

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.1155 of 2018**

Arising Out of PS. Case No.-19 Year-2015 Thana- D.R.I District- Muzaffarpur

1. Sonu @ Sri Sonu
2. Chandra Shekhar, Both Sons of Sri Kalicharan, Resident of Village-
Bomnoi, P.S. Akraabad, District- Aligarh U.P..

... .. Appellant/s

Versus

The Union Of India Through Dharendra Kumar, Intelligence Officer, D. R. I. ,
Patna

... .. Respondent/s

For the Appellant/s	:	Mr. Krishna Prasad Singh, Sr. Adv Mrs. Meena Singh, Adv
For the Respondent/s	:	Mr. Ranvir Kumar Sr. S.C. (DRI)

**CORAM: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN
SINGH**

and

HONOURABLE MR. JUSTICE RAJIV ROY

ORAL JUDGMENT

**(Per: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN
SINGH)**

Date : 29-04-2023

Heard Mrs Meena Singh learned counsel for the
appellants and Mr Ranvir Kumar learned counsel for the
Department of Revenue Intelligence (DRI for short).

2. The appellants have preferred this appeal under
Section 374(2) of the Code of Criminal Procedure, 1973 (Cr.P.C
for short) against the judgment of conviction dated 14.08.2018
and order of sentence dated 16.08.2018 passed by learned



Additional District Judge-I, Muzaffarpur in Trial No. 61 of 2016 arising out of DRI (NDPS) Case No. 19/2015-16, whereby and whereunder the appellants have been convicted and sentenced as under:

Appellant No. 1 Sonu @ Sri Sonu

Conviction under Section	Sentence		
	Imprisonment	Fine (Rs.)	In default of fine
under Section 20(b)(ii)(C) of the NDPS Act	Rigorous Imprisonment for 12 years	1,50,000/-	R.I. for one year and six months

Appellant No. 2 Chandra Shekhar

Conviction under Section	Sentence		
	Imprisonment	Fine (Rs.)	In default of fine
under Section 20(b)(ii)(C) of the NDPS Act	Rigorous Imprisonment for 12 years	1,50,000/-	R.I. for one year six months

3. Briefly stated, the prosecution’s case as disclosed by Dhirendra Kumar, the intelligence officer (PW-1) in his forwarding letter addressed to the court of learned District & Sessions Judge, Muzaffarpur (the Special Court under NDPS Act) is, that based on specific information, the officers of DRI had intercepted a vehicle bearing registration no. HR-38H-7757 on 30.09.2015 at about 1:00 pm near Ahiyapur, Muzaffarpur and apprehended two persons namely, Sonu (appellant no. 1) and



Chandra Shekhar (appellant no. 2), both sons of one Kalicharan.

4. During the preliminary examination, the said truck was found loaded with coal and upon further search, 33 packets containing 398.20 Kg of a substance believed to be *ganja* were recovered. The statement of both apprehended accused persons were recorded, wherein, they admitted that the recovered substance was *ganja* and was brought by them from Guwahati. On weighing the weight of *ganja*, said to have been recovered was found to be 398.20 Kg. The recovered *ganja*, the truck, packaging materials and the coal loaded in the truck weighing 10950 Kgs were seized under section 43(a) of the NDPS Act and at about 6:00 pm two accused persons were arrested under section 43(b) of the NDPS Act for the breach of the provisions under Section 8(c) of the NDPS Act ('Act' in short).

5. Two sets of representative samples of *ganja* weighing 24 grams each were drawn and sealed in a yellow envelope marked as A-1 and A-2, which were submitted to the court with a request to order for dispatch of the samples to the Central Revenue Control Laboratory (CRCL), Customs House, Kolkata for testing.

6. PW-1 also made a request to depute a Magistrate for certification of the correctness of the inventory of the seized



goods. Along with the said forwarding letter dated 30.09.2015, the following documents were enclosed:-

(i) Panchanama dated 30.09.2015 (Exhibit-2)

(ii) Seizure memo dated 30.09.2015 (Exhibit-1)

(iii) Statement of appellant no. 1 Sonu (Exhibit-4)

(iv) Statement of appellant no. 2 Chandra Shekhar (exhibit-4/1)

(v) the notices issued in compliance with Section 50 of the Act, (Exhibit-5 and Exhibit-5/1)

7. It is noteworthy that in the said communication dated 30.09.2015 (Exhibit-7), it was not mentioned that the samples of ganja were drawn in the presence of a Magistrate, in compliance with Section 52(A) of the Act.

