

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.172 of 2018

Arising Out of PS. Case No.-22 Year-2015 Thana- BOCHAHAN District- Muzaffarpur

1. Nashima and Anr Wife of Md. Alam, Resident of Village- Baretha Khijarpur, P.S.- Mahanther, District- Muradabad, Uttar Pradesh.
2. Shama, Wife of Md. Meenjar, Resident of Village- Lalbara, P.S.- Shabaj, District- Rampur, Uttar Pradesh.

... .. Appellant/s

Versus

The State of Bihar

.. ... Respondent/s

Appearance :

For the Appellant/s	:	Mr. Ajay Kumar Thakur, Advocate
	:	Mr. Inteyar Ahmad, Advocate
	:	Mr. Ritwik Thakur, Advocate
	:	Mrs. Vaishnavi Singh, Advocate
	:	Mr. Udbahv Singh, Advocate
	:	Mr. Ansul, Advocate
For the Respondent/s	:	Mr. Ashwani Kumar Sinha, Advocate
For the State	:	Mr. Abhimanyu Sharma, APP

CORAM: HONOURABLE MR. JUSTICE A. M. BADAR
and
HONOURABLE MR. JUSTICE CHANDRA SHEKHAR JHA

CAV JUDGMENT

(Per: HONOURABLE MR. JUSTICE CHANDRA SHEKHAR JHA)

Date : 28.03.2023

Heard learned counsel appearing for the appellants
as well as learned APP for the State.

2. The present appeal preferred by both above named appellants/convicts challenging the judgment of conviction dated 09.01.2018 and order for sentence dated 15.01.2018 passed in Session Trial arises out of Bochhahan P. S. Case No. 22/15, whereby and whereunder learned Additional Sessions Judge, 8th, Muzaffarpur convicted the appellants under Sections



20(b)(ii)(c) and 29 of N.D.P.S. Act and has sentenced them to undergo rigorous imprisonment for 16 years with fine of Rs. 2 lakhs each and in failure to pay fine appellants/convicts to undergo additional sentence of two years of imprisonment.

3. As per summarised case of prosecution, a secret information was received by Shambhu Kumar, S.H.O. Bochhahan (PW -10) on 09.02.2015 at about 4:20 AM, that two trucks bearing Nos. JH 09C/6077 and HR 55M/1312 are going towards Muzaffarpur crossing Darbhanga, where each of trucks are loaded with “Ganja” having one female alongwith two children sitting inside. The said secret information was immediately given to area Magistrate i.e., Block Development Officer, Bochhahan (PW-11) with a request to join at police station from where informant (PW-10) alongwith area Magistrate (PW-11), A.S.I. Angad Tiwari (PW-5), A.S.I. Jitendra Singh (PW-6), ladies constable no. 1168 Meena Devi (not examined), Armed Police (S.A.F.) No. 7970 namely, Sundar Bhagwan Singh (PW-3), SAF Police Force No. 4453 Girdhari Gujar (PW-4) and SAF Police Force No. 333 Ajay Shankar Sharma (PW-2) proceeded to verify the said secret input at about 4:30 AM from police station. While aforesaid team arrived at Majhauri Chowk



about hundred yards east of NH 57, the driver of both vehicles by taking benefit of darkness and fog run away, leaving their trucks on spot, where, two females alongwith four children found sitting inside the trucks, who disclosed their names before area Magistrate as Nashima, aged about 30 years, wife of Md. Alam resident of Baretha Khijarpur, P.S. Manather, District- Muradabad, Uttar Pradesh and secondly, Shama, aged about 25 years wife of Md. Meenjar, village- Lalbara, P.S.- Shabaj, District- Rampur, Uttar Pradesh. Both ladies (appellants/convicts) were asked by Area Magistrate (PW-11) to disclose the name of materials giving scent as “Ganja”, but as they remain mum, it was ordered to check the vehicle, where substances appearing like “Ganja” recovered in several packets. The seizure list of said seized “Ganja” like substance was prepared in presence of Block Development Officer (PW- 11). As per seizure, 56 packets wrapped in blue colour plastic bundles were recovered from vehicle no. JH 09C/6077, whereas 31 packets wrapping in black colour plastic and 3 packets wrapped in green plastic were recovered from vehicle No. HR 55M/1312. Subsequent to seizure, Block Development Officer (PW-11) asked to appellants/convicts to produce relevant documents, where upon non-production of documents, as asked



for, both appellants/convicts were taken into custody.

