

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.1410 of 2017**

Arising Out of PS. Case No.-302 Year-2012 Thana- RAXAUL District- East Champaran

Ram Brichh Baitha S/o Late Radha Baitha, Resident of Village- Chainpur,
P.S.- Raxaul, District- East Champaran.

... .. Appellant

Versus

The State Of Bihar

... .. Respondent

Appearance :

For the Appellant/s : Mr.Sangeet Deokuliar, Advocate

For the Respondent/s : Mr.Sujit Kumar Singh, APP

CORAM: HONOURABLE MR. JUSTICE SUDHIR SINGH

and

HONOURABLE MR. JUSTICE CHANDRA PRAKASH SINGH

C.A.V. JUDGMENT

(Per: HONOURABLE MR. JUSTICE SUDHIR SINGH)

Date : 28-07-2023

Heard learned counsel for the appellant and learned
A.P.P. for the State.

2. The present criminal appeal has been preferred against the judgment of conviction dated 17.08.2017, and the order of sentence dated 26.08.2017, passed by Sri Krishna Bihari Pandey, 1st Additional Sessions Judge-cum-Special Judge, N.D.P.S. Act, East Champaran at Motihari in N.D.P.S. Case No. 154 of 2012 whereby and whereunder the appellant has been convicted for the offence under Section 20(b)(ii)(c) of N.D.P.S. Act and sentenced to undergo rigorous imprisonment for a term of twelve years and a fine of Rs. one lac, and in default of payment



of fine an additional period of imprisonment for a term of six months. It was further directed that the period already undergone by the appellant in custody will be set off in the said sentence.

3. The prosecution case as per the written report of the informant-cum-S.H.O. Raxaul Police Station is that on 30.11.2012 at 13:00 hours, informant received confidential information about contraband i.e. 'ganja' to be kept in the house of accused Ram Brichh Baitha situated at village Chainpur. Thereafter the informant along with other police personnel left the police station in a police jeep and reached near the house of accused Ram Brichh Baitha and surrounded it from all sides. In front of two independent witnesses, namely, Shambhu Sharan Patel and Krishna Prasad of village Chainpur, the house of accused Ram Brichh Baitha was searched and 70 kilogram 'ganja' was recovered in 10 bundles each containing 7 kilogram. One person was also arrested during search who disclosed his name as Ram Brichh Baitha. On enquiry, the accused neither produced any licence or valid documents nor replied satisfactorily. Thereafter, a seizure list was prepared in presence of two independent witnesses who also signed on them voluntarily.

4. On the basis of written report of the informant (P.W. 4), Raxaul P.S. case No. 302 of 2012 was registered under



Sections 20, 22, 23 and 24 of N.D.P.S. Act and investigation was taken up. On completion of investigation, a charge-sheet was submitted under sections 20(b), 22, 23 and 24 of N.D.P.S. Act and accordingly, cognizance was taken. Thereupon charges were framed against the appellant to which the appellant pleaded not guilty and claimed to be tried.

5. During trial, the prosecution examined altogether five witnesses, namely, PW1 Baleshwar Kisku, PW2 Kundan Kumar Singh (investigating Officer), PW3 Narendra Kumar (member of raiding team), PW4 Ramkishor Singh (informant) and PW5 Suresh Rai (member of raiding team). Prosecution has also produced exhibits as Ext. 1 written application (F.I.R.) about the occurrence, Ext. 1/1 signature of informant on the FIR, Ext. 1/2 signature of informant on the endorsement. Ext. 2 formal FIR of the instant Raxaul P.S. case No. 302/2012, Ext. 3 seizure list dated 30.11.2012, Ext. 4 confessional statement of accused Ram Brichh Baitha dated 30.11.2012, Ext. 5 forwarding Memo of accused dated 1.12.2012, Ext. 6 petition of I.O. dated 6.12.2012 seeking permission from the Court to send the sample of seized substance to F.S.L., Patna and C.F.S.L., Calcutta. Ext. 7 Court certificate relating to sending of sample to F.S.L., Patna, Ext. 8 Court certificate relating to sending of sample to C.F.S.L.,



