

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.1023 of 2018

Arising Out of PS. Case No.-89 Year-2016 Thana- MADANPUR District- Aurangabad

Kamaljit Mohanty @ Kamaljeet Mohanti, S/o Ram Krishna Mohanti @
Ramkrushna Mohanty, R/o MIG- 11/314, Phase-2, Kaling Bihar, Chhend
Colony, Rourkela, P.S.- Rourkela, District- Sundar Garh (Odisha).

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

with

CRIMINAL APPEAL (DB) No. 924 of 2023

Arising Out of PS. Case No.-89 Year-2016 Thana- MADANPUR District- Aurangabad

Santosh Kumar Jena @ Santosh Kumar Jaina, Son of Lambu Jena, Resident
and P.S. - Brahampur, Distt. - Gankam (Orissa), presently residing at Sector
15 Jhopadi, P.S. - Sector 15, Rawarkela, Orissa

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

Appearance :

(In CRIMINAL APPEAL (DB) No. 1023 of 2018)

For the Appellant/s : Mr. Ajay Kumar Thakur, Advocate
Mrs. Kiran Kumari, Advocate
Mr. Md. Imteyaz Ahmad, Advocate
Mr. Ritwik Thakur, Advocate
Mrs. Vaishnavi Singh, Advocate

For the Respondent/s : Mr. Abhimanyu Sharma, APP

(In CRIMINAL APPEAL (DB) No. 924 of 2023)

For the Appellant/s : Mr. Raj Kishore Prasad, Advocate
Mr. Nand Lal Prasad, Advocate

For the Respondent/s : Mr. Parmeshwar Mehta, APP

CORAM: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH

and

HONOURABLE MR. JUSTICE NAWNEET KUMAR

PANDEY

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH)

Date : 19-09-2023



These appeals have been preferred by the appellants under Section 374(2) of the Code of Criminal Procedure, putting to challenge a judgment of conviction dated 14.06.2018 and an order of sentence dated 20.06.2018, passed by the learned 1st Additional Sessions Judge- cum- Special Judge, NDPS Act, Aurangabad in GR No. 07/2016/ 11/2016, arising out of Madanpur P.S. Case No. 89 of 2016, whereby the appellants have been convicted and sentenced as under:-

Criminal Appeal (DB) No. 1023 of 2018				
Appellant	Penal Provision	Sentence		
		Imprisonment	Fine (Rs.)	In default of fine
Kamaljit Mohanty @ Kamaljeet Mohanti	20 of the NDPS Act	R.I. for 14 years	1,25,000/-	S.I. for one year
Criminal Appeal (DB) No. 924 of 2023				
Appellant	Penal Provision	Sentence		
		Imprisonment	Fine (Rs.)	In default of fine
Santosh Kumar Jena @ Santosh Kumar Jaina	20 of the NDPS Act	R.I. for 14 years	1,25,000/-	S.I. for one year

2. At the outset, we must place it on record that Criminal Appeal (DB) No. 1023 of 2018 was taken up for final hearing on 18.09.2023 and only when the hearing had almost concluded, it could be learnt by this Bench that co-convict Santosh Kumar Jena @ Santosh Kumar Jaina has preferred Criminal Appeal (DB) No. 924 of 2023 nearly five years after his



conviction. The appeal was lying defective. It transpired during the hearing of Criminal Appeal (DB) No. 1023 of 2018 that the case of appellant Santosh Kumar Jena @ Santosh Kumar Jaina is identical with that of appellant Kamaljit Mohanty @ Kamaljeet Mohanti of Criminal Appeal (DB) No. 1023 of 2018. In such background, when Criminal Appeal (DB) No. 924 of 2023 was listed with defect(s) on the point of limitation, the Court deemed it proper in the interest of justice to condone the delay, admit the said appeal and hear the same today itself with Criminal Appeal (DB) No. 1023 of 2018. This is the background in which both the appeals have been heard together.

3. One Shyam Kishore Singh, Officer-in-Charge of Madanpur Police Station in the district of Aurangabad is the informant, whose self-statement recorded on 04.07.2016 at 10:00 PM at NH-2, Madanpur (near Khiriyawan More) is the basis for registration of the concerned Madanpur P.S. Case No. 89 of 2016 on 04.07.2016, disclosing commission of the offence punishable under Section 20 of the Narcotic Drugs and Psychotropic Substances Act ("NDPS Act" in short) and Section 47 of the Bihar Prohibition and Excise (Amendment) Act.

