

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.456 of 2020

Arising Out of PS. Case No.-13 Year-2017 Thana- CHHAURADANO District- East
Champaran

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Mahesh Prasad, son of Late Vishambar Prasad, Resident of Village -
Lakhaura, P.S.- Lakhaura, District- Motihari, East Champaran

... .. Appellant

Versus

The State of Bihar

... .. Respondent

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Appearance :

For the Appellant	:	Mr. Jitendra Singh, Sr. Advocate Mr. Tej Pratap Singh, Advocate Mr. Yash Singh, Advocate Mr. Isshan Singh, Advocate
For the State	:	Ms. Abha Singh, A.P.P.

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CORAM: HONOURABLE MR. JUSTICE CHANDRA SHEKHAR JHA
ORAL JUDGMENT

Date : 12-12-2023

Heard Mr. Jitendra Singh, learned senior Advocate assisted by Mr. Tej Pratap Singh, learned counsel for the appellant and Ms. Abha Singh, learned Additional Public Prosecutor for the State.

2. The present appeal preferred under Section 374(2) of the Code of Criminal Procedure (in short the ‘Cr.P.C.’) challenging the judgment and order of conviction dated 15.10.2019 and order of sentence dated 21.10.2019, respectively as passed by learned 1st Additional Sessions Judge, East Champaran, Motihari in N.D.P.S. Case No. 11 of 2017, CIS No. 56 of 2017 arising out of Chhauradano P.S. Case No. 13 of 2017, whereunder appellant-accused was convicted and



sentenced for offence punishable under Section 20(b)(ii)(c) of the Narcotic Drugs and Psychotropic Substances Act (hereinafter referred to as the “N.D.P.S. Act”) and ordered to undergo rigorous imprisonment for ten (10) years with a fine of Rs. 1,00,000/- and in default of payment of fine, the appellant shall undergo R.I. for six months respectively.

3. As per the prosecution story, while the informant, who is ASI in SSB 47th B.N. Jalgama, was checking the vehicle on 11.09.2017 at about 11:00 O’Clock on road in front of Chhouradano Block, a Tata Magic vehicle bearing Reg. No. BR05 G 3797 was intercepted on which two persons were boarded, thereafter, one blue coloured bag containing ‘Charas’ was recovered from the apprehended person namely, Md. Mujamil. On being weighed it was found 4.6 Kg. One mobile phone was also recovered from the possession of said Md. Mujamil. On search of another person namely, Mahesh Prasad (the appellant), who was driver of the said vehicle, a mobile phone was recovered from him. On asking, both the apprehended persons did not give any satisfactory answer or paper of having contraband ‘Charas’ which was found in their possession. Thereafter, seizure list was prepared in presence of witnesses.



4. On the basis of the aforesaid, Chhauradano P.S. Case No. 13 of 2017 was registered under Section 18, 20, 22 of the N.D.P.S. Act on 19.01.2017 against the accused persons. After investigation, charge-sheet no. 109/2017 dated 10.09.2017 was submitted under Sections 18, 20, 22 of the N.D.P.S. Act in the court of learned District Judge-cum-Special Judge, Motihari. The case record of one co-accused Md. Mujamil was separated and sent to J.J. Board, Motihari and only accused Mahesh Prasad (appellant) has faced trial in this case.

5. On the basis of material collected during investigation learned trial court framed charges under Section 20(b)(ii)(c), 23(c) of the N.D.P.S. Act against the appellant/convict, which he pleaded “not guilty” and claimed trial.

6. To substantiate its case, prosecution examined total of six witnesses in support of the prosecution case. They are Parsun Kumar Murmu (PW-1), who is constable of SSB, Ganesh Das (PW-2), who is also constable of the SSB, Dinesh Singh Rawat (PW-3) is the head constable of SSB, Asim Barmudai (PW-4), who is ASI in SSB and also informant of this case, Paras Raut (PW-5) who is head constable of SSB and Azaj Alam (PW-6) who is the Investigating Officer of this case.



7. The prosecution has produced and relied upon following documentary evidences as to substantiate its case during trial, which are as under:

Exhibit No(s).	List of documents
Exhibit -1	Performa of Seizure list
Exhibit -2	Performa of arrest
Exhibit -3	Details of SSB Personnel, who were in raiding team.
Exhibit -4	Personal search memo
Exhibit -5	Proforma of intercepted goods
Exhibit -6	Notice for search u/s 50 of NDPS Act
Exhibit -7	Kabulnama of accused
Exhibit -8	Written application of informant
Exhibit -9	Production cum seizure list
Exhibit -10	Arrest memo of accused Mahesh Prasad
Exhibit -11	Forwarding petition of RFSL, Muzaffarpur
Exhibit -12	Forwarding petition to CFSL Calcutta.
Exhibit -13	Authorization certificate to examine the Exhibit, page 1
Exhibit -14	Photograph of seized contraband
Exhibit -15	Acceptable report of CFSL, Calcutta
Exhibit -16	Formal F.I.R.
Exhibit -17	Examination report of seized exhibits by RFSL, Muzaffarpur
Exhibit -18	Examination report of seized exhibit by CFSL, Calcutta.

