

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.547 of 2017

Arising Out of PS. Case No.-246 Year-2013 Thana- RAXAUL District- East Champaran

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Baijnath Mahto Son of Ram Chandra Mahto Resident of Village - Amahara,
P.O. P.S. - Bihta, District - Patna.

... .. Appellant/s

Versus

The State Of Bihar

... .. Respondent/s

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Appearance :

For the Appellant/s	:	Mr.Pushpendra Kumar Singh, Adv Smt. Divya Bharti, Adv
For the Respondent/s	:	Mr. Abhimanyu Sharma, APP

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CORAM: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH

and

HONOURABLE MR. JUSTICE KHATIM REZA

CAV JUDGMENT

(Per: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH)

Date : 12-04-2023

Heard learned counsel for the appellant and learned
Additional Public Prosecutor for the State.

2. By the impugned judgment dated 24.03.2017 and
order of sentence dated 28.03.2017 passed by learned 7th



Additional Sessions Judge, East Champaran, Motihari in connection with NDPS Case No. 121 of 2013 arising out of Raxaul P.S. Case No. 246 of 2013, 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) & 23© of the NDPS Act	Rigorous Imprisonment for life	1,00,000/-	Rigorous imprisonment for one year

3. Kamal Chandra Sarkar, ASI (G.D) (PW-1) posted at Pantoka is the informant on whose written information furnished to the officer-in-charge, Raxaul P.S. Case No. 246 of 2013 was registered. He alleged in his written information dated 16.08.2013, that at about 12:15 pm on 16.08.2013, the Incharge of E. Company, Pantoka, had received an information that two persons were coming with narcotic drugs from Nepal to Raxaul through Bhelahi road. Based on the direction issued to him, the informant proceeded towards the place and at about 12:55 pm, they noticed that two persons dressed as indicated in the secret information were seen coming from Nahar Chowk, Raxaul to Koraiya Tola. They were intercepted when they came nearer to the team led by the Informant. The informant disclosed to them his identity and the secret information which was available with



the SSB and explained to them their right to be searched before a Gazetted Officer or a nearby Magistrate. They, however, agreed to be searched by the Informant. Two passersby who were crossing the place were requested to become witnesses to the seizure list to which they agreed. The names of the persons who agreed to be the witnesses to the seizure as disclosed in the FIR were Kameshwar Mahto (not examined) and Jogindra Mahto (not examined).

4. The persons so intercepted by the informant disclosed their names as Baijnath Mahto (the appellant) and Papu Paswan. They were given option to make search of the persons of the patrolling team of SSB which they declined. Thereafter, the patrolling party made a search leading to recovery of a red-coloured bag which the appellant was carrying. In the said bag certain suspicious article was found wrapped in a grey tape with the use of narcotics detection kit, the article so wrapped was found to be *charas*. With the use of weighing machine, which the patrolling party was carrying, weight of the seized articles was taken and found to be 1.800 kg.

5. Both of them were arrested at about 13:10 pm and a seizure list was prepared on which the seizure list witnesses put their signature. One copy each of the seizure list was handed



over to the persons apprehended by the SSB personnel.

6. It is pertinent to note at this juncture itself that the FIR was registered with the Raxaul Police Station at about 10:00 pm based on the information which was given at the Police Station at about 10:00 pm. By the informant It is evident thus that the information was given to the police by the informant nearly 9 hrs after the appellant and co-accused Papu Paswan were arrested. It is also evident from the FIR (Exhibit-9) that the distance of the Police Station from the place of occurrence was 1 Km. The police upon completion of investigation submitted chargesheet on 30.11.2013 against the appellant and co-accused Papu Paswan, apparently because of completion of 90 days from their arrest in order to obviate the chance of grant of compulsory bail under Section 167(2) of the Cr.P.C to the accused persons. It is also noted at this juncture itself that till the chargesheet was submitted, the samples of the intercepted items were not sent for forensic examination as is evident from the evidence of the I.O. (PW 6). The I.O. (PW 6) in his deposition at the trial has clearly stated that much after filing of the chargesheet on 23.12.2013, the samples were sent to CFSL, Kolkata and FSL, Patna.

7. After taking cognizance of the aforesaid offences, charges came to be framed on 30.06.2014 for the offences



punishable under Sections 20(b) ii (C) and 23(c) of the NDPS Act. The appellant pleaded his innocence and claimed to be tried.

8. At the trial, altogether six witnesses came to be examined including the informant as PW-1, Suresh Kumar, Head Constable, SSB Pantoka (PW-2), Mukesh Kumar Singh Constable (G.D) SSB E.Company, Pantoka (PW-3), Ramesh Kumar Yadav, SSB Camp, Pantoka (PW-4), Manoj Bora, Constable SSB Company Headquarter, Raxaul (PW-5) and Birendra Kumar Singh, I.O. (PW-6).

