

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.1102 of 2017

Arising Out of PS. Case No.-26 Year-2014 Thana- RAXAUL District- East Champaran

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Ashok Kumar Son of Satya Narayan Ram, R/o Vill.- Bara Pareva, Ward No. 17 , P.S.- Raxole, District- East Champaran.

... .. Appellant

Versus

The State of Bihar

... .. Respondent

=====

with
CRIMINAL APPEAL (DB) No. 1197 of 2017

Arising Out of PS. Case No.-26 Year-2014 Thana- RAXAUL District- East Champaran

=====

Mumtaj Dewan S/o Late Hassanullah, resident of Village- Bada Pareuwa Dala, P.S.- Raxaul, District- East Champaran.

... .. Appellant

Versus

1. The State of Bihar
2. The Union of India through Mukesh Kumar, HC/GD B' OP Commander, B' Coy, SSB.

... .. Respondent

=====

with
CRIMINAL APPEAL (DB) No. 1305 of 2017

Arising Out of PS. Case No.-26 Year-2014 Thana- RAXAUL District- East Champaran

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Mahendra Kumar Rathaur @ Mahendra Singh Rathaur S/o Late Dhani Ram Rathaur, R/o of House No.69/47, Dhanakahari, P.S.- Harbansh Mahal, Distt.- Kanpur U.P..

... .. Appellant

Versus

1. The State of Bihar
2. The Union of India through Mukesh Kumar, HC/GD B' OP Commander, B' Coy, SSB.

... .. Respondents

=====

Appearance:

(In CRIMINAL APPEAL (DB) No. 1102 of 2017)

For the Appellant/s : Mr. Devi Das Srivastava, Advocate

For the Respondent/s : Mr. Abhimanyu Sharma, APP

(In CRIMINAL APPEAL (DB) No. 1197 of 2017)

For the Appellant/s : Mr. Shri Prakash Tiwari, Advocate



For the Respondent/s : Ms. Shashi Bala Verma, APP
(In CRIMINAL APPEAL (DB) No. 1305 of 2017)
For the Appellant/s : Mr. Shri Prakash Tiwari, Advocate
For the Respondent/s : Mr. Ajay Mishra, APP

CORAM: HONOURABLE MR. JUSTICE ASHWANI KUMAR SINGH
and
HONOURABLE MR. JUSTICE MADHURESH PRASAD
ORAL JUDGMENT
(Per: HONOURABLE MR. JUSTICE ASHWANI KUMAR SINGH)
Date: 15.09.2021

These appeals are directed against the judgment of conviction dated 25.07.2017 and the consequent order of sentence dated 26.07.2017 passed by the learned 1st Additional Sessions Judge-cum-Special Judge, N.D.P.S. Act, East Champaran, Motihari in N.D.P.S. Case No. 11 of 2014 arising out of Raxaul P.S. Case no. 26 of 2014 whereby and whereunder the appellants in these three appeals have been convicted under Section 20(b)(ii)(C) read with Section 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short 'NDPS Act'). They have been sentenced to undergo rigorous imprisonment for a term of 12 years and to pay a fine of Rs. 1 lac each and on default of payment of fine to further undergo rigorous imprisonment for a period of six months.

2. The prosecution case, in short, is that on 14.01.2014 at 10:10 AM, the informant Mukesh Kumar HC/GD, SSB 13th Battalion Bhelahi, received a piece of information from the Assistant Commandant, SSB regarding the movement



of three riders on a Platina Motorcycle somewhere near College Road, Raxaul. Having received such information, the informant constituted a team consisting of seven constables, namely, Sapan Vosi, Ugra Sen Yadav, Damodar Rakesh Bhai, R. Marimathu, Punit Kumar, Dhanna Ram and Ramesh N. They proceeded towards College Road, Raxaul. At about 11:05 AM, they saw three persons coming on a motorcycle. They were stopped by the informant. He disclosed his identity to them. He issued them a notice under Section 50 of the NDPS Act and after taking their consent took their search in the presence of two independent witnesses, namely, Jitan Singh and Ramkaran. However, nothing incriminating was recovered from their possession. Thereafter, during the search of the motorcycle, 16 packets were recovered from beneath the seat. On inquiry, they disclosed that the packets contained *charas*. The contraband was examined by Drug Detection Kit by the informant, which confirmed that the seized packets contained *charas*. The total weight of the 16 packets as shown in the weighing machine brought by the informant was 5.5 Kg. On inquiry, they disclosed their identity. They stated that the *charas* packets were entrusted to them by a resident of Birganj near Parewa Railway crossing for being delivered to a person, namely, Wazir at Sugauli. He



had assured them to give Rs. 1500/- for delivery of the consignment to Wazir.

3. Since the informant had conducted a personal search of each of the accused persons (hereinafter referred to as 'appellants') in the presence of two witnesses, namely, Ramkaran and Jitan Singh, he prepared respective personal search memos on 14.01.2014 at 11:10 AM under Section 51 of the Code of Criminal Procedure (for short 'Cr.P.C.'). He prepared a deposition of seized goods and attached it with the proforma of seizure report. He arrested the three appellants and prepared arrest memos in this regard.