8. On the basis of evidences/incriminating circumstance during the trial, statement of accused was recorded under section 313 of the Cr.P.C. by explaining evidences/circumstances as surfaced, for which he shows his complete innocence.

9. The defence has adduced Ramesh Kumar Yadav as



DW-1 and Rajendra Rai as DW-2. No any documentary evidence has been adduced by the defence during trial.

10. After conclusion of trial, the learned trial court has awarded the sentence as stated hereinabove, being aggrieved of which appellant/convict preferred the present appeal.

11. Hence, the appeal.

12. Mr. Jitendra Singh, learned senior counsel, while arguing on behalf of the appellant submitted that from the narration of F.I.R. itself, it appears that the contraband, as alleged, was found between the legs of co-passenger of the cabin namely, Md. Mujamil whose trial was separated being a juvenile. It is pointed out that even on query, disclosure as to have 'Charas' inside the bag was made by co-accused Md. Mujamil and not by appellant-convict, who was the driver of Tata Mazic/pick-up van.

13. Learned senior counsel further submitted that the independent witnesses namely, Ram Biswas and Jammu Narayan were not examined during the trial and furthermore, compliance of section 42 and 43 of the N.D.P.S. Act, which otherwise necessarily to be followed, not appears to be complied in the present case. It is also pointed out that compliance of Section 50 of the N.D.P.S. Act also not appears to be followed in



the present case.

14. Learned senior counsel submitted that this is not a case where recovery is made from the cabin of Tata Mazic/pick-up van, rather it is a case where recovery was made from the co-passenger who was carrying the contraband i.e. 'Charas'. By supplying strength to this point of argument, learned senior counsel submitted that seizure list of contraband, which claimed to be prepared on spot itself, is not bearing the signature of appellant-convict, falsifying the entire case of prosecution as to recovery of contraband from the appellant-convict.

15. Learned senior counsel submitted that the conviction of appellant-convict secured on two grounds, firstly, **Exhibit '7' i.e. 'Kabulnama'** which has been alleged to be made before S.S.B. police personnel, which is a police and, secondly that recovery was from joint possession with co-accused. It is submitted by learned senior counsel that the learned trial court merely on the ground as appellant-convict were found in conversation on 07.12.2016 and 24.12.2016 much prior to this occurrence over seized mobiles with co-accused Mujamil, it was held that the appellant-convict had 'meeting of mind' with co-accused Md. Mujamil from the possession of whom, the alleged contraband was recovered. It is pointed out that merely on the



basis of two conversations which made much earlier to recovery/occurrence, the finding of learned trial court regarding 'meeting of mind' as to established "culpable mental state" is appearing not convincing on it's face.

16. Giving strength to his aforesaid argument, learned senior counsel also submitted that even call detail report (in short the 'CDR') of these two conversations was not exhibited during the trial. Learned senior counsel also submitted that the CDR was not even supported by the certificate in terms of Section 65-B of Indian Evidence Act.

17. Hammering conviction, bad as per law, learned senior counsel submitted that no seized 'Charas' or even the seized sample of contraband i.e. the 'Charas' was produced before the court during the trial as material exhibits despite of fact it was not destroyed and merely on the ground of photographs which were taken at the time of alleged seizure, the conviction was made.

18. Learned senior counsel further submitted that the informant, who examined during the trial as PW-6, deposed that recovery of contraband was made from co-accused Mujamil and same also transpires from the testimony of other prosecution witnesses.



19. Learned senior counsel while travelling over his argument further submitted that in the present case procedures regarding sampling, sealing and dispatching were not followed as per standing instruction 'No. 1 of 1988 dated 15.03.1988 of Narcotic Control Bureau, Government of India as issued under Section 52A of the N.D.P.S. Act.

20. While concluding argument, learned senior counsel submitted that presumption regarding possession of illicit articles as available under Section 54 of the Act and regarding “culpable mental state” as available under Section 35 of the Act can be imported only when prosecution established foundational aspects of it's case. In support of the submissions as made above, learned senior counsel relied upon the report of Hon'ble Supreme Court in the matters of **State of Haryana Vs. Jarnail Singh** reported in (2004) 5 SCC 188; **Tofan Singh Vs. State of Tamil Nadu** reported in (2021) 4 SCC 1; **Union of India Vs. Mohanlal and Another** reported in (2016) 3 SCC 379; **Gorakh Nath Prasad Vs. State of Bihar** reported in (2018) 2 SCC 305; **Ashok alias Dangra Jaiswal vs. State of Madhya Pradesh** reported in (2011) 5 SCC 123; **Jitendra Vs. State of M.P.** reported in (2004) 10 SCC 562; and **Noor Aga Vs. State of Punjab & Another** reported in (2008) 16 SCC



