

**IN THE HIGH COURT OF JUDICATURE AT PATNA**  
**CRIMINAL MISCELLANEOUS No.24070 of 2021**

Arising Out of PS. Case No.-9 Year-2020 Thana- KISHANGAANJ RAIL P.S. District-  
Katihar

=====

GOPAL KUMAR MAHTO SON OF TURILAL MAHTO @ TUSILAL  
MAHTO R/O PTTHAR TOLA, P.S.- KURSELA, DISTT.- KATIHAR

... .. Petitioner/s

Versus

The State of Bihar

... .. Opposite Party/s

=====

**Appearance :**

|                          |   |                                   |
|--------------------------|---|-----------------------------------|
| For the Petitioner/s     | : | Mr. Ajay Kumar Thakur, Advocate   |
|                          |   | Mr. Sanjeev Kumar Singh, Advocate |
| For the Opposite Party/s | : | Mrs. Sharda Kumari, A.P.P.        |

=====

**CORAM: HONOURABLE MR. JUSTICE PURNENDU SINGH**  
**ORAL ORDER**

11    07-03-2022                      Heard learned counsel appearing on behalf of the  
petitioner and learned APP for the State.

Let the defect(s) be removed within two weeks of the  
complete start of the physical Court in normal course.

Petitioner, who is in custody since 08.06.2020, seeks  
regular bail in connection with Kishanganj Rail P.S. Case No.  
09 of 2020 registered for offences punishable under Sections  
20/22 of the N.D.P.S. Act.

Prosecution story in brief is that the petitioner was  
apprehended in connection with Katihar Town P.S. Case No.  
146 of 2020 dated 21.02.2020 under Section 8(c)/21(c) of the  
N.D.P.S. Act on the basis of confessional statement of two co-  
accused persons namely Dharmendra Kumar and Rajesh



Paswan from whose possession 870 gms of *Heroine* was recovered and a Micromax mobile was recovered from the another co-accused respectively. The petitioner was apprehended on 21.02.2020. On the basis of information from the accused persons, a raid was conducted by the Police Inspector, Rajesh Kumar Tiwary the then S.H.O., Kishanganj Town P.S. along with Imteyaz Ahmad, Railway P.S. Kishanganj in railway quarter of the petitioner from where 5.326 kgs of Marijuana (*Ganja*) was recovered from the bag found below the bed in a bedroom in presence of one Puja Kumari who had claimed herself to be the wife of the petitioner.

The matter was heard on 13.12.2021 and it was informed by learned counsel appearing on behalf of the petitioner that the said Puja Kumari in whose presence the seizure was conducted who had claimed herself to be the wife of the petitioner was neither handed over the seizure list nor was asked to sign the said seizure list in whose presence the entire raid was conducted. He had submitted that the informant had not complied with the provision of Section 100 of the Cr.P.C. and the N.D.P.S. Act in conduct of seizure.

Considering the specific prayer of the petitioner a report was called from the Senior Superintendent of Police/



Superintendent of Police, Katihar with respect to the raid effected giving details of one lady Puja Kumari in whose presence the alleged marijuana (Ganja) was recovered as well as the manner in which the officer of the raiding team had complied with the provision of N.D.P.S. Act. The Senior Superintendent of Police instead of submitting a report had filed a counter-affidavit dated 23.12.2021 in which he has narrated the entire allegation made in the F.I.R. and in the manner in which the situation which prompted to conduct raid of one abandoned railway quarter alleged to be of constable No. 113 Gopal Kumar Mahto (petitioner) from where 5.326 kgs of marijuana (Ganja) was recovered from the bag found below his bed in his bedroom. This Court was not satisfied from the counter-affidavit as there was no whisper or reference regarding the identity of said Puja Kumari who had claimed herself to the wife of the petitioner and in absence of the detailed report and connection of the petitioner with the said Puja Kumari. The Senior Superintendent of Police, Katihar was directed to file an affidavit duly sworn by him giving reason as to why the order dated 13.12.2021 was not complied with.

