 1st Additional Sessions Judge,



Gopalganj in Trial Case No. 42 of 2013 arising out of Vijayepur
P.S. Case No. 28 of 2013 is set aside.

51. The appellants, who are in custody, are directed to
be released forthwith if not wanted in connection with any other
case.

(Ashwani Kumar Singh, J)

(Arvind Srivastava, J)

Pradeep/-

AFR/NAFR	NAFR
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