8. Be that as it may, the investigation was taken up by the DRI and upon completion of investigation, a complaint petition subsequently came to be filed by PW-1 on 23.02.2016 giving rise to DRI (NDPS Case No. 19/2015-16, Trial No. 61 of 2016) in the court of learned 1st Additional Sessions Judge, Muzaffarpur.

9. Apart from what was alleged in the aforementioned communication dated 30.09.2015, it was further asserted in the complaint petition filed on 23.03.2016 that both the appellants



upon apprehension were intimated in writing regarding secret information which the DRI official had received, and the right of the appellants under section 50 of the Act to be searched either by a Magistrate or before a gazetted officer. As both the appellants had consented in writing expressing their willingness to be searched before the departmental Gazetted Officer was present at the spot, a search was conducted. Further, since the appellants had requested that their examination might be conducted at a safe place, keeping in mind the presence of a crowd, and the safety of the apprehended persons and goods as well, it was decided to conduct further examination at the office premises of DRI, Muzaffarpur and accordingly, the truck along with the two apprehended persons, i.e. the appellants were brought to the DRI Office, Muzaffarpur in the presence of two independent witnesses. From the subsequent complaint dated 22.03.2016, it is evident thus that the search was not conducted at the place of occurrence rather the same was done at the DRI Office, Muzaffarpur, in the presence of independent witnesses. It was further disclosed that in their statements recorded under Section 67 of the Act both the apprehended persons i.e. the appellants admitted the amount which they had taken from the consignor for loading and transporting of *ganja* and delivering



the consignment near Muzaffarpur to some unknown person. A report of arrest and seizure so prepared was submitted to the immediate official superior namely Rakesh Ranjan (PW-6), as per the complaint petition.

10. We consider it useful to notice at this juncture itself, the evidence of PW-6 at the trial that wherein he deposed it was he who had received the secret information first and had constituted the raiding team of DRI for interception and search of the vehicle.

11. The chemical examination report dated 17.03.2016 was received from the CRCL, Kolkata, which affirmed that the samples responded to the test (chemical chromatographic) for *cannabis* and had characteristics of *ganja*.

12. Based on the complaint petition filed by PW-1 charges came to be framed against the appellants for commission of the offences punishable under Sections 20 and 25 of the Act.

13. In support of the charge, the prosecution examined, seven persons namely, Dhirendra Kumar (complainant/PW-1), Ramanand Chaudhary (intelligence officer of DRI) and a member of the raiding party (PW-2), Rajiv Ranjan Pathak (an Officer of DRI, Patna) PW-3 who too was a member of the



raiding party, Pradeep Kumar Pandey another officer of DRI and a member of the raiding team (PW-4), Vimal Kumar (also a member of the raiding party) (PW-5), Ranjan Kumar who had led the raiding team (PW-6). We notice at this juncture that according to the prosecution's case, as narrated in the complaint petition, it was PW-6 to whom the report of arrest and seizure was forwarded by PW-1 Dhirendra Kumar in purported compliance with Section 57 of the Act. We also notice that there does not appear to be any dispute over the fact that the entire search and seizure carried out by the DRI officials were in the presence of PW-6. Parmanand (PW-7) produced before the trial court, the godown register, the inventory, the samples and the certification mainly to prove the destruction of the seized contraband articles.

14. Apparently, the seizure list witnesses were not examined, no independent witness other than the members of the raiding team of DRI was examined at the trial. As we have noted above, the samples of the contraband article were apparently not drawn in the presence of a Magistrate.

15. The trial court after having appreciated the oral as well as documentary evidence adduced at the trial has held appellants guilty of the commission of the offence punishable



under Section 20(b)(ii)(C) of the Act. The appellants, however, were acquitted of the charge of commission of the offence punishable under Section 25 of the Act.

