

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.25 of 2020**

Arising Out of PS. Case No.-55 Year-2013 Thana- RAXAUL District- East Champaran

AMAR CHOUDHARY Son of Late Rampukar Choudhary Resident of
Village-Chapkaiya, Ward no.3, P.O. and P.S.-Birganj, District-Parsa, Nepal.

... .. Appellant/s

Versus

The State of Bihar .

... .. Respondent/s

Appearance :

For the Appellant/s : Mr.Archana Sinha @ Archana Shahi, Adv

For the Respondent/s : Mr.Ajay Mishra, APP

CORAM: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH

and

HONOURABLE MR. JUSTICE RAJIV ROY

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH)

Date : 12-05-2023

We have heard Mrs. Archana Sinha, learned legal aid counsel for the appellant and Mr. Ajay Mishra, learned Additional Public Prosecutor for the State.

2. By the impugned judgment of conviction dated 03.05.2017 and the order of sentence dated 09.05.2017 passed by the learned 7th Additional Sessions Judge- cum Special Judge, Motihari in NDPS Case No. 43/2005 of 2013/16 arising out of Raxaul P.S. Case No. 55 of 2013, the appellant has been convicted and sentenced as under:-



Conviction under Section	Sentence		
	Imprisonment	Fine (Rs.)	In default of fine
under Section 20(b)(ii)(C)	Rigorous Imprisonment for 15 years	1,50,000/-	RI for one and a half years

3. The facts which emerge from the record of the present appeal reflect abject failure on the part of the investigating agency in carrying out the mandatory requirements under the Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS Act in short) and the statutory instructions issued by the Central Government under the said Act.

4. Before we address the points involved in the present appeal, we consider it apt to notice that after the impugned judgment of conviction dated 3.5.2013 and the order of sentence dated 9.5.2017 passed by the learned trial court, the appellant had not preferred any appeal. It was at the initiative of the Patna High Court, Legal Services Committee, that the appellant was provided legal aid with the engagement of a learned Legal Aid Counsel of the Legal Services Committee, Patna High Court to prefer this appeal and accordingly it came to be filed on 10.01.2020. An attempt was made by the learned legal aid counsel for suspension of sentence and release of the appellant on bail during the pendency of the appeal. Instead



considering the appellant's prayer for suspension of sentence a co-ordinate bench of this Court considered it proper to secure the ends of justice to fix a date for final hearing of the appeal itself. It is in the light of the said order of this Court dated 11.10.2022, that this appeal has been taken up for final hearing.

5. An Assistant Sub-Inspector of Police of Haraiya police out-post under Raxaul P.S. (P.W.-1) Ashok Kumar Singh, made a written report to the officer-in-charge, Haraiya O.P. that on the mobile phone of the S.H.O, a secret information was received at 9:15 AM on 04.03.2013 that a *Tanga* loaded with *ganja* was moving towards Pareua Aerodrome Road. In this regard, an information was given to the Superior Officer. Acting swiftly on the said information, the S.H.O. and armed police officials proceeded on a jeep for conducting the raid. The *Tanga* was found coming near Pareua bazar, Haraiya Aerodrome Road near a temple. The person who was riding the *Tanga* after having seen the police party attempted to escape but was apprehended. He disclosed his name and address. He claimed to be a resident of Nepal. He is said to have confessed before the police that he was carrying *ganja* over the carrier of the *Tanga* and had attempted to escape to prevent his arrest. Several persons assembled there, two of whom were requested to



become the seizure list witnesses who agreed and in whose presence 11 bundles of *ganja* wrapped in red packets which were kept in the carrier of the *Tanga* was found. The plastic bundles were opened and in each of them *ganja* was found. With the help of a local shopkeeper, a balance and weights were arranged for the weighment of recovered *ganja*. The total weight of recovered *ganja* was found to be 64 kgs. Thereafter, the *Tanga*, and *ganja* were seized and a seizure list was prepared. The appellant is said to have disclosed in his confessional statement the place from where he was bringing the contraband substance and the person to whom the same was supposed to be handed over. Based on the written report to the aforesaid effect, Raxaul P.S. Case No. 55 of 2013 came to be registered on 04.03.2013 at 8:00 PM. It is evident from the formal FIR that the distance of the police station from the place of occurrence was seven kilometers.

6. The police, upon completion of investigation submitted charge-sheet on 31.5.2013. It is worthwhile to mention that at this juncture itself that it is manifest from the record that the FIR does not disclose drawing of sample from the seized *ganja* either at the place of seizure or at the place where the same was taken to by the informant. It is also evident



that for the first time on 17.4.2013 i.e. nearly one and half months after the date of seizure, an application was made for drawal of sample from the seized substance for the purpose of scientific examination. The sample said to have been so drawn was sent to the Forensic Science Laboratory on 17.4.2013 by a special messenger and was received in the office of Director, Forensic Science Laboratory, Bihar, Patna on 16.5.2013. As noted above the, charge-sheet was filed on 31.5.2013 even before the preparation of forensic science report on 19.6.2013. It is not mentioned in the FIR that even for the purpose of *prima facie* satisfaction any Drug Detection Kit was used to ascertain as to whether the substance recovered by the police was *ganja* or not.