4. Upon direction of Block Development Officer (PW-11), the present case was registered under Sections 20(b)(ii)(c)/22/29 of N.D.P.S. Act and 120B/34 of Indian Penal Code against both appellants/convicts and the drivers of both vehicles, who were run away, leaving the trucks on spot.

5. After investigation, charge-sheet was submitted against appellants/convicts, where the charges were framed by learned Trial Court on 06.04.2016 under Section 20(b)(ii)(c)/22/29 and 120B/34 of Indian Penal Code against both appellants/convicts, where both appellants/convicts pleaded “not guilty” and claimed trial, leading their conviction u/s 20(b)(ii)(c)/22/29 of Indian Penal Code for sixteen years with fine of Rs. 2 lakhs. Appellants/convicts were acquitted for the charges as framed u/s 120(B) and 34 of Indian Penal Code.

6. Hence, the present appeal.

7. To establish its case before the learned Trial Court, prosecutions altogether examined total of 11 witnesses, namely, PW 1- Jitendra Kumar, PW 2- Abhay Shankar Sharma, PW 3- Sundar Bhagwan Singh, PW 4- Girdhari Gurjar, PW 5- Angad Tiwary, PW 6 – Jitendra Kumar Singh, PW 7- Siyaram Singh (Investigating Officer), PW 8- Devendra Sahni, PW 9- Deepak



Kumar, PW 10 – Shambhu Kumar Bhagat (Informant) and PW 11- Raviranjan Kumar Bhagat (Area Magistrate, BDO Bochhahan).

8. The prosecutions also exhibited the following documents during the trial which are as:

1. Exhibit 1- Statement

2. Exhibit 2, 2/1, 2/3 - Signature of Seizure list witnesses

3. Exhibit 3 - Signature of Shambhu Kumar Bhagat, S.H.O., Bochhahan P.S. on the formal F.I.R.

4. Exhibit 4, 4/1 - Signature of Siya Ram Singh, A.S.I., on the application dated 01.04.2015 addressed to the District and Sessions Judge seeking permission to send contraband to FSL

5. Exhibit 5, 5/1 - Forwarding of Special Judge, Muzaffarpur

6. Exhibit 6 - Test Report

7. Exhibit 7 - Forensic Report

9. During the course of trial, five witnesses were also examined in defense as:



1. DW 1 - Ajeet Kumar

2. DW 2 - Md. Ateek

3. DW 3 - Md. Shamshul

4. DW 4 - Md. Azaad

5. DW 5 - Vipin Kumar

10. PW-1, Jitendra Kumar, who is working as an electrician claimed to be acquainted with the writing of Shambhu Kumar Bhagat (PW-10), who is the informant of this case. He identified hand written complaint, signature and short signature of PW-10, which were exhibited before the learned Trial Court as Exhibit 1, 2 and 3 respectively. He categorically submitted that he never worked with PW-10 and has no personal knowledge regarding contents of the written complaint. He also shows his complete ignorance about seizure.

11. PW-2 is Abhay Shankar Sharma, PW-3 is Sundar Bhagwan Singh and PW-4, namely, Girdhari Gurjar all were the member of patrolling team. It is deposed by PW-2 that he alongwith other prosecution witnesses, while on patrolling duty and moving towards Dharbhanga found that one truck appears collided back to back, giving an impression of accident, where taking occurrence as an accident, PW-6 being driver of patrolling vehicle went up to trucks and found 2-3 packets lying



below one truck and 10-15 packets lying below another truck. He clearly refused to identify anyone. During cross-examinations, PW-2 stated that packets were torn by people and it was containing of “Ganja” and affirmed the version of prosecution that recovery was made from both the trucks, PW-3, namely, Sundar Bhagwan Singh stated that occurrence is of 15th January, he stated to locate container and driver while he was on patrolling duty and also stated that first of all PW-6 visited the place of occurrence and subsequently, they went there and found packets, where he came to know later that it was containing “Ganja”, he refused to see anything more as he stated, in cross examination, it was stated by him that truck container was open.