9. Seizure list witnesses were not examined. The prosecution at the trial brought on record following evidence:-

(i) Notice for search (Exhibit-1)

(ii) Proforma of intercepted goods (Exhibit-2)

(iii) Proforma of apprehension (Exhibit-3)

(iv) Kabulnama (Confessional statement of accused-appellant (Exhibit-4)

(v) Kabulnama (confessional statement of co-accused Papu Paswan (Exhibit-5)

(vi) Written application to SHO by the informant which was the basis for registration of FIR (Exhibit-7)



(vii) Seizure list dated 16.08.2013 (Exhibit-7)

(viii) Signature of Ramesh Kumar Yadav on the
seizure list dated 16.08.2013 (Exhibit-7/1)

(ix) Receipt of CFSL, Kolkata about sample sending
(Exhibit-8)

(x) Receipt of sample by FSL, Patna (Exhibit-8/1)

(xi) Formal FIR of Raxaul P.S. Case (Exhibit-9)

(xii) FSL report issued by the office of Director, FSL,
Patna (Exhibit-10)

10. Upon closure of the evidence of the prosecution's witnesses, the statement of the appellant was recorded under Section 313 of the Cr.P.C explaining the circumstances emerging against him based on the evidence of the prosecution's witnesses, The appellant denied the circumstances, in his response.

11. On the basis of evidence adduced at the trial by the prosecution, both oral and documentary, the trial court held the appellant guilty of the offences punishable under Section 20(b) ii (c) of the NDPS Act, having been found in possession of commercial quantity of *charas*. The trial court also found proved at trial the charge of commission of offence punishable under Section 23(c) of the NDPS Act for transporting *charas* from



Nepal to India. After having recorded the finding of conviction, the trial court sentenced the appellant for the respective proved charges as has been noted at the outset.

12. We have heard Mr. Pushpendra Kumar Singh learned counsel for the appellant with Mr. Abhimanyu Sharma learned Additional Public Prosecutor for the State.

13. Learned counsel appearing on behalf of the appellant has submitted that there is no evidence on record to the effect that the samples of the contraband articles were taken by the officials from the packets at the place of occurrence nor there is any evidence that the said articles were duly sealed, before the same was handed over to the police. He has also argued that there has been infraction of Section 50(6) of the NDPS Act, inasmuch as, neither the officer conducting search had recorded the reason for such belief which had necessitated such search nor a copy thereof was sent to his superior officer. He has further argued that the police, without even sending the samples of the allegedly seized articles to the Forensic Science Laboratories submitted the chargesheet in utter haste. He has further contended that there is no evidence on record to suggest that the articles said to have been recovered from the possession of the appellant were duly kept in safe custody by the police before the



samples were sent for forensic examination. He has also submitted that it is evident from the evidence of the I.O. (PW-6) that the weight of the seized articles was taken by using weighing machine borrowed from a departmental store nearby the Police Station. He accordingly, contends that the prosecution has not been able to establish the weight of the seized goods.

14. Learned additional public prosecutor representing the state on the other hand has submitted that the prosecution's witnesses have consistently deposed that four packets containing *charas* were recovered from the possession of the appellant, which was confirmed by narcotic detection kit which the SSB team was carrying. He has argued that the FSL report confirmed that the articles recovered from the possession of the appellant was *charas* also known as *hasish*. He has also argued that there has been no breach of any procedure proceeded under the Act for making search and seizure of goods by the SSB personnel. He accordingly, contends that the trial court has rightly recorded the finding of conviction against the appellant based on due analysis of the evidence adduced at the trial.

15. We have perused the impugned judgment of the trial court as well as lower court records (LCR), and have given our thoughtful consideration to the rival submissions advanced



on behalf of the parties.

16. Before we proceed to address the evidence of the prosecution's witnesses, we consider it desirable to take into account at the very outset certain glaring aspects of the case.

17. It is the prosecution's case that the appellant and the co-accused were intercepted at about 12:55 pm and they were arrested at 1:10 pm by the SSB informant after recovery of the contraband articles, according to FIR. The seizure list was prepared by the informant, according to the FIR, at the place of the occurrence itself. The distance of Police Station from the place of recovery of the articles from the possession of the appellant was one kilometre as it emerges from the FIR. From the evidence of the informant (PW-2) at paragraph no. 34 it can be seen that the informant had returned to the SSB Camp at about 1:15 pm itself. More than 8½ hours thereafter the informant is said to have handed over the contraband articles and the accused persons to the police at the Police Station at 10:00 pm. It is pertinent to note at this juncture that he deposed in paragraph no. 3 of the examination-in-chief that he had prepared a production-cum-seizure list of the recovered item (*charas*) kept in three packets weighing 11.800 kgs. We are conscious of the fact that mentioning of 11.800 Kgs in the evidence of PW6