4. All the aforesaid processes were completed by the informant on 14.01.2014 at about 11:10 AM.

5. Thereafter, the informant submitted his written report to the S.H.O. of Raxaul Police Station at 7:00 PM on 14.01.2014, based on which, Raxaul P.S. Case No. 26 of 2014 was registered under Sections 20, 22, 23, 24 of the NDPS Act against the appellants and handed over the investigation of the case to Sajjad Gaddi, a Sub Inspector of Police.

6. The Investigating Officer (for short 'I.O.') prepared a production-cum-seizure list on 14.01.2014 at 7:00 PM itself in respect of the 5.5 Kg. *charas* and Platina



motorcycle which was seized by the informant of the case in the forenoon on 14.01.2014.

7. A perusal of production-cum-seizure list would make it evident that the seized articles were handed over by the informant Mukesh Kumar in the presence of two constables of the SSB, namely, Ugrasen Yadav and Sapan Kumar Bauri.

8. After preparing the production-cum-seizure list, the I.O. inspected the place of occurrence, recorded the statements of the witnesses, sent the samples of the seized *charas* to the Forensic Science Laboratories, Bihar, Patna and the Central Forensic Science Laboratories, Kolkata and finding the case true against the appellants submitted a report under Section 173(2) of the Cr.P.C. vide charge-sheet No. 202 of 2014 dated 10.07.2014 under Sections 20, 22, 23 and 24 of the NDPS Act before the Trial Court.

9. After taking into consideration the charge-sheet and the materials collected during the investigation, the Trial Court took cognizance of the offences. It framed the charge under Sections 20(b)(ii)(C) read with 29 and 23(C) read with 29 of the NDPS Act against the appellants to which they pleaded not guilty and claimed to be tried.

10. To prove the charges, the prosecution examined



the informant Mukesh Kumar (P.W.2), the constables Ugrasen Yadav (P.W.1), Punit Kumar (P.W.3), Damodar Rakesh Bhai (P.W.5), Sapan Kumar Bauri (P.W.6), R. Marimuthu (P.W.7) and the I.O. of the case Md. Sajjad Gaddi (P.W.4).

11. The prosecution has also proved the following documentary evidence:

SI. No.	Exhibit	Description
1	1	Signature of Mukesh Kumar (P.W. 2) on the deposition of seized goods.
2	1/1	Signature of Mukesh Kumar (P.W. 2) on the proforma of seizure list.
3	2	Notice for search memo of the appellant Mahendra Kumar Rathaur.
4	2/1	Notice for search memo of the appellant Ashok Kumar.
5	2/2	Notice for search memo of the appellant Mumtaj Dewan.
6	3	Signature of Mukesh Kumar (P.W. 2) on the arrest memo of the appellant Ashok Kumar.
7	3/1	Signature of Mukesh Kumar (P.W. 2) on the arrest memo of the appellant Mumtaj Dewan.
8	3/2	Signature of Mukesh Kumar (P.W. 2) on the arrest memo of the appellant Mahendra Kumar Rathaur.
9	4	Signature of Mukesh Kumar (P.W. 2) on the search memo of the appellant Ashok Kumar
10	4/1	Signature of Mukesh Kumar (P.W. 2) on the search memo of the appellant Mumtaj Dewan
11	4/2	Signature of Mukesh Kumar (P.W. 2) on the search memo of the appellant Mahendra Kumar Rathaur.
12	5	Signature of Mukesh Kumar (P.W. 2) on the written report.
13	6	Signature of Mukesh Kumar (P.W. 2) on the production cum seizure list.



14	7	Signature of R. Marimuthu (P.W. 4) on the petition for examination of sample.
15	8	Receiving receipt of sample from F.S.L. Patna
16	9	Receiving receipt of sample from C.F.S.L. Kolkata
17	10	Signature of the Director Forensic Science Laboratories, Government of Bihar, Patna

12. **Mukesh Kumar (P.W.2)** is the informant of the case. He has corroborated the contents of the FIR in his examination-in-chief. He stated that he had tested the seized contraband from his own Drug Detection Device and weighed the *charas* packets on the weighing machine, which he was carrying with himself. He identified his signature on the deposition of seized goods which was marked as Exhibit-I with objection. The proforma of the seizure list was also proved by him which was marked as Exhibit-1/1 with objection. He proved the notices for search by which the appellants were given option to be searched in presence of Gazetted Officer or the area Magistrate or by him, which were marked as Exhibits-2, 2/1 and 2/2 respectively. He stated that the proforma notices for the search were filled up by him. He stated that he had prepared separate memos of arrest for each of the accused appellants. He identified his signature on those arrest memos, which were marked as Exhibits-3, 3/1 and 3/2. He stated that all the aforesaid memos contained the signature of the two witnesses,



namely, Ramkaran and Jitan Singh. He stated that he conducted a personal search of the arrested accused and prepared separate search memos for each of the accused appellants. He identified his signature on those three search memos which were marked as Exhibit-4, 4/1 and 4/2, respectively. He stated that he had prepared the written report, which was submitted to the S.H.O. of Raxaul Police Station, which also contained his signature. He identified his writing and signature on the written report, which was marked as Exhibit-5. He stated that the production-cum-seizure list was prepared at the Raxaul Police Station. He proved his signature on the production-cum-seizure list, which was marked as Exhibit-6. He identified the appellants in the dock.

