

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.512 of 2021

Arising Out of PS. Case No.-280 Year-2017 Thana- BIDUPUR District- Vaishali

PANKAJ KUMAR KHURANA Son of Late Deepak Khurana Resident of
Village - Mohalla - R.G.P. Raghuveer Nagar-14, P.S.- Khayala, Distt.- Delhi,
Pin Code – 110027. Appellant

Versus

The State of Bihar Respondent

Appearance :

For the Appellant : Mr. Rakesh Kumar, Advocate
For the Respondent : Ms. Shashi Bala Verma, A.P.P.

CORAM: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN
SINGH

and

HONOURABLE MR. JUSTICE NAWNEET KUMAR

PANDEY

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN
SINGH)

Date : 04-10-2023

This appeal has been preferred by the sole appellant under Section 374(2) of the Code of Criminal Procedure, 1973 (CrPC for short), putting to challenge a judgment of conviction dated 23.01.2021 and the order of sentence dated 01.02.2021, passed by the learned Additional Sessions Judge-1st-cum-Special Judge, N.D.P.S. Act, Vaishali at Hajipur, in Bidupur P.S. Case No. 280 of 2017 (G.R. No. 4041 of 2021), whereby the appellant has been convicted and sentenced as under:

Cr. Appeal (DB) No. 512 of 2021				
Appellant	Penal provision	Sentence		
		Imprisonment	Fine (Rs.)	In default of fine
Pankaj Kumar Khurana	Section 20(b)(ii)(C) of the Narcotic Drugs and Psychotropic Substances Act (NDPS Act, for short)	R.I. for 11 years	1,00,000/-	S.I. for six months



2. A self-statement of Sub-Inspector of Police posted at Bidupur Police Station, Vaishali, Manohar Kumar (PW 9), is the basis for registration of the concerned Bidupur P.S. Case No. 280 of 2017, dated 12.09.2017 disclosing commission of offence punishable under Section 8/20(b)(ii)(C) of the NDPS Act. According to the said self-statement (Ext. 3), the informant was on a patrolling duty with Assistant Sub-Inspector of Police (ASI) Ram Binod Yadav (PW 2), ASI Vijay Paswan (PW 8), Constable Md. Samsad Ahmad (PW 5), Constable Santu Kumar (PW 1), Constable Karuna Shankar (PW 7) and driver-chowkidar Arjun Paswan (not examined). During the course of patrolling and checking of vehicles, the patrolling party reached Panapur Chowk at 7:30 PM, when he received a secret information that ganja was being transported into the village Madhurapur. After having deliberated upon the information so received with the other members of the patrolling team, the patrolling party proceeded from Panapur chowk at 7:40 PM. The moment they reached near the house of Salendra Kumar Singh, a white Hyundai car, bearing registration no. DL 1ZA5745 was seen parked. Two persons were noticed standing near the vehicle. Based on suspicion, the police jeep was stopped. The two persons standing near the car started fleeing away, noticing the presence of police party. They were,



however, apprehended on chase and upon enquiry, they disclosed their names as Aman Kumar Sharma and Pankaj Kumar Khurana (the appellant). They could not disclose the purpose behind their presence at the said place, they being residents of Delhi. Seeing police in action, the villagers nearby had assembled, out of whom, in the presence of two witnesses, namely, Salendra Kumar Singh (PW 3) and Hare Kishun Paswan (PW 4), the vehicle was searched, leading to recovery of altogether 32 packets of ganja from the dickey of the car. Co-accused Aman Kumar Sharma admitted before the police that he was the owner of the vehicle. He also confessed that he had come from Delhi to Patna with other persons and he was engaged in illicit trade of ganja, which he would purchase with the help of local people for being taken to Delhi for supply. He also disclosed that two of his accomplices managed to escape upon seeing the police party. The *mahal* chowkidar Baliram Mahto (not examined) arranged the weighing scale for weighment of ganja. The total weight of ganja was found to be 64 kg. After obtaining the drug detection kit from the police station, samples weighing 25 gm each from the packets recovered were prepared. The informant has mentioned '13.09.2017' after putting his signature at the bottom of self-statement. It is an impossible situation that based on self-statement of the informant



signed on 13.09.2017, the FIR could be registered on previous day, i.e., on 12.09.2017. A possibility of mentioning the date, i.e., '13.09.2017', being slip of pen, cannot be ruled out.