16. Mrs. Meena Singh learned counsel appearing on behalf of the appellants has submitted that PW-6 himself was leading the raiding team. As would appear from the depositions of all the prosecution witnesses, the entire search and seizure were made in the presence of PW-6 and in his leadership. In such circumstances, the communication given to PW-6 regarding search, recovery and seizure, by PW-1 does not amount to due compliance of Section 57 of the Act. She has further submitted that the samples were not drawn strictly in accordance with the requirement of Section 52(A) of the Act. She has further submitted that non-examination of the seizure list witnesses, in the present set of the facts and circumstances of the case, is fatal to the prosecution's case and the entire search and seizure becomes doubtful.

17. Relying on the Supreme Court's decision in the case of *Toofan Singh Vs State of Tamil Nadu* reported in *(2021) 4 SCC 1*, she has argued that the confessional statement of these appellants said to have been made by these appellants become meaningless. She has further argued that the trial court



did not duly put the questions to these appellants under Section 313 of the Cr.P.C and for the said reason also the impugned finding of the fact recorded by the trial court deserves interference.

18. She has further submitted that in the present case, the initial complaint was filed before the Special Court on 30.09.2015 by PW-1. Subsequently, PW-1 himself investigated the case and filed a subsequent complaint petition after the completion of the investigation. She has contended that PW-1, being the informant could not have investigated the case and for this reason, also the entire prosecution is vitiated and the appellants' conviction is rendered vulnerable.

19. Mr. Randhir Kumar learned Special Public Prosecutor for DRI has submitted that there has been due compliance of the requirement under Section 313 of the Cr.P.C. He contends that the appellants have not been able to demonstrate any serious prejudice caused to the appellants because of any breach of the provisions envisaged under Section 313 of the CrPC. Relying on the Supreme Court's decision in the case of *State of Punjab Vs. Swarn Singh* reported in (2005) 6 SCC 101, he has submitted that it is not a fit case which requires interference on the ground of breach of Section 313 of



the Cr.P.C. He has further submitted, relying on the Supreme Court's decision in the case of ***Khet Singh Vs. Union of India*** reported in ***(2002) 4 SCC 380***, that if there are justifiable and reasonable grounds to do so, the seizure list can be prepared at a later stage. He has argued that the conduct of search and seizure at the DRI Office instead of the place of interception and recovery itself cannot be said to be vitiating the trial. He contends that it is evident from the prosecution's case that the appellants were present throughout the search and seizure of the contraband articles and therefore non-preparation of the seizure list at the place of interception does not render the seizure list illegal. He has further submitted that in paragraphs No. 18 and 19 of the Supreme Court's decision in the case of ***Mukesh Singh Vs. State (Narcotic Branch of Delhi)*** reported in ***(2020) 10 SCC 120***, on which great reliance has been placed on behalf of the appellants do not contain the opinion of the Supreme Court rather they are submissions advanced on behalf of the parties. He has also argued that non-examination of the eye-witnesses in the present case is also inconsequential. He has submitted that the testimony of official witnesses cannot be rejected on the ground of non-corroboration by the independent witnesses. He has relied upon the Supreme Court's decision in



the case of *Rizwan Khan Vs. State of Chhatisgarh* reported in *(2020) 9 SCC 627*, *Surinder Kumar Vs. State of Punjab* reported in *(2020) 2 SCC 563*. He has also argued that there has been no violation of Section 50 of the Act as it is not a case of personal search but rather a search from a vehicle and therefore, the provision under Section 50 of the Act has no application. He has relied on a three Judges Bench decision in the case of *Sajan Abraham Vs. State of Kerala* reported in *(2001) 6 SCC 692*, wherein, it has been held that non-compliance of Section 57 of the Act would not vitiate the prosecution's case.

20. We have perused the impugned judgment of the trial court and the trial court's records. We have carefully appreciated the evidence adduced at the trial. We have given our thoughtful consideration to the rival submissions advanced on behalf of the parties, which have been noted hereinabove.