The matter was directed to be heard on 18.01.2022. A counter-affidavit was filed on behalf of the Superintendent of



Police, Katihar in which it has been informed to this Court that said Puja Kumari in whose presence the alleged raid was conducted is the second wife of the petitioner and she resides at her native place with her small child. Reference of several paragraphs of the case diary has been made in the said counter-affidavit and it has further been informed that both petitioner and Puja Kumari by bringing call details of mobile phone No. 8789109299 belonging to the petitioner to mobile No. 8051256539 which belongs to one Kanak Lata about whom after investigation it has been confirmed that she is the wife of the petitioner and she is residing presently at her parents' home. In the service book of the petitioner, name of Kanak Lata has been written in the wife column while no evidence has been brought on record to connect the said Puja Kumari in whose presence the raid was conducted and in course of investigation also the investigating officer too has not submitted charge-sheet against her. The Superintendent of Police had appeared in virtual mode on 18.01.2021 and informed this Court that he has not jurisdiction so far as the raid is concerned and made a prayer before this Court that he will inform the Superintendent of Police, Rail, Katihar to file comprehensive counter-affidavit in the present case. The matter was adjourned considering the



specific prayer of the Superintendent of Police, Katihar and to be heard on 08.02.2022 on which date the S.P., Rail, Katihar, sought two week's time to file comprehensive counter-affidavit on his behalf. The matter was fixed on 17.02.2022 but has to be adjourned for allowing the S.P., Rail to come out with comprehensive counter-affidavit till 22.02.2022. However, the counter-affidavit could only be filed on his behalf on 03.03.2022 and was heard today (07.03.2022).

From perusal of the counter-affidavit it appears that almost in all the paragraphs, the same has been reiterated as what has been filed on behalf of the Superintendent of Police, Katihar on earlier occasion. It is further stated in paragraph no. 6 that out of 8 prosecution witnesses named in the charge-sheet 4 prosecution witnesses were examined.

From the above paragraph one thing is clear that from the counter-affidavit filed on behalf of the Superintendent of Police, Katihar, that the legally wedded wife of the petitioner is one Kanak Lata and the raid was conducted in a abandoned railway quarter which has been alleged to be the quarter allotted to the petitioner however, no valid evidence has been brought in this regard nor from the material which has come in course of investigation. However, from the counter-affidavit filed on



behalf of the Rail Police it appears that show cause has been sought from (i) Police Inspector, Rajesh Kumar Tiwary, then posted at Adarsh P.S. Kishanganj (ii) Sub-inspector of Police, Satish the then S.H.O. of Rail Police, Kishanganj (iii) Sub-inspector of Police, Imteyaz Ahmad then posted at Kishanganj Rail P.S. (iv) Magistrate, namely, Binod Kumar who was the settlement officer, Kishanganj at the time of raid vide memo No. 203, 204, 205, 206/ R.O. dated 15.02.2022 respectively through the District Magistrate, Kishanganj against Binod Kumar.

Considering the specific statement made in paragraph No. 5 of the counter-affidavit dated 01.02.2022 filed on behalf of the S.P., Katihar that the raid was conducted in an abandoned railway quarter, alleged to have been used by the petitioner, in presence of Puja Kumari, who claims to be the wife of the petitioner, has not been substantiated by any legal document, which has forced this Court to observe that the raiding team has deliberately left such lacuna to allow the mafia scot-free by not conducting the raid in accordance with law.

The mandatory provision of N.D.P.S. Act has been violated and it was incumbent upon the investigating agency to prepare the site plan according to guidelines provided in the police rules. In this regard, it is essential to look into the legal



position first:

*N.D.P.S Act is a special law enacted by the Parliament with an object that for controlling and regulating the operations relating to narcotic drugs and psychotropic substances. It is for this that stringent provisions of law have been made. I was felt that, social evils are increasing and so also the drugs menace. It was felt that due to fast increase of consumption of the drugs the country is becoming one of the centres of narcotics under world criminals and in order to curb all these, N.D.P.S. Act was brought into force. While enacting the law, Legislature provided for heavy punishment in as much as minimum sentencing provision was kept and minimum sentence prescribed in most of the sections was 10 years rigorous imprisonment and a fine of Rs. 1,00,000/. Obviously when such astringent provision regarding fine was made, it was obvious that full proof procedure regarding issuance of warrants and authorisation, power of entry, search, seizure and arrest; power to stop and search conveyance and power to investigate including the obligations of officers to assist each other were specifically provided. Non-observance of procedure provided in*



