

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.221 of 2023

Arising Out of PS. Case No.-28 Year-2016 Thana- PALANWA District- East Champaran

NARESH YADAV Son of Narayan Yadav Resident of Village- Harai Simra
Ps- Simra,District- Janakpur (Bara) Nepal Appellant

Versus

The State of Bihar Respondent

Appearance :

For the Appellant : Mr. Ajay Kumar Singh, Advocate
Mr. Dharmesh Kumar Srivastava, Advocate

For the Respondent : Ms. Shashi Bala Verma, APP

CORAM: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH

and

HONOURABLE MR. JUSTICE KHATIM REZA

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH)

Date : 22-11-2023

This appeal has been under Section 374(2) of the Code of Criminal Procedure putting to challenge the impugned judgment of conviction dated 13.07.2022 and the order of sentence dated 18.07.2022 passed by the learned 1st Additional Sessions Judge, East Champaran, Motihari, in NDPS Case No. 28 of 2016, CIS No. 31/2016, arising out of Palanwa {Bhelahi (Bhelai) OP}P.S. Case No. 25 of 2016, whereby the appellant has been convicted and sentenced as under:

Criminal Appeal (DB) No. 221 of 2023				
Appellant's Name	Penal provision	Sentence		
		Imprisonment	Fine (Rs.)	In default of fine
Naresh Yadav	Under Section 20(b) (ii) (C) of the NDPS Act	R.I. for 14 years	1,50,000/-	S.I. for two years
	Under Section 23(c) of the NDPS Act	R.I. for 14 years	1,50,000/-	S.I. for two years



2. Both the sentences have been ordered to run concurrently.

3. The Sub-Inspector of Police of 13 Battalion, Shashatra Seema Bal (SSB), Anil Kumar Yadav (PW 3) is the informant of the connected Palanwa {Bhelahi (Bhelai) OP} P.S. Case No. 25 of 2016 which gave rise to the aforesaid NDPS Case No. 28 of 2016 (CIS No. 31 of 2016). A written report of PW-3 dated 18.05.2016, addressed to the Officer-in-charge Palanwa P.S. (East Champaran) is the basis for the registration of the First Information Report. According to the informant, he had received a confidential information to the effect that a person coming from Nepal to India was carrying with him certain narcotic substance. After informing his superior officials about the said input and, upon seeking their permission, he constituted a raiding team which started waiting for the person, who, according to the secret information, was likely to come from Nepal. At about 8.15 pm, he noticed a person coming from the side of Nepal having the same physical features as was informed by the informer. The person was intercepted by the team, who disclosed his name to be Naresh Yadav (the appellant herein). The raiding team disclosed to the appellant about the secret information, which was received by them, and also disclosed their intention to cause a personal search



of the appellant. The informant is said to have apprised the appellant of his statutory right to be searched either in the presence of a Magistrate or by the raiding team itself. The appellant is said to have consented to his search by the raiding team. The raiding team requested two persons (Khaleel Miyan and Angad Mahto, both not examined) who were working in a nearby field to become seizure list witness to which they agreed. In the presence of the aforesaid two seizure list witnesses, personal search of the appellant was conducted leading to recovery of a white plastic bag containing nine packets. In the presence of the independent search and seizure list witnesses, with the aid of drug detection kit, the raiding team found the substance to be *charas*. Weight of the said substance was taken with the aid of weighing machine which the raiding team had brought. The weight of *charas* was found to be 4.5 kg. At 8.30 pm, the said contraband was seized by the raiding team and on intensive search of the person of the appellant, other articles, namely, wrist watch and foreign currencies were recovered. The appellant is said to have confessed before the team that he was carrying the substance for being handed over to someone at Raxaul and that he was engaged in such activity for his livelihood.



4. It is evident that though search and seizure was made on 17.05.2016 at 10.30 pm, according to the prosecution's case, the information by the SSB to the police in the form of written report was given on the next date, i.e., 18.05.2016 at 08.40 am. From the formal F.I.R., it appears that the distance of the police station from the place of occurrence was ten kilometers.