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21. Per contra, learned A.P.P., while appearing on behalf of the State submitted that in the present case compliance of provisions as available under Section 42 of the N.D.P.S. Act not required to be followed as in present case, recovery of contraband made from Tata Mazic/pick up van from a public place. It is submitted that this is a case where Section 43 of the N.D.P.S. Act is to be followed. Learned A.P.P. further submitted that this is not even a case of recovery from person, therefore compliance of Section 50 of the N.D.P.S. Act is also not required to be followed. It is submitted that appellant-convict and co-accused Md. Mujamil were in the same cabin of Tata Mazic/pick up van and as such it is safe to gather that appellant-convict was under knowledge having contraband with co-passenger/co-accused Md. Mujamil. This fact can be also gathered by importing the presumption as available under Section 35 and 54 of the N.D.P.S. Act. Learned State counsel further submitted that the forensic report clearly indicate that seized contraband was 'Charas' and, as such recording of conviction is correct in the eye of law.

22. Lower Court records and proceeding was perused and also upon consideration of arguments as raised by learned



counsel appearing on behalf of the parties, it appears apposite to discuss evidence for the sake of re-appreciation which is as under:-

23. PW-1, Prasun Kumar Murmu, who posted as constable of SSB Camp, Mahuawan on the date of occurrence i.e. 19.01.2017, deposed through his examination-in-chief that on the date of occurrence Company Commander Jitendra Kumar directed ASI Asim Barmudai (PW-4) to immediately create a check-post team near Chhauradano Block. Said team was consisting of Commander Asim Barmudai (PW-4), Paras Raut (PW-5), Dinesh Singh Rawat (PW-3), Ganesh Das (PW-2), where he was also a member. At 11:50 AM one Tata Mazic vehicle was stopped, Asim Barmudai (PW-4) after introducing him started enquiry from the driver. There were two persons sitting inside. He failed to disclose the name of those two persons. Thereafter, vehicle was taken to road-side. It was further deposed by him that a bag was recovered lying between the legs of a person sitting inside cabin. Both accused-appellants disclosed same as 'Charas'. Thereafter, Commander Asim Barmudai (PW-4) informed Commander Jitendra Kumar, whereupon Company Commander Jitendra Kumar arrived on spot along with company clerk. Charas was taken by Company



Commander and was examined through Drug Detection Kit, whereupon it was confirmed as 'Charas', which upon weighing found 4 Kg. 600 gm. It was deposed thereafter that upon direction of Commander, clerk prepared papers at the place of occurrence. After preparing papers, both accused persons including appellant-convict were brought to Company Camp. An enquiry was made from both apprehended accused persons in presence of company commander. After enquiry, both were taken to police station where vehicle, contraband, mobiles and other related things were handed over. He identified appellant-convict by face during the trial and not by his name.

23.1. Upon cross-examination, he stated that he was standing somewhere between 100-200 meters away from the place where vehicle was stopped. It was stated that enquiry was made by Asim Barmudai (PW-4), who informed that Charas was recovered. It was stated that he was in Camp and engaged in his work and cannot said that what queries were made by Company Commander. He was not involved in preparation of papers. He denied suggestion of learned counsel that there was no recovery from appellant-convict and also denied suggestion that he deposed falsely and was not present at place of recovery.

24. PW.2 namely, Ganesh Das, also deposed on



similar line to that of PW-1 in his examination-in-chief. He deposed colour of bag as green. It was stated that person who was sitting beside the driver disclosed that bag containing 'Charas'. He deposed that an option was given to appellant-convict and co-accused as to whether they would prefer search by Jitendra Kumar/Company Commander or by Gazetted Officer. It is deposed that the first search was made by Asim Barmudai (PW-4) who was the Naka Commander, whereupon one mobile was found from co-accused Md. Mujamil and ten packets were also recovered from him having suspicious material, whereas one mobile was found from the pocket of appellant-convict. It was deposed that the search were made in presence of two independent witnesses. Thereafter, Asim Barmudai (PW-4) opened each packets and it was examined by Drug Detection Kit, confirming same as 'Charas' which was 4.6 Kg. It was deposed that both accused persons including appellant-convict were brought to Company Camp where enquiry was made and their confessional statement was recorded, which was duly signed by appellant-convict. After that appellant-convict along with co-accused were sent to Primary Health Centre for their medical check-up and thereafter they were sent to Police Station along with seized contraband. He



identified accused-appellant before the learned trial court.

24.1. Upon cross examination, it was stated that no one entered inside Tata Mazic Vehicle. Search was made outside the vehicle by Asim Barmudai (PW-4). Suspicious substance was weighed by check-post Commander, who said about it's weight i.e. 4.6 Kg. It was stated that check-post commander examined it through Drug Detection Kit. He did not signed any paper. He stated to went up to police station at about 8:00 P.M. Appellant-convict was detained along with co-accused for about six hours in Camp, whereas the distance of police station is only about 3½ Km. He failed to disclosed the registration number of Tata Mazic vehicle. It was stated that the vehicle was brought from place of occurrence by appellant-convict where one person was deputed in vehicle with them but he failed to disclose the name of said person. He was in government vehicle.