Calcutta, Ext. 9 receiving slip of sample sent to F.S.L., Patna, Ext. 10 receiving slip of sample sent to C.F.S.L., Calcutta, Ext. 11- Arrest Memo of accused Ram Brichh Baitha, Ext. 12 F.S.L. report received from F.S.L., Patna (with objection). The defence has not produced any oral or documentary evidence in support of its case. Thereafter, the statement of the appellant was recorded under section 313 of the Cr.P.C. After conclusion of the trial, the learned Trial Court convicted and sentenced the appellant in the manner indicated above.

6. Learned counsel for the appellant submitted that the trial of the instant prosecution suffers from several infirmities which having been overlooked by the learned trial Court and therefore, the impugned judgment of conviction is not sustainable in the eyes of law. The learned trial court has not properly appreciated the evidences brought on record by the prosecution. It has been contended that the prosecution has miserably failed to prove the mandatory compliance of section 42(2) of the N.D.P.S. Act. It has been further argued that obligatory guidelines relating to sampling and sealing, as provided in the Standing Order 1/88 issued by the Central Government has not been complied with. It has been contended that the place of recovery is also doubtful as there are material omissions on the part of the prosecution



witness. Furthermore, the learned counsel for the appellant asserts the non-examination of the independent seizure witnesses by the prosecution has caused serious prejudice to the appellant. Therefore, it has been argued that on these scores the judgment of conviction, assailed in the present appeal, be set aside, Consequently, the appellant be acquitted from the charges and set free from custody.

7. Learned A.P.P. appearing for the State, on the other hand, has rebutted the arguments advanced by learned counsel for the appellant. It has been submitted that the judgment of conviction and order of sentence under challenge requires no interference as the prosecution has been able to prove the case beyond all reasonable doubts. It has been contended that the witnesses have been consistent in their depositions and there does not remain any lacuna in case of the prosecution. The minor inconsistencies in the testimony of the witnesses cannot be a ground to reject their evidence as a whole. It has been submitted that there is substantial compliance of section 42(2) of the Act. Learned A.P.P. furthermore, submits that the guidelines prescribed under Standing Order are directory in nature and cannot vitiate the trial. It has been further argued that non-examination of the independent seizure witnesses would *per se* not make the



appellant liable for acquittal and there has been no demonstration of any prejudice which has been caused to the appellant. Therefore, it has been argued that guilt of the appellant has been proved beyond reasonable doubt by the evidences adduced during the course of trial and there is no infirmity in the judgment of conviction of the learned trial Court.

8. After hearing the arguments advanced by the learned counsels appearing for the parties and upon thorough examination of the entire material available on the record, the following issues arise for consideration in the present appeal:

- I. Whether the prosecution has made the mandatory compliance of section 42(2) of the Act?
- II. Whether the prosecution has made compliance of the procedures prescribed under Standing Order 1/88 in respect of the seized contraband?
- III. Whether the prosecution has proved the place of recovery of the contraband beyond reasonable doubt?
- IV. Whether the non-examination of independent seizure witnesses would cause prejudice to the defence?

9. Before we advert ourselves to the appreciation of the evidence, in relation to the first issue formulated above, it deems



appropriate to briefly state the law settled by the Hon'ble Supreme Court with regard to non-compliance of section 42(2) of the NDPS Act (hereinafter referred as Act). The constitution bench of the Hon'ble Apex Court in the case of ***Karnail Singh Vs State of Haryana*** reported in **(2009) 8 SCC 539** held in paragraph 35 (c) and (d) of the judgment, which is as follows:

“35.(c) In other words, the compliance with the requirements of Sections 42(1) and 42(2) in regard to writing down the information received and sending a copy thereof to the superior officer, should normally precede the entry, search and seizure by the officer. But in special circumstances involving emergent situations, the recording of the information in writing and sending a copy thereof to the official superior may get postponed by a reasonable period, that is, after the search, entry and seizure. The question is one of urgency and expediency.