13. In cross-examination, he admitted that at the time of occurrence, he was posted as Head Constable. He stated that he cannot say the exact time when he had proceeded to College Road, Raxaul on receipt of the information from the Assistant Commandant, SSB. He admitted that he did not record in writing the information received by him from the Assistant Commandant. He stated that he cannot describe the boundary of the place where the motorcycle of the appellants was intercepted. He admitted that the Police Station is at a distance



of 1 ½ to 2 Km. from the place of occurrence. He further admitted that the seizure list was prepared at the police station. He stated that the Camp of his company is situated at a distance of 7-8 Km. from the place of occurrence. According to him, the FIR was registered after 1-2 hours of the preparation of the seizure list. He stated that he had disclosed to the appellants that they have legal right to get themselves searched in presence of a Gazetted Officer, but they refused to exercise that option. He admitted that he had not sealed the seized packets of *charas*. He denied the defence suggestion that he was not authorized in law to carry search and seizure under the NDPS Act. He denied that no recovery of contraband was made from beneath the seat of the motorcycle. He admitted that all the 16 packets were weighed together. He further admitted that neither the deposition of seized goods (Exhibit 1) nor the proforma of the seizure report contains the names of the appellants. He denied the defence suggestion that the motorcycle in question did not belong to the appellants and the appellants were falsely implicated in the case.

14. **Ugrasen Yadav (P.W.1)** corroborated the prosecution case as narrated in the FIR in his examination-in-chief. In cross-examination, he admitted that he had not



received any confidential information. He also admitted that he had not made any inquiry in this regard. He stated that when the seizure list was prepared, he was present at the place of occurrence. However, he did not prepare the seizure list.

15. **Punit Kumar (P.W.3)** corroborated the prosecution case as narrated in the FIR in his examination-in-chief. In cross-examination, he stated that after the appellants were apprehended and the seizure list was prepared, they were first taken before the Assistant Commandant, SSB and from there the appellants along with the seized contraband and the motorcycle were taken to Raxaul Police Station. He stated that on the next day of the alleged incident, he along with the Assistant Commandant, SSB and the entire raiding team had gone to the Police Station. He stated that the police did not inquire from them about the occurrence. He admitted that his statement was never recorded by the police. He denied the defence suggestion that the appellants were not riding the motorcycle. He stated that he does not know as to who is the owner of the motorcycle seized by the police.

16. **Damodar Rakesh Bhai (P.W. 5)** stated in his deposition that on the order of his Commandant, he along with others went to Raxaul where 5 ½ Kg. *charas* was seized at



College Road. In cross-examination, he admitted that he neither knows the name of the arrested appellants nor he can identify them. He admitted that after the arrest, the appellants were not taken to the police station. He further admitted that from the place of occurrence, the patrolling party took the seized contraband and the appellants to the Camp of the Company at 11:30 AM. He admitted that he never met with the police after the search and seizure of the contraband.

17. **Sapan Kumar Bauri (P.W.6)** also corroborated the prosecution case as narrated in the FIR in his examination-in-chief. In cross-examination, he stated that he cannot disclose the registration number of seized motor bike. He stated that he cannot say as to who was riding the motorcycle and who were the pillion riders. He stated that the arrested persons were not taken to the Camp. He denied the defence suggestion that the appellants were not found moving on the motorcycle and they have been falsely implicated in the case. He admitted that he came to know about the entire incident from the informant Mukesh Kumar.

18. **R. Marimuthu (P.W.7)** has also corroborated the prosecution case as narrated in the FIR in his examination-in-chief. In cross-examination, he stated that he cannot say the



registration number of the motorcycle. He further stated that nothing incriminating was recovered from the personal search of the arrested persons. He stated that it was he along with the other members of the police team, who had weighed the seized packets of contraband. He admitted that he had not put his signature on any of the documents prepared pursuant to the seizure of the contraband. He further admitted that his statement was not recorded by the I.O. of the case during the investigation. He denied the defence suggestion that he was not a member of the raiding team. He stated that after the search and seizure, they had reached the police station between 12:30-1:30 PM along with the arrested persons and they returned to their Camp by 4:00 PM after handing over the arrested persons to the police. He denied the defence suggestion that he had not witnessed the occurrence.

