

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.35 of 2022

Arising Out of PS. Case No.-226 Year-2017 Thana- BIDUPUR District- Vaishali

MUNNA KUMAR S/o Late Shivji Sharma R/o village- Daud Nagar, P.S.- Bidupur, District- Vaishali at Hajipur

... .. Appellant

Versus

The State of Bihar

... .. Respondent

Appearance :

For the Appellant/s : Mr. Rajendra Narayan, Sr. Advocate
Mr. Vijay Kumar Singh, Advocate
Mr. Abhinav Shandilya, Advocate
For the Respondent/s : Mr. Sujit Kumar Singh, APP

CORAM: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH

and

HONOURABLE MR. JUSTICE NAWNEET KUMAR PANDEY

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH)

Date : 26-07-2023

The sole appellant has preferred this appeal under Section 374(2) of the Code of Criminal Procedure against the judgment of conviction dated 26.11.2021 and order of sentence dated 07.12.2021 passed by the learned 1st Additional Sessions Judge-cum-Special Judge, NDPS Act, Vaishali at Hajipur, in Bidupur P.S. Case No. 226 of 2017, whereby and whereunder the appellant has been convicted and sentenced as under :-

Conviction under Section	Sentence		
	Imprisonment	Fine (Rs.)	In default of fine
20(b)(ii)(C) of the NDPS Act	Rigorous imprisonment for 13 years	1 Lakh	S.I for six months



2. Based on the self statement of Lalan Prasad Choudhary (PW-3), the Station House Officer, Bidupur Police Station, dated 29.07.2017, the concerned Bidupur P.S. Case No. 226 of 2017 came to be registered on 30.07.2017 disclosing commission of an offence punishable under Section 8/20(b)(ii) (C) of the N.D.P.S. Act. According to the said self statement, on 29.07.2017, the informant along with other police personnel, namely, Sub-Inspector Vijay Kumar Choudhary (not examined), Assistant Sub-Inspector of Police Ram Sundar Prasad (PW-8), Assistant Sub-Inspector of Police Vijay Paswan (PW-10), Constables Md. Samshad Ahmad (PW-11), Shantu Kumar (PW-6), Bibhishan Kumar Rai (PW-12), Chaukidar Jag Narayan Paswan (PW-5), Chaukidar Dinesh Paswan (PW-9), lady Chaukidar Meena Devi (PW-7), driver Chaukidar Md. Samad were on patrolling duty when they learnt at 1:00 a.m. that the accused persons viz. Ajay Rai and Munna Kumar (the appellant) were jointly involved in illicit trade of *ganja* and they had concealed huge quantity of *ganja* in the house of one Nandani Devi. For verification of the said information with the aid of Mahal Chaukidar, they went to the house of Nandani Devi and in the presence of Ajay Kumar (PW-2) and Pappu Kumar (PW-1), the house of Nandani Devi was searched. Nandani Devi



managed to escape from her house taking advantage of darkness. From her house, huge quantity of *ganja* (390 kilogram) was recovered. A seizure list was prepared. The house of the appellant Munna Kumar was also searched in the presence of the said witnesses Ajay Kumar (PW-2) and Pappu Kumar (PW-1), leading to recovery of 400 kilogram of *ganja*. Certain other articles were also recovered from the house during the search, which were seized and a seizure list was prepared. House of co-accused Ajay Kumar was also searched, but from his house, nothing incriminating was recovered.

3. Upon completion of investigation, the police submitted charge-sheet for commission of the offence punishable under Section 8/20(b)(ii)(C) of the N.D.P.S. Act against the appellant on 08.11.2017, while keeping the investigation pending against other FIR named accused persons. Cognizance was taken by the Court of the said offence on 27.11.2017, and subsequently, the appellant was charged of commission of offence punishable under Section 20(b)(ii)(C) of the N.D.P.S. Act on 09.01.2018. The appellant denied the charge and claimed to be tried.