4. According to the First Information Report, the informant (PW-5) was on an evening patrolling duty with ASI Jay



Ballabh Verma (PW-6) and other police personnel, namely, constable Jitesh Kumar (PW-2), Ashok Kumar (PW-4), Bipin Kumar (PW-3), Basant Kumar (PW-1) and police driver Satish Kumar Singh (PW-8). During the course of patrolling, he received a secret information to the effect that *ganja* was being transported in a white Indigo vehicle which was likely to come from the direction of Dobhi for illicit trade. They started checking of the vehicles during the course of which, at 9:45 PM, they noticed the vehicle of the aforesaid description coming from the same direction as was informed to the informant, which was intercepted. Two persons, namely, Kamaljit Mohanty and Santosh Kumar Jaina (the appellants) were found occupying the vehicle and on enquiry they disclosed their names and addresses. Two, out of the police personnel who were with the informant, namely, Jitesh Kumar (PW-2) and Ashok Kumar (PW-4), both constables became witnesses, in whose presence the vehicle was searched and personal search of the two appellants was also conducted. From the FIR, it is evident that the place where the vehicle was intercepted, was in front of Madanpur Police Station. The search led to recovery of altogether thirty packets, according to the informant, all of which contained *ganja*. Five kg *ganja* each in 16 packets was found both weighing 80 kg, whereas 2 kg each in the



rest 14 packets was found, with the total quantity of *ganja* said to have been recovered as 108 kg. From the possession of the appellants, mobile phones were also recovered. The appellants, according to the informant, disclosed that the *ganja*, which they were carrying, belonged to Ravi Mishra, Subhash and Suresh who were engaged in illicit trade of *ganja*. It was Subhash who had loaded the *ganja* in the vehicle at Korapur (Orissa) and Ravi Mishra and Suresh Saha had told them that they would be disclosing the identity of the person to whom the *ganja* was to be delivered once they reached Aurangabad. They also disclosed the name of the owner of the vehicle as Rajesh Shetty.

5. With the allegation to the aforesaid effect, the FIR was registered. After completion of investigation, chargesheet was submitted and later, on 16.12.2016 charges were framed against these appellants for commission of the offences punishable under Section 20 of the NDPS Act and Section 47 of the Bihar Prohibition and Excise (Amendment) Act. The appellants denied the charge and claimed to be tried.

6. At the trial, the prosecution examined altogether ten witnesses, seven of whom, including the informant, were the members of the police party which had intercepted the vehicle, searched the vehicle and the appellants and seized the contraband



from the vehicle. One independent witness (PW-7), who ran a shop near the place of interception, did not support the prosecution's case and accordingly he came to be declared hostile at the instance of the prosecution. The Investigating Officer came to be examined as PW-9. PW-10 is a formal witness, who produced the material exhibits at the trial.

7. In addition to the oral evidence of the prosecution's witnesses, the prosecution brought on record following documentary evidence :-

- i. Seizure-list- Exhibit-1
- ii. Confessional statement- Exhibit-2
- iii. Formal FIR- Exhibit-3
- iv. Petition dated 14.09.2016 before the court of learned District and Sessions Judge, Aurangabad seeking permission to send samples of *ganja* to forensic science laboratory- Exhibit-4
- v. Photo copy of letter dated 17.09.2016 addressed to the Director, Forensic Science Laboratory, Patna for scientific examination-Exhibit-5
- vi. Letter dated 17.09.2016 addressed to the Central Chemical Laboratory, Custom House, Kolkata for chemical examination of *ganja*- Exhibit-5/1.
- vii. The report dated 15.11.2016 received from the



Central Chemical Laboratory, Custom House, Kolkata- Exhibit-6.

8. After closure of the prosecution's evidence the appellants were questioned under Section 313 CrPC so as to give them opportunity to explain the incriminating circumstances emerging against them based on the evidence of the prosecution's witnesses. They denied the circumstances.

9. One defence witness, namely, Jalaluddin (DW-1) was also examined at the trial on behalf of the defence.

10. The trial court, after having appreciated the evidence adduced at the trial, reached a conclusion as recorded in the impugned judgment of conviction that the prosecution could not establish the charge of commission of the offence punishable under Section 47 of the Bihar Excise (Amendment) Act and accordingly the appellants stood acquitted of the said charge. The trial court, however, found the charge of commission of offence against this appellants punishable under Section 20 of the NDPS Act to have been successfully established by the prosecution based on the evidence led during the trial.

11. Mr. Ajay Kumar Thakur, learned counsel appearing on behalf of the appellant in Criminal Appeal (DB) No. 1023 of 2018 has submitted that there has been blatant violation of the mandatory statutory requirements under Section 42 of the NDPS



Act in causing search of the vehicle and the so called seizure of *ganja* from the said vehicle. He contends that there is no evidence that the informant had reduced in writing his reasonable belief, after having received the secret information that *ganja* was being transported in the vehicle, as disclosed by him in his self-statement, which is the basis for registration of FIR. He submits that this is a mandatory requirement which the informant did not follow.