5. We notice, at this juncture itself, that it is indisputable that soon after the seizure was made by the SSB and the case was registered with police, no application was made before any court of competent jurisdiction for drawing of samples soon thereafter for the purpose of the same being sent to Forensic Science Laboratory for examination. It is apparent from the order sheet of the court below that more than three months after the seizure and registration of the F.I.R., for the first time, on 20.08.2016, a petition was filed before the court of learned Special Judge, Motihari, by the Investigating Officer (IO) seeking permission for certification of the seized contraband for chemical examination by Regional Forensic Science Laboratory (RFSL), Muzaffarpur, and Central Forensic Science Laboratory (CFSL), Kolkata. It appears that pursuant to the said order, an inventory of the seized contraband was prepared under the signatures of Judicial Magistrate, First Class, Motihari (Exhibit-11) which reads thus :-



“INVENTORY OF SEIZED CONTRABAND
ARTICLES
NDPS Case No.28/16-Palanwan Bhelahi (OP) P.S. Case
No. 25/16 Dt. 18.05.2016,

(1)	Quantity of carried articles from the police Station	04 Kg 500 Grams <i>charas</i> in pockets of 9) Nine)
(2)	Quantity of articles which is being sent to F.S.L., Muzaffarpur	30 Grams <i>charas</i> sealed in a tin pot & sent.
(3)	Quantity of articles which is being sent to C.F.S.L., Kolkata	30 Grams <i>charas</i> sealed in an envelope & sent
(4)	Rest Quantity of articles which is being returned to Police Station for keeping in Malkhana	04 Kg 440 Grams <i>charas</i> in pockets at 9 (Nine)

Signature of Judicial 7th
Magistrate Ist Class Motihari East
Champaran (Bihar).”
(Highlighted for emphasis)

6. Manifestly, according to the said inventory, 30 gm of the contraband was being sent to RFSL, Muzaffarpur, and same quantity to C.F.S.L., Kolkata. The remainder was returned to the police station for being kept in Malkhana as mentioned in the inventory was 4.440 kg.

7. Be that as it may, the police completed its investigation and submitted charge sheet against the appellant, whereupon cognizance was taken of the offence punishable under Sections 20(b), 22, 23 and 24 of the NDPS Act. The appellant was



subsequently charged for commission of offence punishable under Section 20(b)(ii)(C) and 23(c) of the NDPS Act. The appellant denied the charge and claimed trial.

8. At the trial, nine witnesses deposed to sustain the charge against the appellant including the informant (P.W.-3) and the IO (P.W.-9). P.W.1 (Sudhir Kumar), P.W.-2 (Sanjay Kumar Yadav), P.W.-4 (Bikash Kumar Yadav), P.W.-5 (Manoj Kumar), P.W.-6 (Khem Chandra), P.W.-7 (Rameshwar Prasad Meena) and P.W.-8 (Vijay Kumar) are all SSB personnel, who, according to their deposition at the trial, were members of the raiding team in whose presence the appellant was searched. The seizure list witness were not examined. In addition to oral evidence of the prosecution witnesses, as noted above, the prosecution brought on record at the trial following documentary evidences:-

1.	Signature of Sanjay Kumar Yadav (P.W.-2) on production -cum-seizure list	Exhibit-1
2.	A written application of the informant	Exhibit-2
3.	Proforma of the seizure list	Exhibit-3
4.	Seizure list	Exhibit-4
5.	Notice given to the appellant for his search under Section 50 of the NDPS Act	Exhibit-5
6.	Arrest memo	Exhibit-6
7.	Receipt issued by regional Forensic Science Laboratory, Muzaffarpur regarding the receiving of sample	Exhibit-7
8.	Submission of Exhibit for Forensic	Exhibit-8



	analysis to Central Forensic Science Laboratory, Kolkata	
9.	Forwarding letter regarding dispatch of sample to Regional Forensic Science Laboratory Bihar, Muzaffarpur dated 19.08.2016	Exhibit-9
10.	Application to the District & Sessions Judge for sending the exhibit for examination	Exhibit-10
11.	Inventory report	Exhibit-11
12.	Photograph	Exhibit-12
13.	F.S.L. report of the R.F.S.L., Muzaffarpur dated 08.12.2016	Exhibit-13

