

**IN THE HIGH COURT OF JUDICATURE AT PATNA  
CRIMINAL APPEAL (DB) No.579 of 2015**

Arising Out of PS. Case No.-703 Year-2010 Thana- BHAGALPUR KOTWALI District-  
Bhagalpur

- 
1. Md. Sikander son of Md. Khalil, Resident of Mohalla- Sahebganj, P.S.-  
University, District- Bhagalpur
  2. Md. Rizwan, Son of Md. Idris, Resident of Vill.- Chamelichak, P.S.-  
Hasibpur, District- Bhagalpur

... .. Appellant/s

Versus

The State Of Bihar

... .. Respondent/s

---

**Appearance :**

For the Appellant no.1 : Mr. Vikramdeo Singh, Adv  
For the Appellant no.2 : Mr. Rajive Ranjan Singh, Adv  
Md. Nazmul Hodda, 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 : 05-09-2023**

The appellants have preferred this appeal under Section  
374(2) of the Code of Criminal Procedure assailing the  
judgment of conviction dated 11.06.2015 and an order of  
sentence dated 16.06.2015 passed by the learned 1<sup>st</sup> Additional  
Sessions Judge-cum-Special Judge (NDPS), Bhagalpur in G.B.  
Case No. 2847 of 2010 arising out of Kotwali (Tatarpur) P.S.



Case No. 703 of 2010, whereby and whereunder, the appellants have been convicted and sentenced as under :-

**Appellant Md. Sikander**

| Conviction under Section              | Sentence                           |            |                    |
|---------------------------------------|------------------------------------|------------|--------------------|
|                                       | Imprisonment                       | Fine (Rs.) | In default of fine |
| Section 20(b) (ii)(C) of the NDPS Act | Rigorous imprisonment for 20 years | 1 Lakh     | R.I for two years  |

**Appellant Md. Rizwan**

| Conviction under Section              | Sentence                           |            |                    |
|---------------------------------------|------------------------------------|------------|--------------------|
|                                       | Imprisonment                       | Fine (Rs.) | In default of fine |
| Section 20(b) (ii)(C) of the NDPS Act | Rigorous imprisonment for 20 years | 1 Lakh     | R.I for two years  |

2. Ajay Kumar (PW-5), a probationer Sub-Inspector of police posted at Dadarpur Police Station in the district of Bhagalpur, is the informant whose written report dated 11.10.2010 addressed to the Chief Judicial Magistrate, Bhagalpur is the basis for registration of Kotwali (Tatarpur) P.S. Case No. 703 of 2010 for commission of the offences punishable under Sections 20/22 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the ‘NDPS Act’ in short).

3. According to the informant, he had received a secret



information at about 4:00 AM on 11.10.2010 to the effect that some substantial quantity of *ganja* was being transported in a SUMO vehicle, which was coming from Munger side. Acting upon the said information, the informant with other police personnel reached Sarai road near Kali Ghat More and started searching the vehicles. In the meanwhile, at about 4:45 AM, a red colour SUMO vehicle, bearing registration no. JH-04A-2595 was seen approaching the place where the police personnel were checking the vehicles. The said vehicle was intercepted. The persons occupying the vehicle i.e. driver and cleaner, who are the appellants herein, attempted to escape but were apprehended by the police personnel. They disclosed their names as Md. Sikander and Md. Rizwan, who are the appellants herein. Soon after the vehicle was intercepted, some people present around assembled and two from amongst them namely Mithilesh Kumar Yadav and Md. Miraj Alam were requested to become witnesses to the search of the vehicle. The vehicle was subsequently searched, leading to recovery of 14 packets of *ganja*, packed in a saffron plastic sheet. As the appellant did not furnish any satisfactory explanation, the said 14 kg of *ganja*, each containing 13.500 kg (total 189 kg) was seized. Further, on personal search of appellant no. 1, a NOKIA mobile with SIM



No. 9006011350 and another NOKIA mobile with SIM No. 9973188570 were seized. The signatures of the witnesses to the search and seizure were obtained on the seizure list, copies of which were handed over to these appellants and they were arrested. Upon interrogation, the appellants said to have further disclosed that they were carrying *ganja* at the instance of Ramesh Sah from Fatuha. The *ganja* was to be delivered to said Ramesh Sah. They also disclosed the name of the owner of the vehicle.

