

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.544 of 2022

Arising Out of PS. Case No.-7 Year-2018 Thana- D.R.I District- Muzaffarpur

ANIL YADAV Son of Sudama Yadav Resident of Village - Gobari, P.s.-
Banjaria, Distt.- Motihari, East Champaran.

... .. Appellant/s

Versus

The Union of India through Director of Revenue Intelligence, Muzaffarpur.
Bihar

... .. Respondent/s

with

CRIMINAL APPEAL (DB) No. 326 of 2023

Arising Out of PS. Case No.-7 Year-2018 Thana- D.R.I District- Muzaffarpur

HARI OM GIRI @ HARI OM KUMAR SON OF HORILGIRI Resident of
village- Dhanhar Dihuri, Police Station- Ramgadhua, District- East
Champaran (Motihari).

... .. Appellant/s

Versus

1. The State of Bihar
2. The Union Of India, Delhi

... .. Respondent/s

Appearance :

(In CRIMINAL APPEAL (DB) No. 544 of 2022)

For the Appellant/s : Mr.Jitendra Narain Sinha, Adv
Mr. Ujjawal Kumar Singh, Adv
For the DRI : Mr. Ranvir Kumar, Sr. S.C

(In CRIMINAL APPEAL (DB) No. 326 of 2023)

For the Appellant/s : Mr. Raj Kumar, Adv
Mr.Vijay Kumar, Adv
Mr.Rajnish Kumar, Adv
Mr. Sarvottam Kumar, Adv
For the DRI : Mr. Ranvir Kumar, Sr. S.C

CORAM:HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH

and

HONOURABLE MR. JUSTICE NAWNEET KUMAR PANDEY

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH)

Date : 24-08-2023



The appellants have preferred these appeals under Section 374(2) of the Code of Criminal Procedure against a judgment of conviction dated 17.05.2022 and an order of sentence dated 19.05.2022 passed by the learned Sessions Judge, Muzaffarpur in DRI Case No. 07 of 2018 arising out of NDPS Case No. 42 of 2018, whereby and whereunder, they have been convicted and sentenced as under :-

Anil Yadav appellant in Criminal Appeal (DB) No. 544 of 2022

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

Hari Om Giri @ Hari Om Kumar appellant in Criminal Appeal (DB) No. 326 of 2023

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

2. An Intelligence Officer, Directorate of Revenue Intelligence, Regional Unit, Muzaffarpur, namely Sanjay Kumar Gupta, filed a complaint on 18.06.2019 in the court of learned



Sessions Judge, Muzaffarpur, against these appellants, alleging commission of offences punishable under Sections 20 & 23 of the NDPS Act, 1985 (hereinafter referred to as the 'Act' in short) for violation of Section-8(c) of the Act. He asserted in his complaint that acting on a specific intelligence regarding transportation of *charas* by a truck bearing registration no. WB 23B 3145 from Kathmandu (Nepal) to Patna via Sahebganj, Muzaffarpur, the officials of DRI, Muzaffarpur in the presence of two independent witnesses had intercepted the said truck at about 8:30 pm on 24.12.2018, near Sahebganj, Muzaffarpur. On interrogation the appellants disclosed their identity. The appellant Anil Yadav identified himself to be the driver of the truck and the appellant Hariom Giri @ Hariom Kumar as a cleaner of the said vehicle. Complying with the requirement under section-50(1) of the Act, they were given option to be searched either before a Magistrate or a gazetted officer, whereupon, they agreed to be searched in the presence of a gazetted officer. Initially, they claimed that the truck was empty, however, on interrogation they accepted that there was *charas* concealed in an specially built cavity inside the truck. The complainant further disclosed that it had become dark and therefore, for security reasons the vehicle was brought to the



DRI Office, Muzaffarpur for examination and other necessary formalities with the consent of the appellants and the panchas. At DRI Office, Muzaffarpur, the truck was searched in the presence of the appellants and two witnesses leading to recovery of 6 packets containing substance believed to be *charas*. The packets were marked as 01 to 06. Further, it was found that the packet nos. 1, 2, 3, 5 & 6 were containing 20 small packets and packet no. 4 was containing 17 small packets. Weighment of each packet of *charas* was taken separately in the presence of these appellants and two independent witnesses and a detailed weighment list was prepared which was duly signed by these appellants and the independent witnesses. Gross weight of the recovered packets of *charas* was found to be 119.360 Kg and net weight 109.250 Kg.