12. PW-4 is Girdhari Gurjar, who stated that occurrence is of 22nd day of month (without disclosing the name of month). He also stated that they were on patrolling duty alongwith PW-6 and other police persons. He stated that there was a container and one truck with packets of “Ganja” alongwith two ladies and children, he failed to identify the ladies (appellants/convicts) before the learned Court. In cross examination, he stated that he was informed that container was containing of “Ganja”.



13. PW-5 is Angad Tiwari, who deposed that occurrence is of February, 2015. It is deposed by him that time was 11 PM and the container was loaded with “Ganja” which was in process of unloading. He also deposed that two ladies alongwith four children were found inside the vehicle. It is also deposed by him that seizure of “Ganja” was prepared which was total of 5.6 quintals. It is also deposed that the witnesses signed the seizure list on spot and the seized “Ganja” were found in green and black packets. He identified appellants/convicts before the learned Trial Court. On cross examination, he deposed that no TIP was conducted and he is also not remembering the number of container or any vehicles. He also failed to depose that who were involved in loading and unloading. It is also deposed that during search and seizure, several people of nearby localities arrived at the place of occurrence and further he is unable to produce the relevant papers related with raid, before learned Trial Court.

14. PW-6 is Jitendra Kumar Singh, who deposed that occurrence took place in early morning of 9th of February, 2015 at about 04:00 AM, where he failed to depose the name of B.D.O. Bochhahan (PW-11) but said that he was accompanied with S.H.O. Shambhu Prasad (PW-10), A.S.I. Angad Tiwari



(PW-5) and ladies constable Meena Devi (not examined). He deposed that as they arrived close to Majhauili Chowk, they found that one truck having big closed container with open gate was found standing very close to one big size truck in back to back position. He also deposed that the “packet of 10 Kg” was in loading process with container, where the “Ganja” was of 90 packets. He also affirmed the presence of two ladies and children inside the container but failed to depose about exact number of children as whether they were two or three. He also deposed that one of the ladies disclosed her name as Nashima (applicant/convict) whereas another disclosed her name as Shama (applicant/convict) but failed to recollect the name of public witnesses. It further appears from his depositions that the container was searched in his presence, where after opening the packet of “Ganja” seizure list was prepared by S.H.O. (PW-10) and B.D.O. (PW-11). He further deposed that both trucks, ladies and children were brought to police station alongwith seized “Ganja”. He identified both appellants/convicts before the learned Trial Court. On cross examination, he deposed that he was the member of raiding team and not participated in investigation. He also stated that he has no idea about TIP. He also failed to depose the registration no. of truck and container.



He failed to produce documentary evidence suggesting that he was the member of raiding team.

15. PW-7 is Siyaram Singh, who is an investigating officer of this case and recorded restatement of informant (PW-10), B.D.O. (Area Magistrate, PW-11), A.S.I. Angad Tiwari (PW-5), A.S.I. Jitendra Singh (PW-6), three S.A.Fs. constables, namely, Sundar Bhagwan Singh (PW-3), Girdhari Gujar (PW-4) and Ajay Shankar Sharma (PW-2) and Meena Kumari (not-examined). He stated further that the statement of appellants/convicts, namely, Nashima and Shama was obtained after being allured them. He also recorded the statement of seizure list witnesses, namely, Devendra Shahni (PW-8) and Deepak Kumar (PW-9). It is also deposed by him that seized 90 packets containing 9 quintals of “Ganja” was produced before the Court and thereafter, all those packets were taken back to police station. It is further stated that sample taken as report 1, 2 and 3 were sent for forensic science laboratory, Patna and Customs House, Kolkata for examinations. He also stated that the number of two trucks were HR 55M/1312 and JH 9C6077. He also identified his signature on application given to Sessions Judge for sample examinations which were identified before the learned Trial Court and



exhibited as **Exhibit 4** and **4/1**. He further identified his hand writing contents and signature over sample which were sent to Patna and Kolkata and same were exhibited as **Exhibit 5** and **5/1** before learned Trial Court and also identified test memo suggesting that all nine quintals “Ganja” was brought before the learned Trial Court which were exhibited as **Exhibit 6** before the learned Trial Court. On cross-examination, he deposed that the statement of appellants/convicts was recorded in defense and was not in nature of confessional statement. He was again recalled for cross examination on 03.11.2016 where he stated that he was not the part of raiding team and nothing was recovered before him. He deposed that at first glance he saw the seized item at police station and thereafter at the place of occurrence. He also deposed that some of packets were in torn condition and found open but detailed of the same was not recorded. It is also stated that the packets were of green and black colour. It is also deposed that sample was sent after 15-20 days of recovery which was weighing about 30 grams, where no forensic report was received by him before submitting the chargesheet and as seized substance scented as “Ganja”, assuming that same is “Ganja” charge-sheet was submitted.