4. At the trial, the prosecution examined 14 witnesses including the seizure list witnesses Pappu Kumar (PW-1) and



Ajay Kumar (PW-2). Both these witnesses, however, came to be declared hostile at the instance of the prosecution as they did not support the prosecution's case. The informant Lalan Prasad Choudhary was examined as PW-3 and Investigating Officer Gajendra Kumar Singh as PW-4. Two *chowkidars*, who were members of the raiding team, namely, Jag Narayan Prasad (PW-5) and Meena Devi (PW-7) too did not support the prosecution's case and accordingly, they also came to be declared hostile at the instance of the prosecution. Other members of the raiding party, namely, Shantu Kumar (PW-6), Ram Sundar Prasad (PW-8), Dinesh Paswan (PW-9), Vijay Paswan (PW-10), Md. Samshad Ahmad (PW-11) and Bibhishan Kumar Rai (PW-12) supported the prosecution's case of search, recovery and resultant seizure of *ganja* from the appellant's house. Chandan Kumar, Assistant Director in the Office of the Director, Regional Forensic Science Laboratory, Bihar, Muzaffarpur, proved the FSL report (Ext. 5) to the effect the sample sent for chemical examination was *ganja*, as PW-13. *Ganja* seized from the possession of this appellant was produced by *Malkhana* In-charge, Shailendra Kumar (PW-14).

5. The prosecution, in addition to the oral evidence adduced at the trial also adduced documentary evidence,



namely, the signatures of the seizure list witnesses (Ext.1, 1/1,1/2, 1/3), the seizure list 1 (Ext. 2), seizure list 2 (Ext. 2/1), written report (Ext. 3), which was the basis for registration of FIR, formal FIR (Ext. 3/1), the FSL report (Ext.5).

6. After closure of the evidence of the prosecution's witnesses, the appellant was questioned under Section 313 of the CrPC. The appellant answered the questions put to him in negative and claimed that no recovery was made from his house and that when the search was conducted he was not present in the house and he used to live with his in-laws at some other place.

7. The trial court, after having appreciated the evidence adduced at the trial, reached a conclusion that the prosecution successfully proved charge against the appellant of commission of offence punishable under Section 20(b)(ii)(C) of the N.D.P.S. Act. After having convicted the appellant for the aforesaid offences, the learned trial court sentenced him to imprisonment and fine by the impugned order, as has been noted hereinabove.

8. Mr. Rajendra Narayan, learned senior counsel appearing on behalf of the appellant, has taken us to the evidence of the prosecution's witnesses and has contended that



there has been blatant violation of Section 42 of the N.D.P.S. Act as the search of the house was conducted after sunset and before sunrise without following the procedure prescribed under the said provision. He has submitted that it was incumbent upon the informant to have taken down in writing his personal knowledge or information given by any person, which was the reason for him to believe that an offence punishable under the Act had been committed, before invoking his power under Section 42 of the Act. He has further submitted that the second *proviso* to Section 42 requires that if an empowered officer has reason to believe that a search warrant for authorization cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender, he might enter and search the building at any time between sunset and sunrise but only after recording the grounds of his belief. Sub-section (2) of Section 42 of the Act further contemplates that any information taken down in writing under Sub-section (1) of Section 42 of the Act or the grounds of his belief under the *proviso* thereto must be sent by the empowered officer to his immediate official superior within 72 hours, which was not done in the present case. He has further argued that in the present case, it is an admitted position that the samples were not drawn



in the presence of any Magistrate as mandated under Section 52A(2)(b) of the N.D.P.S. Act. In support of his submission, he has taken us to the evidence of the informant (PW-3), who deposed at the trial in no uncertain terms that the sample was not drawn in the presence of a Magistrate. He submits that the entire prosecution's case stands vitiated because of non-compliance of these mandatory statutory requirements. He has further argued that the seizure list witnesses have not supported the prosecution's case of seizure of any contraband from the appellant's house in their presence and further, two of the *chowkidars*, who according to the prosecution, were also members of the raiding party, have also not supported the prosecution's case. He contends that the finding of conviction recorded by the trial court based on the evidence of police personnel, all of whom were members of the raiding team deserves interference. He has drawn our attention to the Forensic Science Laboratory report dated 04.06.2018 (Ext. 5) to submit that from the said report, it is manifest the sample of the seized material was advised to be dispatched on 10.08.2017 through a special messenger Gajendra Kumar Singh (the Sub-Inspector of Police, PW-4), but the said sample was received in the office of the Director, Forensic Science Laboratory on



07.11.2017. He contends that from the said report, it can be easily inferred that the sample remained in custody of PW-4 for nearly three months before the same was delivered in the office of the Director, Regional Forensic Science Laboratory, Bihar, Muzaffarpur. The proper safety and security of the sample said to have been drawn stood compromised because of the inordinate delay of three months in delivering the sample in FSL, Bihar Muzaffarpur, he contends.