7. Be that as it may, cognizance was taken on 28.6.2013 of the offences punishable under sections 22, 23 and 24 of the NDPS Act and subsequently, charges were framed against the appellant on 24.7.2013 for commission of the offences punishable under sections 20(b)(ii) (C) and 23 (c) of the NDPS Act. As the appellant denied the charge and claimed to be tried, he was put on the trial.

8. Altogether seven prosecution's witnesses came to be examined including the informant Ashok Kumar Singh



(P.W.1), Hare Ram Singh Havildar and a member of the raiding team (PW-2), Rajiv Kumar a constable and a member of the raiding team (PW-3), Dinesh Yadav a constable and a member of the raiding team (PW-4), Anay Kumar a constable and a member of the raiding team (PW-5), Sunil Kumar the investigating officer (PW-6) and Madan Prasad the seizure list witness (PW-7).

9. The prosecution also brought on record by way of evidence following documentary evidence:-

Exhibit List

Exhibit-1	Written application of Ashok Kumar Singh	Prosecution	21.12.16	Without objection
Exhibit-2	Seizure List	Prosecution	1.3.17	Without objection
Exhibit-3	Forwarding on written application	Prosecution	1.3.17	Without objection
Exhibit-4	Formal FIR	Prosecution	1.3.17	Without objection
Exhibit-5	Confessional Statement of Amar Chaudhary	Prosecution	1.3.17	Without objection
Exhibit-6	Arrest Memo	Prosecution	1.3.17	Without objection
Exhibit-7	Application for examination of seized exhibit	Prosecution	1.3.17	Without objection
Exhibit-8	Forwarding of FSL Patna	Prosecution	1.3.17	Without objection
Exhibit-8/1	Forwarding for Custom House Kolkata	Prosecution	1.3.17	Without objection
Exhibit-9	Receipt of FSL Patna	Prosecution	1.3.17	Without objection
Exhibit-10	Jimmanama	Prosecution	1.3.17	Without



				objection
Exhibit-11	FSL Report	Prosecution	3.3.17	Without objection
Exhibit-12	Signature of Madan Prasad on seizure list	Prosecution	12.4.17	Without objection

10. Material exhibit said to be ganja was not produced by the prosecution before the court at the trial nor any report relating to destruction/disposal of *ganja* was adduced as evidence during the course of the trial.

11. The appellant was questioned by the court under section 313 of the Cr.P.C, after closure of the evidence of the prosecution witnesses, in accordance with requirement under section 313 of the Cr.P.C.

12. The trial Court after having appreciated and analyzed the evidence adduced at the trial and other attending circumstances reached a conclusion that the appellant was guilty of keeping in his possession in the *Tanga*, 11 bundles of commercial quantity of *ganja* which was being carried by him from Nepal and accordingly, convicted him for commission of the offences punishable under Sections 20(b)(ii)(C) and 23(c) of the NDPS Act and sentenced him by an order dated 09.05.2017 as has been noted at the outset.

13. Learned legal aid counsel appearing for the appellant has submitted that it is evident from the evidence of



the prosecution witnesses that the sample was not drawn from the seized articles soon after the seizure was made. She has further submitted that there is no evidence to suggest that the seized articles were safely stored in accordance with the requirements laid down under standing order no. 1 of 1989 issued in exercise of power under Section 52-A(i) of the NDPS Act. She has submitted that unexplained delay in sending the samples to the forensic science laboratory coupled with the fact that the investigating officer has failed to explain the circumstances in which the special messenger had kept in his custody the samples drawn from 17.04.2013 to 16.05.2013 demolishes the entire prosecution's case.

14. Mr. Mishra, learned Additional Public Prosecutor for the State has though attempted to defend the impugned finding of conviction and the order of sentence recorded by the trial court, he has not been able to meet the crucial points raised on behalf of the appellant in this case as regards (i) failure on the part of the police to draw samples soon after the seizure, (ii) absence of evidence of storage of the seized articles in safe custody, (iii) delay in transmission of the samples to the Forensic Science Laboratory and (iv) failure to produce the seized articles at the trial.



15. We find substance in the submission made on behalf of the appellant that failure on the part of the prosecution to draw the samples at the place of seizure or soon after the seizure was made goes to the root of the matter. As has been noted above, the investigating officer for the first time approached the court for drawing the samples on 17.04.2013. The investigating officer in paragraph no. 9 of his cross examination deposed that he had not recorded in his case diary regarding drawal of samples by the Magistrate. In paragraph no. 11 of his cross-examination, he deposed that he did not mention in the case diary as to where the samples so drawn were kept from 17.04.2013 when it was handed over to the Special Messenger Ashok Paswan till 16.05.2015, when the same was received in the office of Director Forensic Science Laboratory, Bihar, Patna. In paragraph no. 15, the investigating officer deposed that he had not recorded in the case diary as to where the seized ganja was stored after drawal of the samples.

