

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.203 of 2021

Arising Out of PS. Case No.-21 Year-2017 Thana- D.R.I District- Patna

Litu Das S/O Sri Ranjit Chandra Das Resident Of Village- Bhola More,
Jamuribhita, Dabgram (p), P.O.- Sahudangi Hat, P.S.- Bhaktinagar, District-
Jalpaiguri, West Bengal.

... .. Appellant/s

Versus

The Union Of India Through Intelligence Officer D.R.I. Regional Unit, Patna
Bihar

... .. Respondent/s

Appearance :

For the Appellant/s : Mr. Ajay Kumar Sinha, Advocate
For the DRI : Mr. Ranvir Kumar, Sr. Standing Counsel

CORAM: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH

and

HONOURABLE MR. JUSTICE NAWNEET KUMAR

PANDEY

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH)

Date : 27-06-2023

This appeal has been preferred by the appellant under Section 374(2) of the Code of Criminal Procedure, putting to challenge the impugned judgment of conviction dated 09.12.2020 and order of sentence dated 14.12.2020, passed by learned Additional Sessions Judge-XXV-cum-Special Judge, Patna, in Special Case No. 39 of 2017, arising out of D.R.I. Unit case no. 21 of 2016-17, whereby the appellant has been convicted and sentenced as under:

Criminal Appeal (DB) No. 203 of 2021				
Appellant	Conviction under Section	Sentence		
		Imprisonment	Fine (Rs.)	In default of fine
Litu Das	20(b) (ii) (C) of the NDPS Act	R.I. for 12 years	1,00,000/-	R.I. for two years



2. It is the prosecution's case as initially disclosed by Ashok Kumar (PW-1), an Intelligence Officer, DRI, Regional Unit, Patna in the application submitted before the Court of learned Additional Sessions Judge, Patna that acting upon a secret information, the Officers of the Directorate of Revenue Intelligence (DRI in short) recovered two trolley bags, two air bags and one *thaila* (a bag) containing substance believed to be *ganja* from Coach No. S-2 of train no. 112523 viz. New Jalpaiguri to New Delhi Superfast express between Hajipur Junction and Chapra Junction. Three persons namely, Satto Mandal, Bijoy Roy and this appellant were intercepted, who claimed themselves to be the owners of the said trolley bags, air bags and the *thaila*. They are said to have accepted before the DRI officials that they were carrying *ganja* in the said bags from New Jalpaiguri to New Delhi for money. A detailed examination of the said trolley bags, air bags and *thaila* was done at the DRI office, Patna in the presence of the said three persons and two independent *panchas* leading to recovery of total fourteen packets of substance believed to be *ganja*. Gross weight and net weight of the packets of *ganja* were found to be 47.950 kgs and 45.500kgs respectively. All packets of *ganja* were torn and small quantities from each packet were taken out from all the recovered 14 packets and two representatives samples each weighing 24gms were drawn and packed in a plastic pouch and sealed in two yellow envelopes marked as A and B.



Remaining amount of the said goods were re-packed in their packets and replaced in the same two trolley bags, two air bags and one *thaila*. Thereafter, the two trolley bags were kept in two separate plastic bags and remaining two air bags and one *thaila* in another separate plastic bag. All the plastic bags were stitched and sealed with the DRI seal. The statement of the persons apprehended were recorded under Section 67 of the NDPS Act in which they admitted their guilt and their knowledge of possession, carriage and transportation of the seized *ganja*. In the application filed before the learned Additional Sessions Judge, Patna the PW-1 made a request to dispatch the samples drawn by the DRI officials for chemical examination by CRCL, Kolkata. A request was also made for deputation of a Magistrate for certification of the inventory of the seized goods under Section 52 A (2) of the NDPS Act. From the application dated 05.03.2017, it is evident that the samples were not drawn in the presence of a Magistrate at any point of time.