21. After having perused the evidence and other materials on record and considering rival submissions advanced on behalf of the parties, we are of the view that without entering into various points raised on behalf of the parties, this appeal can be adjudicated upon with reference to the requirements under Section 52(A) and Section 57 of the Act. Section 52(A) of the Act reads as under:-

“52A. Disposal of seized narcotic drugs and



psychotropic substances.- (1) The Central Government may, having regard to the hazardous nature, vulnerability to theft, substitution, constraint of proper storage space or any other relevant consideration, in respect of any narcotic drugs, psychotropic substances, controlled substances or conveyances, by notification in the Official Gazette, specify such narcotic drugs, psychotropic substances, controlled substances or conveyance or class of narcotic drugs, class of psychotropic substances, class of controlled substances or conveyances, which shall, as soon as may be after their seizure, be disposed of by such officer and in such manner as that Government may, from time to time, determine after following the procedure hereinafter specified.

(2) Where any [narcotic drugs, psychotropic substances, controlled substances or conveyances] has been seized and forwarded to the officer-in-charge of the nearest police station or to the officer empowered under section 53, the officer referred to in sub-section (1) shall prepare an inventory of such [narcotic drugs, psychotropic substances, controlled substances or conveyances] containing such details relating to their description, quality, quantity, mode of packing, marks, numbers or such other identifying particulars of the [narcotic drugs, psychotropic substances, controlled substances] or conveyances or the packing in which they are packed, country of origin and other particulars as the officer referred to in sub-section (1) may consider relevant to the identity of the [narcotic drugs, psychotropic substances, controlled substances or conveyances] in any proceedings under this Act and make an application, to any Magistrate for the purpose of--

(a) certifying the correctness of the inventory so prepared; or

(b) taking, in the presence of such magistrate, photographs of [such drugs, substances or conveyances] and certifying such photographs as true; or

(c) allowing to draw representative samples of such drugs or substances, in the presence of such magistrate and certifying the correctness of any list of samples so drawn.

(3) Where an application is made under sub-section (2), the Magistrate shall, as soon as may be, allow the application.



(4) Notwithstanding anything contained in the Indian Evidence Act, 1872 (1 of 1972) or the Code of Criminal Procedure, 1973 (2 of 1974), every court trying an offence under this Act, shall treat the inventory, the photographs of 5[narcotic drugs, psychotropic substances, controlled substances or conveyances] and any list of samples drawn under sub-section (2) and certified by the Magistrate, as primary evidence in respect of such offence.”

22. It is evident from the complaint petition itself that no application was made by the DRI to the Court for the drawal of representative samples of the substance in the presence of the Magistrate, certifying the correctness of any list of samples so drawn. It is the case of the prosecution that soon after the recovery, the truck, the contraband articles and the coal beneath which the articles were concealed were taken to the DRI office, the seizure was made and samples were drawn in the presence of the two independent witnesses.

23. Noticing the mandatory nature under Section 52(A) of the NDPS Act, the Supreme Court in the case of *Union of India Vs. Mohan Lal* reported in (2016) 3 SCC 379 has held in paragraph nos. 16 as under:-

“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.”

24. The Supreme Courts in the case of Mohan Lal (supra) had the occasion to address the issue of reconciling the requirements under Section 52(A) of the Act and the guidelines laid down in the Standing Order No. 1 of 1989 dated 13.06.1989. The Supreme Court in paragraph no. 19 in the case of Mohal Lal (supra) has categorically laid down that there cannot be any manner of doubt that the seizure of contraband articles must be followed by an application for drawing the samples and certification as contemplated under the Act. Reiterating the said opinion, the Supreme Court clarified that there would be 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. Further, the scheme of the Act in general and Section 52(A) in particular, does not brook any delay in the matter of making an application or the drawing of samples and certification. After having said so, the Supreme Court further observed in the case of *Mohan Lal (supra)* as under:-



“19.....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.”

25. It is manifest from the materials on record that the samples were not drawn in the presence of the Magistrate in compliance with the statutory requirement envisaged under Section 52(A) of the Act. Non-examination of the independent witnesses said to have been present at the time of seizure and drawing of samples become significant in the aforesaid background i.e. the fact that the samples were drawn in breach of the mandatory requirement under Section 52A of the Act.

26. Further, Section 57 of the NDPS Act requires that



whenever any person makes any arrest or seizure under the Act, he shall within 48 hours after such arrest or seizure, make a full report of all the particulars of such arrest or seizure to his immediate official superior.

