

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.583 of 2022s

Arising Out of PS. Case No.-31 Year-2010 Thana- MADHWAPUR District- Madhubani

LAL BABU YADAV S/o Motilal Yadav R/o village- Dhubiyahi, P.S.- Rahika,
District- Madhubani

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

with

CRIMINAL APPEAL (DB) No. 590 of 2022

Arising Out of PS. Case No.-31 Year-2010 Thana- MADHWAPUR District- Madhubani

ARUN KUMAR @ ARUN KUMAR YADAV Son of Ram Lakhan Yadav
Resident of Village - Rajhan, P.S.- Madhubani Town, Distt.- Madhubani.

... .. Appellant/s

Versus

THE STATE OF BIHAR

... .. Respondent/s

with

CRIMINAL APPEAL (DB) No. 631 of 2022

Arising Out of PS. Case No.-31 Year-2010 Thana- MADHWAPUR District- Madhubani

KALYAN SAH S/o Sri Jogi Sah R/o village- Loma, P.S.- Saharghat, District-
Madhubani

... .. Appellant/s



Versus

The State of Bihar

... .. Respondent/s

Appearance :

(In CRIMINAL APPEAL (DB) No. 583 of 2022)

For the Appellant/s : Mr. Ramakant Sharma, Sr. Adv

Mr.Lakshmi Kant Sharma, Adv

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

(In CRIMINAL APPEAL (DB) No. 590 of 2022)

For the Appellant/s : Mr. Ramakant Sharma, Sr. Adv

Mr.Lakshmi Kant Sharma, Adv

For the Respondent/s : Ms. Shashi Bala Verma, APP

(In CRIMINAL APPEAL (DB) No. 631 of 2022)

For the Appellant/s : Mr.Ashok Kumar Jha, Adv

For the Respondent/s : Mr.Sujit Kumar Singh,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 : 16-08-2023

It has been continually held by the Supreme Court and this Court in various judicial pronouncements that the provisions of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the 'NDPS Act' in short) are of stringent nature, enacted to combat the *menace* of crimes relatable to Narcotic Drugs and Psychotropic Substances. Manifestly, in order to strike a balance between investigation and trial of the offences under the NDPS Act, and fundamental rights of the citizens, several provisions of the NDPS Act lay down various safeguards. It is a settled legal principle that



where a statute confers drastic powers and contain stringent penal provisions as under the NDPS Act, it is imperative that scrupulous compliance with the statutory provisions must be insisted upon. It is one of the fundamental legal principles that severer the punishment, greater the care must be taken to ensure the safeguards provided in the statutes are scrupulously followed. We have made these opening observations in the wake of scenario which has emerged after going through the records of the present appeal and having heard submissions advanced on behalf of the appellants and learned Additional Public Prosecutor. We are of the considered view that it is a gross case where various agencies empowered to search, seize and investigate have miserably failed to comply with the requirements which are the basic essential safeguards present under the NDPS Act, which we shall be discussing at an appropriate stage.

2. The appellants have preferred this appeal under Section 374 (2) of the Code of Criminal Procedure, 1973 against the judgment of conviction dated 01.07.2022 and order of sentence dated 06.07.2022 passed by the learned Additional Sessions Judge-1st cum Special Judge, Madhubani in G.R. Case No. 08 of 2010 arising out of Madhwapur P.S. Case No. 31 of



2010 (NDPS No. 8/2010), whereby and whereunder the appellants have been convicted and sentenced as under :-

Appellant Lal Babu Yadav (Criminal Appeal (DB) No.583 of 2022)

Conviction under Section	Sentence		
	Imprisonment	Fine (Rs.)	In default of fine
under Section 21(c) of the NDPS Act	Rigorous imprisonment for 15 years	1,50,000/-	S.I for one year
Under Section 23(c) of the NDPS Act	Rigorous imprisonment for 15 years	1,50,000/-	S.I for one year
Under Section 25 of the NDPS Act	-----	-----	-----

Appellant Arun Kumar @ Arun Kumar Yadav (Criminal Appeal (DB) No.590 of 2022)

Conviction under Section	Sentence		
	Imprisonment	Fine (Rs.)	In default of fine
under Section 21(c) of the NDPS Act	Rigorous imprisonment for 15 years	1,50,000/-	S.I for one year
Under Section 23(c) of the NDPS Act	Rigorous imprisonment for 15 years	1,50,000/-	S.I for one year
Under Section 25 of the NDPS Act	-----	-----	-----



**Appellant Arun Kumar @ Arun Kumar Yadav Criminal Appeal
(DB) No. 631 of 2022**

Conviction under Section	Sentence		
	Imprisonment	Fine (Rs.)	In default of fine
under Section 21(c) of the NDPS Act	Rigorous imprisonment for 15 years	1,50,000/-	S.I for one year
Under Section 23(c) of the NDPS Act	Rigorous imprisonment for 15 years	1,50,000/-	S.I for one year
Under Section 25 of the NDPS Act	-----	-----	-----