19. **Md. Sajjad Gaddi (P.W.4)** is the I.O. of the case. He stated in the examination-in-chief that the incident took place on 14.01.2014. On that day, he was posted as a Sub Inspector of Police at Raxaul Police Station. He was handed over the investigation of the case by the S.H.O. Dayanath Jha. After taking over the investigation, he prepared the production cum seizure list of 5.5 Kg. *charas* and a motorcycle. He stated



that the seized articles were kept at Thana Sirista as he could not meet the *Malkhana* in charge. The seized motorcycle was kept on the premises of the police station. He stated that he recorded the subsequent statement of the informant at the police station and proceeded to the place of occurrence along with the police party, inspected the place of occurrence and recorded the statements of witnesses. He sent the seized contraband to the Forensic Science Laboratory for a test after obtaining the permission of the Court on 20.05.2014. He proved his writing and signature on the application submitted before the Court for sending the seized contraband to the Forensic Science Laboratories, Patna and Central Forensic Science Laboratories Kolkata, which was marked as Exhibit-7. He stated that he sent the sample for a test under a proper seal in a duly stamped envelope. He stated that after obtaining instructions from the superior police officer and completing the investigation of the case, he submitted a charge sheet before the Court. He produced the receipt dated 30.06.2014 issued by the Forensic Science Laboratories, Patna and the letter of acceptance of the request for forensic examination of seized contraband issued under the signature of the Director Central Forensic Science Laboratories, Government of India, which were marked as Exhibits-8 and 9



respectively by the Trial Court.

20. In cross-examination, he admitted that neither receipt of the Forensic Science Laboratories, Patna nor the acceptance report of the Forensic Science Laboratories, Kolkata was prepared and sent in his presence. He admitted that he had not retained the copy of the seal put on the packet of the seized contraband sent to the Forensic Science Laboratories. He admitted that it is not mentioned in the diary that all the packets were sealed. He admitted that no application was given before the Court during the investigation for disposal of the seized contraband. He further admitted that the seized contraband has not been produced before the Court.

21. It would appear from the record that subsequently the report issued under the signature of the Director Forensic Science Laboratories, Government of Bihar, Patna was issued on 19.05.2015, which was marked as Exhibit-10 on 11.07.2016 by the Trial Court.

22. After the closure of the prosecution evidence, the statements of the appellants were recorded under Section 313 of the Cr.P.C. In their respective statements, they claimed themselves to be innocent. They stated that nothing incriminating was recovered from beneath the seat of the



motorcycle. They also took a plea that at the relevant time, they were not moving on the motorcycle.

23. The defence did not adduce any evidence during the trial.

24. After completion of the trial, the Trial Court acquitted the appellants of the charge under Section 23(C) read with 29 of the NDPS Act but they were held guilty of the charge under Section 20(b)(ii)(C) read with Section 29 of the NDPS Act.

25. After closing the prosecution evidence, the Trial Court recorded the statements of the appellants on 16.12.2016 under section 313 of the Cr.P.C. for enabling them personally to explain the circumstances appearing in the evidence against them.

26. The circumstances put forward by the trial Court and the answers given by the appellants were as follows:

“प्रश्न : - क्या आपने साक्षियों का बयान सुना है?

उत्तर- : - जी हाँ |

प्रश्न : - आपके विरुद्ध अभियोजन साक्ष्य है कि आप दिनांक १४-१-२०१४ को समय एक बजे दिन बिना नंबर का प्लेटिना मोटरसाइकिल काला रंग पर दो अन्य अभियुक्तों के साथ आ रहे थे, कि रक्सौल कॉलेज रोड में डॉ० एस० के० सिंह के क्लिनिक से करीब १०० मीटर दक्षिण रोड पर एस० एस० बी० के जवानों द्वारा रोके गए और उक्त मोटरसाइकिल के तलाशी लेने पर मोटरसाइकिल के सीट के निचे सोलह पैकेट वजन साढ़े पाँच (५ १/२) केजी० चरस बरामद हुआ, क्या कहना है?

उत्तर : - जी नहीं | कुछ भी बरामद नहीं हुआ था | मोटरसाइकिल



से नहीं आ रहे थे।

प्रश्न : - पूछने पर आपने यह बताया की बीरगंज के रहने वाले एक व्यक्ति ने उक्त चरस को परेवा रेलवे क्रासिंग के पास दिया था जिसे सुगौली में बजीर नामक व्यक्ति को देना था, जिसके बदले ये पन्द्रह सौ रुपये मिलने थे क्या कहना है?

उत्तर : - जी नहीं ।”

27. Thus, it would appear from the statements recorded under Section 313 of the Cr.P.C. that it was not brought to the notice of the appellants that the contraband seized from their possession was sent to the Forensic Science Laboratories, Patna for test and the result of the examination confirmed that the seized article was found to be *charas*.

28. However, it would appear from Exhibit-10 that a parcel consisting of a tin container was received in the office of the Director Forensic Science Laboratories, Bihar, Patna on 30.06.2014. The report of Forensic Science Laboratories dated 15.05.2015 in connection with Raxaul P.S. Case No. 26 of 2014 dated 14.01.2014 and the dark greenish-brown solid substance sent in the tin container was found to be *charas*.

29. Assailing the impugned judgment of conviction and sentence, Mr. Shri Prakash Tiwari, learned counsel for the appellants being assisted by Mr. Devi Das Srivastava, learned counsel submitted that the Trial Court did not appreciate the evidence adduced during trial properly. He contended that the finding of guilt is against the weight of overwhelming evidence



showing the innocence of the appellants.