instead of 1.800 kg, the learned trial court may be a result of slip of pen. However, investigation was handed over to the I.O. (PW-6) after registration of FIR at about 10:00 pm. The production-cum-seizure list must have been prepared by the investigating officer after written information was given by the Informant to the police. The production cum seizure list is there on record of the trial court by way of Exhibit-7. The time of preparation of production-cum-seizure list as mentioned in the said Exhibit-7 is 9:20 pm. The said production-cum-seizure list was prepared by the investigating officer himself. In no circumstance, the production-cum-seizure memo could have been prepared by the investigating officer before the information was given by the informant, SSB official, to the police which is at 10:00 pm. It is the consistent case of the prosecution that information to the police was given at about 10:00 pm on 16.08.2013 which is evident from the FIR also. Preparation of production cum seizure list at 9:20 pm by the I.O. thus becomes doubtful.

18. Now coming to the evidence of the prosecution's witnesses, we need to notice the evidence of the Informant and the I.O. first. He proved preparation of production cum seizure list at the Police Station as Exhibit-7. He admitted that he had not recorded the information which he had received leading to



the patrolling party proceeding to intercept the accused persons. He further deposed that he had opened only one packet out of the four which were seized, which he had resealed subsequently. Further all the four packets were not weighed separately. Other packets were not opened to ascertain the nature of articles present therein. Though he had sealed all the four packets but he did not mention about the sealing in his written information to the police. He categorically mentioned in paragraph no. 36 of his deposition in cross-examination that the recovered articles and the accused persons were handed over to the police at about 10:00 pm on 16.08.2013. From the evidence of the I.O. (PW-6), it is evident that the seized articles were not sent for forensic examination till submission of the chargesheet. The seized articles were kept in *malkhana*. The sample of the seized article was sent on 22.12.2013. He had not mentioned in the case diary that he had taken out the samples for scientific examination from the seized articles. There was no mention in the case diary that the seized articles were taken out from *malkhana* for production before the Judicial Magistrate. It is thus apparent that the prosecution failed to establish that the seized articles were kept in safe custody at the Police Station.

19. It is curious to note that in paragraph no. 22 of the



evidence of I.O (PW-6), who deposed that he had taken the weight of the seized articles by borrowing a weighing machine from a nearby shop, could not disclose the name of the shopkeeper. He admitted in his cross-examination that he had not mentioned in the case diary that he had received a bag also from the informant with the contraband articles and that he had taken weight of the seized articles. It is also significant to note that according to the evidence of the I.O., the seized articles were not sealed from before and he had also not sealed the same. He had not mentioned in the case diary that whether the seized articles were kept in *malkhana* of the Police Station or not. Further contrary to the prosecution's case as disclosed in the FIR as well as the evidence of the informant (PW-2), to the effect that the seized articles were found in four packets, the investigating officer deposed that the seized articles were packed in three packets. PW-4 also, who was another member of the patrolling party of the SSB in his evidence in paragraph no. 7 deposed that three packets were recovered from the bag in course of search. PW-4, however, denied that the contraband articles were weighed in his presence. Even from production-cum-seizure list (Exhibit-7) it emerges that three packets were handed over to the police instead of four as was claimed by the informant in his FIR



and deposition.

20. The prosecution's evidence is inconsistent on the point of number of packets of contraband articles seized. Further, there is no evidence that more than one of such packets were opened for taking sample for being sent to the Forensic Science Laboratory. The packets were not duly sealed nor there is evidence of them having been kept in the safe custody. There is no explanation as to why information was given to the police more than 8 hrs after the seizure was made by the SSB officials when the place of occurrence was nearly 1 kilometer away from the Police Station. Further, it is evident that the alleged narcotic powder seized from the possession of the appellant was never produced before the trial court as material exhibit. There is thus, no evidence to connect forensic report with the substance that was seized from the possession of the appellant. In the present case, the seizure list witnesses were not examined and all the witnesses are officials of the patrolling party of SSB.