12. Secondly, the search was made of a vehicle, which was admittedly not a public conveyance, after sunset and before sunrise. In such situation, the informant was further required to record the grounds of his belief as contemplated in the second *proviso* to Section 42(1) of the NDPS Act.

13. Further, as the informant did not reduce in writing his reason to believe as contemplated under Section 42(1) of the Act nor the grounds as stipulated under the second *proviso* to Section 42(1) of the Act, there was no question of compliance of sub-section (2) of Section 42 of the Act which requires that such information in writing/ grounds of belief should be sent to the immediate official superior within 72 hours. He has submitted that there is no evidence of compliance of sub-section (2) of Section 42 of the NDPS Act. He has also submitted that it appears



from the FIR that the informant had recorded his self-statement at the place of interception itself i.e. at the National Highway, in front of the police station, soon after recovery of the contraband. It is not evident from the FIR as to how could he obtain the weight of *ganja* from each of the 30 packets said to have been recovered and subsequently seized. Further, there is no reason why the members of the police party had become seizure-list witnesses in the absence of any disclosure that despite efforts no independent witness could be traced in whose presence the search and seizure could be made. He has further argued that it is also evident from the FIR that the seized articles were not sealed and samples were not drawn soon after the seizure of contraband. The seizure was made on 04.07.2016 and for the first time on 14.09.2016, the Investigating Officer made an application to the court seeking permission to draw the samples of the seized contraband and for sending the same to the FSL, Patna and CRCL, Kolkata. More than one month thereafter, the sample was sent for forensic examination on 17.10.2016. He has also submitted that the FIR was registered on 04.07.2016 which reached the court on 06.07.2016 without any explanation for delay. It has been argued that drawing of sample was apparently in contravention of the standing order No. 1/1988. He has further



argued that it is peculiar to note from the evidence of the Investigating Officer that entire quantity of *ganja* was sealed in four packets weighing 108 kg but PW-10 produced three packets as material exhibits at the trial which also weighed 108 kg. This very fact creates serious doubt on the prosecution's case of production of *ganja* before the court which, according to the prosecution, was seized from the possession of these appellants.

14. Mr. Raj Kishore Prasad, learned counsel for the appellant in Criminal Appeal (DB) No. 924 of 2023 has adopted the submissions advanced by Mr. Ajay Kumar Thakur in Criminal Appeal (DB) No. 1023 of 2018. He has submitted that case of this appellant is identically situated with the case of appellant of Criminal Appeal (DB) No. 1023 of 2018.

15. Mr. Abhimanyu Sharma, learned Additional Public Prosecutor appearing on behalf of the State has submitted that in the present case, subsequent to seizure of *ganja* from these appellants their confessional statements were recorded by the police during the course of investigation. He contends that merely because the witnesses are police personnel, their depositions may not be completely brushed aside. In the present case, the samples were drawn in the presence of the court, which were sent to FSL, Patna and CRCL, Kolkata. The report received from the CRCL,



Kolkata upon chemical examination establishes that the articles seized from the possession of these appellants were *ganja*. He accordingly, submits that there is no legal infirmity in the findings recorded by the trial court. He has, however, not been able to explain the circumstance in which, after seizure of the contraband, as per the prosecution's case on 04.07.2016, why steps were taken for drawing the samples more than two months thereafter and why the samples were not immediately drawn after the seizure was effected.

16. We have perused the impugned judgment and the order of the trial court as well as the lower court's records. We have given our thoughtful consideration to the rival submissions advanced on behalf of the parties as noted-above.

17. We need to notice at the very outset Section 42 of the NDPS Act, which reads as under :-

"42. Power of entry, search, seizure and arrest without warrant or authorisation.—(1) Any such officer (being an officer superior in rank to a peon, sepoy or constable) of the departments of central excise, narcotics, customs, revenue intelligence or any other department of the Central Government including para-military forces or armed forces as is empowered in this behalf by general or special order by the Central Government, or any such officer (being an officer superior in rank to a peon, sepoy or constable) of the revenue, drugs control, excise, police or any other department of a State Government as is empowered in this behalf by general or special order of the State Government, if he has reason to believe from personal knowledge or information given



by any person and taken down in writing that any narcotic drug, or psychotropic substance, or controlled substance in respect of which an offence punishable under this Act has been committed or any document or other article which may furnish evidence of the commission of such offence or any illegally acquired property or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act is kept or concealed in any building, conveyance or enclosed place, may between sunrise and sunset,—

(a) enter into and search any such building, conveyance or place;

(b) in case of resistance, break open any door and remove any obstacle to such entry;

(c) seize such drug or substance and all materials used in the manufacture thereof and any other article and any animal or conveyance which he has reason to believe to be liable to confiscation under this Act and any document or other article which he has reason to believe may furnish evidence of the commission of any offence punishable under this Act or furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act;

and

(d) detain and search, and, if he thinks proper, arrest any person whom he has reason to believe to have committed any offence punishable under this Act:

1[Provided that in respect of holder of a licence for manufacture of manufactured drugs or psychotropic substances or controlled substances granted under this Act or any rule or order made thereunder, such power shall be exercised by an officer not below the rank of sub-inspector:

Provided further that] if such officer has reason to believe that a search warrant or authorisation cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place at any time between sunset and sunrise after recording the grounds of his belief.