30. Mr. Shri Prakash Tiwari, learned counsel for the appellants submitted that the Head Constable was not an empowered officer either under Sub-section (1) of Section 42 of the NDPS Act. Therefore, the search and seizure effected by him were illegal. He contended that since the search was taken by the Head Constable and the seizure was effected by him without any authority of law or any authorization under Sub-section (1) of Section 42 of the NDPS Act, the articles seized by him cannot be looked into nor the same can be used as evidence against the appellants. He urged that the witnesses who have been deposed during the trial are all official witnesses. In their anxiety to prove the prosecution version, they have stated only what the prosecution case initially revealed. He argued that the Trial Court failed to appreciate that the two seizure list witnesses, namely, Ramkaran and Jitan Singh have not been produced before the Court. The Trial Court also lost sight of the fact that the independent witnesses have deliberately not been examined during the trial. He further contended that the Trial Court did not appreciate the fact that though the search and seizure of the contraband were made on 14.01.2014 at 11:10 AM, the contraband was received in the office of the Director



Forensic Science Laboratories, Bihar, Patna on 30.06.2014. He contended that the Trial Court did not appreciate that there was an onerous duty on the part of the investigating agency to have immediately dispatched the sample for forensic determination. He contended that the Trial Court failed to appreciate that on the sample, no identification mark was given. Moreover, it is not known from which packet the sample was drawn. He contended that the sample was not drawn at the place of recovery in presence of the appellants. In this background, he submitted that there is no assurance about the substance sent to the Forensic Science Laboratory for the test.

31. He contended that there is total non-compliance with the provisions of Section 42, 52, 52(A)(2) and 55 of the NDPS Act. He argued that the witnesses examined during trial on behalf of the prosecution have contradicted each other in material particulars. Some of the witnesses have stated that after the search and seizure, the appellants were taken to the police station directly but some other witnesses have stated that they were first taken to the Camp of the SSB and from there they were taken to the police station. He urged that the seized contraband was neither produced in the Court nor there is any evidence that the same was destroyed after taking permission of



the Court.

32. On the other hand, Ms. Shashi Bala Verma, learned Additional Public Prosecutor for the State being assisted by Mr. Abhimanyu Sharma and Mr. Ajay Mishra, learned Additional Public Prosecutors submitted that the Trial Court has appreciated the evidence led before it in correct perspective. The witnesses examined during the trial are consistent. Merely because they are official witnesses, their evidence would not lose credibility. She contended that the informant was competent in law to search and seize contraband under the NDPS Act in the discharge of his official duty. He had accidentally found that the appellants were concealing *charas* packets. She further contended that right from the beginning, it is the case of the prosecution that the informant had proceeded towards the College Road, Raxaul under the orders of his superior officer i.e., the Assistant Commandant, SSB. She argued that the official witnesses cannot be put in the category of interested witnesses. They had no animosity toward the appellants. She contended that non-production of the seized contraband would not be fatal to the prosecution case. She further contended that the non-compliance of the provisions of Sections 52, 52-A(2) and 55 would not vitiate the proceeding, as they are not the



mandatory provisions of law.

33. We have heard learned counsel for the parties. We have also given our thoughtful consideration to the evidence adduced during the trial and the materials on record.

34. Section 42(1) of the NDPS Act provides that a search and seizure in respect of any contraband under the NDPS Act can be effected by an officer, who has been so authorised either by the Central or by the State Government. However, the officer must be above the rank of peon, sepoy or constable.

35. Mr. Shri Prakash Tiwary, learned counsel for the appellants has submitted that a Head Constable of SSB has not been authorised to exercise the power conferred by Section 42(1) of the NDPS Act within their respective jurisdiction. The contention of Mr. Tiwary cannot be accepted given the Gazette of India notification of the Ministry of Finance (Department of Revenue) dated 20th April, 2010 vide S.O. No. 901(E) whereby in the exercise of the powers conferred by Sub-section (1) of Section 42 of the NDPS Act read with Section 67 thereof and Section 153 of the Sashatra Seema Bal Act, 2007 (53 of 2007) has empowered the officers, not below the rank of Head Constable of the Sashatra Seema Bal, to exercise the powers and perform duties specified in Sections 42 and 67 within the area of



his jurisdiction.

36. Hence, it cannot be said that the informant had acted without jurisdiction in conducting the search and seizure of the contraband *charas*.

37. From the statement of the informant and the FIR, it would appear that there was no prior information that the three riders on a motorcycle were transporting or carrying *charas*. The informant has stated that his Assistant Commandant had informed him at 10:10 AM on 14.01.2014 that three persons were likely to pass through College Road, Raxaul on a Platina motorcycle, and on such information, he had constituted a police team and proceeded to College Road, Raxaul.

38. When a police officer whether empowered or not under Sub-section (1) of Section 42 of the NDPS Act proceeds to search without knowing that such person under search is carrying contraband or not, then he is not required to follow the procedures prescribed under the NDPS Act.

39. If the police officer, who by chance recovers narcotics is not an empowered officer, then immediately after finding the narcotics, he is required to inform the empowered officer, who is required thereafter to proceed in accordance with the provisions of the NDPS Act. If he happens to be an



empowered officer also, then from that stage onwards, he would be required to investigate in accordance with the other provisions of the NDPS Act.