25. PW-3 is Dinesh Singh Rawat, Head constable of 47 Battalion SSB Camp, Mahuawan. He deposed through his examination-in-chief on same line as of PW-2 and therefore same is not required to be repeated for the sake of brevity.

25.1. Upon cross examination, he stated that only mobile was seized from the appellant-convict namely, Mahesh Prasad. It was stated that no paper or cash was recovered from



him. It is submitted that entire search was made from Asim Barmudai (PW-4) and he was the person who disclosed regarding recovery of 'Charas'. He stated as not to participate in any paper works and not even signed any documents. He failed to disclose the number of truck. It was stated that the bag containing Charas was brought to Camp by Commander from place of occurrence and also to police station.

26. PW-4 is Asim Barmudai, informant of this case, deposed more or less in similar way as of PW-3 and deposed that appellant-convict and co-accused became ready for giving their search and statement before them. He deposed that when search was under process, two persons were passing over there, namely, Ram Bilas and Jammu Narayan, who on request, given their consent, for independent witness and thereafter, in their presence, search of appellant-convict namely, Mahesh Prasad was made upon, where one mobile phone was recovered from his pocket. Thereafter, on search of co-accused Md. Mujamil, a mobile was found from his pocket and upon further search a bag having 10 packets of suspicious substance was recovered, which was disclosed as "Charas" and found total of 4.6 Kg. and thereafter on his direction company clerk namely, Pawan Kumar prepared seizure report and other documents at the place of



recovery itself, whereafter seized contraband along with appellant-convict and co-accused, were brought to company camp. It was deposed that confessional statement of appellant-convict and co-accused were recorded at company and thereafter they were sent for their medical examination and after which, appellant-convict along with co-accused were handed over to police along with mobiles, seized contraband and vehicle etc. He identified proforma for seizure, proforma for arrest, details of SSB Personnel, search memo, proforma of intercepted goods, notice for search etc. He identified his signature thereof upon which these documents were exhibited during trial as **Exhibit nos. 1, 2, 3, 4, 5 & 6** respectively. He also identified his signature over written information which was exhibited as **Exhibit '8'**. He also identified his signature over production of seizure list, which was exhibited as **Exhibit '9'**.

26.1. Upon cross examination, it was stated that 'proforma for search' was prepared by Pawan Kumar on his direction but same is not bearing his signature and also the signature of independent witnesses. He stated that it is also not showing the signature of appellant-convict namely, Mahesh Prasad. It is stated by him that appellant-convict was arrested at about 11:50 A.M. on 19.02.2017, but no information was given



to his relative. It is also stated by him that personal search memo is also not disclosing as what was recovered from appellant-convict namely, Mahesh Prasad. It was stated by him that the moment he put sample on drug detecting kit, it's colour changed to yellow and for that reason he came to know that the suspicious substance was 'Charas'. Said kit was not handed over at the police station. It was stated to be disclosed by appellant-convict that he is the driver of the vehicle, which is a goods carrier. It was stated by him that appellant-convict came out from the cabin on his own, carrying key in his hand which was seized by him, but no seizure list was prepared of that effect. The key of the vehicle was kept by him without any seizure list. It was further stated that he handed-over the key to appellant-convict and same was not taken back. It was stated by him that after taking contraband from all ten packets, it was kept over a newspaper page and thereafter it's weight was taken collectively. It was stated that he did not mark packets.

27. PW-5 is Paras Raut. He deposed that on the date of occurrence i.e. 19.01.2019, he was posted as Head Constable in 47 Battalion SSB Camp, Mahuawan where an information was received by Company Commander that some persons are coming from Nepal along with contraband, upon which a team



was constituted comprising, Asim Barmudai (PW-4), Head Constable Ganesh Das (PW-2), Dinesh Singh Rawat (PW-3) and Parsun Kumar Murmu (PW-1). He disclosed first time the colour of Tata Mazic as 'White'. It was deposed that co-accused Mujamil disclosed about 'Charas' inside the bag, thereafter, in presence of two independent witnesses enquiry was made to them where they disclosed their names as Mahesh Prasad and Md. Mujamil. When Mujamil was asked by commander of the Company, it was disclosed that bag containing 'Charas' and they works together. He also deposed about the total weight of contraband as 4.6 kg. He identified appellant-convict before the learned trial court.

27.1. Upon cross examination, an attention was drawn to him where with denying note he stated that it is not correct as he not made statement before police that Mujamil (co-accused) stated that he works together with appellant-convict.

28. PW-6 is Azaj Alam, who is the Investigating Officer of this case, who upon information, visited place of occurrence on 20.01.2017 and also recorded the statement of seizure list witnesses namely, Ram Biswas and Jammu Narayan. He produced appellant-convict along with co-accused before the learned trial court. It was deposed by him that prior



conversations were made between two accused, where SIMs were registered in name of one Kalima Khatoon, wife of Mujamil and Sangeeta Devi, wife of Mahesh Prasad (appellant-convict). It is stated that conversations were made on two different occasions, i.e. on 24.12.2016 and 07.12.2016. He brought forensic report from Muzaffarpur and Kolkata and identified his signature on forwarding letter.