4. We note at this juncture itself that it is apparent from the very First Information Report that the operation of search of the vehicle was conducted in the wee hours, before sunrise. Be that as it may, it transpires from the records that in relation to the said seizure of *ganja* on 11.10.2010 for the first time, an application was made to the court on 25.11.2010 for preparation of samples in the presence of a Magistrate. An order was passed for preparation of samples by the learned Sessions Judge, Bhagalpur on the same day i.e. 25.11.2010. The sample was, however, prepared later and was received in the Forensic Science Laboratory, Patna on 05.01.2011. Apparently thus, it took nearly two and half months in drawing the samples and nearly three months in transmission of the samples, said to have



been drawn from the seized contraband articles, to the Forensic Science Laboratory, Patna. Forensic Science Laboratory, Patna recorded in its report prepared on 13.01.2012 that the samples which were received by the FSL were *ganja* containing Tetra Hydro Cannabinol (THC) as their chief intoxicating ingredient.

5. In the meanwhile, the police completed the investigation and submitted its chargesheet on 08.01.2011, whereupon cognizance was taken for commission of the offences punishable under Sections-20/22 of the NDPS Act. Charges were subsequently framed against these appellants on 02.02.2011 for commission of the offences punishable under Section 20(b)(ii)(C) and Section 22 of the NDPS Act. The charges were later modified to the offence punishable under Section 20(b)(ii)(C) and Section 22 of the NDPS Act by the court below under an order dated 08.06.2015. The appellant denied the charges and claimed to be tried. Accordingly, they were put on trial.

6. At the trial, the prosecution examined altogether 8 witnesses including two seizure list witnesses Mithilesh Kumar Yadav (PW-2) and Md. Miraj Alam (PW-6) and the Investigating Officer Shrawan Kumar (PW-7). Arun Kumar



Singh (PW-8), a police personnel, is a formal witness, who produced before the court, the *ganja* said to have been seized by the police as material exhibit. Other than these witnesses, a probationer Sub-Inspector of Police Vijay Kumar (PW-1), constables Sarfaraj Ansari (PW-3) and Ranjeet Kumar Singh (PW-4), who were accompanying the informant at the time of search and seizure also deposed for the prosecution at the trial.

7. In addition to the oral evidence of the aforesaid witnesses, the prosecution also adduced documentary evidence namely:-

- (i) Signature of Ajay Kumar upon the seizure list- Exhibit.1
- (ii) Written report of the informant - Exhibit. 1/1
- (iii) Signature of Amarnath Tiwary on the formal FIR- Exhibit. 1/2
- (iv) Signature of PW 6 on seizure list- Exhibit. 1/3
- (v) Formal FIR – Exhibit. 1
- (vi) chargesheet - Exhibit. 3
- (vii) FSL report- Exhibit. 4
- (viii) Material Exhibits- Exhibit. I to I/XIII

8. The trial court, after having appreciated the evidence adduced at the trial, came to a conclusion that the prosecution was able to establish the charge of commission of offence punishable under Section 20(b)(ii)(C) of the NDPS Act against these appellants beyond all reasonable doubts and accordingly, convicted them of the aforesaid offence. The trial court, however, concluded that Section 22 of the NDPS Act could not



be attracted based on the basis of the evidence adduced at the trial and accordingly, the appellants stood acquitted of the charge of the offence punishable under Section 22 of the NDPS Act. After having convicted the appellants for the offence punishable under Section 20(b)(ii)(C) of the NDPS Act, the trial court sentenced the appellants to undergo imprisonment and fine, as has been noticed at the outset.