9. It is evident that the police submitted charge sheet much before the report of the Forensic Science Laboratory was made available to it. Description of the article contained in the parcel received by R.F.S.L., Muzaffarpur, reads thus:-

“Polythene packet as described above contained creamy dark brown colored sticky substance weighing about 33 gram (with packet) seized from the accused Naresh Yadav”

10 .The result of the examination reads thus:-

“The creamy dark brown colored sticky substance as described above was found to contain charas.”

“charas is the crude resinous matter collected from leaves and flowering top of the cannabis plant, which chief intoxicating ingredient is Tetrahydrocannabinol (THC)



11. After closure of the evidence of the prosecution evidence, the appellant was questioned by the trial court under Section 313 of the CrPC so as to give him an opportunity to explain the incriminating circumstances emerging against him based on the evidence of the prosecution adduced at the trial. Following was the only question put in this regard by the trial court: -

“प्रश्न: आपके विरुद्ध साक्ष्य है की दिनांक 17.05.2016 समय 08:15 बजे साम को ग्राम भेलाही कब्रगाह औ. पी.- भेलाही थाना पलनवा , जिला- पूर्वी चम्पारण गुप्त सुचना के आधार पर सस्त्र सिमा बल टीम के द्वारा आपको 4 किलो 500 ग्राम चरस एवं विभिन्न देशों की करेंसी के साथ पकड़ा गया जो आप नेपाल से भारत तस्करी कर बेचने हेतु ले कर आ रहे थे। उक्त पकड़े गए चरस को आर एफ़ एस एल मुजफ्फरपुर जांच हेतु भेजा गया था जिसके जांच रिपोर्ट में चरस की पुष्टि हुई है। इस सम्बन्ध में क्या कहना है ?

उत्तर : जी नहीं। ”

12. The appellant denied the aforesaid incriminating circumstances. The trial court, after having appreciated the evidence, both oral and documentary adduced at the trial, reached a conclusion that the prosecution could successfully establish that



4.5 kg of *charas* was recovered from the appellant's possession, which he had imported to India from Nepal for selling. Referring to Section 54 of the NDPS Act, the trial court opined that onus was on the appellant to prove that he was not conscious about the possession of *charas*, recovered from his possession and, thus, failed to discharge the onus. Accordingly, the trial court held that the charge against the appellant of commission of offence punishable under Section 20(b)(ii)(C) and 23(c) of the NDPS Act stood proved beyond of reasonable doubts. After having held the appellant guilty of the aforesaid offence, the trial court has sentenced him to imprisonment and fine by the impugned order dated 18.07.2022.

13. Learned counsel appearing on behalf of the appellant has firstly submitted that it is the prosecution's own case that upon personal search of the appellant, 4.5 kg of *charas* and certain other articles were recovered after complying with the mandatory statutory requirement under Section 50 of the NDPS Act. He has drawn our attention to Exhibit-5, which is the notice said to have been issued by the raiding team/SSB personnel for appellant's personal search under Section 50 of the NDPS Act, purportedly in order to make him aware about his right to be searched before a



gazetted officer or a Magistrate. He submits that the said notice contains, *inter alia*, following statement:-

“I have been informed and I want to get myself searched by”...

“signature/thumb impression/name of the suspect.”