3. The police, upon completion of investigation, submitted charge-sheet on 31.10.2017 against the aforesaid two named accused persons for commission of the offences punishable under Section 8/20 (b)(ii)(C) of the NDPS Act, whereupon cognizance was taken on 06.01.2018.

4. It is pertinent to mention here that till the date of submission of charge-sheet on 31.10.2017, even the permission of the court below to send the samples for scientific examination was not obtained. From the order sheet of the trial court, it transpires that for the first time on 23.11.2017, an application was made before the court seeking permission for examination of seized ganja by Forensic Science Laboratory, Muzaffarpur, which was granted on the same day by the court. It is, thus, clear that much before the samples were sent for forensic examination, the charge-sheet was already filed. It is an uncontroverted position that the samples were not drawn in the presence of a Magistrate, requisite under Section 52-A(2)(b) of the NDPS Act.

5. Be that as it may, the charges were framed on 23.02.2018 against this appellant and the other co-accused for



commission of offences punishable under Section 20 (b)(ii)(C)/29 of the NDPS Act. The appellant and co-accused denied the charge and accordingly they were put to trial. The trial as against co-accused Aman Kumar Sharma was separated because of his continued absence. The appellant thus faced the trial.

6. At the trial, the prosecution examined altogether 11 witnesses including the two seizure list witnesses, Salendra Kumar Singh (PW 3) and Hare Kishun Paswan (PW 4), who, though proved their signatures on the seizure memo, did not support the prosecution's case of recovery/seizure on any contraband in their presence. Both the seizure list witnesses deposed at the trial that no recovery was made in their presence and they were made to put their signatures on plain papers. Out of nine witnesses, eight are police personnel including the Investigation Officer (PW 6) and the informant (PW 9). Assistant Sub-Inspector (ASI) Shailendra Kumar (PW 11) is a formal witness, who produced the material exhibits (the ganja, which was seized before the trial court). The Assistant Director, Forensic Science Laboratory, Muzaffarpur, Mazid Khan deposed as PW 10 at the trial.

7. We have already noted above that non-preparation of samples of the recovered articles in the presence of a Magistrate is not at all in dispute, which is evident from the depositions of the



prosecution's witnesses. Preparation of sample in the presence of a Magistrate is a mandatory requirement of Section 52-A(2)(c) of the NDPS Act as has been held by the Supreme Court in case of ***Union of India v. Mohanlal***, reported in **(2016) 3 SCC 379**.

8. In addition to the oral evidence of the witnesses, the prosecution also brought on record following documentary evidence at the trial in support of the charge: -

Sl. No.	Exhibit No.	Contents
1.	Ext.-1	Signature of Salendra Kumar Singh on seizure list.
2.	Ext.-1/1	Signature of Salendra Kumar Singh on memo of Arrest.
3.	Ext.-2	Signature of Hare Kishun Paswan on seizure list.
4.	Ext.-2/1	Signature of Hare Kishun Paswan on Memo of Arrest.
5.	Ext.-3	<i>Fard-beyan.</i>
6.	Ext.-3/1	<i>Pristhankan.</i>
7.	Ext.-4	Whole seizure list.
8.	Ext.-5	Whole Memo of Arrest.
9.	Ext.-6	Forwarding letter for examination of Ext. to F.S.L.
10.	Ext.-7	F.S.L. report.
11.	Ext.-8	Forwarding letter from F.S.L.



9. After closure of the prosecution's evidence, the appellant was questioned under Section 313 of the CrPC so as to give him an opportunity to explain the circumstances emerging against him based on the evidence led by the prosecution at the trial. The appellant answered in negative the questions pertaining to incriminating materials as put by the trial court. It is significant to note that no question was put by the trial court on the point that the articles seized from the vehicle were found to be ganja upon scientific examination conducted by the Forensic Science Laboratory.