27. In the present case, the secret information was received by P.W. 6, he had constituted the team of DRI officials of which he too was a member. The search was conducted in his presence and the seizure list was prepared by the Investigating Officer. According to his deposition samples were drawn and sealed in his presence. On reading the evidence of the prosecution's witness, it transpires that it was P.W. 6, who was instrumental in the arrest of the appellants and seizure of the articles. It is peculiar to note that it is the prosecution's case that in compliance with Section 57 of the Act, the full report of all the particulars of arrest and seizure was given to P.W. 6 by P.W. 1 on the reasoning that P.W. 1 had conducted the search and seizure and P.W. 6 was his immediate official superior. In the present set of facts, we are not inclined to accept the stand taken on behalf of the DRI that the information given to P.W. 6, who himself was part of the process of search and arrest of the appellants, by P.W. 1 can be considered to be substantial compliance of Section 57 of the Act. We at this juncture, need to



notice the deposition of P.W. 6 at the trial wherein he unequivocally deposed that he was a member of the team which had intercepted the truck and recovered the articles and subsequently, search, seizure and arrest were made in his presence under his leadership. In true compliance with Section 57 of the Act, the report of arrest and seizure ought to have been communicated by P.W. 6 himself being the senior most officer of the team carrying out the arrest of the appellants and seizure of the contraband. If what has been submitted on behalf of the DRI is to be accepted as regards compliance with Section 57 of the Act, the provision itself will become redundant as any junior officer of the team conducting arrest and seizure can be said to be submitting a report to his immediate official superior, who too is a party to the operation of arrest and seizure. We are not convinced with the submission of learned counsel representing the DRI with reference to the Supreme Court's decision in the case of Sajan Abraham (Supra) that there has been substantial compliance with Section 57 of the Act, in the present facts and circumstances of the case as noted above. This is for the reason that the required report of arrest and seizure under Section 57 of the NDPS Act was never made to an immediate official superior.

28. We are conscious of the well-settled legal



position that the provision under Section 57 of the Act is directory, and the absence of strict compliance with the procedural instructions after the arrest and seizure by itself will not render the acts done by the officials null and void but it is likely to affect the probative value of the evidence regarding arrest or search and in some cases, it may invalidate such arrest. Dealing with Sections 52 and 57 of the Act, the Supreme Court in the case of *State of Punjab vs. Balbir Singh* reported in *(1994) 3 SCC 299* while holding the said provisions directory has observed that the officers cannot totally ignore these provisions and in case there is no proper explanation for non-compliance or where the officers totally ignore the provisions then they will definitely have an adverse effect on the prosecution's case and the Courts have to appreciate the evidence and the merits of the case bearing these aspects in view. In case of violation of these provisions, the Court is required to examine the effect of the same.

29. In the present case, all the prosecution's witnesses were members of the raiding team which had conducted the search of the vehicle, seizure of the articles and arrest of these appellants. The sample of *ganja* was not drawn in the presence of a Magistrate. The complainant, a member of the raiding team



sent a report of the seizure of the articles and the arrest of the appellants to P.W. 6, an official superior to P.W. 1 who himself was leading the raiding team. All these facts considered together, in our considered opinion, definitely have an adverse effect on the prosecution's case.

30. On the cumulative assessment of these three circumstances i.e. drawal of samples in the absence of a Magistrate, non-examination of the independent seizure list witnesses and non-compliance with Section 57 of the Act, we are of the view that the prosecution cannot be said to have proved its case of recovery of contraband articles from the possession of these appellants.

31. Situated thus, we do not consider it safe to affirm the finding of the conviction recorded by the trial Court for the offences punishable under Section 20(b)(ii)(C) of the Act based on the evidence of the DRI official witnesses only. The appellants deserve to be acquitted, giving them benefit of doubt. We hold accordingly.

32. Accordingly, the impugned judgment of conviction dated 14.08.2018 is hereby set aside. Consequently, the order of sentence dated 16.08.2018 is also set aside.

33. Both these appeals are allowed.



34. Since the appellants are in custody, let them be released from jail forthwith, if not required in any other case.

(Chakradhari Sharan Singh, J)

(Rajiv Roy, J)

ranjan/suraj-

AFR/NAFR	
CAV DATE	
Uploading Date	
Transmission Date	