3. The complainant (PW-1) in the present case conducted the enquiry and subsequently made an application in the Court of learned District and Sessions Judge, Civil Court, Patna on 31.08.2017 for taking cognizance of offences punishable under Sections 20, 23, 25 and 29 of the NDPS Act and also for confiscation of the *ganja* so recovered.

4. The charges were subsequently framed against all the three persons including this appellant for commission of the offences



punishable under Sections 20(b)(ii), 23, 25 and 29 of the NDPS Act. They denied the charges and claimed to be tried. Accordingly, they were put on trial. From the contents of complaint petition filed by PW-1, which is the basis for taking of cognizance and framing of the charges it is evident that the confessional statements made by the three persons apprehended by the DRI officials were the only materials against the persons so apprehended including this appellant. The chemical examination report (Exhibit-6 and 6/1), according to the prosecution confirmed that the samples responded to the test for *cannabis* and characteristic of *ganja*. The prosecution further relied on the call-detail-reports (CDR) to bring home the charge against the persons put on trial to the effect that they were involved in the illicit trade of *ganja*.

5. Be that as it may, at the trial the prosecution examined altogether seven witnesses to bring home the charges against the persons put to trial including this appellant. It is noteworthy that none of the seizure list witnesses were examined. All the witnesses, who came to be examined in support of the trial, were members of the DRI personnel, who had participated in recovery of *ganja* from the train, except PW-4, PW-6 and PW-7. PW-4 was not one of those DRI personnel, who had participated in recovery of the contraband as is evident from his depositions. He deposed at the trial he had received the secret information whereafter the raiding team was constituted. He specifically



denied in his cross-examination that he was one of the members of the raiding team. He rather deposed that he had constituted a raiding party with the consent of the superior officials. It is pertinent to note that other witnesses deposed at the trial that PW-4 was also one of the members of the raiding team.

6. Learned counsel appearing on behalf of the appellant has submitted that it is evident from the depositions of the prosecution's witnesses that the bags said to be containing *ganja* were recovered from beneath the berth of coach No. S-2 of the train No.12523, i.e. New Jalpaiguri-New Delhi Superfast express. The bags were not recovered from the possession of this appellant, rather according to the prosecution's case, the persons put on trial disclosed that they had confessed that they were carrying *ganja*. Except for the confessional statement said to have been made by this appellant, there is absolutely no evidence to substantiate the charge that he was in possession of *ganja*, so recovered and was in any manner connected with the said *ganja*. He has submitted that in the light of Supreme Court's decision in the case of *Tofan Singh vs. State of Tamil Nadu* reported in (2021) 4 SCC 1, the confessional statement made by an accused before the DRI officials under Section 67 of the Act has no evidentiary value. He has further submitted that the samples sent for forensic examination were not drawn in the presence of a Magistrate and thus, it was done in



contravention of the instructions issued by Standing Order No. 1/89 dated 13.06.1989 issued by the Ministry of Finance, Department of Revenue. He has further submitted that if the case of the prosecution as disclosed in the forwarding report and the complaint petition is taken into account, there is apparent violation of Section 52 A of the Act, which mandates that samples must be drawn in the presence of a Magistrate.

7. Learned Senior Standing Counsel representing the DRI *per contra* has submitted that the appellant has been rightly convicted based on the disclosures made by them to the DRI officials which are admissible in evidence in the light of the provision under Section 67 of the Act. He has submitted that there has been substantial compliance by the DRI officials in drawing the samples and since the Forensic Science Laboratory has reported that the seized articles were *ganja*, there is no legal infirmity in the finding of conviction recorded by the trial court. He has also submitted that the learned trial court has rightly noticed Section 54 of the NDPS Act while recording a finding of conviction. He submits that under Section 54 of the Act, there is presumption, unless contrary is proved that an accused has committed an offence under the Act, possession of which he fails to account for satisfactorily.

8. We have carefully perused the impugned judgment and order of the trial court as well as the lower court's records. We have



given our thoughtful consideration to the rival submissions advanced on behalf of the parties.