3. (PW-1) Diwan Singh Karki, a Sub-Inspector of Seema Suraksha Bal (SSB), is the informant whose written statement addressed to the Officer-in-charge, Madhwapur Police Station in the district of Madhubani is the basis for registration of the connected Madhawpur P.S. Case No. 31/2010 registered on 16.08.2010, disclosing the commission of the offences punishable under Sections 21/23 of the NDPS Act. In the formal FIR, the time of occurrence has been mentioned as 4:20 am and the time of receipt of information by the police station as 5:30 pm. The distance of the place of occurrence, according to the formal FIR was 16 kilometers from the police station. The informant mentioned in his written report that in the night of 15.08.2010, he had received an information regarding



smuggling of *ganja* from Nepal. Taking into account the gravity of the information, a special raiding team was constituted, headed by the informant Deewan Singh Karki himself and Sub-Inspectors Vivek Kumar (PW 5), Yudhveer Singh (PW 3) and constables Mukesh Kumar (not examined), Subhrat Das (not examined), Dasrath Singh (PW 2) and Rajesh Singh (PW 4). Based on the information, at the relevant destination, they laid a barrier near Balwa village adjacent to National Highway-104 at 11:00 pm on 15.08.2010. On 16.08.2010, at 4:20 am they noticed two Bolero vehicles approaching from Nepal which were intercepted. In the meanwhile, two persons, who were found by the raiding party out of their houses for easing themselves, were requested to become independent witnesses. The said Two persons, namely, Bharat Sah (not examined) and Md. Islam (not examined) acceded to the request of the raiding team to become witnesses of the search and seizure of the vehicles. In the meanwhile, a gazetted officer of Sashatra Seema Bal (SSB) of the rank of Assistant Commandant Sena Nayak Amod reached the place where the vehicles were intercepted. In his presence and in the presence of the aforesaid two independent witnesses the two vehicles were searched leading to recovery of 10 packets of *ganja* in one of the vehicles bearing



registration number BR 32B 9543 and 16 packets from the other vehicle bearing registration no. BR 43A 1603. In each of the vehicles, two persons were found sitting who disclosed their names as Rakesh Kumar (an appellant), Kalyan Sah (an appellant), Lal Babu Yadav(an appellant) and Arun Kumar (an appellant). Weighment of all the packets was done upon which the total weight of *ganja* so recovered was found to be 200 kg. Four mobile phones were recovered from the persons apprehended, which were seized. The recovered *ganja* was sealed. Seizure list was prepared relating to seizure of *ganja*, mobile phones and two BOLERO vehicles. On the seizure list, both the witnesses and the persons apprehended (the appellants) put their signatures. The seizure list was prepared at 8:30 am. The persons so apprehended, the *ganja*, mobile phones and the vehicles so recovered were handed over to the officer-in-charge of Madhwapur police station, thereafter. From the materials on record, it can be easily inferred that nearly 9 days after the said seizure, the seized items were handed over to the officer-in-charge of Madhwapur police station and an application was also made to the learned Sessions-cum-Special Judge on 25.08.2010 for sending the samples to the Forensic Science Laboratory, Patna. As per the order-sheet of the trial court, three samples of



the recovered contraband, each of 500 gm were drawn and sealed in three packets for being sent to the FSL and the remaining *ganja* was also separately sealed. One sealed sample of the seized material was directed to be sent to the FSL, Patna and the other sealed sample, to be kept in the office itself. Rest of the seized material was handed over to Sub-Inspector of Police D.N. Mandal (PW-6).

4. The police submitted charge-sheet against all the four persons named in the FIR for commission of the offences punishable under Sections 21 and 23 of the NDPS Act whereafter, cognizance was taken by the court for the offences punishable under Section 20(b)(ii)(C), 21(c) and 23(c). Charges were subsequently framed against all the four accused persons on 07.12.2010. It is noteworthy to mention that before submission of the charge-sheet, the FSL report was not available with the police. As a matter of fact, till the date of framing of charge, the FSL report (Exhibit-8) was not prepared which is dated 29.08.2011. The appellants denied the charges and claimed to be tried.

5. At the trial, the prosecution examined altogether seven witnesses including the informant Dinanath Karki (PW-1), Dasrath Singh (PW-2), Yudhveer Singh (PW-3), Rajesh



Singh (PW-4) and Vivek Kumar (PW-5), all members of the raiding party. Dinanath Mandal, S.H.O. of Madhwapur police station and the I.O. of the case deposed at the trial as PW 6. Ram Babu Sah (PW-7) produced seizure list at the trial. In addition to the oral evidence adduced at the trial, the prosecution brought on record following documentary evidence by way of exhibits.