9. Mr. Sujit Kumar Singh, learned Additional Public Prosecutor representing the State, while defending the finding of conviction and the order of sentence passed by the trial court, has submitted that the prosecution was able to prove at the trial that the recovery of *ganja* was made from the house of the appellant. The appellant failed to properly explain the circumstance in which the *ganja* was found by the police officials in his house. He submits that Section 54 of the N.D.P.S. Act creates presumption of possession of illicit articles unless contrary was proved by an accused, as the appellant miserably failed to account satisfactorily the presence of *ganja* in his house. By invoking Section 54 of the Act, the trial court has rightly convicted the appellant of the offence punishable under Section 20(b)(ii)(C) of the NDPS Act.



10. We have perused the impugned judgment and order of the trial court as well as the lower court's records. We have given our anxious consideration to the rival submissions made on behalf of the appellant and the State.

11. In order to address the submissions advanced on behalf of the appellant as noted above, we need to consider first the statutory safeguards prescribed under Section 42 of the Act, which reads thus:-

“42. Power of entry, search, seizure and arrest without warrant or authorisation.-(1) Any such officer (being an officer superior in rank to a peon, sepoy or constable) of the departments of central excise, narcotics, customs, revenue intelligence or any other department of the Central Government including para-military forces or armed forces as is empowered in this behalf by general or special order by the Central Government, or any such officer (being an officer superior in rank to a peon, sepoy or constable) of the revenue, drugs control, excise, police or any other department of a State Government as is empowered in this behalf by general or special order of the State Government, if he has reason to believe from personal knowledge or information given by any person and taken down in writing that any narcotic drug, or psychotropic substance, or controlled substance in respect of which an offence punishable under this Act has been committed or any document or other article which may furnish evidence of the



commission of such offence or any illegally acquired property or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act is kept or concealed in any building, conveyance or enclosed place, may between sunrise and sunset,-

(a) enter into and search any such building, conveyance or place;

(b) in case of resistance, break open any door and remove any obstacle to such entry;

(c) seize such drug or substance and all materials used in the manufacture thereof and any other article and any animal or conveyance which he has reason to believe to be liable to confiscation under this Act and any document or other article which he has reason to believe may furnish evidence of the commission of any offence punishable under this Act or furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act; and

(d) detain and search, and, if he thinks proper, arrest any person whom he has reason to believe to have committed any offence punishable under this Act:

¹[Provided that in respect of holder of a licence for manufacture of manufactured drugs or psychotropic substances or controlled substances granted under this Act or any rule or order made thereunder, such power shall be exercised by an officer not below the rank of sub-inspector:

Provided further that] if such officer has reason to believe that a search



warrant or authorisation cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place at any time between sunset and sunrise after recording the grounds of his belief.

(2) Where an officer takes down any information in writing under sub-section (1) or records grounds for his belief under the proviso thereto, he shall within seventy-two hours send a copy thereof to his immediate official superior.”

12. On a plain reading of Section 42, it can be easily inferred that an officer competent to exercise his jurisdiction under Section 42 of the Act must have reason to believe either from his personal knowledge or information given by any person and taken down in writing that an offence has been committed and that in that case the officer concerned may, between the sunrise and the sunset only, enter, search and seize drugs and materials and arrest any person, who, he believes, has committed an offence. Sub-section (2) of Section 42 further requires that where the aforesaid information is taken down in, writing, the officer informed must send a copy thereof to his immediate official superior within 72 hours. It is noteworthy that the Supreme Court, in case of *A.S. Krishnan and others versus State of Kerala*, reported in (2004), 11 SCC 576, has



construed the expression 'reason to believe', paragraph 9 of which reads as under:-

9. Under IPC, guilt in respect of almost all the offences is fastened either on the ground of "intention" or "knowledge" or "reason to believe". We are now concerned with the expressions "knowledge" and "reason to believe". "Knowledge" is an awareness on the part of the person concerned indicating his state of mind. "Reason to believe" is another facet of the state of mind. "Reason to believe" is not the same thing as "suspicion" or "doubt" and mere seeing also cannot be equated to believing. "Reason to believe" is a higher level of state of mind. Likewise "knowledge" will be slightly on a higher plane than "reason to believe". A person can be supposed to know where there is a direct appeal to his senses and a person is presumed to have a reason to believe if he has sufficient cause to believe the same. Section 26 IPC explains the meaning of the words "reason to believe" thus:

"26. '*Reason to believe*'.—A person is said to have 'reason to believe' a thing, if he has sufficient cause to believe that thing but not otherwise.

