

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.430 of 2022

Arising Out of PS. Case No.-183 Year-2018 Thana- CHANPATIA District- West Champaran

SHAKTI KUMAR S/o Late Ladoo Yadav Resident of Village- Jurabganj,
P.S.- Kodha, District- Katihar.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s	:	Mr. Bindhya Keshari Kumar, Sr. Adv Mr. Neeraj Kumar @ Sanidh, Adv Mr. Ashwini Raj Narayan, Adv Mr. Ravi Ranjan Dixit, Adv Mr. Vivek Kumar Sinha, Adv Mr. Ashutosh Kumar, Adv Mr. Ravi Shankar Pathak, Adv
For the Respondent/s	:	Ms. Shashi Bala Verma, APP

CORAM: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH

and

HONOURABLE MR. JUSTICE NAWNEET KUMAR

PANDEY

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH)

Date : 27-07-2023

The appellant has preferred this appeal under Section 374(2) of the Code of Criminal Procedure against the judgment of conviction dated 01.04.2022 and order of sentence dated



07.04.2022 passed by the learned District & Sessions Judge, West Champaran at Bettiah in NDPS Case No. 39 of 2018 arising out of Chanpatiya P.S. Case No. 183 of 2018, whereby and whereunder the appellant has been convicted and sentenced as under :-

Conviction under Section	Sentence		
	Imprisonment	Fine (Rs.)	In default of fine
under Section 20(b)(ii)(C) of the NDPS Act	Rigorous imprisonment for 15years	2 Lakhs	R.I for one year
Under Section 22(c) of the NDPS Act	Rigorous imprisonment for 15years	2 Lakhs	R.I for one year
Under Section 23(c) of the NDPS Act	Rigorous imprisonment for 15years	2 Lakhs	R.I for one year
Section 414 of the IPC	-----	-----	-----

2. A self statement of the Officer-in-charge of Chanpatia Police Station made on 14.05.2018 at 10:45 hours is the basis for registration of the concerned Chanpatia P.S. Case. No. 183 of 2018 disclosing the offences punishable under Sections 20, 22, 23, 24, 27 and 29 of the N.D.P.S. Act and Section 414 of the Indian Penal Code, which gave rise to NDPS Case No. 39 of 2018. Briefly noted, it is the informant’s case as disclosed in the self statement that based on a secret information to the effect that three persons



were carrying *Charas* and were moving on a motor cycle, a raid was organized with a raiding party led by the Officer-in-charge Rajesh Kumar Jha (PW-1), Assistant Sub-Inspector of Police Arvind Kumar Singh (PW-3), reserve guards posted at the police station namely, havildar Jhapas Ram (PW2), constable Ashok Kumar Singh (not examined), constable Arun Kumar (PW-5) and Pushpendra Kumar Yadav (PW-6), and a request was made to the Block Development Officer to be present for the purpose of conducting search of the persons riding the vehicle. During the course of checking, the raiding team noticed three persons riding a blue APACHE motorcycle. The second pillion rider was carrying a bag on his back. They were intercepted and though they attempted to flee away all the three persons were apprehended by the police. According to the said self statement of the informant, on interrogation, the persons disclosed that there was *charas* in the bag which they were bringing from Nepal, which was in possession of this appellant. They were given an option to be searched either before a Magistrate or by the police personnel themselves. They did not object to their search by the police personnel. A search was accordingly conducted leading to recovery of two packets of *charas* wrapped with yellow polythene. The packets were weighed and their weight was found to be 950 gram each. Further, a mobile phone was recovered from this



appellant on search of his person. Two persons accompanying the appellant were also subjected to personnel search, leading to recovery of mobile phones. The APACHE motorcycle did not bear any registration number. The accused persons are said to have disclosed the names of other persons also who were involved in illicit trade of *charas*. They admitted their involvement in various criminal activities. The recovered articles were seized in the presence of two independent witnesses namely Chhamata Kumar (not examined) and Ashrafi Alam (not examined). The *charas* so seized by the informant (PW-1) was sealed and three persons were arrested.

3. The lower court's records (LCR) suggest that an order was passed by the learned Sessions Judge, West Champaran at Bettiah, deputing a Magistrate for drawing of the samples. There is however, no material on record to suggest that in compliance of the said order of the learned Sessions Judge, West Champaran at Bettiah, samples of the seized articles were drawn in the presence of a Magistrate. It however appears that the samples were dispatched for forensic examination on 04.06.2018 by special messenger namely A.S.I Vijay Kumar Pandey, which was received in the office of the Director Forensic Science Laboratory, Bihar, Patna on 26.07.2018. We will be dealing with the evidence of the prosecution's witnesses with reference to the manner in



which the samples of the seized articles were handled by the police officials, which is one of the points which has been taken in the present appeal on behalf of the appellant.