Exhibit-1	Signature of Diwan Singh Karki on the seizure list
Exhibit-2	Signature of Diwan Singh Karki on written report part of FIR
Exhibit-3	Panchnama
Exhibit-4	Memo of Seizure
Exhibit-1/1	Signature of Diwan Singh Karki on seizure list
Exhibit-2/1	Signature of I.O.
Exhibit-5	Formal FIR
Exhibit-6 to 6/3	Arresting Memo
Exhibit-7	Chargesheet
Exhibit-1/2	Signature of Ram Babu Sah on seizure list
Exhibit-1/3	Signature of Ram Babu Sah on memo of arrest
Exhibit-8	FSL report

6. The seizure list witnesses were not examined. No evidence was produced by way of material exhibit at the trial. No evidence was led at trial to prove that the seized material found to have been *ganja* in the FSL report, was destroyed.

7. The trial court upon appreciation of the evidence adduced at the trial concluded that all the four persons facing



the trial were guilty of commission of the offences punishable under Sections 21(c) and 23(c) read with section 25 of the NDPS Act. From the judgment of the trial court, it appears that on the date of judgment i.e., 01.07.2022, co-convict Rakesh Kumar was not present though, he was represented by his counsel. Rakesh Kumar was on bail on the date of judgment and because of his absence, his bail bond was cancelled. It further appears that as co-convict Rakesh Kumar did not appear on the date fixed for hearing on the point of sentence, the records relating to him were separated. Trial court in such circumstance imposed sentence of imprisonment and fine against these appellants, as has been noted above.

8. Mr. Ramakant Sharma, learned counsel appearing on behalf of the appellants Lal Babu yadav in Criminal Appeal(DB) No. 583 of 2022 and Arun Kumar @Arun Kumar Yadav in Criminal Appeal (DB) No. 590 of 2022 have argued that the entire case of the prosecution is vitiated in view of the admitted facts on record, which suggest that there has been blatant violation of mandatory requirements under Sections 42 and 52A(2)(b) of the NDPS Act. It has been submitted that it is apparent from the narration of the case in the FIR that the two vehicles, were searched before sunrise nearly at 04:00 am and



thus there has been non-compliance of Section 42 of the NDPS Act on three counts; firstly, there is no evidence on record that after receipt of the information, the informant had taken down in the writing the information which he had received based on which he had reason to believe that *ganja* was likely to be smuggled which is a condition precedent for carrying out search of vehicle under Section 42 of the NDPS Act. Secondly, such power of search under Section 42(i) of the NDPS Act can be exercised by an empowered officer between sunset and sunrise only after recording the ground of his belief that a search warrant or authorisation cannot be obtained without affording an opportunity for the concealment of evidence or facility for an escape of an offender, as stated in the second *proviso* to Sub-Section (1) of Section 42 of the NDPS Act. Thirdly, since, in the present case, the informant did not take down the information in writing as required under Section 42(1) of the NDPS Act, there would have been no occasion for him to comply with the requirement under Section 42(2) of the NDPS Act of sending a copy thereof to his immediate official superior. It has further been submitted that the evidence of the witnesses contradict each other on the point of drawing of the samples. According to the informant, the samples were drawn by the informant himself



whereas according to the I.O. the samples were drawn in the court. Further the delay of 9 days in producing the seized materials before the court and thereafter making of an application for preparation of samples itself cast serious doubt on the prosecution's case. Mr. Sharma, learned senior counsel has also argued that the failure on the part of the prosecution to produce the sample which was retained and remaining seized articles before the court at the time of trial further demolishes the prosecution's case of recovery of any contraband substance from the possession of these appellants. He submits that in the background of the aforesaid admitted facts, it is unsafe for this Court to uphold the finding of conviction recorded by the trial court based on the evidence of the prosecution's witnesses all of whom are either members of the raiding team or the official/formal witnesses.

9. Mr. Ashok Kumar Jha, learned counsel appearing on behalf of the appellant-Kalyan Sah in Criminal Appeal (DB) No. 631 of 2022, has adopted the submissions advanced by Mr. Ramakant Sharma, learned senior counsel.

10. Mr. Sujit Kumar Singh, learned Additional Public Prosecutor, while justifying the findings recorded by the trial court has submitted that in the present case, the seizure was



made by an authorized officer who, in accordance with the requirements under Section 42 of the NDPS Act, had immediately sent the seized articles to the police station whereafter, the officer-in-charge had made an application before the trial court for preparation of samples and transmission of samples to the FSL. The FSL has found the nature of articles seized to be *ganja*. He contends that there has been substantial compliance of the requirements of the provisions of the NDPS Act and further that minor deviations of insignificant nature in following the procedure may not be a reason for this Court to interfere with the finding of conviction.