3. It is manifest from the complaint itself that the search of the vehicle was not conducted at 5:30 pm where it was intercepted rather the search was conducted after sunset when it had become dark, at the DRI Office, Muzaffarpur. We have noted this aspect of the matter at this juncture to address the issue of compliance of the requirements of Section 42 of the Act.

4. The complainant further asserted that two samples



each weighing 25 grams of homogeneous mixture of *charas* drawn from all the small packets contained in the individual packets were drawn from all the six packets of *charas* and marked as A-1 & A-2, B-1 & B-2, C-1 & C-2; D-1 & D-2; E-1 & E-2 and F-1 & F-2 respectively, which were kept concealed in a white transparent polythene bag and were further sealed with the seal of “Directorate of Revenue Intelligence” containing national emblem in a plastic coated yellow envelope in the presence of intercepted persons and both the independent witnesses, which were duly signed by these appellants, the said two witnesses and the seizing officer. The complainant further asserted that both the appellants confessed their guilt and their confessional statements were recorded under Section-67 of the Act. The seizure list and *panchnama* were prepared and were duly signed by these appellants. The appellants were arrested under Section-43 of the Act and produced before the court of learned Sessions Judge, Muzaffarpur and were subsequently remanded to judicial custody. One set of samples where were marked as “A-2, B-2, C-2, D-2, E-2 & F-2” were deposited in the ‘Customs’ godown, Customs (P) Division, Muzaffarpur along with the remaining seized contraband whereas the other set of samples marked as “A-1, B-1, C-1, D-1, E-1 & F-1” was



sent to CRCL, New Delhi on 25.12.2018 for chemical examination. The test report was received on 31.01.2019, which indicated that each of the samples in the form of blackish small lumps, tested positive for *charas*. There is reference in the complaint petition of the steps taken for verification of the address of these appellants and ownership of the truck, which was seized by making correspondence with the respective Motor Vehicle Departments and the licensing authorities.

5. On the basis of said complaint petition filed on 18.06.2019, cognizance was taken and charges were framed against these appellants for the offences punishable under Sections-20(b)(ii)(C) and 23 of the Act. The appellants denied the charges and claimed to be tried.

6. At the trial, prosecution examined three witnesses namely, Sanjay Kumar Gupta, the complainant (PW-1), Ashok Kumar Jha, Senoir Intelligence Officer, DRI, Muzaffarpur, who was a member of the team constituted for intercepting the vehicle. Godeshwar Kumar, Assistant Commissioner, Customs Preventive Division, Muzaffarpur, deposed as PW-3 to prove the entries in the godown register (Exhibit-9), inventory prepared of the seized materials and certification by a judicial magistrate (Exhibit-10) to prove the disposal of the seized materials. The



samples which were kept in the godown were proved by him as material exhibits.

7. After closure of the prosecution's evidence the appellants were questioned by the trial court under Section-313 of the CrPC in order to give them an opportunity to explain the circumstances emerging against them based on the evidence led by the prosecution at the trial. The appellants answered the questions in negative.

8. The trial court, after having evaluated the evidence on record reached a conclusion that the prosecution failed to prove that the substances recovered from the truck which was found to be *charas* was loaded in Nepal and was thus illegally smuggled into India. Accordingly, the trial court acquitted the appellants of the charge of commission of the offence punishable under section-23 of the Act. Taking aid of Section-54 of the Act which casts presumption of commission of offence of possession of illicit articles, the trial court held the appellants guilty of the offence punishable under Section-20(b)(ii)(C) of the Act.