(d) While total non-compliance with requirements of sub-sections (1) and (2) of Section 42 is impermissible, delayed compliance with satisfactory explanation about the delay will be acceptable compliance with Section 42. To illustrate, if any delay may result in the accused escaping or the goods or evidence being destroyed or removed, not recording in writing the information received, before initiating action, or non-sending of a copy of such information to the official superior forthwith, may not be treated as violation of Section 42. But if the information was received when the police officer was in the police station with sufficient time to take action, and if the police officer fails to record in writing the information received, or fails to send a copy thereof, to the official superior, then it will be a suspicious circumstance being a clear violation of Section 42 of the Act. Similarly, where the police officer does not record the information at



all, and does not inform the official superior at all, then also it will be a clear violation of Section 42 of the Act. Whether there is adequate or substantial compliance with Section 42 or not is a question of fact to be decided in each case. The above position got strengthened with the amendment to Section 42 by Act 9 of 2001.”

In the light of the law settled by the Hon’ble Supreme Court, we shall appreciate the evidence of PW 4, the informant of the present case. In his written application (Ext. 1), PW 4 stated that while working in the *Sirista* of the Police Station, upon receiving confidential information about contraband kept in the appellant's house, he lodged a “*Sanha*” i.e. Station Diary entry and subsequently, led a team to raid the house of the appellant. Further, PW 4 in paragraph 2 of his deposition (cross-examination) categorically stated that after recording the “*Sanha*” in the station diary, he did not take any further action but proceeded directly to the spot. Thus, it is evident from the perusal of the Ext. 1 and the deposition of PW 4 that the said “*Sanha*” was not reported to the immediate superior official by the informant. Moreover, PW 3, who accompanied the informant (PW 4) during raid, in his deposition stated that the “*Sanha*” was prepared but he could not confirm whether it was sent to the official superior. So far as the other witnesses are concerned, it is found that they are silent regarding the copy of written



confidential information being forwarded to any superior official. Furthermore, it is noteworthy that the prosecution has failed to produce the “*Sanha*” as material exhibit on the record. This, further casts doubt on the genuineness of the assertions regarding the recording of the confidential information by the informant in the station diary. Thus, after the appreciation of the evidence available on records, it is evident that the PW 4, though being present at the police station did not forward copy of the “*Sanha*” to his immediate superior official prior to conducting the search and seizure. Additionally, the prosecution has failed to establish the existence of any such special circumstances or emergent situation to dispense with the requirement to send the copy of such information before proceeding to take actions as per clauses (a) to (d) of Section 42(1). Therefore, in the light of the principle settled through the above judicial precedent as discussed above, we are of the firm view that the such non-compliance of the provision adversely affects the prosecution’s case.

Accordingly, the issue no. I is decided in **negative**.

10. Now coming to second issue raised in this case pertains to the alleged violation of Standing Order 1/88, which is in *pari materia* with Standing Order 1/89 issued under Section 52A of the N.D.P.S. Act by the Central Government. It is found that the



procedures given therein relating to sampling, sealing and dispatching the seized samples to the laboratory were not complied. Before we proceed to scrutinize the evidences placed on records, it is apposite for us to refer to the clauses provided hereunder to address the issue at hand.

Clauses 1.4, 1.5, 1.6, 1.8, and 1.13 of Standing Instruction No.1/88 dated 15.03.1988 read as under: -

“1.4. If the drugs seized are found in packages/containers the same should be serially numbered for purposes of identification. In case the drugs are found in loose form the same should be arranged to be packed in unit containers of uniform size and serial number should be assigned to each package/container. Besides the serial number, the gross and net weight, particular of the drug and date of seizure should invariable be indicated on the packages. In case sufficient space is not available for recording the above information on the package, a Card Board label, should be affixed with a seal of the seizing officer and on this Card Board label, the above details should be recorded.