4. It would be pertinent to mention that according to prosecution's case, the accused persons confessed their guilt in their statements recorded by the officer-in-charge of the police station. The said statements were recorded by S.I. Jafaruddin of Chanpatia Town Police Station Bettiah at Chanpatia.

5. The police, upon completion of investigation submitted charge-sheet on 10.08.2018, against all the accused persons including this appellant, for commission of the offences punishable under Sections 20, 22, 23, 24 and 27 of N.D.P.S. Act and Section 414 of the Indian Penal Code, though by the said date the FSL report was not available with the police. Subsequently, the cognizance of the offences was taken on 13.08.2018 and the charges were framed against the accused persons by the trial court on 14.05.2018 for commission of the offences punishable under sections 20(b)(ii)(C), 22(c), and 23(c) of the N.D.P.S. Act. No charge was framed for the offence punishable under section 414 of the IPC. The accused persons denied the charges and claimed to be tried.

6. At the trial the prosecution examined altogether six witnesses namely Rajesh Kumar Jha (officer-in-charge) of the



police station of Chanpatia Police station, the informant (PW-1); Havildar Jhapas Ram, a member of the raiding team (PW-2); Arvind Kumar Singh, an Assistant Sub-inspector of police and member of the raiding team (PW-3); Abhimanyu Kumar and Arun Kumar, investigating officers, (PW-4 and PW-5); and constable Pushpendra Kumar Yadav a member of the raiding team (PW-6). The seizure list witnesses were not examined.

7. The prosecution also brought on record documentary evidence by way of following exhibits at the trial :-

- (i) Seizure list (Exhibit-1)
- (ii) Written report of the officer-in-charge of the police station (Exhibit-2)
- (iii) Formal FIR (Exhibit-4)
- (iv) Endorsement on the FIR (Exhibit-5)
- (v) Arrest memo of Sakti Kumar (Exhibit-3)
- (vi) Arrest memo of co-accused Sikandra Yadav (Exhibit 3/a)
- (vii) Arrest memo of Kabir Kumar (Exhibit-3/b)
- (viii) FSL report (Exhibit-6)
- (ix) The seized materials came to be marked as Exhibit-X.

8. After closure of the prosecution's evidence, the accused persons were questioned under Section 313 of the Cr.P.C so as to give them an opportunity to explain the circumstances emerging against them based on the evidence of the prosecution's witnesses.



They answered in negative.

9. It transpires that two accused persons other than this appellant did not present themselves at the stage of argument of the case and accordingly by an order dated 14.12.2021, the trial court directed for separating their trial from the original trial. The trial court, upon appreciation of the evidence adduced at the trial has held the appellant guilty of the offences punishable under Sections 20(b)(ii)(C), 22(c) and 23(c) of the N.D.P.S. Act and has sentenced him to undergo rigorous imprisonment and fine as has been noted at the outset.

10. Mr. Bindhya Keshari Kumar, learned senior counsel appearing on behalf of the appellant has submitted that the finding of conviction recorded by the trial court is unsustainable for the reason that there is no evidence that the samples were drawn in the presence of a Magistrate as contemplated under 52A(2)(b) of the N.D.P.S. Act. He as submitted that the prosecution miserably failed to prove that the samples which were sent for forensic examination tallied with the material exhibits produced at the trial. Non-examination of the seizure list witnesses renders the entire process of the seizure doubtful. He further contends that the witnesses, all of whom are police personnel are not consistent in their depositions, as regards, the manner in which the seizure was made and seized articles were weighed. He submits that according



to the informant (PW-1) the police party had borrowed a balance and weights for measuring the weight of the seized articles from a nearby shop but the description of the weights used for weighment of the seized articles falsifies the prosecution's case of seizure of 950 grams of *charas* in each of the two packets, said to have been recovered from the appellant's possession. He contends that PW-1 deposed at the trial that weights of the denomination of '1 kg', '1/2 kg' and '200' gram were used for taking the weight of the two packets of the *charas* but with the said denomination and weights, it was impossible for the raiding party to reach to a conclusion that total weight of each of the packets containing *charas* was 950 gram. He has further submitted, with reference to the deposition of the prosecution's witnesses that the prosecution miserably failed to establish that the material exhibits produced before the trial court were the same which were seized and marked by the informant, according to the prosecution's case, in the absence of a proper marking found over the material exhibit produced at the trial. He has also submitted that according to prosecution's case the seized articles were stored in a police *malkhana*, which cannot be considered to be in accordance with the requirement under Standing Order No. 1 of 89 issued by the Finance Department, Government of India,. He has relied on a Division Bench decision of this court in case of **Dipak Kumar Vs. State of Bihar** reported



in **2011(3) PLJR 494**, to contend that inordinate delay in delivery of the samples to the Forensic Science Laboratory vitiates the entire prosecution's case against the appellant.