28.1. Upon cross examination, it was stated by him that weight of received material was not taken by him. He also failed to disclose about seal on the seized exhibits. He stated that he did not inspect the cabin of Tata Mazic. He has categorically stated that seized material was not destroyed and also stated that he did not brought seized material before the court. He also stated that appellant-convict was not involved earlier in similar offence. He stated that he did not mention in the case diary regarding register number through which seized material was kept in Malkhana/warehouse. He stated that he did not record the statement of nearby people around the place of recovery/occurrence. He did not record statement of any independent witnesses. It is stated that he submitted charge-sheet against appellant-convict without obtaining CSFL report.

29. With aforesaid factual aspects, oral and



documentary evidences in hand, it appears apposite to discuss the legal ratio settled through different legal reports of Hon'ble Supreme Court as under:

30. In the matter of Full Bench decision of Hon'ble Bombay High Court in the case of Jayantilal Modi and Another Vs. State of Maharashtra reported in [2001 (2) Mh.L.J. 615], it was held while answering the reference in the following terms:

“In respect of an offence under the Narcotics Drugs and Psychotropic Substances Act, 1985, it is necessary for the empowered officer to comply with the provisions of Section 42, even when the information received by him is regarding the commission of an offence in a public place of the like mentioned in the explanation to Section 43.”

31. In this context, it would be further apposite to refer paragraph '9' of the legal report in the matter of **State of Haryana Vs. Jarnail Singh (supra)** which reads as under:-

“9. Sections 42 and 43, therefore, contemplate two different situations. Section 42 contemplates entry into and search of any building, conveyance or enclosed place, while Section 43 contemplates a seizure made in any public place or in transit. If seizure is made under Section 42 between sunset and sunrise, the requirement of the proviso thereto has to be complied with. There is no such provision in Section 43 of the Act and, therefore, it is obvious that if a public conveyance is searched in a public place, the officer making the search is not required to record his



satisfaction as contemplated by the proviso to Section 42 of the NDPS Act for searching the vehicle between sunset and sunrise.”

32. In view of above, coming back to the facts of the present case, where a submission was raised by the State as Section 42 of the Act is not required to be followed in the present case is not appearing convincing.

33. Further, Hon’ble Supreme Court held through **Ashok** (supra), **Jitendra** (supra), and **Gorakh Nath Prasad** (supra) that conviction of the appellant of the case unsustainable as prosecution failed to produce the material exhibits (ganja) during the trial.

34. There is another glaring flaw in the prosecution’s case as samples were admittedly not drawn in the presence of a Magistrate, as contemplated under Section 52-A(2)(b) of the Act, which is mandatory requirement, as has been held in the matter of **Union of India Vs. Mohanlal** (supra).

35. From the testimony of different prosecution witnesses as discussed above, it appears that it was the co-passenger who disclosed that the bag contains ‘Charas’. Though, it was deposed by PW-4 that process of search was made in presence of two independent witnesses namely, Ram Bilas and Jammu Narayan but they were not examined during



the trial. In want of their non-examination, the seizure list failed to proved during the trial, moreover, PW-1, PW-2 and PW-3 who were also present over place/occurrence as part of raiding team not even disclosed the name of independent witnesses and it was disclosed for the first time by PW-4. It is deposed specifically by PW-2 & PW-3 that confessional statement was not even voluntarily as it is apparent from their deposition that “*abhiyukto se puchhtachh hua tatha kabulnama likhwaya*”. Moreover, the SSB personnel are police and confession made before them is eclipsed under provision of Section 25 of the Indian Evidence Act. PW-4 stated in examination-in-chief that before taking weight of contraband, he mixed whole sample together for purpose of taking weight. From the deposition of I.O. namely, Azaj Alam, who was examined as PW-6, it is clear that the seized materials were not destroyed and was not produced during the trial before the court. It was also deposed by him that the packets were not marked properly.

36. Facts of present case suggest that “culpable mental state” as available under Section 35 of the Indian Evidence Act and presumption under Section 54 of the Act were imported merely on two grounds, as PW-5 disclosed in his examination-in-chief that co-accused Md.



Mojamil said that he worked with appellant/convict and secondly on the ground that the mobiles which were seized from appellant/convict and co-accused, suggest from their call details report that conversations were made between them before 20 days of the alleged recovery of contraband. Save and except above, nothing surfaced during the course of trial which may established the presumption regarding culpable mental state and possession of illicit articles against the appellant/convict. The conversation over telephone as alleged was made on 07.12.2016 and 24.12.2016, whereas occurrence is of 19.01.2017. There was no conversation for about last 25 days of the present recovery/occurrence. Merely on the basis of these evidences, it cannot be said that prosecution established foundational aspects as to import presumption available under section 35 & 54 of the Act.