9. We find force in the submissions made on behalf of the appellant that the bags said to be containing *ganja* were not recovered from the possession of the appellant. The recovery of the *ganja* from beneath the berth of a train on which the appellant was found to be sitting cannot be said to be recovery from possession of this appellant. As is the prosecution's case the said bags containing *ganja* were recovered from berth no. 21 and 22. There is no evidence to the effect that the said berths were reserved in the name of the present appellant. Section 54 of the NDPS Act shall have no application in the present case as the prosecution cannot be said to have established that the bags containing *ganja* were recovered from the possession of this appellant. Section 54 of the NDPS Act reads thus:-

54. Presumption from possession of illicit articles. In trials under this Act, it may be presumed, unless and until the contrary is proved, that the accused has committed an offence under this Act in respect of:-

(a) any narcotic drug or psychotropic substance or controlled substance;

(b) any opium poppy, cannabis plant or coca plant growing on any land which he has cultivated;

(c) any apparatus specially designed or any group of utensils specially adopted for the manufacture of any narcotic drug or



psychotropic substance or controlled substance; or

(d) any materials which have undergone any process towards the manufacture of a narcotic drug or psychotropic substance or controlled substance, or any residue left of the materials from which any narcotic drug or psychotropic substance or controlled substance has been manufactured, for the possession of which he fails to account satisfactorily.

10. It can be easily culled out on bare reading of Section 54 of the NDPS Act that presumption under the said Act will arise only when the recovery is made from possession of a person when he fails to account for such possession satisfactorily. Here is a case where, according to the prosecution, the appellant disclosed to the DRI officials that those articles belonged to him. The submissions made on behalf of the DRI with reference to Section 54 of the NDPS Act cannot be accepted and accordingly, it is rejected.

11. Further we find force in the submissions advanced on behalf of the appellant that a confessional statement made by an accused before the officials investigating a case under the provisions of the NDPS Act are not admissible in evidence in the light of the Supreme Court's decision in case of **Tofan Singh** (supra). In no uncertain terms the Supreme Court has laid down in case of **Tofan Singh** (supra) that the officers who have been invested with the powers under Section 53 of the NDPS Act are police officers within the meaning of Section 25 of the



Evidence Act, as a result of which any confessional statement made before them would be barred under the provisions of Section 25 of the Evidence Act and cannot be taken in evidence to convict an accused for an offence punishable under the provisions of NDPS Act. Further, a statement recorded under Section 67 of the NDPS Act cannot be used as a confessional statement at the trial of an offence punishable under the NDPS Act, the Supreme Court has concluded.

12. In view of clear enunciation of law in case of ***Tofan Singh*** (supra), the confessional statements taken by the DRI officials cannot be taken into account in view of the bar under Section 27 of the Act for conviction of the appellant. We reiterate that disclosures said to have been made by this appellant and another person put on trial to the DRI officials are the only materials which connect this appellant with the bags containing *ganja* said to have been recovered by the DRI officials. Further, we notice that there has been no proper compliance of the requirement under Section 52-A of the NDPS Act, inasmuch as, the samples were not drawn in the presence of a Magistrate.

13. In such view of the matter, in our considered opinion the impugned judgment of conviction cannot be sustained. Accordingly, the impugned judgment recording finding of conviction of this appellant dated 09.12.2020 is hereby set aside. The order of sentence dated 14.12.2020 is also set aside.



14. The appellant stands acquitted of the charge of commission of offence punishable under Section 20 (b) (ii) (C) of the NDPS Act. This appeal is accordingly allowed.

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

16. Learned counsel for the appellant has informed this Court that two co-convicts have not preferred any appeal against their conviction and they are undergoing their respective sentences. Let a copy of this judgment be transmitted to the Member Secretary, Bihar State Legal Services Authority and to the Jail Superintendent, Central Jail, Beur (Patna) to take steps for filing appeals in their cases on their behalf.

(Chakradhari Sharan Singh, J)

(Nawneet Kumar Pandey, J)

Nishant/Nirmal-

AFR/NAFR	NAFR
CAV DATE	NA
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