21. In this regard, it would be useful to take note of the Supreme Court's decision in the case of ***Jitendra Kumar & Anr Vs State of M.P.*** reported in ***(2004) 10 SCC 562***, relevant portion of paragraph nos. 5 and 6 are being reproduced hereinbelow: -

“5. The evidence to prove that *charas* and *ganja* were



recovered from the possession of the accused consisted of the evidence of the police officers and the panch witnesses. The panch witnesses turned hostile. Thus, we find that apart from the testimony of Rajendra Pathak (PW 7), Angad Singh (PW 8) and Sub-Inspector D.J. Rai (PW 6), there is no independent witness as to the recovery of the drugs from the possession of the accused. The *charas* and *ganja* alleged to have been seized from the possession of the accused were not even produced before the trial court, so as to connect them with the samples sent to the Forensic Science Laboratory. There is no material produced in the trial, apart from the interested testimony of the police officers, to show that the *charas* and *ganja* were seized from the possession of the accused or that the samples sent to the Forensic Science Laboratory were taken from the drugs seized from the possession of the accused. Although the High Court noticed the fact that the *charas* and *ganja* alleged to have been seized from the custody of the accused had neither been produced in the court, nor marked as articles, which ought to have been done, the High Court brushed aside the contention by observing that it would not vitiate the conviction as it had been proved that the samples were sent to the Chemical Examiner in a properly sealed condition and those were found to be *charas* and *ganja*. The High



Court observed, “non-production of these commodities before the court is not fatal to the prosecution. The defence also did not insist during the trial that these commodities should be produced”. The High Court relied on Section 465 CrPC to hold that non-production of the material object was a mere procedural irregularity and did not cause prejudice to the accused.

6. In our view, the view taken by the High Court is unsustainable. In the trial it was necessary for the prosecution to establish by cogent evidence that the alleged quantities of *charas* and *ganja* were seized from the possession of the accused. The best evidence would have been the seized materials which ought to have been produced during the trial and marked as material objects. There is no explanation for this failure to produce them. Mere oral evidence as to their features and production of panchnama does not discharge the heavy burden which lies on the prosecution, particularly where the offence is punishable with a stringent sentence as under the NDPS Act. In this case, we notice that panchas have turned hostile so the panchnama is nothing but a document written by the police officer concerned. The suggestion made by the defence in the cross-examination is worthy of notice. It was suggested to the prosecution witnesses that the landlady of the house in collusion with the police had



lodged a false case only for evicting the accused from the house in which they were living. Finally, we notice that the investigating officer was also not examined. Against this background, to say that, despite the panch witnesses having turned hostile, the non-examination of the investigating officer and non-production of the seized drugs, the conviction under the NDPS Act can still be sustained, is far-fetched.”

22. The view taken in the case of Jitendra (supra) has been reiterated in the case of *Ashok alias Dangra Jaiswal Vs State of Madhya Pradesh* reported in (2011) 5 SCC 123, paragraph 12 of which reads as follows:-

“12. Last but not the least, the alleged narcotic powder seized from the possession of the accused, including the appellant was never produced before the trial court as a material exhibit and once again there is no explanation for its non-production. There is, thus, no evidence to connect the forensic report with the substance that was seized from the possession of the appellant or the other accused.”

23. The aforesaid view of the Supreme Court in the case of Jitendra (supra) and Ashok (supra) has also been reiterated in paragraph no. 6 of the decision rendered in the case of *Gorakhnath Prasad Vs. State of Bihar* reported in (2018) 2 SCC 305, which is relevant for the present purpose, has been



reproduced hereinbelow:-

“6. In the facts of the present case, the independent witnesses with regard to the search and seizure, PW 2 and PW 3, having turned hostile deposing that their signatures were obtained on blank paper at the police station, the mere fact of a FSL Report (Ext. 8), being available is no confirmation either of the seizure or that what was seized was ganja, in the absence of the production of the seized item in court as an exhibit. The non-production of the seized material is therefore considered fatal to the prosecution case. The issue whether there has been compliance with Sections 42 and 50 of the NDPS Act loses its relevance in the facts of the case.

24. In view of the observations noted above and coupled with the Supreme Court's decisions, in our considered opinion it would be unsafe to rely upon the testimony of the SSB officials alone more so, there being manifest contradictions and inconsistencies in the evidence of the prosecution's witnesses. There is failure on the part of the prosecution to produce the seized materials before the court at the trial and unexplained delay in informing the police by the SSB officials are circumstances fatal to the case of the prosecution. Conviction of the appellant for the offence punishable under Sections 20(b)(ii) (C) of the NDPS Act thus cannot be upheld. Consequently, the appellant's conviction for commission of the offence punishable



under Section 23(c) of the NDPS Act also cannot be upheld.

25. We hasten to note here that there is no iota of evidence adduced at the trial that the articles which were seized were being illegally imported in India from Nepal, except for the said secret information received by SSB officials which according to the prosecution’s case had led to recovery of contraband articles.

26. In the result, this appeal is allowed and the judgment of conviction recorded by the trial court is set aside.

27. This appeal is accordingly allowed.

28. Let the appellant be released from jail forthwith, if not required in any other case.

(Chakradhari Sharan Singh, ACJ)

I agree.

Khatim Reza, J

(Khatim Reza, J)

ranjan/-

AFR/NAFR	NAFR
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