37. It would be apposite to reproduce in this connection paragraph 6, 8 and 13 of the judgment of Hon'ble Supreme Court in the case of **Gorakh Nath Prasad** (supra) which are as under:

“6. The NDPS Act provides for a reverse burden of proof upon the accused, contrary to the normal rule of criminal jurisprudence for presumption of innocence unless proved guilty. This shall not dispense with the requirement of the prosecution to having first establish a



prima facie case, only whereafter the burden will shift to the accused. The mere registration of a case under the Act will not ipso facto shift the burden on to the accused from the very inception. Compliance with statutory requirements and procedures shall have to be strict and the scrutiny stringent. If there is any iota of doubt the benefit shall have to be given to the accused.

8. The remaining prosecution witnesses being police officers only, it will not be safe to rely upon their testimony alone, which in any event cannot be sufficient evidence by itself either with regard to recovery or the seized material being ganja. No explanation has also been furnished by the prosecution for non-production of the ganja as an exhibit in the trial. The benefit of doubt will, therefore, have to be given to the appellant and in support of which learned Senior Counsel Shri Rai has relied upon *Jitendra v. State of M.P.* (2004) 10 SCC 562 and reiterated in *Ashok alias Danga Jaiswal v. State of Madhya Pradesh* (2011) 5 SCC 123 as follows:

“12. Last but not the least, the alleged narcotic powder seized from the possession of the accused, including the appellant was never produced before the trial court as a material exhibit and once again there is no explanation for its non-production. There is, thus, no evidence to connect the forensic report with the substance that was seized from the possession of the appellant or the other accused.

13. It may be noted here that in *Jitendra v. State of M.P.*, (2004) 10 SCC 562, on similar facts this Court held that the material placed on record by the prosecution did not bring home the charge against the accused beyond reasonable doubt and it would be unsafe to maintain their conviction on that basis. In *Jitendra (supra)*, the Court observed and held as under: (SCC pp. 564-65, paras 5-6)

‘5. The evidence to prove that charas and ganja were recovered from the possession of the accused consisted of the evidence of the police officers and the panch witnesses. The panch witnesses turned hostile. Thus, we find that apart from the testimony of Rajendra Pathak (PW 7), Angad Singh (PW 8) and



Sub-Inspector D.J. Rai (PW 6), there is no independent witness as to the recovery of the drugs from the possession of the accused. The charas and ganja alleged to have been seized from the possession of the accused were not even produced before the trial court, so as to connect them with the samples sent to the forensic science laboratory. There is no material produced in the trial, apart from the interested testimony of the police officers, to show that the charas and ganja were seized from the possession of the accused or that the samples sent to the forensic science laboratory were taken from the drugs seized from the possession of the accused. ...

6.... The best evidence would have been the seized materials which ought to have been produced during the trial and marked as material objects. There is no explanation for this failure to produce them. Mere oral evidence as to their features and production of panchnama does not discharge the heavy burden which lies on the prosecution, particularly where the offence is punishable with a stringent sentence as under the NDPS Act. In this case, we notice that panchas have turned hostile so the panchnama is nothing but a document written by the police officer concerned.’ ”

38. It is further apposite to reproduce the paragraph 27, 28, 29, 30, 31, 32, 55, 56, 57 & 58 of the judgment of Hon’ble Supreme Court in the case of **Noor Aga** (supra) as to understand the implication of Section 35 and 54 of the Act, which are as under:

“27. Section 43, however, empowers an officer of any department mentioned in Section 42 to detain and search any person who he has reason to believe has committed an offence punishable under the Act in a public place. Section 50 provides for the conditions under which search of persons is to be conducted. Section 51 provides for application of the Code of Criminal Procedure, 1973 insofar as they are not inconsistent with the provisions of the Act. Section 52 provides for disposal of persons



arrested and articles seized.

28. Section 52-A provides for disposal of seized narcotic drugs and psychotropic substances; sub-section (2) whereof reads as under:

“52-A. (2) Where any narcotic drug or psychotropic substance has been seized and forwarded to the officer in charge of the nearest police station or to the officer empowered under Section 53, the officer referred to in sub-section (1) shall prepare an inventory of such narcotic drugs or psychotropic substances containing such details relating to their description, quality, quantity, mode of packing, marks, numbers or such other identifying particulars of the narcotic drugs or psychotropic substances or the packing in which they are packed, country of origin and other particulars as the officer referred to in sub-section (1) may consider relevant to the identity of the narcotic drugs or psychotropic substances in any proceedings under this Act and make an application, to any Magistrate for the purpose of—

- (a) certifying the correctness of the inventory so prepared; or
- (b) taking, in the presence of such Magistrate, photographs of such drugs or substances and certifying such photographs as true; or
- (c) allowing to draw representative samples of such drugs or substances, in the presence of such Magistrate and certifying the correctness of any list of samples so drawn.”

29. Indisputably, the proper officers of the 1962 Act are authorised to take action under the Act as regards seizure of goods, documents and things.