16. It would be relevant to notice, the Supreme Court's decision in the case of *Union of India Vs. Mohan Lal* reported in *(2016) 3 SCC 379*, which has laid great emphasis on safe storage and disposal of the contraband articles under the NDPS Act. The present case is a glaring example of not



following the Standing Order No.1/1989 issued by the Government of India which is binding in character with a clarification as regards drawl of samples from the seized contraband on the spot at the time of recovery itself as prescribed under par 2.2 of the said standing order. The Supreme Court after having extensively dealt with the requirement under Section 52(A)(2) of the NDPS Act, has held in paragraph no. 15 and 16 as under:-

“15. It is manifest from Section 52-A(2) (c) (supra) that upon seizure of the contraband the same has to be forwarded either to the officer-in-charge of the nearest police station or to the officer empowered under Section 53 who shall prepare an inventory as stipulated in the said provision and make an application to the Magistrate for purposes of (a) certifying the correctness of the inventory, (b) certifying photographs of such drugs or substances taken before the Magistrate as true, and (c) to draw representative samples in the presence of the Magistrate and certifying the correctness of the list of samples so drawn.

16. Sub-section (3) of Section 52-A requires that the Magistrate shall as soon as may be allow the application. This implies that no sooner the seizure is effected and the contraband forwarded to the officer-in-charge of the police station or the officer empowered, the officer concerned is in law duty-bound to approach the Magistrate for the purposes mentioned above including grant of permission to draw representative samples in his



presence, which samples will then be enlisted and the correctness of the list of samples so drawn certified by the Magistrate. In other words, the process of drawing of samples has to be in the presence and under the supervision of the Magistrate and the entire exercise has to be certified by him to be correct.”

17. Dealing with Section 55 of the NDPS Act which requires an Officer-in-charge of a Police Station to take charge of the contraband articles and keep it in safe custody, pending orders of the Magistrate read with para 3.2 to 3.9 of the standing order, the Supreme Court in the case of **Mohan Lal (supra)** has laid down in paragraph no. 21 as under:-

“21.It is evident from a plain reading of Para 3.2 (supra) that storage of all drugs in safes and vaults has been made mandatory and that agencies of the Central and the State Governments have been permitted to designate their godowns for storage purposes. It is also clear that keeping in view the importance of protecting the seized drugs against theft, substitution or pilferage the Central Government has prescribed that such godowns shall be placed under the overall supervision and charge of a gazetted officer of the respective enforcement agencies who shall exercise utmost care, circumspection and personal supervision over the storage facilities.”

18. It is unfortunate that in the present case there is no clue as to where the seized articles were kept after seizure of the



seized contraband articles and as to whether they were disposed off and destroyed in accordance with the procedure prescribed therefor. We have already noted above that the seized articles were not produced at the trial as material exhibits and the sample remained with one Ashok Paswan a constable to whom it was handed over on 17.04.2013 till the same was received on 16.05.2013 in the office of Director, Forensic Science Laboratory, Bihar, Patna. The investigating officer has not given any explanation for the same. It is also the prosecution's case that the weighment of the seized articles was done by using weights and measures provided by a local shopkeeper who was not examined at the trial nor his name has been disclosed in the First Information Report. In such circumstances, in our considered opinion, it is unsafe for this Court to hold that the sample which was sent for forensic examination was actually drawn from the seized contraband articles said to have been recovered by the police. Failure on the part of the prosecution to produce before the trial court the said articles alleged to be contraband, casts serious doubt over the recovery itself.

19. For the reasons noted above, we are of the considered view that the conviction of the appellant for commission of the offences punishable under Sections 20(b)(ii)



(C) and 23(c) of the NDPS Act cannot be upheld.

20. Accordingly, the impugned judgment of conviction dated 03.05.2017 is hereby set aside. Consequently, the order of sentence dated 09.05.2017 is also set aside.

21. This appeal is allowed.

22. Since the appellant is in custody, let him be released from jail forthwith, if not required in any other case.

23. Before we part with the present judgment and order, we record our deep appreciation for the able assistance extended by Mrs. Archana Sinha, learned legal aid counsel who has presented the case of the appellant by way of legal aid. For the assistance extended by her to this Court, Patna High Court Legal Services Committee, is directed to pay her a sum of Rs. 15,000/-.

(Chakradhari Sharan Singh, J)

(Rajiv Roy, J)

ranjan/ravi-

AFR/NAFR	NAFR
CAV DATE	NA
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