40. In the ***State of Punjab vs. Balbir Singh [(1994) 3 SCC 299]***, the Supreme Court held:

“If a police officer without any prior information as contemplated under the provisions of the NDPS Act makes a search or arrests a person in the normal course of investigation into an offence or suspected offences as provided under the provisions of CrPC and when such search is completed at that stage Section 50 of the NDPS Act would not be attracted and the question of complying with the requirements thereunder would not arise. If during such search or arrest there is a chance recovery of any narcotic drug or psychotropic substance then the police officer, who is not empowered, should inform the empowered officer who should thereafter proceed in accordance with the provisions of the NDPS Act. If he happens to be an empowered officer also, then from that stage onwards, he should carry out the investigation in accordance with the other provisions of the NDPS Act.”

41. Section 43 of the NDPS Act relates to the power of seizure and arrest in a public place which provides that any officer of any of the departments mentioned in Section 42



may seize in any public place or in transit, any narcotic drug or psychotropic substance or controlled substance in respect of which he has reason to believe an offence punishable under the NDPS Act has been committed. Such officer has also been authorized to detain and search any person whom he has reason to believe to have committed an offence punishable under Chapter-IV and if such person has any narcotic drug or psychotropic substance or controlled substance in his possession and such possession appears to him to be unlawful, arrest him and any other person in his company.

42. In the present case, indisputably, Mukesh Kumar (P.W.2) was an authorised officer to take search and effect seizure under Sections 42 and 43 of the NDPS Act.

43. Coming to the next submission on behalf of the appellants, indeed, the independent seizure list witnesses have not been examined during the trial. However, it is not an uncommon phenomenon in criminal trials particularly in cases relating to NDPS Act and the case of the prosecution cannot be doubted merely because of the non-examination of the seizure list witnesses.

44. To prove a charge under the NDPS Act, the representative samples must be drawn from the seized



substances and sent to such experts in the designated laboratory for chemical analysis and report confirming the presence of narcotic drugs or psychotropic substances in the seized substances. It is also important that the seized substances and samples are handled properly and in the prescribed manner.

45. Standing Instruction No.1/88 dated 15.03.1988 of Narcotics Control Bureau, Government of India issued under Section 52 of the NDPS Act prescribes the detailed procedure for sampling, sealing and dispatching the seized samples to the laboratory for test.

46. Clauses 1.4, 1.5, 1.6 and 1.9 of Standing Instruction No.1/88 dated 15.03.1988 read as under:

“**1.4** If the drugs seized are found in packages/containers, the same should be serially numbered for purposes of identification. In case the drugs are found in loose form, the same should be arranged to be packed in unit containers of uniform size and serial numbers should be assigned to each package/ container. Besides the serial numbers, the gross and net weight, particular of the drug and the date of seizure should invariably be indicated on the packages. In case sufficient space is not available for recording the above information on the package, a Card Board label, should be affixed with a seal of the seizing officer and on this Card



Board label, the above details should be recorded.

1.5 Place and time of drawal of sample

Samples from the Narcotic Drugs and Psychotropic Substances seized must be drawn on the spot of recovery, in duplicate, in the presence of search (Panch) witnesses and the person from whose possession the drug has been recovered, and mention to this effect should invariably be made in the panch nama drawn on the spot.

1.6 Quantity of different drugs required in the sample

The Quantity to be drawn in each sample for chemical test should be 5 grams in respect of all narcotic drugs and psychotropic substances except in the cases of Opium, Ganja and Charas/Hashish where a quantity of 24 grams in each case is required for chemical test. The same quantities should be taken for the duplicate sample also. The seized drugs in the packages/containers should be well mixed to make it homogeneous and representative before the sample in duplicate is drawn.

1.9 It needs no emphasis that all samples must be drawn and sealed; in the presence of the accused, Panchnama witnesses and seizing officer and all of them shall be required to put their signatures on each sample. The official seal of the seizing officer should also be affixed. If the person, from



whose custody the drugs have been recovered, wants to put his own seal on the sample, the same may be allowed on both the original and the duplicate of each of the samples.”

47. There is nothing on record to show that the seizing officer sealed the seized articles at the place of seizure or at any time even thereafter in terms of Clause 1.4 of the Standing Instruction No. 1/88. There is also no evidence to suggest that any sample from the seized articles was drawn on the spot of the recovery in the presence of the accused in terms of Clause 1.5 of the aforesaid Standing Instruction. Not sealing the seized packets and not collecting the sample at the initial stage of the seizure were the defects, which could not have been cured later on.

48. This aspect of the matter has been considered by the Supreme Court in ***Kuldip Singh Vs. State of Punjab [(2010) 10 SCC 219]*** wherein it has been observed:

“11. Having considered the submissions made on behalf of the parties, while we are willing to accept the propositions advanced on behalf of the State of Punjab as far as substantial compliance with Section 42 of the NDPS Act, 1985 is concerned, we are unable to accept the latter part of the submissions relating to collection of samples at the police station from



the seized goods which had been sealed by PW 3 Malkiat Singh. Non-collection of samples at the initial stage of seizure was a defect, which could not have been cured in the manner in which it was done by opening the bags which had been sealed by Malkiat Singh and mixing the contents thereof.