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

12. No useful purpose would be served by encumbering the present judgment with numerous precedents on the point that the officer/agencies authorized and empowered under the NDPS Act are under an obligation to scrupulously adhere to the mandatory requirements of the Act keeping in mind the stringent provisions which it contains. Sub-section (1) of Section 42 authorizes an officer to enter into and to search any



such building, conveyance or place in the circumstances and in accordance with the procedure laid down under the said provision. Section 42 of the NDPS Act read 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:

2[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.]”

13. As has been noted above, as per the informant the search of the vehicle was conducted between the sunset and sunrise. As stipulated under the second proviso to section 41(1) of the NDPS Act, while doing so, he was obligated to record the grounds of his belief that a search warrant or authorization could not be obtained without affording opportunity for concealment of evidence or facility for the escape of the offenders. There is no evidence adduced at the trial to suggest that before conducting search of the vehicle, in the present case between sunset and sunrise, the informant had recorded the grounds of his “belief” as contemplated in the second proviso to sub-section (1) of Section 42 of the NDPS Act. This, in our considered opinion, is a major breach of a significant statutory safeguard in conducting search of the vehicle between sunset and sunrise. Further, section 42(2) of the NDPS Act requires that



if 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. In the present case, because of non compliance of sub-section (1) of Section-42 of the NDPS Act there was no question of compliance of sub-section (2) of Section-42 of the NDPS Act.

14. The second major lacunae in the present case, is on the point of preparation of samples of the seized articles soon after the seizure. We have noticed hereinabove, that according to the prosecution's case the seizure was made at 4:20 am on 16.08.2010 whereas an application was made to the learned Sessions judge after 9 days for sending the samples to the Forensic Science Laboratory. It is curious to note that the informant in his deposition testified that he had drawn the samples from the seized articles and he had kept the samples in his camp but he had not discussed about the samples having been drawn in any of the records. He has admitted that he had not drawn the samples in the presence of any witness. There is another glaring aspect of this case. According to the informant, two persons, who were found nearby, were made witnesses of search and seizure namely, Bharat Sah and Md. Islam who have



not been examined. We have seen the seizure memo, which does not bear signatures of either of the said persons namely, Bharat Sah and Md. Islam (Exhibit-1). The said seizure list rather bears signatures of Yogendra Das and Ram Babu Sah (PW-7). Ram Babu Sah in his evidence has not in any way supported the prosecution's case.

15. It would be appropriate to mention at this stage that the informant in his evidence at the trial also deposed that he had not handed over copies of the seizure list to the accused persons. Further, in his evidence the informant deposed that the seizure list was prepared at the police station. It is significant to note that according to the informant, once the contraband were seized at 4:20 am, they were handed over to the officer-in-charge of the P.S. at 5:30 pm, more than 12 hours, thereafter. The distance of the police station from the place of occurrence, as is evident from the First Information Report, was hardly 16 kilometers. Further, the informant(PW-1) in his evidence has deposed at the trial that he had borrowed digital weighing machine from a nearby shop from the market but he did not know the name of the shopkeeper or the shop from where the weighing machine was borrowed. It is also significant to note from the evidence of PW-1 that he had not even sealed the



seized articles in presence of any independent witness at the place of occurrence rather he had sealed the same in the SSB Camp. Referring to Exhibits-3 and 4, which are arrest memos, the informant deposed at the trial that initially a rough copy was prepared at the place of occurrence whereafter they were given final shape at the SSB Camp.

16. Further, the result of examination of the FSL though confirmed that the nature of articles sent to it by way of sample was *ganza*, it is pertinent to note that the FSL report does not mention the quantity of *ganza* which was received by the laboratory for examination.

17. Keeping in mind, the patent violations, in conducting search and seizure as mandated under section 41 of the NDPS Act and failure to draw the samples as contemplated under Section 52(A)(2)(b) of the NDPS Act and other discrepancies as noted above, we are of the view that the prosecution cannot be said to have proved its case against these appellants based on the evidence of the official witnesses only. We are surprised to notice that signatures of the seizure list witnesses in whose presence, according to the informant the search and seizure was made are not present on the seizure list. It is neither mentioned in the FIR nor in the deposition of the



informant that the search was conducted and seizure was made in the presence of Yogendra Das and Ram Babu Sah (PW-7) whose names have been mentioned in the seizure memo as witnesses. In such view of the matter, the appellants deserves to be given benefit of doubt.

18. Accordingly, the impugned judgment of conviction dated 01.07.2022 and order of sentence dated 06.07.2022 passed by the learned Additional Sessions Judge-1st cum Special Judge, Madhubani in G.R. Case No. 08 of 2010 arising out of Madhwapur P.S. Case No. 31 of 2010 (NDPS No. 8/2010), is set aside.

19. These appeals are allowed.

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

(Chakradhari Sharan Singh, J)

(Nawneet Kumar Pandey, J)

ranjan/suraj-

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