9. We have heard Mr. Vikram Deo Singh and Mr. Rajive Ranjan Singh, learned counsel for the appellants and Ms. Shasi Bala Verma, learned Additional Public Prosecutor for the State.

10. Mr. Vikram Deo Singh, learned counsel appearing on behalf of the appellant, has submitted that in the present case, there has been gross violation of Section 42 and 52A(2)(b) of the NDPS Act. Elaborating his submissions, he has argued that it is evident from the FIR itself that the informant, after having received the secret information, did not record in writing, that he had reason to believe that narcotic drug or psychotropic substance, or controlled substance in respect of which an offence punishable under the Act had been committed or any document or other article which might furnish evidence of the commission of such offence or any illegally acquired property



or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of the Act is kept or concealed in any conveyance between sunrise and sunset (in the present case), which is a pre-condition for exercise of entry, search, seizure and arrest without warrant under Section 42 of the NDPS Act. He has further submitted that in the present case, the informant cannot be said to have exercised the power under Section 43 of the NDPS Act which authorises an empowered officer to seize in any public place or in transit, any narcotic drug or psychotropic substance, in view of the explanation defining the expression 'public place' which connotes "public conveyance" intended for use by, or accessible to, the public.

11. In the present case, there is no evidence that conveyance seized by the police was a public conveyance intended for use or accessible to the public. It has further been submitted that as Section 42 of the NDPS Act is applicable in the present case, the informant could not have caused search of the vehicle between sunset and sunrise without complying with the requirement under the second proviso to Section 42(1) of the NDPS Act.



12. There is no evidence that the informant has recorded the grounds of his belief that warrant of authorization for search of the vehicle could not be obtained without affording opportunity to the appellants for concealment of evidence or facility for their escape. He further submits that the information taken down in writing as contemplated in Section 42(1) of the NDPS Act and the grounds for his belief under the second *proviso* were required to be sent by the informant to his immediate officials superior, which has not been done. He has further submitted that it is manifest from the evidence of the prosecution's witnesses that the prosecution did not ensure safe storage and maintenance of *ganja* which according to the prosecution's witnesses was casually kept in the *malkhana* of the police station. Inordinate delay in preparation of samples and belated transmission of the samples to the Forensic Science Laboratory cast serious doubt about the genuineness of the search and seizure. Further, the seizure list witnesses have not supported the prosecution's case in their deposition at the trial and based on the evidence of police team, the trial court has wrongly recorded judgment of conviction. It has also been submitted that there is no proof of proper sealing of the seized articles soon after the same was seized by the police officer



which might have been unsealed subsequently for the purpose of drawing of the samples, nearly more than one month after the seizure list said to have been prepared by the informant. He has also submitted that the informant in his evidence at the trial has not stated about the quantity of the contraband said to have been seized and further there is no cogent evidence, as regards, the means and manner for weighment of *ganja*.

13. Mr. Rajive Ranjan Singh, learned counsel appearing on behalf of the appellant no. 1 while adopting the submission advanced by Mr. Vikram Deo Singh, has submitted that there are contradictions in the depositions of the informant and other witnesses on the point of the place where the seizure memo was prepared and the place where the recovered contraband was weighed. He submits that the entire case of the prosecution becomes doubtful for delayed preparation of samples and their transmission to the Forensic Science Laboratory.

14. Ms. Shashi Bala Verma, learned Additional Public Prosecutor appearing on behalf of the State has submitted that the finding of conviction recorded by the trial court is upon taking into account the overall evidence of the prosecution's witnesses. She contends that Section 42 of the NDPS Act in the



present state of facts shall not apply rather Section 43 of the NDPS Act shall have application as the search and seizure was conducted by the police in a public place. She submits that the contradictions on the point of place of seizure and weighment of the contraband articles are of not such nature as would require this Court to interfere with the finding of conviction recorded by the trial court.

15. We have perused the impugned judgment and order of the trial court as well as the trial court's records and we have given our thoughtful consideration to the rival submissions advanced on behalf of the parties, as noted above.

