

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.131 of 2021

Arising Out of PS. Case No.-4 Year-2018 Thana- BHANGHA District- West Champaran

Shohrab Sheikh @ Sohrab Sheikh, S/o Hanif Karim Sheikh, Resident of Mahadeo Patti, P.S. Sherwa, District - Parsa, Nepal .

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s : Mr. Bimlesh Kumar Pandey, Advocate
For the Respondent/s : Mr. Sujit Kumar Singh, APP

CORAM: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH

and

HONOURABLE MR. JUSTICE RAJIV ROY

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH)

Date : 11-05-2023

By the impugned judgment and order dated 27.11.2020, passed by the learned District & Sessions Judge- cum-Special Judge, NDPS Act, West Champaran, Bettiah in connection with Trial No. 15/2018/ CIS No. 20/2018, arising out of Bhangaha P.S. Case No. 04/2018, 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	RI for life	2,00,000/-	SI for one year
22(c) of the NDPS Act	RI for life	2,00,000/-	SI for one year
22(c) of the	RI for life	2,00,000/-	SI for one year



NDPS Act			
----------	--	--	--

2. A written report addressed to the Officer-in-Charge of Bhangaha Police Station dated 13.01.2018 by the Assistant Commandant, "A" Coy, 44 BN SSB (Sashastra Seema Bal) is the basis for the registration of the concerned Bhangaha P.S. Case No. 4/2018 for the offences punishable under Sections 20, 22, 23 and 28 of the Narcotic Drugs and Psychotropic Substances Act (the Act in short). According to the written report, the informant (P.W. 5) received a confidential information at about 6:00 P.M. on 12.01.2018 to the effect that a person was likely to cross Nepal border in a red Bajaj CT 100 motorcycle with contraband articles, at about 9:00 P.M. and that he would be going to Narkatiyaganj. The secret information so received was communicated to the Commandant of SSB who directed the informant to constitute a raiding team to intercept the said person. Accordingly, equipped with drug detection kit, weighing machine, sampling materials, and packaging materials, the informant reached the indicated place at about 8:15 P.M. with other members of the raiding team. In the meanwhile, two persons namely, Lal Babu Sah @ Lal Babu Jaiswal (P.W. 7) and Akhilesh Yadav (not examined) were seen crossing the place who were requested by the raiding team to



co-operate in the search operation. They acceded to the request. At about 9:30 P.M. the appellant was seen coming in the motorcycle and was intercepted. An information in this regard was given immediately to Rajiv Kumar, Assistant Commandant (not examined) who also came and in his presence and in the presence of independent witnesses search of the members of the raiding team was firstly allowed to be conducted and thereafter, on a consent given by the appellant to be searched, his personal search was conducted leading to recovery of three packets from the inner pocket of his jacket which he was wearing and two packets tied with his belt and 15 packets of contraband articles from the vehicle. Total weight of the stuff so seized was found on weighment, to be 10 Kg. With the aid of drug detection kit the substance was, *prima facie*, found to be *charas*. The appellant also disclosed that the stuff was *charas*. Two samples were, thereafter, drawn, 25 gm each which were sealed and rest of the articles so seized were duly packaged. The appellant, accepting the stuff to be *charas* disclosed to the raiding team that he had taken them from one Shakil Ahmad which he was required to hand over to one Suresh of a place named Lauriya. It further transpires from the written report that the appellant was arrested and he was forwarded to the Officer-in-Charge of the



nearest police station with the seized articles, the seizure-list, the arrest Memo and **one sample** of the seized article. After registration of the FIR, the investigation was handed over to Navin Sharma (P.W. 6).

3. We notice, at this juncture, the prosecution's case that the sample was sent for forensic examination which was received in the Office of the Director, Forensic Science Laboratory, Bihar, Patna on 17.07.2018. It transpires from the ordersheet maintained by the learned Sessions Judge that the Investigating Officer had made an application on 05.02.2018 to depute a Magistrate to seal the seized materials for sending it to the FSL, Patna and accordingly Sri Chandra Bhusan Ram, Judicial Magistrate Ist Class, West Champaran, Bettiah was deputed to seal the seized materials. There is reference to Memo No. 1140 dated 19.04.2018 advising dispatch of a parcel through special messenger viz. ASI Samsuddin Ansari (not examined), issued by the Office of the learned District and Sessions Judge, West Champaran, Bettiah to the Director, Forensic Science Laboratory, Bihar. The description of the article contained in the parcel has been given in the FSL report (Exhibit- 8) as "*tin dibba* containing some semi-solid dark brown coloured substance". The result of the forensic examination dated



29.11.2019 reads as under:

"The dark brown coloured semi solid substance contained in the tin dibba as described above was found to be Charas. CHARAS also known as Hashish is the resinous exudates of the flowering and fruiting tops of the female plant of cannabis sativa containing Tetra Hydro Cannabinol (THC) as their chief intoxicating ingredients."