16. PW-8, namely, Devendra Shahni and PW-9,



namely Deepak Kumar, both are seizure list witnesses who were identified their signature over seizure list which were exhibited as **Exhibit No. 2/1** and **2/2** before learned Trial Court and on cross-examination, they categorically stated that incharge police station/Daroga obtained his signature on plain paper at police station in early morning about 7-8 AM. It is also categorically deposed that no material was seized before them.

17. PW-10 is informant of this case, namely Shambhu Kumar Bhagat who stated before the learned Trial Court that occurrence is of 09.02.2015 and time was about 4 AM, when on receiving the secret information, he informed the B.D.O. Bochhahan (PW-11) and seized 56 packets of blue colour packets from a truck having registration no. of Jharkhand and also found one lady alongwith two children. He also deposed to recovery of 31 bundle packets of green colour from a truck bearing registration no. of Haryana State. He also stated that on the direction of B.D.O. (PW-11) both vehicles were searched, where, "Ganja" like substance was recovered. It is also stated that both ladies were arrested by following the rules, and also identified his signature on seizure list, which is already exhibited as **Exhibit No. 2**. He also identified the signature of B.D.O. (PW-11), which is already exhibited as **Exhibit 2/3**. He



also identified his hand writing and signature of written complaint, which also found exhibited as **Exhibit No. 1**. He also affirmed his signature over formal F.I.R. On cross examination, he stated that information was given to D.S.P. and S.S.P. of the area but no one arrived at the place of occurrence. It is stated that the B.D.O. (PW-11) arrived on the direction of S.S.P. It is also stated that trucks were in standing conditions and was not stopped by them. He also deposed that witnesses were called from nearby locality.

18. PW-11 is the B.D.O., namely Ravi Ranjan, who is the Area Magistrate deposed before the learned Trial Court that on information received from PW-10, namely, Shambhu Bhagat, who is the informant of this case, he arrived at place of occurrence in early morning of 09.02.2015 at about 4:30 AM. He clearly stated that two trucks were standing very close by their back to back having also of two ladies and four children. It is stated by him that the packet was secretly kept inside the truck in plastic packets which were seized and brought to police station. He also failed to depose the name of appellants/convicts. He affirmed that seizure list prepared on spot and also identified his signature on the seizure list, which is already exhibited before the learned Trial Court as **Exhibit No.**



2/3, the weight of seized packets was done at police station which was found as more than 9 quintals. On cross-examination, he deposed that he never made any statement before the police and not recorded any statement of appellants/convicts. He also deposed that save and except putting his signature on seizure list, he did nothing.

19. After closure of the prosecution case, the statement of appellants/convicts were recorded under Section 313 of the Code of Criminal Procedure, where they claimed complete innocence by denying all incriminating circumstances put before them.

20. The defense adduced total of five witnesses in support of their innocence, where all witnesses starting from DW-1 to DW-5 deposed suggesting the innocence of appellants/convicts and stated that both appellants/convicts took a lift from the driver of trucks alongwith their children for Muzaffarpur, as they failed to get a bus for Muzaffarpur from Darbhanga bus stand.

21. After the closure of prosecution and defense evidence, argument was heard as advanced on behalf of the appellants by learned Trial Court, where vide impugned judgment dated 09.01.2018 both the appellants were held guilty



for the offense punishable under Section 20(b)(ii)(c) and 29 of N.D.P.S. Act, consequently, both of them were sentenced vide impugned order dated 15.01.2018, for 16 years rigorous imprisonment and fine of Rs. 2 Lakhs.