10. The trial court, after having appreciated the evidence adduced at the trial, has reached a conclusion that the prosecution successfully brought home the charge of commission of offence punishable under Section 20(b)(ii)(C) of the NDPS Act. The appellant has, however, been acquitted of the charge of commission of offence punishable under Section 29 of the NDPS Act by the trial court by its judgment dated 23.01.2021. The appellant has been sentenced to imprisonment and fine by an order dated 01.02.2022 after having held the appellant guilty of the charge as has been noted above.

11. We have heard Mr. Rakesh Kumar, learned counsel appearing on behalf of the appellant and Ms. Shashi Bala Verma,



learned Additional Public Prosecutor representing the State of Bihar. We have perused the impugned judgment and order of the trial court as well as the lower court's record. We have carefully scrutinized the oral evidence of the prosecution's witnesses as well as the other materials on record.

12. From our experience we take judicial notice of the fact that it is prevalent practice in the State of Bihar of the State Police Officials dealing with the cases under NDPS Act that the samples of the seized articles are not drawn in the presence of a Magistrate despite the law laid down by the Supreme Court in the case of ***Mohanlal*** (supra). Same is the situation in the present case. The Supreme Court in the case of ***Mohanlal*** (supra) has issued positive and definite direction that soon after seizure of any narcotic drugs or any psychotropic substances is effected, the empowered Officer under Section 53 of the NDPS Act is bound to approach the Magistrate with an application under Section 52-A(2) of the Act, which shall be allowed by the Magistrate as soon as may be required under sub-section (3) of Section 52-A of the NDPS Act. The sampling, the Supreme Court has held, must be done under the supervision of a Magistrate. The Supreme Court has held in paragraph 19 of the said decision as under:-

19. “... .. There is in our opinion
no manner of doubt that the seizure of the



contraband must be followed by an application for drawing of samples and certification as contemplated under the Act. There is equally no doubt that the process of making any such application and resultant sampling and certification cannot be left to the whims of the officers concerned. The scheme of the Act in general and Section 52-A in particular, does not brook any delay in the matter of making of an application or the drawing of samples and certification. While we see no room for prescribing or reading a time-frame into the provision, we are of the view that an application for sampling and certification ought to be made without undue delay and the Magistrate on receipt of any such application will be expected to attend to the application and do the needful, within a reasonable period and without any undue delay or procrastination as is mandated by sub-section (3) of Section 52-A (supra). We hope and trust that the High Courts will keep a close watch on the performance of the Magistrates in this regard and through the Magistrates on the agencies that are dealing with the menace of drugs which has taken alarming dimensions in this country partly because of the ineffective and lackadaisical enforcement of the laws and procedures and cavalier manner in which the agencies and at times Magistracy in this



country addresses a problem of such serious dimensions.”

13. The purport of Section 52A of the Act on the point of preparation of sample has been discussed in paragraphs 15 to 17 which read as under:-

“15. It is manifest from Section 52-A(2)(c) (supra) that upon seizure of the contraband the same has to be forwarded either to the officer-in-charge of the nearest police station or to the officer empowered under Section 53 who shall prepare an inventory as stipulated in the said provision and make an application to the Magistrate for purposes of (a) certifying the correctness of the inventory, (b) certifying photographs of such drugs or substances taken before the Magistrate as true, and (c) to draw representative samples in the presence of the Magistrate and certifying the correctness of the list of samples so drawn.

16. Sub-section (3) of Section 52-A requires that the Magistrate shall as soon as may be allow the application. This implies that no sooner the seizure is effected and the contraband forwarded to the officer-in-charge of the police station or the officer empowered, the officer concerned is in law duty-bound to approach the Magistrate for the purposes



mentioned above including grant of permission to draw representative samples in his presence, which samples will then be enlisted and the correctness of the list of samples so drawn certified by the Magistrate. In other words, the process of drawing of samples has to be in the presence and under the supervision of the Magistrate and the entire exercise has to be certified by him to be correct.

17. The question of drawing of samples at the time of seizure which, more often than not, takes place in the absence of the Magistrate does not in the above scheme of things arise. This is so especially when according to Section 52-A(4) of the Act, samples drawn and certified by the Magistrate in compliance with sub-sections (2) and (3) of Section 52-A above constitute primary evidence for the purpose of the trial. Suffice it to say that there is no provision in the Act that mandates taking of samples at the time of seizure. That is perhaps why none of the States claim to be taking samples at the time of seizure.”