12. Accordingly, as indicated hereinabove, since the provisions of the aforesaid Act have to be construed strictly, we have no other option but to hold that the seizure and collection of samples was not in accordance with the provisions of Section 42 of the Act and the entire procedure stood vitiated as a result thereof.”

49. Coming back to the question as to whether or not non-compliance of the guidelines issued vide aforesaid Standing Instruction No.1 of 1988 would vitiate the trial, it is to be noted that Standing Instruction No.1/88 dated 15.03.1988 do not have the force of law and they are directory in nature and intended to guide the officers and to see that a fair procedure is adopted by the investigating agency of a case during investigation. However, complete non-compliance with the guidelines issued under the aforesaid Instruction creates grave suspicion on the reliability of the prosecution case.

50. The Supreme Court in **Khet Singh Vs. Union**



of India [AIR 2002 SC 1450] after examining the said issue held:

“10. The instructions issued by the Narcotics Control Bureau, New Delhi are to be followed by the officer in-charge of the investigation of the crimes coming within the purview of the NDPS Act, even though these instructions do not have the force of law. They are intended to guide the officers and to see that a fair procedure is adopted by the officer in-charge of the investigation.....”

51. In **Noor Aga Vs. State of Punjab [(2008) 16 SCC 417]**, the Supreme Court after giving thoughtful consideration to the guidelines issued under the NDPS Act in the Standing Order, observed in paragraphs 89 to 91 as under:

“89. Guidelines issued should not only be substantially complied, but also in a case involving penal proceedings, vis-à-vis a departmental proceeding, rigours of such guidelines may be insisted upon. Another important factor which must be borne in mind is as to whether such directions have been issued in terms of the provisions of the statute or not. When directions are issued by an authority having the legal sanction granted therefor, it becomes obligatory on the part of the subordinate authorities to comply therewith.



90. *Recently, this Court in State of Kerala & Ors. v. Kurian Abraham (P) Ltd. & Anr. [(2008) 3 SCC 582], following the earlier decision of this Court in Union of India v. Azadi Bachao Andolan [(2004) 10 SCC 1] held that statutory instructions are mandatory in nature.*

91. *The logical corollary of these discussions is that the guidelines such as those present in the Standing Order cannot be blatantly flouted and substantial compliance therewith must be insisted upon for so that sanctity of physical evidence in such cases remains intact. Clearly, there has been no substantial compliance of these guidelines by the investigating authority which leads to drawing of an adverse inference against them to the effect that had such evidence been produced, the same would have gone against the prosecution.”*

52. In **Union of India Vs. Bal Mukund & Ors. [(2009) 12 SCC 161]**, the Supreme Court observed in paragraph 36 as under:

“36. There is another aspect of the matter which cannot also be lost sight of. Standing Instruction 1/88 which has been issued under the Act, lays down the procedure of taking samples. The High Court has noticed that P.W.7 had taken samples of 25 gm each from all the five bags and then mixed them and then sent to the laboratory. There



is nothing to show that adequate quantity from each bag had been taken. It was a requirement of law.”

53. There is no evidence that the packets of *charas* seized from the possession of the appellants were assigned a serial number. There is an admission by the I.O. as well as the Seizing Officer that the *charas* found in each of the packets was not weighed separately. There is an admission by the Seizing Officer that neither he sealed the seized contraband nor he put his seal over it. There is also no evidence that the contents of the 16 packets were well mixed to make it homogeneous and representative before the sample in duplicate was drawn. The samples were not sealed in the presence of the appellants and the seizure witnesses. The official seal of the I.O. before whom the seized contraband was produced was not produced before the Court. There is also no evidence to show that the sample sent to the Forensic Science Laboratories, Patna or Central Forensic Science Laboratories, Kolkata drawn from the articles said to have been seized from beneath the motorcycle in question were drawn from the seized articles from the appellants by the Seizing Officer.

54. Thus, it is seen that in the present case there is total non-compliance with the guidelines issued in the Standing



Instruction No.1/88 dated 15.03.1988 in respect of sealing, sampling and dispatching the seized sample to the Forensic Science Laboratory for the test, which makes the entire prosecution case doubtful.

55. We further find that no seal was sent along with the sample of seized articles to the Forensic Science Laboratories, Patna to compare the seal appearing on the sample sent for chemical examination.

56. From the evidence of Md. Sajjad Gaddi, the I.O. of the case, it would appear that the request was made to the Court on 14.03.2014 for sending the sample to the Forensic Science Laboratories, Patna and the Central Forensic Science Laboratories, Kolkata and order in this regard was received from the Court on 20.05.2014. Thereafter, vide letter dated 19.06.2014, the sample was sent to the Forensic Science Laboratories, Patna for the test. The report of the Forensic Science Laboratories, Patna (Exhibit-10) would demonstrate that the parcel was received in the office of the Director Forensic Science Laboratories, Patna on 30.06.2014 through chowkidar 1/4 Anand Kumar Yadav in connection with Raxaul P.S. Case No. 26 of 2014 dated 14.01.2014. The said chowkidar Anand Kumar Yadav has not been examined during the trial.



