

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.497 of 2022

Arising Out of PS. Case No.-621 Year-2017 Thana- PATNA GRP CASE District- Patna

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ARVIND KUMAR RAI Son of Munarik Rai Resident of Village -
Bahrapur, P.S.- Raghopur, Distt.- Vaishali.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

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Appearance :

For the Appellant/s : Mr. Vikram Deo Singh, Adv
Mr.Sudish Kumar, Adv
For the State : Mr. Sujit Kumar Singh, APP

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CORAM: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH
and
HONOURABLE MR. JUSTICE NAWNEET KUMAR PANDEY
ORAL JUDGMENT
(Per: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH)

Date : 28-07-2023

The appellant has preferred this appeal under Section 374(2) of the Code of Criminal Procedure against a judgment of conviction dated 12.04.2022 and an order of sentence dated 18.04.2022 passed by the learned Additional Sessions Judge-



XXV cum Special Judge, Patna in Special Case No. 195 of 2017 arising out of Patna Junction Rail P.S. Case No. 621 of 2017, 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 15 years	1 Lakh	R.I for two years

2. A Police Sub-Inspector (Rail), posted at Patna Junction, is the informant (PW-1) whose written report dated 24.12.2017 addressed to the officer-in-charge of the Government Rail Police Station (GRPS), Patna is the basis for registration of the concerned Patna Junction (Rail) P.S Case No. 621 of 2017 registered for the commission of the offences punishable under Sections 20 (b)(ii)(C) and 22(c) of the NDPS Act (Act in short). According to the said written report, a police party in escort duty in Train No. 022643 (Up Ernakulam-Patna Express) led by Raju Kumar Rana (PW-5) with havildar Bambam Kumar, constable Pradeep Yadav, constable Sri Prakash Singh got an information that a substantial quantity of ganja was there in



Coach No. S-4 of the train. The information was transmitted to the GRPS, Patna where ASI Jai Prakash Singh (PW-4) was on duty. This intelligence was forwarded to the control room of the Superintendent of Police (Rail) Patna. Soon thereafter the officer-in-charge of GRPS, Patna was informed about the information received from the escort party whereupon the escort party was asked to immediately reach S-4 coach of the train and conduct checking of the suspicious articles and suspicious persons. A *sanha* to this effect was entered by the officer-in charge and an information was given to the senior police officials, on whose direction, a team was constituted under the leadership of the informant Jafarullah Khan (PW-1) with him, Assistant Sub-Inspector of Police Rahul Kumar Srivastava (PW-2), ASI Sridhar Mukund (not examined), ASI Jaiprakash Singh (PW-4), havildar Mithlesh Kumar Yadav (not examined), constable Sanjay Kumar (not examined) and constable Uddu Hussain for verification of the information and necessary action. The team so constituted reached platform No. 5 of Patna Junction Railway Station at 8:35 pm on which the train was



scheduled to. Two persons, namely, Chintu Kumar (not examined) and Mithlesh Kumar (not examined), who were found standing at platform no. 5 were informed by police team about the information which they had received and requested them to become witnesses to the search and the anticipated seizure. They acceded to the request to become witnesses to the search and seizure. Ten minutes after, the informant with his team had reached platform No. 5, the said train arrived at the platform at 8:45 pm on the hint given by the escort party, they started enquiring about a suspicious person, who was found sitting in the coach and on interrogation, who disclosed his name as Arvind Kumar Rai (the appellant). He disclosed to the police that there was *Ganja* in six bags/trolley bags kept under the berth, which he was occupying. The said *Ganja* he was carrying from Visakhapatnam, he disclosed to the police. It is further case of the informant that a notice was given to the appellant to exercise his option under Section 50 of the Act for being searched either before a Gazette Officer or a Magistrate. He agreed to be searched by the police personnel. In course of search, substance like *Ganja* rolled into a plastic kept in all



the bags/trolley bags were recovered from the appellant's possession. They thereafter came out from the coach alongwith the bags, the appellant and the witnesses. Samples from all the bags were checked with Drug Detection Kit and the six bags were marked as A, B, C, D, and F. Further, there were 29 bundles of *Ganja* in the said six bags/trolley bags, total weight of which was found to be 68.120 Kg. Further on personal search of the appellant, one mobile phone, a charger and two railway tickets (one from Fathua to Visakhapatnam dated 18.11.2017 and another from Visakhapatnam to Patna Junction dated 20.12.2017) were also recovered. The seizure list was prepared, on which the seizure list witnesses put their signatures, a copy of which was supplied to the appellant.