13. The Supreme Court in case of ***Tofan Singh versus***



State of Tamil Nadu, reported in (2021), 4 SCC 1 has distinguished the expression 'reason to believe' and 'reason to suspect'.

14. Given the stringent nature of the provisions under the N.D.P.S. Act, several safeguards have been provided before power is exercised under Section 42 of the Act; of which the first and foremost is that the officer must have the reason to believe before he exercises such power. It is trite that the statute like the N.D.P.S. Act has to be construed strictly bearing in mind the established legal principal that severer the punishment, the greater the care, to be taken to see that the safeguards provided in the statute are scrupulously followed. Reference may be made in this regard to the Supreme Court's decisions in the case of *State of Punjab versus Baldev Singh*, reported in (1999) 6 SCC 172 and *Directorate of Revenue versus Mohammed Nisar Holia*, reported in (2008) 2 SCC 370.

15. In case of *Union of India Versus Balmukund and others*, reported in (2009) 12 SCC 161, the Supreme Court observed that where a statute confers drastic powers and seeks to deprive a citizen of his liberty for not less than 10 years, and makes stringent provision for grant of bail, scrupulous compliance with the statutory provisions must be insisted upon.



16. In the present case, we find substance in the submission made on behalf of the appellant that the informant blatantly breached the mandatory requirements under Section 42 of the Act by entering into the house of the appellant after sunset and before sunrise, without recording any ground as ordained under Sub-section 2 of Section 42 of the NDPS Act. Further, there is no evidence that the informant had taken down in writing his reason to believe which made him enter into the house premises and conduct a search.

17. Further, it is also an admitted position that the sample was not drawn in the presence of Magistrate as contemplated under Section 52A(2)(b) of the Act. In case of *Union of India versus Mohan Lal and another*, reported in **(2016) 3 SCC 379**, the Supreme Court has laid down in clear terms that no sooner the seizure of any narcotic drugs and psychotropic and controlled substances and conveyances is effected, the same shall be forwarded to the officer-in-charge of the nearest police station and the officer concerned shall then approach with an application under Section 52A(2)(b) of the Act, which shall be allowed by the Magistrate as soon as may be required under Sub-section (3) of Section 52A. In the present case, the sample having not been drawn in the presence of the



Magistrate, it cannot be safely held that the sample, which was sent to the Forensic Science Laboratory for examination, was drawn from the materials seized by the police. In any case, it amounts to breach of the requirement under Section 52A(2)(b) of the Act.

18. Last but not the least, we do not find any justification why the sample was delivered to the Forensic Science Laboratory nearly three months after its dispatch through the special messenger (in the present case, the Investigating Officer himself). The delay has completely remained unexplained. Further, in the present case, the prosecution claimed to have produced the *ganja*, which was seized from the house of the appellant. It emerges from the evidence of the prosecution's witnesses that the said substance was kept in the *Malkhana* of the police station. The safe storage of *ganja* was certainly not ensured as required under Standing Order No. 1/89 dated 13th June, 1989, Government of India, Ministry of Finance, Department of Revenue.

19. For the aforesaid reasons, in our opinion, the prosecution cannot be said to have established the charge of commission of the offence punishable under Section 20(b)(ii) (C) of the N.D.P.S. Act, considering patent violation of Sections



42 and 52A of the Act in addition to what has been discussed hereinabove.

20. Thus, the impugned judgment of conviction dated 26.11.2021 and order of sentence dated 07.12.2021, passed by the learned 1st Additional Sessions Judge-cum-Special Judge, NDPS Act, Vaishali at Hajipur, in Bidupur P.S. Case No. 226 of 2017, are accordingly set-aside. The appellant stands acquitted of the charge of commission of offence punishable under Section 20(b)(ii)(C) of the N.D.P.S. Act by giving him benefit of doubt.

21. This appeal is allowed.

22. The appellant is in custody. Let him be released forthwith, if not, required in any other case.

(Chakradhari Sharan Singh, J)

(Nawneet Kumar Pandey, J)

SONALI/Kundan

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