22. The learned counsel Mr. Ajay Thakur while assailing the impugned judgment of conviction which is the subject matter of present appeal submitted that seized articles have not been produced during trial and no any explanation has been furnished by the prosecution for non production of same during the trial. In support of his submissions, he relied upon the report of Hon. Supreme Court as reported in the matter of **Vijay Jain vs. State of M.P. (2013) 14 SCC 527**. It is also submitted that both seizure list witnesses i.e., PW-8 and PW-9 categorically submitted that nothing was seized before them and their signatures were obtained on plain paper that too, in early morning at about 7-8 AM much after the seizure. It is further submitted that though these witnesses were not declared hostile by the learned Trial Court but it is very apparent from their depositions (PW-8 and PW-9) that nothing as alleged by the prosecutions was seized before them and in support of submissions he relied upon the report of Hon. Supreme Court as reported in the matter of **Gorakhnath Prasad vs. State of**



Bihar (2018) 2SCC 305. The learned counsel also relied upon the report of **Amirul Rahman vs. Union of India Cr. Appeal No. 1945/22 (SLP Cr. No. 8086/21) disposed of on 10.11.2022.**

It is also submitted by Mr. Thakur that the information received by informant was never reduced in writing and it was not immediately transmitted to superior officer, within 48 hours next after arrest or seizure. It is also submitted that compliance of Section 42, 52A and 57 of N.D.P.S. Act appears not to be followed in present case, benefit of which must go with appellants/convicts. In support of submissions, the learned counsel place a reliance on the report of Hon. Supreme Court as reported in the matter of **Karnal Singh vs. State of Haryana (2009) 8 SCC 539.** While concluding the argument, it is submitted by Mr. Thakur that from the perusal of deposition of PW-1, PW-2, PW-3 and PW-10, it appears that their statement is not even in consistent with time and date of occurrence. It is also submitted that the seized packets were found in torn condition. Learned counsel also submitted that the compliance of standing “order 1 of 88” issued by Narcotic Control Bureau was also not followed in present case and on this ground alone the appellants/convicts may be acquitted, where reliance was made upon the report of Hon. Supreme Court reported as **U.P.**



vs. Hansraj (2018) 18 SCC 355.

23. Per contra, Mr. Abhimanyu Sharma, learned Additional Public Prosecutor appearing for State contended that the witnesses examined during the trial are consistent. It is submitted that informant (PW-10) has fully corroborated the prosecution case as narrated in the F.I.R. during the trial. It is submitted that the “Ganja” was seized at the place of occurrence and minor contradictions, if any, appears in the evidence of the witnesses, same are not so vital, on the basis of which conviction of appellants be looked with tented glass.

24. Taking note of the submission of learned APP as made above, Mr. Thakur, learned counsel appearing on behalf of the appellants/convicts further submitted that no evidence adduced during the trial that seized contraband was ever kept in *Malkhana*, rather it was kept in police station. He argued that the contradictions amongst deposition of witnesses cannot be said minor, as even the parties of raiding team are not appears consistent regarding quantity of “Ganja”, its seizure and sampling.

25. Upon hearing the learned counsel for the respective parties and perusal of the records, we find forces in the argument as raised on behalf of the appellants/convicts as it



is clearly appearing from the deposition of PW-7, namely, Siya Ram Singh, who is the investigating officer of this case that the packet containing contraband was taken back to police station, it not appears from his examination that it was ever produced before the learned Trial Court during the course of trial. It also appears that the sample was sent with delay of 15-20 days for its forensic examination.

26. This Court, while dealing on the subject of non-production of seized contraband before the learned Trial Court would like to reproduce the relevant Paragraph of Judgment of **Vijay Jain Case (Supra)**, for better appreciation and understanding of present case, where ratio of **Jitendra v. State of M.P.**, reported in **(2004)10 SCC 562** and of **Ashok v. State of M.P.**, reported in **(2011) 5 SCC 123** were also taken into consideration.

Para-10 of the judgment speaks as:-

10. On the other hand, on a reading of this Court's judgment in Jitendra case, we find that this Court has taken a view that in the trial for an offence under the NDPS Act, it was necessary for the prosecution to establish by



*cogent evidence that the alleged quantities of the contraband goods were seized from the possession of the accused and the best evidence to prove this fact is to produce during the trial, the seized materials as material objects and where the contraband materials alleged to have been seized are not produced and there is no explanation for the failure to produce the contraband materials by the prosecution, mere oral evidence that the materials were seized from the accused would not be sufficient to make out an offence under the NDPS Act particularly when the panch witnesses have turned hostile. Again, in **Ashok** this Court found that the alleged narcotic powder seized from the possession of the accused was not produced before the trial Court as material exhibit and there was no*



explanation for its non-production and this Court held that there was therefore no evidence to connect the forensic report with the substance that was seized from the possession of the appellant.