30. We may notice Section 110 of the 1962 Act, sub-section (1) whereof reads as under:

“110. *Seizure of goods, documents and things.*—(1)



If the proper officer has reason to believe that any goods are liable to confiscation under this Act, he may seize such goods:

Provided that where it is not practicable to seize any such goods, the proper officer may serve on the owner of the goods an order that he shall not remove, part with, or otherwise deal with the goods except with the previous permission of such officer.

(1-A) The Central Government may, having regard to the perishable or hazardous nature of any goods, depreciation in the value of the goods with the passage of time, constraints of storage space for the goods or any other relevant consideration, by notification in the Official Gazette, specify the goods or class of goods which shall, as soon as may be after its seizure under sub-section (1), be disposed of by the proper officer in such manner as the Central Government may, from time to time, determine after following the procedure hereinafter specified.

(1-B) Where any goods, being goods specified under sub-section (1-A), have been seized by a proper officer under sub-section (1), he shall prepare an inventory of such goods containing such details relating to their description, quality, quantity, mark, numbers, country of origin and other particulars as the proper officer may consider relevant to the identity of the goods in any proceeding under this Act and shall make an application to a Magistrate for the purpose of—

(a) certifying the correctness of the inventory so prepared; or

(b) taking in the presence of the Magistrate, photographs of such goods, and certifying such photographs as true; or

(c) allowing to draw representative samples of such goods, in the presence of the Magistrate, and certifying



the correctness of any list of sample so drawn.

(1-C) Where an application is made under sub-section (1-B), the Magistrate shall, as soon as may be, allow the application.”

31. Indisputably, the Central Government has issued guidelines in this behalf being Standing Order 1 of 1989 dated 13-6-1989 which is in the following terms:

“WHEREAS the Central Government considers it necessary and expedient to determine the manner in which the narcotic drugs and psychotropic substances, as specified in Notification No. 4/89 dated 29-5-1989 [F. No. 664/23/89-Opium, published as S.O. 381(E)], which shall, as soon as may be, after their seizure, be disposed of, having regard to their hazardous nature, vulnerability to theft, substitution and constraints of proper storage space;

Now, therefore, in exercise of the powers conferred by sub-section (1) of Section 52-A of the Narcotic Drugs and Psychotropic Substances Act, 1985 (61 of 1985) (hereinafter referred to as ‘the Act’), the Central Government hereby determines that the drugs specified in the aforesaid notification shall be disposed of in the following manner....”

These guidelines under the Standing Order have been made under the statute, and heroin is one of the items as substances listed for disposal under Section I of the Standing Order.

32. Paras 3.1 and 6.1 of the Standing Order read as under:

“Preparation of inventory

3.1. After sampling, detailed inventory of such packages/containers shall be prepared for being enclosed to the panchnama. Original wrappers shall also be preserved for evidentiary purposes.



Certificate of destruction

6.1. A certificate of destruction (in triplicate) (Annexure III) containing all the relevant data like godown entry no., file no., gross and net weight of the drugs seized, etc. shall be prepared and duly endorsed by the signature of the Chairman as well as members of the Committee. This could also serve the purpose of panchnama. The original copy shall be posted in the godown register after making necessary entries to this effect, the duplicate to be retained in the seizure case file and the triplicate copy will be kept by the Disposal Committee.”

55. The provisions of Section 35 of the Act as also Section 54 thereof, in view of the decisions of this Court, therefore, cannot be said to be ex facie unconstitutional. We would, however, keeping in view the principles noticed hereinbefore, examine the effect thereof vis-à-vis the question as to whether the prosecution has been able to discharge its burden hereinafter.

Burden of proof

56. The provisions of the Act and the punishment prescribed therein being indisputably stringent flowing from elements such as a heightened standard for bail, absence of any provision for remissions, specific provisions for grant of minimum sentence, enabling provisions granting power to the court to impose fine of more than maximum punishment of Rs 2,00,000 as also the presumption of guilt emerging from possession of narcotic drugs and psychotropic substances, the extent of burden to prove the foundational facts on the prosecution i.e. “proof beyond all reasonable doubt” would be more onerous. A heightened scrutiny test would be necessary to be invoked. It is so because whereas, on the one hand, the court must strive towards giving effect to the parliamentary object and intent in the light of the



international conventions, but, on the other, it is also necessary to uphold the individual human rights and dignity as provided for under the UN Declaration of Human Rights by insisting upon scrupulous compliance with the provisions of the Act for the purpose of upholding the democratic values. It is necessary for giving effect to the concept of “wider civilisation”. The court must always remind itself that it is a well-settled principle of criminal jurisprudence that more serious the offence, the stricter is the degree of proof. A higher degree of assurance, thus, would be necessary to convict an accused. In *State of Punjab v. Baldev Singh* [(1999) 6 SCC 172 : 1999 SCC (Cri) 1080] it was stated: (SCC p. 199, para 28)

“28. ... It must be borne in mind that severer the punishment, greater has to be the care taken to see that all the safeguards provided in a statute are scrupulously followed.”