14. The said notice does not indicate entry of the appellant's choice of being searched by raiding team and it does not bear the appellant's signature or thumb impression. The said notice, he contends, does not, in any manner, indicate that the appellant was either made aware of his right by the SSB personnel to be searched before a gazetted officer or a Magistrate nor that the appellant had given his consent to be searched by the members of the raiding team. He has secondly submitted that there has been non-compliance of Section 52A(2)(b) of the NDPS Act read with the Supreme Court's decision in case of ***Union of India vs. Mohan Lal***, reported in **(2016) 3 SCC 379** inasmuch as soon after the alleged seizure of the contraband from the appellant's possession, no sample was drawn in the presence of a Magistrate. He next submits that there has been unexplained inordinate delay on the part of the IO in making an application before the court below for drawing samples for being sent to the FSL. He has further submitted that in view of blatant non-compliance of the statutory requirement under Sections 50 and 52A(2)(b) of the



NDPS Act and the apparent delay in preparation of the samples, it would be highly unsafe to uphold the appellant's conviction based merely on the oral evidence of the members of the raiding team particularly when the seizure list witnesses have not been examined. He has also argued that there are inconsistencies in the evidence of the informant (PW 3) and that of PW 1 on the point as to when was the secret information received and the appellant was subsequently intercepted by the SSB personnel. He has also argued that the failure on the part of the prosecution to produce material exhibit (remainder of the seized contraband) is also fatal to the prosecution's case. He has also relied on a coordinate Bench decision of this Court in the case of *Bajinath Mahto vs. State of Bihar* reported in **2023(3) PLJR 265**, to bolster his contention.

15. Learned Additional Public Prosecutor appearing on behalf of the State, defending the finding of conviction recorded by trial court, has submitted that the prosecution's witnesses have proved seizure of contraband substance recovered from the possession of the appellant. The informant, after having received the secret information regarding the appellant carrying contraband from Nepal to India, had intimated his officials superior in this regard and had thereafter constituted a raiding team to intercept the appellant. She submits that the RFSL, Muzaffarpur, upon analysis,



has found the substance to be *charas*. Merely because the prosecution's witnesses are the officials of SSB, their evidence may not be discarded on that ground alone. She has further submitted that the appellant has not been able to demonstrate any prejudice caused to him because of delayed transmission of the samples for scientific examination to Forensic Science Laboratories. She contends that the prosecution has been able to prove the recovery of contraband from the appellant's possession. In such circumstances, the trial court has rightly applied Section 54 of the NDPS Act for recording the appellant's conviction as he failed to discharge the statutory onus on him under the said provision.

16. We have perused the impugned judgment and order of the trial court and carefully scrutinized the lower court's records, more particularly the evidence adduced by the prosecution at the trial. We have given our thoughtful consideration to the rival submissions made on behalf of the parties.

17. It is indisputable that according to the prosecution's case, the seizure was made on 17.05.2016 at 2:30 pm by the officials of the SSB. Seizure list (Exhibit-4) was prepared by the informant (PW-3) on 17.05.2016 at Border Pillar No. 402/29 near



village Bhelai. The value of 4.500 kg (wrongly mentioned as gm) of *charas* at the rate of Rs. 10 lakh per Kg has been assessed as Rs. 45 lakh. The seizure list discloses recovery from the appellant currencies notes of Nepal, Sri Lanka, Malaysia, Saudi Arabia, Korea and Qatar. The seizure list bears the signature of the seizure list witnesses, namely, Khaleel Miyan and Angad Mahto. None of the seizure list witnesses were examined at the trial. The seizure list has been proved by PW-3, namely, Anil Kumar Yadav, the informant. It is noted that it is also the prosecution's case that after taking out 60 gms of the substance recovered from the appellant's possession to have been sent to Forensic Science Laboratories (30 gm each to two laboratories), rest was handed over to the IO by the Magistrate to be kept in Malkhana. Thus, 4.440 kg of the substance was handed over to the IO to be kept in Malkhana. At the trial, neither the said contraband substance nor the foreign currencies, said to have been recovered from the appellant's possession, were produced at the trial as material exhibits.