9. Learned counsel appearing on behalf of the appellants has submitted that there has been no compliance of the mandatory requirements as stipulated under Section-52A(2)(b) of the Act, as explained and laid down by the Supreme Court in



the case of *Union of India Vs. Mohanlal and Anr* reported in *(2016) 3 SCC 379*. He has also submitted that in the present case there has been breach of Section-42 of the Act. It is evident from the prosecution's case itself that the search of the truck was conducted after sunset in the office of DRI, Muzaffarpur on the ground that it had become dark and the vehicle was required to be taken to the DRI Office for conducting examination/search. It has been submitted that there is nothing on record to demonstrate that the officer who had received the secret information had taken down in writing his reason to believe as contemplated under Section-42(1) of the Act and the grounds for his belief in terms of the second proviso to Sub-section (1) of Section-42 of the Act. It has also been argued that though according to the prosecution, the seizure was conducted in presence of two independent witnesses, but none of the seizure list witnesses have been examined at the trial. The conviction, in the present case is based on the evidence of only two witnesses including the complainant who had also investigated the case after interception of the vehicle and another officer who to was a part of the team which had intercepted the vehicle. It has, accordingly, been submitted that the trial court has erred in holding the appellant guilty of the



offence punishable under Section- 20(b)(ii)(C) of the Act based on the evidence of the two said official witnesses only.

10. Learned senior standing counsel appearing on behalf of DRI controverting the submissions advanced on behalf of the appellants has submitted that in the present case, the officials were not required to comply with the requirements under Section-42 of the Act since the vehicle was seized from a public place under section-43 of the Act. He has further submitted that though in the present case the samples were not drawn soon after the seizure of the contraband articles in the presence of a Magistrate, the fact remains that subsequently the inventory was prepared and certification was done by the Magistrate before the disposal of the contraband articles. He has also submitted that the prosecution has brought on record at the trial by way of material exhibits, the said samples which were preserved in the customs godown and the signature showing disposal of the seized contraband. He, accordingly, contends that there is no illegality in the findings of conviction recorded by the trial court and cannot be said to be infirm merely on a technical ground that the samples were not drawn in the presence of a Magistrate.

11. We have perused the impugned judgment and order of the trial court as well as lower court's records and we have



given our thoughtful consideration to the submissions advanced on behalf of the parties.

12. It is an admitted position that the samples were not drawn in the presence of a Magistrate. It is the case of the prosecution that the samples were drawn in the presence of two independent witnesses, soon after the seizure. The independent witnesses have not been examined. The Supreme Court in the case of **Mohanlal (supra)** had lucidly dealt with the ambit and scope and the mandatory requirements stipulated under Section-52A of the Act. After having examined the said provision, the Supreme Court, in that case has dealt elaborately with the effect of the requirements under Standing Order No. 1 of 89 issued by the Finance Department, Government of India, which required drawing of samples in the presence of a Magistrate at the place of seizure. After having analyzed the provisions of Section 52A(2) of the Act, the Supreme Court in the case of **Mohanlal (supra)** has laid down in paragraph nos. 15 to 19 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.

18. Be that as it may, a conflict between the statutory provision governing taking of samples and the Standing Order issued by the Central Government is evident when the two are placed in juxtaposition. There is no gainsaid that such a conflict shall have to be resolved in favour of the statute on first principles of interpretation but the continuance of the statutory notification in its present form is bound to create confusion in the minds of the authorities concerned instead of helping them in the discharge of their duties. The Central Government would, therefore, do well, to re-examine the matter and take suitable steps in the above direction.

19. Mr Sinha, learned Amicus Curiae, argues that if an amendment of the Act stipulating that the samples be taken at the time of seizure is not possible, the least that ought to be done is to make it obligatory for the officer conducting the seizure to apply to the Magistrate for drawing of samples and certification, etc. without any loss of time. The officer conducting the seizure is also obliged



to report the act of seizure and the making of the application to the superior officer in writing so that there is a certain amount of accountability in the entire exercise, which as at present gets neglected for a variety of reasons. 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. After having enunciated the law on the point of requirement under Section-52A(2) of the Act, the Supreme Court in no uncertain terms laid down in paragraph no. 31.1 that *no sooner the seizure of any narcotic drugs and psychotropic and controlled substances and conveyances is effected, the same shall be forwarded to the officer in charge of the nearest police station or to the officer empowered under Section 53 of the Act.*



*The officer concerned shall then approach the Magistrate with an application under Section 52A(2) of the Act, which shall be allowed by the Magistrate as soon as may be required under sub-section (3) of Section 52A, as discussed by the Court in the body of this judgment under the heading “seizure and sampling”. The sampling shall be done under the supervision of the Magistrate as laid down in Paras 15 to 19 of this order. The decision in the case of **Mohanlal (supra)** was rendered by the Supreme Court on 28.01.2016.*