There is no evidence where the sample was kept by the chowkidar Anand Kumar Yadav between 19.06.2014 and 30.06.2014. From the time of the seizure of the 16 packets from the possession of the appellants till the examination of the contents of the sample, it is not clear how many persons handled the same and in what way. In such circumstances, the chemical examiner's report loses all its significance.

57. So far as the materials exhibit i.e., *charas* packets are concerned, it was the duty of the S.H.O. of Raxaul Police Station to have kept them in safe custody. He ought to have put his seal on the seized packets. There is no evidence that the packets were sealed by the S.H.O. of the Raxaul Police Station.

58. It would be evident from the record that though a sample of seized contraband was sent to Central Forensic Science Laboratories, Kolkata, no report of Central Forensic Science Laboratories, Kolkata, was brought on record. The result of Forensic Science Laboratories, Patna shows that the dark greenish-brown solid substance contained in the tin container was found to be *charas*.

59. The most important provision has been made by inserting Section 52-A in the NDPS Act for the disposal of



the seized narcotic drugs and psychotropic substances. The said provision requires preparation of an inventory of the seized property in the presence of Magistrate after taking photographs and certifying such photographs to be true and allowing to draw representative samples of such drugs or substance in the presence of such Magistrate and certifying the correctness of any list of samples so drawn. In case the aforesaid procedure is followed notwithstanding anything contained in the Cr.P.C. every Court, trying an offence under the NDPS Act is required to treat the inventory, the photographs of narcotic drugs or psychotropic substances and any list of samples drawn and certified by the Magistrate, as primary evidence in respect of such offence, the procedure prescribed under Section 52-A of the NDPS Act has not been followed in the present case.

60. In absence of proof regarding disposal of the contraband in accordance with the law, it was required for the prosecution to produce the seized contraband before the Court. However, the seized contraband was never produced before the Court during the trial. Neither the *Malkhana* in-charge was examined nor the *Malkhana* register was produced during trial. In absence of any evidence relating to disposal of the seized property and the production of the seized property in the Court,



it cannot be held that any seizure of contraband was made from the possession of the appellants.

61. Before we conclude, we must record our displeasure regarding the manner in which the Trial Court recorded the statement of the appellants under Section 313 of the Code.

62. It is well settled that the object of Section 313 of the Code is to enable the accused to explain the circumstances against him in the evidence personally except where the statute provides otherwise.

63. Section 313 of the Code provides the accused a fair chance to explain his stand with regard to the circumstances in the evidence, which have been collected against him and has come on the record during a trial. If the questions on incriminating circumstances have been ignored by the trial Court, then it is an illegality and amounts to an abuse of the process of the Court.

64. Though the Supreme Court and this Court have been repeatedly impressing upon the Trial Court that questioning of an accused under Section 313 of the Code should not be treated as an empty formality as it is an important facet of the trial, unfortunately, the Trial Courts are recording the



statement of the accused in the most perfunctory manner. In the present case, the appellants were never informed by the Trial Court (a) that a seizure memo of the articles recovered was prepared; (b) that the articles were kept in proper condition in the *Malkhana* of the Police Station; (c) that articles recovered were duly sealed; (d) that a sample of contraband was drawn; (e) that sample was sealed; (f) that sample was sent to the FSL for test; and, (g) that the FSL report shows that the substance sent to the FSL was found to be *charas*.

65. Thus, it would be evident that the appellants were never informed of the circumstances appearing against them during the trial. The appellants did not have any chance to explain them. In our view, these circumstances which were never put to the appellants during the trial would not have been used against them for conviction and sentence.

66. Based on our aforesaid analysis of the facts and law, we are of the view that the investigation of the case was perfunctory. The defects in the investigation are substantial and go to the root of the identity of the alleged articles recovered from the motorcycle in question. These lapses on the part of the investigation and the prosecution would certainly affect the credibility of the prosecution case. The case of the prosecution



is based only on the oral testimonies of the police personnel involved with the arrest of the appellants and the I.O. of the case. Their deposition during the trial does not inspire confidence. They have contradicted each other on the point of taking the appellants from the place of seizure to the police station after their arrest. Some of them have stated that they were immediately taken to the police station whereas some others have stated that they were first taken to the Camp of the SSB before the Assistant Commandant and, thereafter, they were brought to the police station. The statements of most of the witnesses examined during the trial were not recorded by the police during the investigation. There are several discrepancies in the evidence. All these factors lead us to believe that the prosecution has failed to prove its case beyond reasonable doubt against the appellants.

67. Accordingly, appeals are allowed. The impugned judgment of conviction dated 25.07.2017 and the consequent order of sentence dated 26.07.2017 passed by the learned 1st Additional Sessions Judge-cum-Special Judge, N.D.P.S. Act, East Champaran, Motihari in N.D.P.S. Case No. 11 of 2014 arising out of Raxaul P.S. Case no. 26 of 2014 are set aside.



68. The appellants are acquitted of the charges levelled against them. They are directed to be set at liberty forthwith unless their detention is required in any other case.

(Ashwani Kumar Singh, J)

(Madhuresh Prasad, J)

rohit/-

AFR/NAFR	AFR
CAV DATE	N.A.
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