18. It is shocking to note from the deposition of the IO that no entry was made in the Malkhana register and, thus, the Malkhana Register Number showing entry of the seized articles for being kept in Malkhana was unavailable. He had not mentioned in the case diary as to when was the seized substance



taken out from Malkhana and who had handed over the same to him. He has further deposed that he did not enter in the case diary as to what articles were handed over to him by the previous Investigating Officer, Satyendra Narayan Singh, ASI. He admitted that the inventory prepared in this case by the learned Magistrate does not contain the description of the person from whom the article was seized. In such circumstance, in our opinion, the credibility of the seizure list stood lost in the absence of the appellant's signature or his thumb impression over the same; in the absence of any evidence that copy of such seizure list was handed over to the appellant and; absence of the evidence of the seizure list witnesses in whose presence, according to the prosecution's case, the seizure list (Ext.-4) was prepared. Non-production of the seized articles during the course of the trial without any evidence of destruction of the contraband substance casts serious doubt on the prosecution's story. We find force in the submissions made on behalf of the appellant that it would be unsafe to uphold the conviction of the appellant despite non-examination of the seizure list witnesses and non-production of the seized articles at the trial.

19. It would be pertinent to notice the Supreme Court's decisions, in this connection, in the cases of *Jitendra Kumar v. State of M.P.*, reported in (2004) 10 SCC 562 and *Ashok @*



Dangra Jaiswal v. State of M.P., reported in (2011) 5 SCC 123. It would also be beneficial to notice in this regard another Supreme Court's decision in case of ***Gorakh Nath Prasad v. State of Bihar***, reported in (2018) 2 SCC 305, in which the decision in case of ***Jitendra Kumar*** (supra) and ***Ashok @ Dangra Jaiswal*** (supra) have been taken note of with approval. In case of ***Jitendra Kumar*** (supra), the Supreme Court has held in paragraph Nos. 5 and 6 as under:-

“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. Although the High Court noticed the fact that the charas and ganja alleged to have been seized from the custody of the accused had neither been produced in the court, nor marked as articles, which ought to have been done, the High Court brushed aside the contention by observing that it



would not vitiate the conviction as it had been proved that the samples were sent to the Chemical Examiner in a properly sealed condition and those were found to be charas and ganja. The High Court observed, “non-production of these commodities before the court is not fatal to the prosecution. The defence also did not insist during the trial that these commodities should be produced”. The High Court relied on Section 465 CrPC to hold that non-production of the material object was a mere procedural irregularity and did not cause prejudice to the accused.

6. In our view, the view taken by the High Court is unsustainable. In the trial it was necessary for the prosecution to establish by cogent evidence that the alleged quantities of charas and ganja were seized from the possession of the accused. 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. The suggestion made by the defence in the cross-examination is worthy of notice. It was suggested to the prosecution witnesses that the landlady of the house in collusion with the police had lodged a false case only for evicting the accused from the house in which they were living. Finally, we notice that the investigating officer was also not examined. Against this background, to say that, despite the panch witnesses having turned hostile, the non-examination of the investigating officer and non-production of the seized drugs, the conviction under the NDPS Act can still be sustained, is far-fetched.”



20. Relying on the said decision in case of **Jitendra Kumar** (supra), the Supreme Court has held in case of **Ashok @ Dangra Jaiswal** (supra) in paragraph No. 12 as under:-

“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.”

21. In case of **Gorakh Nath Prasad** (supra), the Supreme Court, noticing absence of production of seized items in court as an exhibit recorded in paragraph No. 6 as under:-

“6. In the facts of the present case, the independent witnesses with regard to the search and seizure, PW 2 and PW 3, having turned hostile deposing that their signatures were obtained on blank paper at the police station, the mere fact of a FSL Report (Ext. 8), being available is no confirmation either of the seizure or that what was seized was ganja, in the absence of the production of the seized item in court as an exhibit. The non-production of the seized material is therefore considered fatal to the prosecution case. The issue whether there has been compliance with Sections 42 and 50 of the NDPS Act loses its relevance in the facts of the case.”