14. The sampling in the present case having not been done in accordance with the mandatory statutory requirements under the NDPS Act and the law laid down by the Supreme Court



in the case of *Mohanlal* (supra), in our opinion, the prosecution cannot be said to have proved its case of recovery of contraband articles from the vehicle.

15. Secondly, it is not the prosecution's case that the appellant was occupying the vehicle. He was not inside the vehicle. It is not the case of the prosecution that he was the owner of the vehicle. There is no evidence on record to connect the appellant with the vehicle even otherwise. The only evidence, which has come against the appellant, is that he was standing near the car. Further, he attempted to flee away on seeing the police party and after having been apprehended, upon interrogation, he confessed before the police, his involvement in illicit trade of ganja. The confessional statement, said to have been made to the police by the appellant, as mentioned in the self statement of the informant, which is the basis for registration of the FIR, has no evidentiary value. Based on the confessional statement of the appellant, the prosecution cannot be said to have proved that the contraband was recovered from the possession of the appellant. The prosecution, in our opinion, failed to prove conclusively that the appellant was in possession of the contraband seized by the police, attracting penal provision under Section 20(b)(ii)(C) of the NDPS Act.



16. Thirdly, it is manifest from the evidence and the records that more than two months after the seizure, an application was made by the prosecution before the court on 23.11.2017 for sending the samples for examination by the Forensic Science Laboratory, Muzaffarpur. There is absolutely no explanation nor any justification for inordinate delay of more than two months in approaching the court for the said purpose. The matter does not end there. The court passed an order on 23.11.2017 itself for sending the samples to the Forensic Science Laboratory from the evidence of PW-10 (the Additional Director, Forensic Science Laboratory, Muzaffarpur). From on the report of the FSL dated 22.06.2018 (exhibit-7), it is manifest that the sample was dispatched through special messenger on 23.11.2017 for forensic examination, which was received in the office of the FSL, Muzaffarpur, on 27.04.2018. It took five months for the investigating agency to deliver the samples in the Forensic Science Laboratory at Muzaffarpur from Bidupur. There is no clue from the evidence of the witnesses as to in what manner and how safely was the sample kept in the possession of the special messenger from the 23.11.2017 till the same was delivered to the FSL, Muzaffarpur on 27.04.2018. The sanctity and the integrity of the samples stood negotiated because of such unexplained delay in the



absence of any cogent evidence showing safe and proper storage of the samples for all these months. In our opinion, delay itself is sufficient ground, which creates reasonable doubt over the prosecution's case.

17. Fourthly, the depositions of the prosecution's witnesses vary on the point of weight of the samples drawn. PW-6 in his evidence deposed that the weight of the samples was 4 kgs each. PW-8 deposed in paragraph 10 that he did not remember as to how many samples were drawn, but samples weighing 100 gram each were taken out from all the packets. PW-9, who had drawn the samples, deposed that the weight of each of the samples was 25 grams, which fact is mentioned in his self-statement also. Weight of the samples received by the FSL was found to be 29.2 grams. These discrepancies in the weight of the samples is substantial, cannot be reconciled.

18. In the background of above-mentioned circumstance, where the seizure list witnesses have not supported the prosecution's case, we do not consider it safe to uphold the finding of conviction recorded by the trial court based on the evidence of the police personnel only. The prosecution, in our opinion, cannot be said to have proved beyond all reasonable



doubts the charge against the appellant for commission of offenses punishable under Section 20(b)(ii)(C) of the NDPS Act.

19. The appellant deserves to be acquitted by giving him benefit of doubt.

20. Accordingly, the impugned judgment of conviction dated 23.01.2021 passed by the learned Additional Sessions Judge-1st-cum-Special Judge, N.D.P.S. Act, Vaishali at Hajipur, in Bidupur P.S. Case No. 280 of 2017 (G.R. No. 4041 of 2021) is hereby set aside. The appellant stands acquitted of the charge of commission of offences punishable under Section 20(b)(ii)(C) of the NDPS Act. The order of sentence dated 01.02.2021 also stands set aside.

21. This appeal is allowed.

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

(Chakradhari Sharan Singh, J)

(Nawneet Kumar Pandey, J)

Pawan-Kundan

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