***1.5 Place and time of drawal of sample:** Samples from the Narcotic Drugs and Psychotropic Substances seized must be drawn on the spot of recovery, in duplicate, in the presence of search (Panch) witnesses and the person from whose possession the drug has been recovered, and mention to this effect should invariably be made in the panchnama drawn on the spot.*

***1.6.Quantity of different drugs required in the sample:** The quantity to be drawn in each sample for chemical test should be 5 grams in respect of all narcotic drugs and psychotropic substances except*



in the cases of Opium, Ganja and Charas/Hashish where a quantity of 24 grams in each case is required for chemical test. The same quantities should be taken for the duplicate sample also. The seized drugs in the packages/containers should be well mixed to make it homogeneous and representative before the sample in duplicate is drawn.

1.8.Numbering of packages/containers- *Subject to the detailed procedure of identification of packages/containers, as indicated in Para 1.4 each package/container should be securely sealed and in identification slip pasted/attached on each one of them at such place and in such manner as will avoid easy obliteration of the marks and numbers on the slip. When more than one sample is drawn, each sample should also be serially numbered and marked as S-1, S-2, S-3 and so on, both original and duplicate sample. It should carry the serial number of the packages and marked as P-1, 2, 3, 4 and so on.*

1.13. Mode and Time limit for dispatch of sample to Laboratory: *The samples should be sent either by insured post or through special messenger duly authorized for the purpose. Despatch of samples by registered post or ordinary mail should not be resorted to. Samples must be dispatched to the Laboratory within 72 hours of seizure to avoid any legal objection.”*

Before we advert ourselves to the appreciation of the evidence, it is pertinent to refer to the settled law established by the Hon’ble Supreme Court regarding non-compliance with Standing Instruction 1/88 issued under the Act. The Hon’ble Supreme Court, in the case of **Noor Aga Vs. State of Punjab**



reported in **(2008) 16 SCC 417**, held that compliance with guidelines issued under a legal authority is obligatory and non-compliance can lead to adverse inferences against the prosecution. The Hon'ble Apex Court in paragraphs 89 to 91 of the judgment, held as follows:

“89. Guidelines issued should not only be substantially complied with, but also in a case involving penal proceedings, vis-à-vis a departmental proceeding, rigours of such guidelines may be insisted upon. Another important factor which must be borne in mind is as to whether such directions have been issued in terms of the provisions of the statute or not. When directions are issued by an authority having the legal sanction granted therefore, it becomes obligatory on the part of the subordinate authorities to comply therewith.

90. Recently, this Court in State of Kerala v. Kurian Abraham (P) Ltd. [(2008) 3 SCC 582] , following the earlier decision of this Court in Union of India v. Azadi Bachao Andolan [(2004) 10 SCC 1] held that statutory instructions are mandatory in nature.

91. The logical corollary of these discussions is that the guidelines such as those present in the Standing Order cannot be blatantly flouted and substantial compliance therewith must be insisted upon for so that sanctity of physical evidence in such cases remains intact. Clearly, there has been no substantial compliance with these guidelines by the investigating authority which leads to drawing of an adverse inference against them



to the effect that had such evidence been produced, the same would have gone against the prosecution.”

Taking into consideration the aforementioned decisions of the Hon'ble Supreme Court, we shall appreciate the evidence of the informant (PW 4) who has specifically stated in his deposition that no samples were collected from the seized contraband packages nor were they marked on the spot. Conversely, PW 3 stated that the five sacks containing 10 bundles of contraband were marked on the spot itself. However, he further stated that could not confirm the specific numbering of bundles kept in each numbered sack. Furthermore, it is found that none of the other prosecution witnesses who were the members of the raiding team had in their depositions confirmed that the packages were serially numbered or marked. Thus, it is apparent that there exists a major contradiction in the testimonies of the prosecution witnesses and as such compliance with clauses 1.4 as well as 1.8 of the aforementioned Order appears doubtful.