(2) Where an officer takes down any information in writing under sub-section (1) or records grounds for his belief under the proviso thereto, he shall within seventy-two hours send a copy thereof to his immediate official superior."

18. There is no ambiguity in the language of Section 42(1) of the NDPS Act that if an officer empowered thereunder has reason to believe from his personal knowledge or from any information that an offence punishable under the Act has been committed, he is required to record his reason to such belief in writing. In the present case, it was not done as is evident from the First Information Report itself. There is no iota of evidence adduced at the trial to substantiate compliance of this requirement.

19. Secondly, it is manifest from the materials available on record that the Officer-in-Charge gave a complete goby to the requirements under sub-section (2) of Section 42 of the Act, inasmuch as, he did not give any written information to his official superior regarding search and seizure. It has been held and reiterated by the courts that keeping in mind the drastic effects of the provisions of the NDPS Act and severity of the consequences, the safeguards envisioned under the said Act, must be strictly adhered to. Any non-compliance of such safeguard shall be fatal to the prosecution's case and render the prosecution's case doubtful and unsustainable.



20. Here is a case where there are so many flaws other than non-compliance of Section 42 of the NDPS Act. It is the requirement under the law, as has been succinctly laid down by the Supreme Court in the case of ***Union of India vs. Mohanlal and another*** reported in ***(2016) 3 SCC 379***, that the sample must be drawn soon after the seizure. Unfortunately, in the present case, the first application was made by the prosecution for drawing of the sample before the court on 14.09.2016. It is not at all clear as to how safely and in what manner the seized articles were kept, in the meanwhile, by the police personnel. The samples were drawn on 17.10.2016, whereafter it was dispatched for forensic/ chemical examination.

21. The directions issued by the Supreme Court in case of **Mohanlal** (supra) has not been followed in the present case, paragraph 31.1 of which reads as under :-

"31.1. 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 52-A(2) of the Act, which shall be allowed by the Magistrate as soon as may be required under sub-section (3) of Section 52-A, as discussed by us in the body of this judgment under the heading "seizure and sampling". The sampling shall be done under the supervision of the Magistrate as discussed in Paras 15 to 19 of this order."



22. The seized packets were not sealed. The material exhibit, which was produced before the trial court, was also not found properly sealed. There is absolutely no evidence of link between the material exhibits produced at the trial and the report of CRCL, Kolkata said to have been prepared based on the sample made available to it. The sanctity of preparation of sample more than three months after the date of seizure stands completely compromised. We also find substance in submission made on behalf of the appellants that there is no evidence as to how and with which tool the seized articles were weighed soon after recovery of the alleged contraband from the vehicle occupied by these appellants.

23. We further find material contradictions in the evidence of the prosecution's witnesses on the point of preparation of sample and seizure-list. Illustratively, PW-1 deposed that the sample was taken soon after the seizure but PW-3 denied that such sample was taken.

24. PW-4 deposed at the trial that all the packets were opened after recovery and the contents were mixed and thereafter again the articles were packed in 30 different packets. The evidence of PW-4 in paragraph-8 creates a serious doubt on the prosecution's case.



25. Taking into account the cumulative effect of all the facts and circumstances noted-above, in our opinion, it is not safe for this Court to uphold the finding of conviction recorded by the trial court holding the appellants guilty of the offence punishable under Section 20 of the NDPS Act based on the evidence of all police personnel who were members of the raiding team.

26. Accordingly, the impugned judgment of conviction and the order of sentence dated 14.06.2018/ 20.06.2018 passed by the learned 1st Additional Sessions Judge- cum- Special Judge, NDPS Act, Aurangabad in GR No. 07/2016/ 11/2016, arising out of Madanpur P.S. Case No. 89 of 2016 are set aside. The appellants stand acquitted of the charge of offence punishable under Section 20 of the NDPS Act.

27. These appeals are allowed accordingly.

28. The appellants are in jail custody. Let them be released forthwith, if they are not required in any other case.

(Chakradhari Sharan Singh, J)

(Nawneet Kumar Pandey, J)

Rajesh/-

AFR/NAFR	NAFR
CAV DATE	NA
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