*Chapter V(5) has been made punishable under Sections 58 and 59 of this Act is most unusual and has not been provided in the part in any other law to my knowledge. Sections 58 and 59 of the NDPS Act read as under:*

*Section 58--Punishment for vexatious entry, seizure or arrest (1) Any person empowered Under Section 42 or Section 44 who*

*(a) without reasonable ground of suspicion enters or searches, or causes to be entered to searched, any building, conveyance or place;*

*(b) vexatiously and unnecessarily seizes the property of any person on the pretence of seizing or searching for any narcotic drug or psychotropic substance or other article liable to be confiscated under this Act, or of seizing any document or other article liable to be seized Under Section 42, Section 43 or Section 44; or*

*(c) vexatiously and unnecessarily detains, searches or arrests any person, shall be punishable with imprisonment for a term which may extend to six months or with fine which may extend to one thousand rupees, or with both.*

*(2) Any person willfully and maliciously giving false information and so*



*causing an arrest or a search being made under this Act shall be punishable with imprisonment for a term which may extend to two years or with fine or with both.*

*Section 59--Failure of officer in duty or his connivance at the contravention of the provisions of this Act (1) Any officer, on whom any duty has been imposed by or under this Act and who ceases or refuse to perform or withdraw himself from the duties of his office shall, unless he has obtained the express written permission of his official superior or has other lawful excuse for so doing, be punishable with imprisonment for a term which may extend to one year or with fine or with both, (2) Any officer on whom any duty has been imposed by or under this Act or any person who has been given the custody of-*

*(a) any addict; or*

*(b) any other person who has been charged with an offence under this Act, and who wilfully aids in, or connives at the contravention of any provision of this Act or any rule or order made thereunder, shall be punishable with rigorous imprisonment for a term which shall not be less than ten years but which may extend to twenty years, and shall also be liable to fine which shall not be less than one lakh rupees but which may*



*extend to two lakh rupees.' A reading of the aforesaid two sections makes it absolutely clear that the Police Officers empowered to effect search, make seizure and arrest the accused, must do so after following the mandate of law. It is not only in cases of vexatiously taken proceedings that a person empowered may be prosecuted but even if any officer carries out the functions mentioned in Section 58 without reasonable ground of suspicion even then the legislature has made it cognizable offence. Similarly under sec 59, if any officer does not carry out the duty imposed on him by law, he can be proposed under Section 59 the Act. For infringement of the rights of the accused and for failing to carry out the statutory duties, a criminal action is contemplated against the defaulting officer and the criminal law can be set in motion and it has been made a cognizable offence except in cases where a complaint is filed by a private person. Considering these two provisions along with the provisions mentioned in Chapter IV regarding offences and penalty where minimum sentencing provision has been kept, it is essential to construe the provisions of the law regarding procedure as mandatory. It has been held in several cases that the provisions of Sections 41, 42, 43, 52*



*and 57 are all mandatory in nature and failure to comply with the procedure laid down in any of the aforesaid sections would vitiate the trial. In Biram v. State of Rajasthan; 1988 Cr. LR (Raj.) 718 the provisions of Sections 50, 55 and 57 were examined and my learned brother Judges came to the conclusion that provisions of the aforesaid sections are mandatory and the lacuna left by the prosecution is fatal.*

*The provisions of the Act being mandatory have to be strictly construed especially in view of the minimum sentence of imprisonment and fine prescribed under the Act leaving no discretion to the trial court to impose a lesser sentence of imprisonment or fine in any case what so ever, irrespective of the quantum of recovery. In this case there is no evidence to show compliance with the said provisions of the Act.*