(See also *Ritesh Chakarvarti v. State of M.P.* [(2006) 12 SCC 321 : (2007) 1 SCC (Cri) 744])

57. It is also necessary to bear in mind that superficially a case may have an ugly look and thereby, prima facie, shaking the conscience of any court but it is well settled that suspicion, however high it may be, can under no circumstances, be held to be a substitute for legal evidence.

58. Sections 35 and 54 of the Act, no doubt, raise presumptions with regard to the culpable mental state on the part of the accused as also place the burden of proof in this behalf on the accused; but a bare perusal of the said provision would clearly show that presumption would operate in the trial of the accused only in the event the circumstances contained therein are fully satisfied. An initial burden exists upon the prosecution and only when it stands satisfied, would the legal burden



shift. Even then, the standard of proof required for the accused to prove his innocence is not as high as that of the prosecution. Whereas the standard of proof required to prove the guilt of the accused on the prosecution is “beyond all reasonable doubt” but it is “preponderance of probability” on the accused. If the prosecution fails to prove the foundational facts so as to attract the rigours of Section 35 of the Act, the actus reus which is possession of contraband by the accused cannot be said to have been established.”

39. Coming to the next submission made on behalf of the appellant regarding the illegality of the sampling of the seized contraband, it is manifest from the evidence that the representative samples were not drawn from the seized substance and sent to the expert in the designated laboratory for chemical analysis and report in accordance with law. It would also be evident from the evidence that the seized substance and the samples were not handled properly in the prescribed manner, and it was mixed-up before taking its weight.

40. Standing Instruction “No. 1 of 1988” dated 15.03.1988 of Narcotics Control Bureau, Government of India issued under Section 52A of the N.D.P.S. Act prescribes the detailed procedure for sampling, sealing and despatching the seized sample to the laboratory for test. Clauses 1.4, 1.5, 1.6 and 1.9 of the Standing Instruction No. 1 of 1988 dated 15.03.1998



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.”

41. The question as to whether or not the compliance of the guidelines issued by Standing Instruction No. 1 of 1988 would vitiate the trial was considered by the Hon’ble Supreme Court in **Khet Singh Vs. Union of India** since reported in **AIR 2002 SCC 1450**, **Noor Aga Vs. State of Punjab** since reported in **(2008) 16 SCC 417** and **Union of India Vs. Balmukund and others** since reported in **2012 (9) SCC 161**.

42. In **Khet Singh** (supra) after examining the said issue the Hon’ble Supreme Court held in para 10 as under:

“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.....”

43. In **Noor Aga** (supra) after giving thoughtful consideration to the guidelines issued under the N.D.P.S. Act in the Standing Order the Hon’ble Supreme Court observed in paras 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 therefore, 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.”

44. In *Union of India versus Balmukund* (supra), the Hon’ble Supreme Court observed in para 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.”

45. Based on the aforesaid analysis of the evidence and law, this Court is of the view that the entire investigation of the case was perfunctory. The defects in investigation are substantial and go to the root of the identity of the alleged contraband ‘Charas’ alleged to be recovered from the possession of the appellant/convict. The glaring lapses on the part of the prosecution during investigation would certainly affect the credibility of the prosecution case. The case of the prosecution is based only on the oral testimony of official witnesses with the arrest of the appellant/convict. The evidence adduced during trial does not inspire confidence as PW-4, namely, Asim Barmudai, who is the informant of this case and who had seized the contraband alongwith other prosecution witnesses, stated in his cross examination as to mixed up the contraband before weighing it. No seizure list witnesses were examined during the trial, and moreover seized contraband were not produced before court as per PW-6. It is important to mention that colour of bag stated through FIR (Exhibit ‘8’), authored by PW-4/informant as



“BLUE”, whereas PW-2 & PW-3 stated colour of bag as “GREEN”, which makes entire recovery doubtful. Non-examination of Jitendra Kumar who was Company Commander of SSB-47 Battalion and Clerk Pawan Kumar appears also fatal for prosecution, as they were the persons, who detected contraband as “Charas” through Drug Detecting Kit, carried it upto company base/police station and prepare all papers regarding search and seizure.

46. Precisely, evidence as adduced by the prosecution during trial does not inspire confidence, because of the several discrepancies highlighted hereinabove.

47. Accordingly, prosecution has failed to prove its case beyond all reasonable doubts against the appellant/convict.

48. Accordingly, the present appeal is allowed.

49. The impugned judgment of conviction dated 15.10.2019 and order of sentence dated 21.10.2019, passed by learned 1st Additional Sessions Judge, East Champaran, Motihari in N.D.P.S. Case No. 11 of 2017, CIS No. 56 of 2017 arising out of Chhauradano P.S. Case No. 13 of 2017 is set aside.

50. The appellant/convict is acquitted of the charges levelled against him. He is directed to be set at liberty forthwith



unless his detention is required in any other case. Fine, if any, paid be also returned to appellant-convict immediately.

51. LCR of this case along with copy of the judgment be returned to learned trial court forthwith.

(Chandra Shekhar Jha, J.)

Rajeev/-

AFR/NAFR	AFR
CAV DATE	
Uploading Date	20.12.2023
Transmission Date	20.12.2023