27. Coming to the next submission made on behalf of the appellant regarding the illegality of the sampling of the seized contraband, it is manifest from the evidence that the representative samples were not drawn from the seized substance and sent to the expert in the designated laboratory for chemical analysis and report in accordance with law. It would also be evident from the evidence that the seized substance and the samples were not handled properly in the prescribed manner.

28. Standing Instruction “No. 1 of 1988” dated 15.03.1988 of Narcotics Control Bureau, Government of India issued under Section 52 of the N.D.P.S. Act prescribes the detailed procedure for sampling, sealing and despatching the seized sample to the laboratory for test. Clauses 1.4, 1.5, 1.6 and 1.9 of the Standing Instruction No. 1 of 1988 dated 15.03.1998 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 numbers should be assigned to each package/ container. Besides the serial numbers, the gross and net weight, particular of the drug and the date of seizure should invariably 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 panch nama 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.

1.9 *It needs no emphasis that all samples must be drawn and sealed; in the presence of the accused, Panchnama witnesses and seizing officer and all of them shall be required to put their signatures on each sample. The official seal of the seizing officer should also be af-*



fixed. If the person, from whose custody the drugs have been recovered, wants to put his own seal on the sample, the same may be allowed on both the original and the duplicate of each of the samples.”

29. The question as to whether or not the compliance of the guidelines issued by Standing Instruction No. 1 of 1988 would vitiate the trial was considered by the Hon’ble Supreme Court in **Khet Singh Vs. Union of India** since reported in **AIR 2002 SCC 1450**, **Noor Aga Vs. State of Punjab** since reported in **(2008) 16 SCC 417** and **Union of India Vs. Balmukund and others** since reported in **2012 (9) SCC 161**.

30. In **Khet Singh (supra)** after examining the said issue the Hon’ble Supreme Court held in para 10 as under:

“10. The instructions issued by the Narcotics Control Bureau, New Delhi are to be followed by the officer in-charge of the investigation of the crimes coming within the purview of the NDPS Act, even though these instructions do not have the force of law. They are intended to guide the officers and to see that a fair procedure is adopted



by the officer in-charge of the investigation.....”

31. In Noor Aga (*supra*) after giving thoughtful consideration to the guidelines issued under the N.D.P.S. Act in the Standing Order the Hon’ble Supreme Court observed in paras 89 to 91 as under:

“89. Guidelines issued should not only be substantially complied, 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 & Ors. v. Kurian Abraham (P) Ltd. & Anr. [(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 of 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.”

32. In Union of India versus Balmukund (*supra*),
the Hon’ble Supreme Court observed in para 36 as under:

“36. There is another aspect of the matter which cannot also be lost sight of. Standing Instruction 1/88 which has been issued under



the Act, lays down the procedure of taking samples. The High Court has noticed that P.W.7 had taken samples of 25 gm each from all the five bags and then mixed them and then sent to the laboratory. There is nothing to show that adequate quantity from each bag had been taken. It was a requirement of law.”

33. One of the most important provision i.e. Section 52-A of the N.D.P.S. Act has been made for the disposal of the seized Narcotic Drugs and Psychotropic Substances. The said provision requires preparation of an inventory of the seized property in presence of the Magistrate after taking photographs and certifying such photographs to be true and allowing to draw representative samples of such drugs and substances in the presence of such Magistrate and certifying the correctness of any list of sample so drawn. In case the aforesaid procedure is followed notwithstanding anything contained in the Code of Criminal Procedure, every court trying an offence under the N.D.P.S. Act is required to treat the inventory, the photographs of Narcotic Drugs or Psychotropic Substances and any list of samples drawn and certified by the Magistrate as primary evidence in respect of such offence.



34. In the instant case, it has rightly been pointed out by Mr. Thakur, learned counsel for the appellant that the procedure prescribed under Section 52-A of the N.D.P.S. Act has not been followed.

35. In absence of the proof regarding disposal of the contraband in accordance with law, the prosecution was required to produce the contraband before the court. However, the seized contraband was never produced before the court during trial. In absence of any evidence relating to disposal of the seized property and the production of the seized property in the court, it cannot be held that any seizure of contraband was made from the possession of the appellant.

