

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.466 of 2021**

Arising Out of PS. Case No.-468 Year-2018 Thana- BRAHMPUR District- Buxar

1. Sidhnath Sah S/O Late Parasnath Sah R/O Village-Mahuar, P.S.-BRAHMPUR (NAINIJOR), District-Buxar.
2. Chegan Sah @ Muni Sah @ Muni Lal Sah S/O Late Parasnath Sah R/O Village-Mahuar, P.S.-BRAHMPUR (NAINIJOR), District-Buxar.

... .. Appellant/s

Versus

The State Of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s	:	Mr. Krishna Prasad Singh, Sr. Adv Mrs. Meena Singh, Adv
For the Respondent/s	:	Ms. Shashi Bala Verma, APP

CORAM: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH

and

**HONOURABLE JUSTICE SMT. G. ANUPAMA CHAKRAVARTHY
ORAL JUDGMENT**

(Per: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH)

Date : 01-12-2023

The appellants have preferred this appeal under Section 374(2) of the Code of Criminal Procedure assailing the judgment of conviction dated 22.03.2021 and an order of sentence dated 25.03.2021 passed by the learned Additional District & Sessions Judge, 4th, Buxar in NDPS No. 07 of 2018/CIS No. 7 of 2018 arising out of Brahmpur P.S. Case No. 468 of 2018 whereby and whereunder, the appellants have been convicted and sentenced as under :-

Appellant No. 1 Sidhnath Sah

Penal Provision	Sentence		
	Imprisonment	Fine (Rs.)	In default of fine
Section 20(b)(ii)(C) of the NDPS Act	Rigorous imprisonment for 12 years	2 Lakh	S.I for six months

Appellant No. 2. Chegan Sah

Penal Provision	Sentence		
	Imprisonment	Fine (Rs.)	In default of fine
Section 20(b)(ii)(C) of the NDPS Act	Rigorous imprisonment for 12 years	2 Lakh	S.I for six months

2. The concerned Brahmpur P.S. Case No. 468 of 2018 disclosing commission of offences punishable under sections 20(b)(ii)(C), 27(a) and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the ‘NDPS Act’ in short) was registered on 14.10.2018 at 9:30 pm based on an information received at 9:30 pm. The informant (PW-4), according to the FIR, was posted as an Assistant Sub Inspector of Police at Nainijor P.S. whose self statement is the basis of registration of the FIR. According to him, at 5:30 pm on 14.10.2018, he received a secret information to the effect that these appellants were engaged in illicit trade of *ganja* and had concealed huge quantity of *ganja* in their houses. Their family

members namely, Sheojee Sah, Gupteshwar Sah, Lal Babu Sah, Dharmendra Sah, Jitendra Sah and Udhari Sah were also involved in such illegal trafficking of the contraband. After transmitting the information regarding said secret input to the official superior and a Magistrate-cum-Circle Officer, Brahmpur, he proceeded towards Mahuar village of which the appellants were residents. No sooner he reached at the house of the appellant Sidhnath Sah, upon seeing the presence of the police, they started running away helter skelter. Though they were chased by the police party, they managed to escape. Noticing such action of the police, people in the locality started gathering and upon request made by the police team to assist them in conducting a search, two independent witnesses, namely, Vijay Singh (not examined) and Sunil Sah (not examined) agreed to be the seizure list witnesses. In the presence of the other two seizure list witnesses and the Magistrate-cum-Circle Officer, Brahampur, the house of the appellants Sidhnath Sah was searched leading to recovery of six bags full of *ganja* and other articles. Thereafter, the house of the appellant Chegan Sah was searched leading to recovery of four bags of *ganja*. Upon weighment of bags of *ganja* recovered from the possession of appellant Sidhnath Sah, it was found that

the packets weighed 10kg, 8kg, 8Kg, 7kg, 12kg, 15kg (Total-60kg). Similarly the packets of Ganja recovered from the house of the appellant Chegan Sah, weighed 7kg, 10.500gms, 9.500gms and 23kg (Total 50kg). Apparently thus, according to the first informant (PW-4), 10 packets of *ganja* were recovered from the two houses of the appellants weighing 110kg in all. Two seizure lists were prepared over which the two seizure list witnesses and the Magistrate (Circle Officer) put their signatures, copies of which were handed over to the appellants. From the seized packets, small quantities of the contraband were taken out for preparation of samples. Altogether three samples each weighing 25gms were prepared and sealed in three small plastic bags on which the seizure list witnesses and Circle Officer put their signatures which were marked for the purpose of identification as A1, A2 and A3 and rest of the articles were sealed in a piece of cloth.