11. Learned Additional Public Prosecutor appearing on behalf of the State has argued that minor discrepancy in the evidence of the prosecution's witnesses is immaterial in the facts and circumstances of the case. She contends that non examination of the seizure list witnesses is also not of much significance as their signatures came to be proved by the prosecution's witnesses and the seizure list as a whole has been proved by the witnesses at the trial. She has submitted that impugned order of conviction does not require any interference by this Court.

12. We have perused the impugned judgment and order of the trial court as well as lower court's records and we have considered rival submissions made on behalf of the appellant and the State as noted above.

13. On careful scrutiny of the evidence adduced at the trial, we find that there is no evidence that the samples were drawn in the presence of a Magistrate as contemplated under section 52A(2)(b) of the N.D.P.S. Act. It has been consistently held by the Supreme Court, as laid down in the case of *Union of India vs Mohanlal & Anr* reported in **(2016) 3 SCC 379**, that it is obligatory in accordance with the provisions under Section



52A(2)(b) of the N.D.P.S. Act that the sampling of the seized contraband articles under the N.D.P.S. Act must be done in the presence and supervision of a Magistrate.

14. Secondly, we notice that there has been failure on the part of the prosecution in promptly sending the samples to the Forensic Science Laboratory. Further, it cannot be discerned from the evidence of the prosecution's witnesses as to when was the sample drawn and by whom. From the report of the Forensic Science Laboratory, it only appears that the memo was issued on 04.06.2018 by the learned District and Sessions Judge, West Champaran, Bettiah for sending the parcel through a special messenger, ASI Vijay Kumar Pandey, which was received in the office of the Director, Forensic Science Laboratory on 27.06.2018. It cannot be inferred from the evidence adduced at the trial as to where were the samples kept from 04.06.2018 to 26.07.2018 though one sample was supposed to be delivered to the Forensic Science Laboratory through a special messenger.

15. Furthermore, it has rightly been submitted on behalf of the appellant that the prosecution did not ensure safe storage of the seized articles and the samples as is evident from the depositions of the informant and the investigating officers (PW-4 and PW-5). PW-4 in his examination-in-chief deposed that after obtaining the samples from the court he had deposited the seized



articles in *malkhana* and had handed over the sample to the officer-in-charge of the police station for transmitting the same to the Forensic Science Laboratory. He was thereafter transferred. It is worthwhile mentioning that it is not the prosecution's case that soon after seizure of the contraband articles, the samples were drawn rather the seized articles were kept in the *malkhana* and thereafter they were taken out for drawing of the samples. From the deposition of PW-4, it transpires that he has not maintained any record for taking out the seized articles from *malkhana* or placing the same again in the *malkhana* after the sample was drawn. He expressed his inability to state the amount taken out of the seized articles for preparation of samples. He was also unable to explain the manner in which the samples were kept by the officer-in-charge after the same were handed over to him, to ensure safe storage.

16. As has been noted hereinabove, the so called confessional statement of the appellant and other accused persons were taken by one Jafaruddin a police officer posted at the Bettiah Town police station. The investigating officer expressed his inability to explain circumstance in which an officer of Bettiah town police station was there at Chanpatia police station to record the confessional statement of the accused persons. PW-5, who had taken the charge of investigation from PW-4 deposed in his



examination-in-chief that he had sent the sample for forensic examination to Forensic Science Laboratory, Patna on 26.07.2018. As has been noted hereinabove, there is no evidence as to in what manner and at what place and in whose custody the samples were kept till 26.07.2018, after the same were drawn, according to the prosecution.

17. Considering the abovementioned circumstances coupled with the fact that the independent seizure list witnesses were not examined at the trial and the prosecution intended to prove the charge against the appellant at the trial based on the evidence of PW-1, PW-2, PW-3 and PW-6, all of whom were members of the raiding team, we are of the considered view that finding of conviction based on such evidence cannot be sustained. There being patent violation of the mandatory statutory requirements under the provisions of the NDPS Act, we do not consider it safe to uphold the conviction recorded by the trial court.

18. Accordingly, the impugned judgment of conviction dated 01.04.2022 and order of sentence dated 07.04.2022 passed by the learned District & Sessions Judge, West Champaran at Bettiah in NDPS Case No. 39 of 2018 arising out of Chanpatiya P.S. Case No. 183 of 2018, is set aside.

19. Consequently, the appellant is acquitted of the



charge for the commission of the offences punishable under Sections 20(b)(ii)(C), 22(c), and 23(c) of the N.D.P.S. Act by giving him benefit of doubt.

20. This appeal is allowed.

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

(Chakradhari Sharan Singh, J)

(Nawneet Kumar Pandey, J)

ranjan/Sudha-

AFR/NAFR	NAFR
CAV DATE	NA
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