3. It is significant here to mention that according to the informant, 25/25 gram of *Ganja* was taken out from each of the bundles, which were mixed and kept in equal amount in three separate packets and sampling of *Ganja* so recovered was accordingly done. On the said three packets of the samples, seizure list witnesses as well as the appellant put their signatures. The samples so drawn were



sealed in presence of the seizure list witnesses and the appellant. According to the written report of the informant, the appellant disclosed the manner in which he indulged in illicit trade of *Ganja* with one Jitendra Kumar Rai, who had managed to escape from the said S-4 coach, after the appellant's arrest and noticing/presence of the police. The appellant is said to have disclosed to the police the names of other persons involved in illicit trade of *Ganja*. The FIR was registered against the appellant, co-accused Jitendra Kumar and Dharmendra Kumar. However, the police submitted charge-sheet against against this appellant only on 20.03.2018 for commission of the offences punishable under Sections 8/20/22 of the Act keeping the investigation pending against other two accused persons. Cognizance was subsequently taken on 21.03.2018 of the offences punishable under Sections 8/20/22 of the Act and thereafter, charge was framed against the appellant on 07.05.2018 for commission of the offences punishable under Sections 20(b) (ii)(C)/8(C) and 22 (c) of the Act. At the trial, the appellant denied the charges and claimed to be tried.

4. At the trial, the prosecution examined altogether 8



witnesses, including two Investigating Officers, namely, Birendra Prasad Gupta (PW-7) and Pramod Kumar (PW-8). The informant was examined as PW-1. The other witnesses, namely, Rahul Kumar Srivastava (PW-2), Sridhar Mukund (PW-3), Jai Prakash Singh (PW-4), Raju Kumar Rana (PW-5) and Sri Prakash Singh (PW-6) were either members of the escort party or members of the team constituted to conduct the search and seizure based on the information received from the escort party. The seizure list witnesses were not examined.

5. Apart from oral evidence of the witnesses, the prosecution adduced following documentary evidence at the trial:-

- (i) Notice under Section 50 of the NDPS Act (Exhibit P-1)
- (ii) Seizure-list (Exhibit P-2)
- (iii) Written report (Exhibit P-3)
- (iv) Formal FIR (Exhibit P-4)
- (v) Charge-sheet (with objection) (Exhibit P-5)
- (vi) Requisition to send the seized ganja sample for examination (Exhibit P-6)
- (vii) Carbon copy of requisition send to



FSL,Kolkata (Exhibit P-7)

(viii) Carbon copy requisition send to

FSL,Patna (Exhibit P-7/1)

(ix) Certification report (Exhibit P-8)

(x) FSL Report (with objection)

6. After closure of the prosecution's case, the statement of the appellant was recorded under Section 313 of the Cr.P.C so as to explain the circumstances appearing against him based on the evidence of the prosecution witnesses. In response to the question put by the trial court apropos the evidence that the appellant was travelling in S-4 coach of Up Ernakulam-Patna Express, the appellant answered that he was travelling in a general coach of the train and in the reserved coach replying to the trial court's question regarding recovery of *Ganja* bags and trolley bags from the appellant's possession when he was sitting in the train, the appellant said that he was forcibly brought by the police from the general coach to sleeper coach and was made to deboard the train from the coach got down from the train and was subsequently taken to the police station. He denied the allegation of recovery of any contraband article



from his possession in his statement recorded under Section 313 of the CrPC.

7. Mr. Vikram Deo Singh, learned counsel appearing on behalf of the appellant, has submitted that the entire prosecution's case stands vitiated for non-compliance of the mandatory statutory requirement under Section 52A(2)(b) of the Act, inasmuch as the samples were not drawn in the presence of a Magistrate as contemplated in the said provision and as laid down by the Supreme Court in the case of *Union of India Versus Mohanlal & Anr*, reported in (2016) 3 SCC 379. He has submitted that the prosecution has miserably failed to prove the seizure of the contraband articles from the possession of this appellant, since the seizure list witnesses have not been examined and their signatures have not been proved at the trial. He has further submitted that it is evident from the prosecution's case that the *Ganja* was recovered from beneath the berth on which the appellant was found sitting in the S-4 coach of the train. There is no evidence that the said berth or any other berth in S-4 coach was reserved in the appellant's name. No passenger sitting near the said berth in the train appears to



have been interrogated by the police or examined at the trial. He has argued that the informant is said to have seized from the possession of the appellant, two general tickets one from Patna to Visakhapatnam and other from Visakhapatnam to Patna. Even if the prosecution's case is treated to be correct, one of the tickets from Visakhapatnam to Patna did not authorise the appellant to occupy a berth in a reserved coach. He has argued that according to the prosecution's case, three samples were drawn of the recovered articles out of which one was sent to the Forensic Science Laboratory, Kolkata and Forensic Science Laboratory, Patna. Two other samples were not produced as material exhibit by the prosecution at the trial.