It can be easily noticed from the self statement of the informant (PW-4) that the samples were not prepared in the presence of any Judicial Magistrate rather the same was done in the presence of Circle Officer, who, according to the informant, was a Magistrate. It further transpires from the FIR that ten bags said to have been seized from the houses of

the two appellants they were not marked in a manner so as to identify as to which bag was recovered from whose house. From the ordersheet it transpires that on the next date i.e., 15.10.2018, the articles so seized and samples so prepared were produced before the learned District & Sessions Judge, Buxar along with the two seizure lists. Neither any application was made by the informant for drawing the samples in the presence of a Judicial Magistrate nor the samples were drawn in the presence of a Judicial Magistrate, soon after the seizure. On 17.11.2018, an application was made by the Investigating Officer (PW-2) for sending the samples to the Forensic Science Laboratory. A request was also made on 17.11.2018, i.e., more than after one month the articles were seized by the I.O. for drawing the samples in the presence of a Magistrate. A Magistrate was accordingly deputed under an order dated 17.11.2018 by the learned Special Court under the NDPS Act. Further, from the ordersheet it transpires that ten samples were drawn from each of the ten bags so seized in the presence of the Magistrate on 17.11.2018. It also transpires from the ordersheet dated 17.11.2018 that all the ten bags were resealed after ten samples were drawn from each of the bags in the presence of a Magistrate. It is noticeable at this juncture, at the cost of

repetition, that it is not clear from the FIR that there was any identification mark put on the ten bags said to have been recovered from the houses of these appellants based on which it could be discerned as to which bag was recovered from the possession of which appellant. Accordingly, ten samples which were drawn in the presence of a Magistrate on 17.11.2018 were not referable to recovery from the houses of which of the appellants. Further, after an application was made for transmission of samples to the Forensic Science Laboratory, all the ten samples marked as Exhibits A1 to A10 were directed by the learned Special Court on 19.11.2018 to be sent to the Forensic Science Laboratory, Patna.

3. The police, without waiting for the report of the Forensic Science laboratory, Patna, filed its chargesheet on 31.01.2019 for the offences punishable under Sections 20(b)(ii)(C), 27 (a) and 29 of the NDPS Act whereupon cognizance was taken. The appellants were subsequently charged of the offences punishable under Sections 20(b)(ii)(C), 27(a) and 29 of the NDPS Act. They denied the charges and claimed to be tried. At the trial the prosecution examined altogether five witnesses including three Investigating Officers i.e., PW-2, PW-3 and PW-5, the informant (PW-4) and one Bijendra Kumar (PW-1) who

claimed to be a member of the raiding team.

4. In addition to the oral evidence of the aforesaid five witnesses, the prosecution brought on record at the trial following documentary evidence:-

Sl. No.	Description	Exhibit Number
1.	Seizure list regarding seizure of articles from the house of the appellant no. 1 Sidhnath Sah	Exhibit-1
2.	seizure list relating to the house of the appellant no. 2 Chegan Sah	Exhibit-2
3.	Application filed before the Court for adding <i>ganja</i> in the seizure memo	Exhibit-3
4.	Forwarding report	Exhibit-4
5.	Chargesheet	Exhibit- 5
6.	Self statement of the informant	Exhibit-6
7.	Signature of the informant over the self statement	Exhibit-6/1
8.	Handwriting of Mukesh Kumar Srivastava over the self statement of the informant	Exhibit-6/2
9.	Formal FIR	Exhibit-7
10.	Request seeking permission for forensic examination	Exhibit-8
11.	Arrest memo in respect of the appellant Sidhnath Sah	Exhibit-8/1
12.	Report of the FSL, Patna	Exhibit-9

Further the ten bags said to be containing Ganja were produced at the trial marked as Exhibits- M to M10.

5. After closure of the prosecution's evidence, the appellants were examined under Section 313 of the Cr.P.C. so as to give them an opportunity to explain the incriminating circumstances emerging against them based on the evidence of

the prosecution's witnesses. The appellant answered the questions in negative.

6. The defence also produced one witness, DW-1 (Shradhanand Yadav), who deposed that 11 bags of *bhang* were recovered by the police in his village which were shown to be *ganja* by them. The act of police was objected to by them and an information in this regard was given to the police also.

7. The trial court after having appreciated and analyzed the evidence adduced at the trial has recorded conviction of the appellant for the offences punishable under Sections 20(b)(ii)(C) of the NDPS Act, acquitted them of the offences punishable under Sections 27(a) and 29 of the NDPS Act and has sentenced them to imprisonment and fine, as has been noted above.

8. Ms. Meena Singh, learned counsel appearing on behalf of the appellants has firstly submitted that it is evident from the FIR itself that the houses of the appellants were, according to the informant, raided after sunset as the secret information was received by the informant at 5:30 pm. She submits that search said to have been conducted by the informant is against the mandate of Section 42 of NDPS Act which prohibits search after sunset and before sunrise without following the requirement under the second *proviso* to Section