Further, upon scrutiny of the deposition of PW 4, it is clear that the samples were not drawn at the spot of recovery at the time of seizure. This aspect of the drawl of samples at the place of recovery is considered by Hon'ble Supreme Court in the case of ***Union of India Vs Mohanlal & Anr.*** reported in **(2016) 3**



SCC 379, wherein, it has been observed that the process of drawing samples must be in the presence and supervision of the Magistrate. Therefore, in the present instance, the non-drawl of samples at the spot of recovery does not suffer from any vice. However, upon the careful examination of the evidence of PW 2 and perusal of Ext. 6 it is obvious that the Investigating Officer (PW 2) has made an application to the Court for FSL examination of the seized contraband after a significant delay of 22 days. Over and above, there is no explanation whatsoever has been offered by the prosecution for such delay in this behalf. This aspect has been dealt with by the Hon'ble Supreme Court in the **Mohanlal** case (supra) wherein the Hon'ble Apex Court has observed as reproduced hereunder:

“13....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....

14. ...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 52A (supra)...”

In the light of the principle settled through the above judicial precedent we are of the firm view that by no stretch of imagination, the non-stipulation of time in the statute would mean that the authorities are free to make application as the fancy takes them. Such inordinate delay on the part of the prosecution strengthens the apprehension of the tampering of the seized contraband and creates doubt about the veracity of the prosecution’s version.

Upon careful examination of the deposition of PW 2, it is evident that the samples to be sent for FSL examination, were collected and sealed on 22.12.2012 in the presence of the learned Magistrate. However, it is found that the drawn samples were sent to the laboratories on 14.01.2013. It is further stated by PW 2 that in the meantime, the drawn samples were kept in the *Malkhana* before they were dispatched. Thus, it is evident from the evidence available on record that there is a substantial delay



of 23 days in dispatching the samples for scientific examination. We have also taken note of the fact that the prosecution has neither brought on record the *Malkhana register* as a material exhibit nor the Incharge of *Malkhana* was examined. Further we find that the Narcotics Control Bureau has set a time limit of 72 hours for sending the confiscated sample to FSL examination in order to prevent any attempts to tamper with the sample obtained. Therefore, in view of the facts and circumstances of the case, we are of the considered opinion that such delay, inordinate and unexplained casts doubt on the prosecution case.

Further, it is found that informant in his deposition before the learned trial Court has stated that the seized contraband was deposited in *Sirista* of the Police Station by handing it over to the O.D Officer. However, there is no evidence on record to establish that the seized contraband was ever sealed before depositing it in *Malkhana*. More so, inventory of the seized contraband was not prepared. Such lapses on the part of the prosecution casts doubt about the safe handling of the contraband. The case of the prosecution gets further hammered in the light of the deposition of PW 2 (I.O), who stated that he did not record in the case diary that how many packages or bundles of seized contraband were presented before the Magistrate as well as how much quantity



was drawn in each sample for the chemical test. Further, it is found that the case diary also lacks information regarding the quantity of samples sent to FSL Patna and CFSL, Calcutta. Furthermore, Ext. 12 (FSL report, Patna) contains no details about the weight of the samples received. Thus, there is no evidence on record to show that adequate quantity from each bag had been taken and sent for FSL examination.

In the light of the given facts and circumstances and the discussions made above, we are of the view that prosecution has miserably failed to comply with the crucial guidelines ensconced in the Standing Order No. 1/88 issued by the Central Government.

Accordingly, the Issue No. II is decided in *negative*.