4. For the purpose of quick reference, we quote hereinbelow, the relevant extract of the communication dated 29.11.2019 made by the Office of the Director, Forensic Science Laboratory, Patna :-

"OFFICE OF THE DIRECTOR, FORENSIC SCIENCE LABORATORY

BIHAR, PATNA-800023

REPORT F.S.L. No. 1767/18

Patna, the 29/11/2019

From,

The Director,
Forensic Science Laboratory,
Government of Bihar,
Patna.

To

The District and Session Judge,
West Champaran,
Bettiah.

Your memo No. 1140 dated 19.04.18 advising dispatch of a parcel per special messenger A.S.I. Samsuddin Ansari which was received in this office on 17.07.18 in connection with Bhangha P.S. Case no. 04/18 dated 13.01.18 U/S 20/22/23/28 NDPS Act.

MODE IN WHICH PARCEL WAS FOUND TO BE PACKED ON RECEIPT



AND DESCRIPTION OF SEAL

The parcel consisted of a tin dibba enclosed within cloth cover which was duly sealed with impressions of seal corresponding with the seal impression forwarded.

It said to contained, sample of charas seized from the accused." (Underlined for emphasis)

5. Be that as it may, as is the regular feature, in the present case also even before forensic examination of the articles so seized, the police submitted its chargesheet on 11.04.2018. After taking of cognizance, charge was framed against the appellant for the commission of the offences punishable under Sections 20(b)(ii)(c), 22(c) and 23(c) of the NDPS Act. The appellant pleaded not guilty and claimed to be tried. Accordingly, the appellant was put to trial.

6. At the trial, the prosecution examined altogether seven witnesses to establish the charge; including the seizure-list witness (P.W. 7) and the informant Naresh Kumar (P.W. 5). P.Ws 1, 2, 3 & 4 were other members of the raiding team which was led by the informant Naresh Kumar (P.W. 5). The seizure list witness (P.W. 7) though proved his signature on the seizure memo deposed at the trial that nothing was recovered in his presence and that his signature was obtained on a plain paper and he was not given any opportunity to read the contents of the



seizure memo.

7. Further, the prosecution also got exhibited following documents at the trial in support of the charge:-

Exhibit-1 : The proforma for seizure

Exhibit-2: The proforma for apprehension

Exhibit-3: The written report

Exhibit-4: The name and address of the SSB
personnel involved in seizure

Exhibit-5: The formal FIR

Exhibit-6: The endorsement on FIR,

Exhibit-7: The signature of seizure list witness Lal
Babu

Exhibit-7/A: The signature of witness Lal Babu on the
proforma of apprehension and

Exhibit-8: The F.S.L. report.

8. The seized articles were produced as evidence marked as (I).

9. After closure of evidence of the prosecution's witnesses the statement of the appellant was obtained in accordance with the provision under Section 313 of the CrPC based on the evidence of the prosecution's witnesses. The trial court after having analysed and appreciated the evidence on record reached a conclusion that the prosecution was able to prove the charge of commission of the offence punishable under Section 20(b)(ii)(c) of the Act. Further, taking into account the facts that the recovered *charas* was of commercial quantity, the trial court reached a conclusion that the prosecution was able to



prove the charge against the appellant for commission of the offences punishable under Section 22(b) and 22(c) of the Act also.

10. It is pertinent to mention that the learned District and Sessions Judge-cum-Special Judge, (NDPS Act), while recording the finding of conviction as noted above took into account presumptions of culpable mental state as envisaged under Section 35 of the Act. Taking into account the evidence that the informant (P.W. 5) was inspector of SSB and the search and seizure was made in the presence of Rajiv Kumar, Assistant Commandant, he concluded that there was due compliance of the requirement under Section 50 of the Act.

11. Assailing the impugned judgment of conviction, it has been argued on behalf of the appellant that it is manifest that there has been no compliance of Section 50 of the Act, inasmuch as, there is no evidence to suggest that it was disclosed to the appellant of his right of being searched before a Gazetted Officer or a Magistrate which is a mandatory requirement under Section 50 of the Act. He has further argued that the representative sample was apparently not drawn in the presence of Magistrate and in accordance with the Standing Order 1/89 issued by the Finance Department, Government of



India, in exercise of the powers under the Act. It has been also submitted that if the case of the prosecution, as disclosed in the written report, which is the basis for registration of the FIR, is taken to be correct, two samples were drawn (25 gm each) on the very date of seizure i.e. 13.01.2018. There is no clue as to what happened with the said two samples. Much after the seizure and the registration of the FIR, an application was made by the Investigating Officer before the Learned Sessions Judge on 05.02.2018 for deputing a Magistrate to seal the seized materials for sending it to FSL, Patna. Further, there is no justification coming forth for belated receipt of the samples in the office of Forensic Science Laboratory on 17.07.2018 which was said to have been sent through special messenger on 19.04.2018 itself. There is nothing on record as to where and how the samples were kept by the ASI Samsuddin Ansari (not examined) from 19.04.2018 to 17.07.2018. He has further submitted that the inventory has not been proved in accordance with the requirement under Section 52A of the Act nor *Malkhana* In-charge was examined at the trial to prove safe storage of the seized articles. Further, there is no evidence that the sample was drawn in the presence of the appellant, which is a requirement under Section 50 of the Act.