14. In the present case, according to the prosecution, the seizure was made on 24.12.2018, nearly three years after the decision in the case of **Mohanlal (supra)** was rendered. We express our displeasure over the failure on the part of the DRI officials to strictly follow the law as laid down by the Supreme Court in the case of **Mohanlal (supra)**. The Supreme Court has repeatedly held in various pronouncements that the provisions of NDPS Act being stringent in nature, strict compliance of the statutory safeguards provided under the Act must essentially be ensured. We are not satisfied with the submissions advanced on behalf of the DRI that in this case Section-43 of the Act was applicable, the truck having been intercepted in a public place and the prosecution was not required to follow the provision



under Section 42 of the Act. As is manifest from the language used in the said provision, the said provision applies when the search is to be effected on a public conveyance accessible to the public. The explanation to Section-43 of the Act defines public place as under:-

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

15. It is not the case of the prosecution that the truck which was intercepted was accessible for use by the public in general. In our opinion, the first safeguard under section-42 of the Act is that an officer must have ‘reason to believe’ which he should reduce in writing, before causing a search. Reason to believe is different from mere ‘reason to suspect’ as opined by the Supreme Court in the case of *Tofan singh Vs. State of Tamil Nadu* reported in *(2021) 4 SCC 1*. The Supreme Court in the said case has reiterated that it is for the said reason that the officer must make an inquiry regarding the contravention of the provisions of the Act for otherwise, even without such inquiry, mere suspicion of the commission of an offence would be enough. It is in this enquiry that he has to call for “information” under sub-clause(a) of Section 67, which ‘information’ can be given by any person and take down in writing, as is provided in



Section-42(1). Further, the information given must be for the purpose of “satisfying” himself that there has been a contravention of the provisions of the Act, which again goes back to the expression “reason to believe” under section-42 of the Act.

16. In the present case, we find that no ‘reason to believe’ taken down in writing as contemplated under Section-42(1) of the Act has been brought on record. Further, the search was conducted after sunset without following the mandatory requirement under second *proviso* of Section 42(1) of the Act i.e. recording of the grounds of his belief that a search warrant or authorisation could not be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender. We are thus of the view that there has been non compliance of the requirements under Section-42 of the Act.

17. As regards, the evidentiary value of the confessional statements said to have been made by these appellants and recorded by PW-1, the law in that regard is settled conclusively with the Supreme Court’s decision in the case of ***Tofan Singh (supra)***. The Supreme Court in no uncertain terms has answered the questions of admissibility of the confessional statement



recorded by the officer under Section-67 of the Act, wherein, it has been held in paragraph no. 158.1, as under:-

“158.1. That the officers who are invested with powers under Section 53 of the NDPS Act are “police officers” within the meaning of Section 25 of the Evidence Act, as a result of which any confessional statement made to them would be barred under the provisions of Section 25 of the Evidence Act, and cannot be taken into account in order to convict an accused under the NDPS Act.”

18. The Supreme Court has conclusively held that the officers invested with the powers under Section-53 of the NDPS Act are Police Officers within the meaning of Section-25 of the Evidence Act and therefore, any confessional statement made to them, would be barred under the provisions of Section 25 of the Evidence Act and cannot be taken into account, for conviction of the offences under the provisions of the Act.

19. For the aforesaid reason and in view of the fact that no seizure list witness has been examined and the prosecution’s case is based on the evidence of only two official witnesses, we do not find it safe to uphold the conviction of these appellants recorded by the trial court.

20. The appellants, in our considered opinion, deserve to be acquitted of the charge of the offence punishable under Section- 20(b)(ii)(C) of the Act by giving them benefit of doubt.

21. Accordingly, the impugned judgment of conviction



dated 17.05.2022 and order of sentence dated 19.05.2022 passed by the learned Sessions Judge, Muzaffarpur in DRI Case No. 07 of 2018 arising out of NDPS Case No. 42 of 2018, is set aside.

22. These appeals are allowed.

23. The appellants are in custody. Let them be released from the jail forthwith, if not required in any other case.

(Chakradhari Sharan Singh, J)

(Nawneet Kumar Pandey, J)

ranjan/-

AFR/NAFR	NAFR
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