11. So far as third issue is concerned, the investigating officer (PW 2) in his deposition clearly stated that the witnesses had pointed out the house of the appellant as the place of recovery. Further, it is found that the investigating officer inspected the place of recovery in the presence of witnesses. However, during the cross-examination, PW 2 did not provide any description of the witnesses who pointed out the place of recovery, nor did he mention the name of the witnesses in whose presence the inspection of the spot was done. Furthermore, it is



observed that he did not draw a site map of the spot, indicating the *Khata-Kheshra* of the location wherefrom the contraband was seized. These omissions by PW 2 coupled with the fact that there is no corroboration from any independent evidence raise doubts about the credibility and accuracy of the place of recovery. Therefore, in the light of the facts and circumstances discussed hereinabove we are of the considered opinion that the place of recovery appears to be doubtful.

Accordingly, the issue no. III is decided in *negative*.

12. With regard to the fourth issue, the attention of this Court has been drawn towards non-examination of the independent seizure witnesses in the instant case. Upon the careful examination of the testimony of the official witnesses, it is found that there are severe inconsistencies in their statement regarding the presence of the seizure witnesses and the preparation of seizure list (Ext. 3). PW 1 and PW 3, in their depositions, specifically stated that the house of the appellant was searched in the presence of the independent seizure witnesses and the contraband was seized. They further mentioned that the seizure list was prepared thereupon which was signed by these seizure witnesses. However, from the perusal of PW 4's (informant) deposition, it appears that no independent witnesses



were called to the spot, but they were later called to sign the seizure list. Additionally, PW 5, in his deposition, is silent regarding the presence of any independent witnesses at the place of recovery. Thus, it is quite apparent that these inconsistencies in the testimony of the abovementioned prosecution witnesses raise doubts about the presence of independent witnesses during the search and seizure. Moreover, PW 4, in his deposition, stated that PW 1 and PW 3 prepared the seizure list (Ext. 3) on the spot, whereas, PW 1 and PW 3 themselves stated in their depositions that the seizure list was prepared by the PW 4. Rather, it is found that PW 5 categorically stated that PW 4 was not the part of the raiding team and that all the reading and writing work was done at police station. Thus, it is evident that these major contradictions cast doubts on the case of prosecution. Therefore, if the examination of the independent seizure witnesses had taken place during the course of the trial, it would have undoubtedly yielded valuable information regarding the search and seizure of the alleged contraband. In this context, it becomes imperative to refer the Hon'ble Supreme Court Judgment delivered in the case of ***Krishan Chand v. State of H.P.***, reported in ***(2018) 1 SCC 222***, wherein in para 24 it has been observed that:

“24. As rightly pointed out by the counsel for the appellant that the High Court failed to



appreciate that in the absence of independent witnesses, the evidence of the police witnesses must be scrutinised with greater care especially when police witnesses contradicted themselves on the issue as to in whose handwriting the seizure memo, the arrest memo, consent memo and the NCB form were written and the evidence adduced by the prosecution is not reliable.”

13. Therefore, applying the aforesaid proposition of law as held by the Hon’ble Supreme Court in the given facts of the case, we reach to the conclusion that in the present case, the non-examination of the independent seizure witnesses constitutes a significant flaw that has caused serious prejudice to the trial of the appellant.

Accordingly, Issue no. IV is decided in **affirmative**.

14. In light of the legal position as discussed above and on the basis of the findings arrived at on the issues formulated above, we are of the considered opinion that the conviction of the appellant is not sustainable in the eyes of law and the prosecution has failed to prove its case beyond all reasonable doubts.

15. Accordingly, the appeal is allowed. The judgment of conviction dated 17.08.2017 and the order of sentence dated 26.08.2017 passed by Sri Krishna Bihari Pandey, 1st Additional Sessions Judge-cum-Special Judge, N.D.P.S. Act, East



Champaran at Motihari in N.D.P.S. Case No. 154 of 2012, are set aside. Since, the appellant Ram Brichh Baitha is in jail custody, he is directed to be released from custody forthwith, if not wanted in any other case.

(Sudhir Singh, J)

(Chandra Prakash Singh, J)

Pankaj/-

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