36. In this regard, the appellant has rightly placed his reliance on the judgment of the Hon'ble Supreme Court in **Jitendra and Another Vs. State of M.P.** reported in (2004) 10 SCC 562. In the said case, in paragraph '6', the Hon'ble Supreme Court held as under:-

“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 ac-



cused. 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.”

37. Similarly in **Vijay Jain (supra)**, the Hon’ble Supreme Court in para ‘12’ held as under:-

“12. We are thus of the view that as the prosecution has not produced the brown sugar before the Court and has also not offered any explanation for non-production of the brown sugar alleged to have been seized from the appellants and as the evidence of the witnesses (PW 2 and PW 3) to the seizure of the materials does not establish the seizure of the brown sugar from the possession of the appellants, the judgment of the trial court convicting the appellants and the judgment of the High court maintaining the conviction are not sustainable.”

38. Before we conclude, we must record our dis-



pleasure regarding the manner in which the trial court recorded the statement of the appellant under Section 313 of the Code of Criminal Procedure. The only question asked from the appellant was as under:-

Q.1 Whether you heard the witnesses.

Ans- Yes

Q.2 "There is evidence against you that on 4th of February, 2015 at about 4.00 A.M. 90 packets weighing 900 Kg Ganja were recovered from a truck in which you found sitting at village- Majhauri Chawk, NH-57, Distt- Muzaffarpur, what you have to say.

Ans- No.

Q.3 Anything in defence.

Ans- I am innocent.

39. It is well settled that the object of Section 313 of Code of Criminal Procedure is to enable the accused to explain the circumstances against him in evidence so that he may submit his explanation to those circumstances personally as also his stand with regard the circumstances in evidence which have been collected against him and has come on record during trial. If the questions on incriminating circumstances have been ig-



nored by the trial court then it is an illegality which amounts to an abuse of the process of the court. The question under Section 313 of the Code of Criminal Procedure should not be treated as an empty formality as it is an important facet of the trial.

40. In the present case, the appellants were never informed the following incriminating circumstances by the trial court: (a) that a seizure memo of the contraband recovered was prepared; (b) that the seized packets were produced before the Police Station at Bochhahan; (c) that the articles recovered were kept in the almirah of the Police Station; (d) that a sample of contraband was drawn; (e) that the sample was sealed; (f) that the sample was sent to the FSL for test; and, (g) that the FSL report shows that the substance sent to the FSL was found to be Ganja.

41. Thus, it would be evident that the appellants were never informed of the circumstances appearing against them during trial. They did not have any chance to explain them.

42. We are of the considered view that these circumstances which were not put to the appellant during trial could not have been used against him for conviction and sentence.

43. Based on the aforesaid analysis of the evidence



and law, we are of the view that the entire investigation of the case was perfunctory. The defects in investigation are substantial and go to the root of the identity of the alleged contraband Ganja alleged to be recovered from the possession of the appellant. The glaring lapses on the part of the prosecution during investigation would certainly affect the credibility of the prosecution case. The case of the prosecution is based only on the oral testimony of official witnesses with the arrest of the appellant. The evidence adduced during trial does not inspire confidence as PW-10, Shambhu Kumar Bhagat, who is the informant of this case and who had seized the contraband alongwith PW-11, Ravi Ranjan contradicted the quantity of recovered Ganja, where PW-11 categorically stated in his cross-examination that except putting signature on seizure list he did nothing, moreover PW-8, Devendra Shahni and PW-9, Deepak Kumar, who are seizure list witnesses did not support recovery of Ganja before them and stated that their signature was obtained on plain paper. The evidence on behalf of the prosecution does not inspire confidence also because of the several discrepancies highlighted hereinabove in our discussion.

44. All these factors lead us to believe that the prosecution had failed to prove its case beyond all reasonable



doubts against the appellants/convicts.

45. Accordingly, the present appeal is allowed.

46.The impugned judgment of conviction dated 09.01.2018 and the consequent order for sentence dated 15.01.2018 passed by the learned Additional Sessions Judge, 8th , Muzaffarpur in connection with Bochhahan P.S. Case No. 22/15 are set aside. The appellants/convicts are acquitted of the charges levelled against them. They are directed to be set at liberty forthwith unless their detentions are required in any other case.

(A. M. Badar, J)

(Chandra Shekhar Jha, J)

Archana/-

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Transmission Date	