In the present case, in aforesaid background it is born out that 5.382 kgs of marijuana (*Ganja*) which is less than commercial quantity was seized from an abandoned railway quarter and two accused in another case named the petitioner. The raid was conducted while the petitioner was in custody in connection with Katihar Town P.S. Case No. 146 of 2020 dated 21.02.2020, in presence of one suspicious lady namely Puja



Kumari, who has claimed to be the wife of the petitioner but no legal document has been brought by the investigating officer in course of technical investigation. From the counter-affidavit filed by the Superintendent of Police, Katihar and S.P., Rail, Katihar it is apparently established that the raid was conducted at an abandoned railway quarter and no legal document has been brought on record in support of the allegation made against the petitioner that the said railway quarter was allotted in the name of the petitioner. Word abandoned itself is clear that the same does not belong to the petitioner. Thus, nothing has been recovered from the conscious possession of the petitioner even the investigation has not been able to brought on record C.D.R. report to connect the petitioner either with the two accused namely, Dharmendra Kumar and Rajesh Paswan and one Puja Kumari who had claimed herself to the wife of the petitioner rather from the material available in course of investigation as well as from the counter affidavit filed on behalf of the S.P., Katihar, and S.P., Rail, Katihar, that the petitioner had talked with his legally wedded wife namely, Kanak Lata, 39 times and in this regard a specific statement has been made in paragraph no. 10 of the counter-affidavit dated 01.02.2022. In Paragraph no. 7 of the counter-affidavit, it is stated that petitioner had



made 261 times call on mobile no. 6299891863 belonging to the said Puja Kumari in whose presence the raid was conducted. However, she was deliberately not made accused in the present case. The S.P., Rail, Katihar has admitted that there is complete violation of provisions of the N.D.P.S. Act as well as the manner in which the raid was conducted investigation proceeded. He has been compelled to issue show cause against all the officers of team constituted to conduct raid in the abandoned railway quarter. In absence of any material brought on record to connect the said Puja Kumari in respect of the seized Ganja and evidence regarding her being the wife of the petitioner apart from certain call details the petitioner appears to have been made accused in the present case on mere suspicion. Admittedly, nothing has been recovered from the possession of the petitioner neither in the present case nor in connection with Katihar Town P.S. Case No. 146 of 2020 in which he was arrested on 22.02.2020 in which he has already been enlarged on bail vide order dated 02.09.2020 passed in Cr. Misc. No. 22648 of 2020 by a co-ordinate Bench of this Court.

Learned A.P.P., for the State has opposed the prayer for grant of bail to the petitioner.

Considering the facts and circumstances of the case,



the petitioner has been implicated in this case on the basis of statement of co-accused of the Katihar Town P.S. Case No. 146 of 2020 and he was remanded in the present case on 08.06.2020, the petitioner has prima facie made out a case to be enlarged on bail.

The petitioner is directed to be enlarged on bail upon furnishing bail bond of Rs. 25,000/- (Rupees Twenty Five Thousand) with two sureties of the like amount each to the satisfaction of learned A.D.J.-IV, Katihar in connection with Kishanganj Rail P.S. Case No. 09 of 2020 subject to the following conditions:

(i) Bailors should be local having sufficient immovable property within the jurisdiction of the Court concerned.

(ii) Petitioner shall co-operate in the trial and shall be properly represented on each and every date fixed by the Court.

(iii) If the petitioner tampers with the evidence or the witnesses of the case, in that case, prosecution will be at liberty to move for cancellation of bail of the petitioner.

(iv) If the petitioner is found involved in similar nature of offence, after his release on bail, the trial Court shall take steps to cancel his bail bond.



In view of the action taken against the officers of the raiding team by the Superintendent of Police, Rail, Katihar as well as the District Magistrate, Kishanganj against one Magistrate namely, Binod Kumar, this Court finds it necessary that strict action be taken against such officers in accordance with law.

Let a copy of this order be communicated to the Director Genral, N.C.B, Bihar, Director General of Police, Bihar and Inspector General of R.P.F., Bihar.

**(Purnendu Singh, J)**

Niraj/-

|   |  |   |  |
|---|--|---|--|
| U |  | T |  |
|---|--|---|--|