8. He argues that according to the prosecution's case three samples were drawn from the recovered substance out of which two were send for forensic examination to the forensic laboratories and one was retained. The report of the Forensic Science Laboratory, Patna (Exhibit-9) is based on one of the samples sent to it, which is to effect that the substance was *Ganja*. The third was not produced at the trial as material exhibit. The prosecution thus failed to



prove at the trial, the report of the FSL(Exhibit-9) corresponded to the material said to have been recovered from the train.

9. The trial court, after having considered and appreciated the evidence of the prosecution witnesses concluded in its impugned judgment of conviction that the prosecution was able to establish the charge of commission of offence punishable under Section 20(b)(ii)(C) of the NDPS Act beyond all reasonable doubts. The trial Court, however, acquitted the appellant of the charge of the offence punishable under Section 22(c) of the NDPS Act, as prosecution could not establish the said charge against the appellant.

10. Mr. Sujit Kumar Singh, learned Additional Public Prosecutor appearing for the State has submitted, defending the finding of conviction that, PW-1 has clearly narrated the nature of information received regarding carriage of illicit *Ganja* in the train, in question, in response to which, a team was constituted for verification of the said information and further action. The search and seizure was made in the presence of two independent witnesses. The



samples were drawn soon after the seizure. He submits that soon after obtaining the order from the court, one of the samples was delivered in the office of the Director, Forensic Science Laboratory, Patna promptly on 03.01.2018. The Forensic Science Laboratory in its report has found the substance contained in the small tin box to be *Ganja* containing Tetra Hydro Cannabinol (THC) as their chief intoxicating ingredients. He has submitted that the evidence of the prosecution's witnesses should not be brushed aside merely on the ground that all of them are police personnel. He has also argued that in the facts and circumstances of the present case, non-examination of the seizure list witnesses does not in any manner, vitiate the finding of conviction recorded by the trial Court.

11. We have carefully gone through the impugned judgment and order of the trial Court as well the lower court's records. We have given our thoughtful consideration to the rival submissions advanced on behalf of the parties as noted above. It can be easily inferred from the FIR and the deposition of the prosecution witnesses itself that the samples were drawn by the police officials in the presence



of any Magistrate. Samples were admittedly not drawn in the presence and in supervision of the Magistrate soon after the seizure of the materials.

12. Construing the provision under Section 52A(2) of the NDPS Act, the Supreme Court has laid down in **Mohanlal (supra)** in no uncertain terms that upon seizure of the contraband article, 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 of the NDPS Act 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.

13. The Supreme Court while clarifying the requirements under Section 52(A) of the NDPS Act has further stated in the case of **Mohanlal (supra)** that as soon as an application is made, the Magistrate is required to allow the application. The said requirement 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. It would be useful to reproduce the paragraph nos. 15, 16 and 17 of the decision rendered in the case of **Mohanlal (supra)**, 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 decision in the case of **Mohanlal (supra)** was rendered on 28.01.2016 after having examined various provisions of NDPS Act and the Standing Order No. 1 of 1989. The Supreme Court in the case of Mohanlal (supra) had issued guidelines as contained in paragraph no. 30.1, which read as under:-

“30.1.Cases where the trial is concluded and proceedings in appeal/revision have all concluded finally:

In cases that stood finally concluded at the trial, appeal, revision and further appeals, if any, before 29-5-1989 the continued storage of drugs and narcotic drugs and psychotropic and controlled substances and conveyances is of no consequence not only because of the considerable lapse of time since the conclusion of the proceedings but also because the process of certification and disposal after verification and testing may be an idle formality. We say so because even if upon verification and further testing of the seized contraband in such already concluded cases it is



found that the same is either replaced, stolen or pilferaged, it will be difficult if not impossible to fix the responsibility for such theft, replacement or pilferage at this distant point in time. That apart, the storage facility available with the States, in whatever satisfactory or unsatisfactory conditions the same exist, are reported to be overflowing with seized contraband goods. It would, therefore, be just and proper to direct that the Drugs Disposal Committees of the States and the Central agencies shall take stock of all such seized contraband and take steps for their disposal without any further verification, testing or sampling whatsoever. The heads of the department concerned shall personally supervise the process of destruction of drugs so identified for disposal. To the extent the seized drugs and narcotic substances continue to choke the storage facilities and tempt the unscrupulous to indulge in pilferage and theft for sale or circulation in the market, the disposal of the stocks will reduce the hazards that go with their continued storage and availability in the market.”

15. Despite the aforesaid guidelines issued in clear terms we find that in the present case samples were admittedly not drawn in the presence of a Magistrate for the same being sent to the Forensic Science Laboratory for chemical examination. Secondly, the prosecution brought on record by way of Exhibit-P8, which is a certificate under Section 52A of the NDPS Act issued by learned ACJM-14, Civil Court, Patna, certifying the inventory of recovered substances believed to be *ganja* as per Malkhana register and the substance produced before the learned A.C.J.M XIV, Civil Court, Patna, alongwith



the photographs and the samples drawn in her presence.