22. There is yet another glaring aspect of this case. The seizure was made on 17.05.2016 and the FIR was registered on 18.05.2016, immediately whereafter the investigation had begun.



There was no application made by the IO for preparation of samples for the purpose of forensic examination soon after the substance was seized and handed over to the police. The IO, to whom the investigation of the case was initially handed over, had prepared a production-cum-seizure list soon after the seized articles were handed over to him by the SSB Officials, which has been marked as Exhibit-1. More than three months thereafter, on 20.08.2016, the IO, for the first time, approached the court with an application for drawing the samples in the presence of a Magistrate. The sample was sent to the Forensic Science Laboratory on 29.09.2016.

23. The facts of the case speak volumes on the manner in which the safety and security of the articles seized from the possession of the appellant was compromised. There is absolutely no clue emerging from the evidence of the IO as to how, where, when and by whom, the seized articles were kept to ensure safety and integrity. Failure on the part of the prosecution to produce even the foreign currencies at the trial said to have been recovered from the appellant's possession is truly fatal for the prosecution's case.

24. The Supreme Court in case of *Union of India vs. Mohan Lal* (supra), while interpreting Section 52A of the NDPS



Act has emphasized requirement of sampling of seized contraband articles under the supervision of the Magistrate soon after the seizure is made. The said decision was rendered on 28.01.2016, wherein the Supreme Court has held in no uncertain terms that seizure of the contraband must be followed by an application for drawing of the samples and certification as contemplated under the Act. The Supreme Court underscored in the said case that the scheme of the Act in general and Section 52A in particular does not brook any delay in the matter of making an application or drawing of samples and certification. While observing so, the Supreme Court in case of *Union of India vs. Mohan Lal* (supra) further remarked that though there was no room for reading a time frame into the provision that an application for sampling and certification ought to be made without undue delay and the Magistrate on receipt of any such application would be expected to attend to the application and do the needful within a reasonable period and without any undue delay and procrastination, as is mandated by sub-section (3) of Section 52A of the NDPS Act.

25. We are inclined to interfere with the impugned finding of conviction recorded by the trial court also on the ground of unexplained undue delay on the part of the prosecution in getting the sampling done after the contraband was seized.



26. For the reasons noted above, the appellant's conviction recorded by the trial court, in our opinion, is unsustainable. The appellant deserves to be given benefit of doubt. Accordingly, this appeal is allowed.

27. The impugned judgment of conviction dated 13.07.2022 passed by the learned 1st Additional Sessions Judge, East Champaran, Motihari, in NDPS Case No. 28 of 2016, CIS No. 31/2016, arising out of Palanwa {Bhelahi (Bhelai) OP} P.S. Case No. 25 of 2016, is hereby set aside. The appellant stands acquitted of the charge of commission of offences punishable under Sections 20(b)(ii)(c) and 23(c) of the NDPS Act. The order of sentence dated 18.07.2022 also stands set aside.

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

29. Before we part with the present judgment, we consider it apt to express our concern and displeasure over the failure on the part of the prosecution to produce material exhibit, i.e., contraband, worth Rs. 45 lakh at the trial, said to have been recovered from the appellant's possession in the absence of any clue as to where was the contraband lying and how was that dealt with by the police personnel. Conscious of the limitation of the appellate court exercising power under Section 374(2) of the



CrPC, in the peculiar facts and circumstances of the present case, as noted above, we deem it just and proper in the interest of justice to direct the Director General of Police, Bihar, to cause an enquiry into the disappearance of the substance, which was found to be *charas* upon analysis by the FSL, and was in the custody of the police personnel. The Court expects that the Director General of Police shall take up the matter with due seriousness which it deserves and proceed accordingly, depending upon the outcome of the enquiry.

30. Let a copy of this judgment be communicated to the Director General of Police, Bihar, forthwith.

(Chakradhari Sharan Singh, J)

(Khatim Reza, J)

Pawan-Premchand

AFR/NAFR	NAFR
CAV DATE	N/A
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