16. It is manifest from the prosecution's case that the vehicle was intercepted by the police personnel on 11.10.2010 at about 4:55 AM based on a secret information said to have been received by the informant (PW-5); We are convinced with the submissions advanced on behalf of the appellants that it has never been the case of the prosecution that the SUMO Vehicle intercepted by the police was a public conveyance intended for use by or accessible to public. Section 43 applies only when a power is to be exercised for seizure of a vehicle, in a 'public place', which expression has been defined by way of explanation under Section 43 of the NDPS Act which read as



under :-

*“Explanation.-- For the purposes of this section, the expression "public place" includes any public conveyance, hotel, shop, or other place intended for use by, or accessible to, the public.”*

17. Evidently thus, we are required to examine the correctness of the manner in which the power was exercised by the informant to enter, search, seizure and arrest vested in him under Section 42 of the NDPS Act. Section 42 of the NDPS Act read as under :-

**“42. Power of entry, search, seizure and arrest without warrant or authorisation.--** (1) Any such officer (being an officer superior in rank to a peon, sepoy or constable) of the departments of central excise, narcotics, customs, revenue intelligence or any other department of the Central Government including para-military forces or armed forces as is empowered in this behalf by general or special order by the Central Government, or any such officer (being an officer superior in rank to a peon, sepoy or constable) of the revenue, drugs control, excise, police or any other department of a State Government as is empowered in this behalf by general or special order of the State Government, if he has reason to believe from personal knowledge or information given by any person and taken down in writing that any narcotic drug, or psychotropic substance, or controlled substance in respect of which an offence punishable under this Act has been committed or any document or other article which may furnish evidence of the commission of such offence or any illegally acquired property or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act is kept or concealed in any building, conveyance or enclosed place, may between sunrise and sunset,-

(a) enter into and search any such building, conveyance or place;

(b) in case of resistance, break open any door and remove any obstacle to such entry;



(c) seize such drug or substance and all materials used in the manufacture thereof and any other article and any animal or conveyance which he has reason to believe to be liable to confiscation under this Act and any document or other article which he has reason to believe may furnish evidence of the commission of any offence punishable under this Act or furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act; and

(d) detain and search, and, if he thinks proper, arrest any person whom he has reason to believe to have committed any offence punishable under this Act:

2[Provided that in respect of holder of a licence for manufacture of manufactured drugs or psychotropic substances or controlled substances granted under this Act or any rule or order made thereunder, such power shall be exercised by an officer not below the rank of sub-inspector:

Provided further that] if such officer has reason to believe that a search warrant or authorisation cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place at any time between sunset and sunrise after recording the grounds of his belief.

(2) Where an officer takes down any information in writing under sub-section (1) or records grounds for his belief under the proviso thereto, he shall within seventy-two hours send a copy thereof to his immediate official superior.”

18. On a close reading of the said provision and in the light of the consistent judicial pronouncements, it can be easily discerned that it is mandatory for an empowered officer to reduce in writing the information received by him which gave him the reason to believe that an offence has been committed under the NDPS Act or certain documents or articles which may furnish evidence of commission of offence can be recovered, for



exercise of the said power. Further, power under Section 42 (1) of the NDPS Act can be exercised only between sunrise and sunset. Though, there is no evidence, as regards, time of sunrise on the date when the search and seizure was conducted, we may gainfully refer to the evidence of one of the prosecution's witnesses *viz.*, Ranjit Kumar Singh a Constable (PW-4). PW-4 in his evidence in paragraph no. 5 had deposed at the trial that the vehicle was brought to the police station at 4:45 AM and the packets were weighed at the police station. The evidence of these witnesses suggests that the interception and search of the vehicle at the place of occurrence had taken place before 4:45 AM i.e., before sunrise. The second *proviso* requires that if any search of conveyance is to be effected between sunset and sunrise and if the competent officer has a reason to believe that a search warrant or authorisation cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place at any time between sunset and sunrise after recording the grounds of his belief.