16. From Exhibit-P8 it appears that the order was passed by the learned Additional District and Sessions Judge-XXV on 19.02.2020. The said certificate was issued on 02.03.2020. The substance which was produced before the learned ACJM, for certification has been mentioned at the bottom of the certificate report (Exhibit-P8), which reads as under:-

“CERTIFICATE UNDER SECTION 52(a) OF NDPS ACT IN SPECIAL CASE NO. 195/2017 ARISING OUT OF PATNA JUNCTION PS CASE NO. 621/2017 DATED 22.12.2017
Whereas an application under section 52(a) of NDPS Act in Special case no. 195/2017 arising out of Patna Junction PS case no. 621/2017 dated 22.12.2017 has been allowed by learned Additional District and Session Judge xxv vide his order dated 19.02.2020, I hereby certify the following inventory of recovered substances believed to be ganja as per Malkhana Register and the substance produced before myself alongwith photographs taken and sample drawn in my presence.
DETAILS OF INVENTORY AS PER MALKHANA REGISTER
1.Malkhana Register serial number 989/2020
2.MR no.277/2020
3.Patna Junction PS case no. 621/2017 dated 22.12.2017
4.Registered under section 8/20/22 NDPS Act
5 Name of seizing officer SI Zafrullah Khan
6.Date of entry 21.12.2017

Sl. no.	Description of goods verified	Quantity
1.	Substance believed to be ganja packed in 7 bags and sealed with seal BP labeled A,B,C,D,E,F and G (TOTAL 68.72 kg)#	Labeled A,B,C,D,E,F and G weighing 8.5, 10.2, 8.8, 6.14,19.78, 7.3 and 8 kg respectively (TOTAL 68.72 kg)#
2.	One sample was drawn and placed in white plastic pouch in brown envelope before myself and sealed with seal BP of Malkhana In charge Birendra Prasad Gupta and marked H.	Approx 40 grams

One sample of substances believed to be ganja as stated above was



drawn weighing approx 40 grams and placed in white plastic pouch in brown envelope before myself and sealed with seal BP of Malkhana In-charge Birendra Prasad Gupta and marked H. Thereafter the envelope was signed by undersign and handed over to Malkhana In-charge Birendra Prasad for safe custody. Certified copy of Malkhana Register showing entry of recovered narcotics substances in the case and photograph of the material sealed are attached herewith on separate sheets. The whole proceeding was done in the presence of SHO Railway Thana Shri Ravi Prakash Singh.

Witnesses

1.SI Dwarka Prasad Singh

2.SI Joginder Singh

#Note: The substance were produced before the undersign in gunny bags which were not sealed but only tied with jute ropes. Further the weighing scale was not having any unique identification and the SHO was unable to produce any certification of the correctness of the digital weighing machine. No previous mark was found on any of the gunny bags produced. Moreover the gunny bags were also having porous holes at various places. Submitted please

SMT. SARIKA VAHALIA
ACJM XIV
CIVIL COURT PATNA
02 MARCH 2020.”

17. It can be easily seen from Exhibit-P8 that the seized materials were not kept under safe storage with due security from the date of the seizure till the date of certification report. The prosecution thus apparently compromised the safety and security of the recovered goods.

18. Further, the entire case of the prosecution that the substance was recovered from the possession of the appellant is based on the so called disclosure made by the appellant himself



to the police personnel. The articles were lying under the berth in the sleeper coach (S-4) in the Train No. 022643 (Up Ernakulam-Patna Express). The said berth was not reserved in the name of the appellant. There is no investigation on the point as to in whose name the said berth was reserved or who were other occupants of the berth near the place from where the recovery of the contraband articles were made. Except the disclosure said to have been made by the appellant to the police personnel, there is no evidence adduced at the trial to prove that the appellant was in possession of the contraband articles.

19. For the aforesaid reasons, we do not consider it safe to uphold the appellant's conviction for commission of the offence punishable under Sections 20(b)(ii)(C) of the NDPS Act as recorded by the trial Court.

20. Accordingly, the impugned judgment of conviction dated 12.04.2022 and order of sentence dated 18.04.2022 passed by the learned Additional Sessions Judge-xxv cum Special Judge, Patna in Special Case No. 195 of 2017 arising out of Patna Junction Rail P.S. Case No. 621 of 2017, is hereby set aside.

21. This appeal is allowed.

22. Since the appellant is in custody, let him be



released from jail forthwith, if not required in any other case.

(Chakradhari Sharan Singh, J)

(Nawneet Kumar Pandey, J)

Ranjan/Mahesh

AFR/NAFR	NAFR
CAV DATE	NA
Uploading Date	09.08.2023
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