12. He has placed reliance on various Supreme Court's decisions including the decision in case of *Tofan Singh vs. State of Tamil Nadu* reported in (2021) 4 SCC 1 and *Union of India vs. Mohanlal & Another* reported in (2016) 3 SCC 379 in support of his contentions. Reliance has also been placed on the Supreme Court's decision in case of *Gorakh Nath Prasad vs. State of Bihar* reported in (2018)2 SCC 305.

13. Learned Additional Public Prosecutor appearing on behalf of the State has submitted that there has been substantial compliance of Section 50 of the Act, inasmuch as, the search and seizure was made in the presence of a Gazetted Officer. He has submitted that based on subsequent denial by the seizure-list witness of recovery of the item in his presence cannot be a ground for doubting the correctness of seizure memo since he has proved his signature on the seizure memo. He has further submitted that the prosecution's witnesses, who are the officials of Sashastra Seema Bal, are independent witnesses and, therefore, their evidence has been duly considered by the trial court in right perspective.

14. We have carefully perused the impugned judgment of the trial court as well as the lower court's records. We have given our thoughtful consideration to the rival submissions



made on behalf of the parties.

15. We find substance in the submission made on behalf of the appellant that there is no evidence on record to demonstrate due compliance of the requirement under Section 50 of the Act. The Supreme Court in case of **Tofan Singh** (supra), after having noticed the Supreme Court's decision in case of *State of Punjab vs. Baldev Singh* reported in (1999) 6 SCC 172, *State of Punjab vs. Balbir Singh* reported in (1994) 3 SCC 299, *Vijaysinh Chandubha Jadeja vs. State of Gujarat* reported in (2011)1 SCC 609 and *Karnail Singh vs. State of Haryana* reported in (2009) 8 SCC 539 has reiterated that compliance of Section 50 of the Act is an important safeguard which is subject only to the exceptions carved out in sub-sections (5) and (6) thereof, which can be used only in urgent and emergent situations. Non-compliance of Section 50 would lead to the conviction of the accused being vitiated and substantial compliance with these provisions would not save the prosecution's case, the Supreme Court has held.

16. We deem it apposite to reproduce paragraph 50 of the decision in case of **Tofan Singh** (supra), which reads as under:

"50. Thus, this extremely important safeguard continues, as has been originally enacted, subject only to the exceptions in



sub-sections (5) and (6), which can only be used in urgent and emergent situations. This Court has clearly held that non-compliance of this provision would lead to the conviction of the accused being vitiated, and that "substantial" compliance with these provisions would not save the prosecution case."

17. In our considered view, the finding of conviction deserves interference on the sole ground of non-compliance of Section 50 of the Act. Further, we find that the samples were not drawn in accordance with law in the presence of a Magistrate and the samples so drawn at the time of seizure were not sent to the FSL. There is clear evidence on record that much thereafter, on 05.02.2018, an application was filed for sealing of the seized materials for sending to FSL. The failure on the part of the prosecution to draw the samples soon after the seizure in the presence of a Magistrate also affects the prosecution's narrative adversely. The last but not the least, according to the informant, he had drawn two samples of seized contraband, one of which was handed over to the police. There is no evidence as to how the other sample was disposed of or remained in whose custody.

18. Situated thus, in the light of aforesaid discussions, the present appeal succeeds. The impugned judgment of conviction and the order of sentence dated 27.11.2020, passed by the learned District & Sessions Judge- cum- Special Judge,



NDPS Act, West Champaran, Bettiah in Trial No. 15/2018/ CIS
No. 20/2018, arising out of Bhangaha P.S. Case No. 04/2018 is
hereby set aside.

19. The appellant stands acquitted of the charge of the
commission of offences punishable under Sections 20(b)(ii)(c)
and Sections 22(c) and 23(c) of the NDPS Act.

20. The appeal is accordingly allowed.

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

(Chakradhari Sharan Singh, J)

(Rajiv Roy, J)

Rajesh/Suraj/-

AFR/NAFR	NAFR
CAV DATE	NA
Uploading Date	22.05.2023
Transmission Date	22.05.2023