19. We are of the considered view that the requirement of recording grounds of belief as contemplated under second *proviso* to Section 42 of the NDPS Act is a mandatory



requirement failure of which shall vitiate the search made after sunset and before sunrise. Further, we are also convinced by the submissions advanced on behalf of the appellants that there has been violation of the provisions under Sub-section (2) of Section 42 of the NDPS Act which requires transmission of the information taken down under Section 42(1) of the NDPS Act and the grounds of belief under the second *proviso* to Section 42(1) of the NDPS Act.

20. Further, the prosecution has completely failed to explain the circumstances in which for the first time an application was belatedly made before the Magistrate on 25.11.2010, for drawing the samples when the seizure was made, according to the prosecution, on 11.11.2010 itself. It can be easily discerned from the materials on record that from the date of seizure i.e., 11.10.2010 till 25.11.2010, the samples were not prepared which was serious lapse, completely unacceptable, on the part of the prosecution. Thirdly, seizure list witnesses namely PW-2 and PW-6 have not at all supported the prosecution's case. PW-6 has been declared hostile at the instance of the prosecution. He though identified his signature on the seizure list, he deposed that the seizure list was not prepared in his presence. Evidence of the seizure list witness



PW-2 is to the effect that he (PW-2) had quarrelled with someone in the *mohalla* because of which he was brought to the police station. One day before, his signature was obtained at the police station, on a document on the pretext that he was putting his signature on a bond, whereafter, he was released by the police. He also deposed that he was kept in the police lockup of the police station. PW-1, a trainee officer who was present at the place of occurrence deposed in his evidence that the seized articles including the contraband were not sealed in his presence nor the seizure list was prepared in his presence. As has been noted hereinabove, PW-4, a constable of police deposed that the SUMO vehicle was brought at the police station at 4:45 AM where the contraband was weighed. Apparently thus, the weighment of *ganja* was not done at the place of occurrence. At the same breath, he deposed that the seizure list was prepared at the place of occurrence. The evidence of PW-4 is self-contradictory for the reason that if the *ganja* was weighed at the police station, there would have been no question of preparation of seizure list at the place of occurrence in the absence of weighment of *ganja*. Evidence of the informant (PW-5) demolishes entire case with his evidence that he had not seen the seized articles and there was no weighing machine available



at the police station for weighing *ganja*. Further, from the evidence of I.O. (PW-7) and PW-8 who produced the material exhibits at the trial go to suggest that the safety and security of the seized articles were wholly compromised. The I.O. has gone to the extent of deposing that he didn't know as to under whose custody the *ganja* was stored in the *malkhana*.

21. We need not to reiterate that strict adherence to the safeguards available under the provisions of the NDPS Act are of mandatory nature keeping in mind the stringent provisions, it contains. Despite the fact that Court's have repeatedly issued guidelines and cautioned the investigating agencies, the empowered authorities to strictly comply with the requirement of Section 42 of the Act for a search and seizure to be valid under NDPS Act, the prosecution failed in its duty in the present case.

22. Based on the above mentioned discussions, we are of the view that it would not be just and proper to uphold the impugned finding of conviction recorded by the trial court which requires interference.

23. Accordingly, the judgment of conviction dated 11.06.2015 and the order of sentence dated 16.06.2015 passed by the learned 1<sup>st</sup> Additional Sessions Judge-cum-Special Judge



(NDPS), Bhagalpur in G.B. Case No. 2847 of 2010 arising out of Kotwali (Tatarpur) P.S. Case No. 703 of 2010, are hereby set aside.

24. This appeal is allowed.

25. The appellants are in custody. Let them be released forthwith, if not required in any other case.

**(Chakradhari Sharan Singh, J)**

**(Nawneet Kumar Pandey, J)**

ranjan/kundan/  
sudha -

|                   |            |
|-------------------|------------|
| AFR/NAFR          | NAFR       |
| CAV DATE          | NA         |
| Uploading Date    | 11.09.2023 |
| Transmission Date | 11.09.2023 |