42(1) of the NDPS Act. She further submits that in view of the Supreme Court's decision in the case of *Union of India Vs. Mohan Lal & Anr* reported in (2016) 3 SCC 379 that it was incumbent upon seizing officer to have applied before the competent court for the purpose of drawing the samples. In this case, the samples were firstly drawn by the informant himself and more than a month after the seizure, an application was made before the learned Special Judge, NDPS Act seeking deputation of a learned Judicial Magistrate for drawing the samples. She contends that the samples were sent to the Forensic Science Laboratory, 33 days after the seizure. Such delay in transmission of the seized articles for forensic examination itself is fatal to the prosecution's case. She has further argued that the Forensic Science Laboratory, upon examination has found that out of the aforesaid ten bags, A1, A2, A4, A5 and A10 did not contain Tetra Hydro Cannabinol though other bags containing samples of the substances namely A3, A6, A8 and A9 contained *ganja* with Tetra Hydro Cannabinol as the chief intoxicating ingredient. Further, the bag marked A7 was also found to be containing dry, greenish brown crushed vegetable like substance which was containing *ganja* with Tetra Hydro Cannabinol (THC) as the chief intoxicating

ingredient. She contends that it is evident from the report of the FSL that in the five samples out of 10 *ganja* was not detected. The 10 samples were drawn each from the 10 packets. There is no mark of identification to demonstrate as to from whose house of the two appellants which bag was recovered by the police. In such circumstance, the entire case of the prosecution becomes doubtful. She has further submitted that there are apparent contradictions in the evidence of the prosecution's witnesses on the point of arrest of these appellants. These appellants were not arrested on the date of seizure rather the appellant no. 1 was arrested on 17.11.2018 and appellant no. 2 on 28.01.2019. PW-1 in his deposition, on the contrary deposed that the appellants were arrested at the time of search which fact stands contradicted by the evidence of PW-3. The seizure list witnesses were not examined, nor the Circle Officer in whose presence according to the informant, the searches were conducted and seizures were made was examined. In such circumstance, she contends that it would be highly unsafe to affirm the findings of conviction recorded by the trial Court based on the evidence of five witnesses, all of whom are police personnel, three of them being the investigating officers and the fourth, the informant.

9. Learned Additional Public prosecutor representing the

State of Bihar defending the finding of conviction recorded by the trial court has argued that the procedural irregularities as pointed out by the learned counsel for the appellant are not of substantial nature and in no case such irregularities is said to have been caused any prejudice to the case of the appellants. She has argued that following the procedure laid down by the Supreme Court in the case of *Mohan Lal (supra)*, the samples were to be drawn in the presence of a Magistrate which were sent to the FSL. The five samples have been found to be containing the Tetra Hydro Cannabinol (THC) as the chief intoxicating ingredient and therefore, *ganja*. In such circumstance, the trial court's finding of the appellants conviction under section 20(b)(ii)(C) of the NDPS Act cannot be faulted with.

10. We have perused the impugned judgment of conviction recorded by the trial court as well as the lower court's records and have given our thoughtful consideration to the rival submission advanced on behalf of the parties.

11. This case has its own peculiarities. According to the informant, 10 bags were seized, five each from the houses of these two appellants which contained *ganja*. Two seizure lists were prepared. The bags were marked from A1 to A10 without

any sign of identification to demonstrate as to from whose house which bag was recovered. There is yet another peculiar aspect; completely ignoring the guidelines for preparation of samples as prescribed in the Standing Order No. 1 of 1989, ten samples were prepared in the presence of a Magistrate each taken out from each of the 10 bags. The 10 samples were sent to the FSL for examination out of which five samples have been found not to be containing *ganja*. In the absence of any mark of identification on the bags said to have been seized from the houses of the respective appellants assumes significance in view of the result of the forensic science examination which suggests that five of the samples did not contain *ganja*. This gives an indication that five of the bags said to have been seized by the police were not containing *ganja*. We do not find any evidence which could have suggested the bags seized from one of these appellants or both of them were found to be containing *ganja* with reference to the finding of the Forensic Science Laboratory, Patna. The independent seizure list witnesses have not been examined. We do not find any explanation on record for their non-examination. Production of material exhibits at the trial, in the facts and circumstances of the present case has no relevance for the reason that the prosecution cannot be said to have

established with the aid of evidence adduced at the trial that the bags containing *ganja* were recovered from the houses of the appellants. In this background, we consider it highly unsafe to uphold the finding recorded by the trial court based merely on the evidence of three investigating officers, the informant and PW-1 who claimed to be the member of the raiding team. From his evidence, however, it appears that he (PW-1) was not a member of the team. Non examination of Circle Officer who according to the informant was present at the time of seizure also creates a doubt on the prosecution's case. We further find force in the submission advanced on behalf of the appellants that the search of the houses appears to have taken place after sunset since according to the informant he had received the secret information at 5:30 pm, whereafter he had informed about the secret information to his official superior. No search could have been carried out in the violation of the second *proviso* to Section 42(1) of the NDPS Act. It has been repeatedly held by the courts that the strict adherence to the statutory mandate under the provisions of the NDPS Act is essentially required considering the stringent penal provisions stipulated under the Act.

12. We are accordingly of the view that it is not safe

to uphold the convictions of the appellants as recorded by the trial court. The appellants deserve to be acquitted on the grounds mentioned hereinabove.

13. Accordingly, the impugned judgment of conviction dated 22.03.2021 is hereby set aside. Consequently, the order of sentence dated 25.03.2021 is also set aside.

14. This appeal is allowed.

15. Since the appellants are in custody, let them be released from jail forthwith, if not required in any other case.

(Chakradhari Sharan Singh, J)

(G. Anupama Chakravarthy, J)

ranjan/Aditi-

AFR/NAFR	NAFR
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