

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.619 of 2017

Arising Out of PS. Case No.-166 Year-2014 Thana- BARACHATTI District- Gaya

Barhan Mahto Son of Late Jagish Mahto, resident of Village- Dhamna, P.S.-
Barachatti, District- Gaya.

... .. Appellant/s

Versus

The State Of Bihar

... .. Respondent/s

with
CRIMINAL APPEAL (DB) No. 620 of 2017

Arising Out of PS. Case No.-166 Year-2014 Thana- BARACHATTI District- Gaya

Prayag Prasad Son of Late Dasharath Mahto, resident of Village- Dhamna,
P.S.- Barachatti, District- Gaya.

... .. Appellant/s

Versus

The State Of Bihar

... .. Respondent/s

with
CRIMINAL APPEAL (DB) No. 677 of 2017

Arising Out of PS. Case No.-166 Year-2014 Thana- BARACHATTI District- Gaya

Rameshwar Prasad son of Shukhdeo Mahto, R/o Village- Dhamna, P.S.-
Barachatti, District- Gaya.

... .. Appellant/s

Versus

The State Of Bihar

... .. Respondent/s

with
CRIMINAL APPEAL (DB) No. 791 of 2017

Arising Out of PS. Case No.-166 Year-2014 Thana- BARACHATTI District- Gaya

Shyamdeo Prasad Son of Late Ratan Mahto, Resident of Village- Dhamna,
P.S.- Barachatti, District- Gaya.

... .. Appellant/s

Versus

The State Of Bihar



... .. Respondent/s

with
CRIMINAL APPEAL (DB) No. 891 of 2017

Arising Out of PS. Case No.-166 Year-2014 Thana- BARACHATTI District- Gaya

Keshar Prasad Son of Late Chulhai Mahto, R/o Village- Dhamna, P.S.-
Barachatti, District- Gaya.

... .. Appellant/s

Versus

The State Of Bihar

... .. Respondent/s

Appearance :

(In CRIMINAL APPEAL (DB) No. 619 of 2017)

For the Appellant/s : Mr. Suraj Narain Yadav, Adv.

For the Respondent/s : Mr. Sri Ajay Kumar Mishra, APP

(In CRIMINAL APPEAL (DB) No. 620 of 2017)

For the Appellant/s : Mr. Suraj Narain Yadav, Adv

For the Respondent/s : Mr. Ajay Kumar Mishra, APP

(In CRIMINAL APPEAL (DB) No. 677 of 2017)

For the Appellant/s : Mr. Vikramdeo Singh, Adv.

For the Respondent/s : Mr. Ajay Kumar Mishra, APP

(In CRIMINAL APPEAL (DB) No. 791 of 2017)

For the Appellant/s : Mr. Vikramdeo Singh, Adv.

For the Respondent/s : Mr. Ajay Kumar Mishra, APP

(In CRIMINAL APPEAL (DB) No. 891 of 2017)

For the Appellant/s : Mr. Vikramdeo Singh, Adv

For the Respondent/s : Mr. Ajay Kumar Mishra, APP

CORAM: HONOURABLE MR. JUSTICE ASHUTOSH KUMAR
and
HONOURABLE MR. JUSTICE SHAILENDRA SINGH
ORAL JUDGMENT
(Per: HONOURABLE MR. JUSTICE ASHUTOSH KUMAR)

Date : 03-07-2023

1. All the criminal appeals have been heard
together and are being disposed of by this common
judgment.

2. We have heard Mr. Suraj Narain Yadav, the
learned Advocate for the appellants in Criminal Appeal



(DB) No. 619/2017 (Barhan Mahto) and Criminal Appeal (DB) No. 620/2017 (Prayag Prasad), Mr. Vikramdeo Singh, the learned Advocate for the appellants in Criminal Appeal (DB) No. 677 of 2017 (Rameshwar Prasad), Criminal Appeal (DB) No. 791 of 2017 (Shyamdeo Prasad) and Criminal Appeal (DB) No. 891 of 2017 (Keshar Prasad) and Mr. Ajay Kumar Mishra, the learned Additional Public Prosecutor for the State.

- 3.** All the appellants have been convicted under Section 20 and 22 of the N.D.P.S. Act, 1985 vide judgment of conviction dated 28.04.2017 and the consequent order of sentence dated 05.05.2017 passed by the learned Additional Sessions Judge-1st -cum Special Judge (N.D.P.S. Act), Gaya in N.D.P.S. Case No. 7/2015 (arising out of Barachatti P.S. Case No. 166 of 2014 for recovery of 27 kgs of *Ganja* from the appellant / Barhan Mahto; 15 kgs of *Ganja* from the appellant /Prayag Prasad; 67 Kgs of *Ganja* from the appellant /Rameshwar Prasad; 43 kgs of *Ganja*



from the appellant/Shyamdeo Prasad; and 85 kgs of *Ganja* from appellant/Keshar Prasad.

- 4.** The appellant/Barhan Mahto in Criminal Appeal (DB) No. 619 of 2017 has been sentenced to undergo R.I. for 14 years and to pay a fine of Rs. One Lakh Fifty Thousand and in default of payment of fine, to further undergo R.I. for two years. The appellant / Prayag Prasad in Criminal Appeal (DB) No. 620 of 2017 has been sentenced to undergo R.I. for 10 years each under sections 20 and 22 of the NDPS, to pay a fine of Rs. One Lakh and in default of payment of fine, to further undergo R.I. for one year. The appellant/Rameshwar Prasad in Criminal Appeal (DB) No. 677 of 2017 has been sentenced to undergo R.I. for 14 years under Sections 20 and 22 of the N.D.P.S. Act and to pay a fine of Rs. One Lakh Fifty Thousand and in default of payment of fine to further undergo R.I. for two years. The appellant / Shymadeo Prasad in Criminal Appeal (DB) No. 197 of 2017 has been sentenced to undergo R.I. for 14 years under



Sections 20 and 22 of the N.D.P.S. Act, to pay a fine of Rs. One Lakh Fifty Thousand and in default of payment of fine to further undergo R.I. for two years. The appellant / Keshar Prasad in Criminal Appeal (DB) No. 891 of 2017 has been sentenced to undergo R.I. for 14 years under Sections 20 and 22 of the N.D.P.S. Act, to pay a fine of Rs. One Lakh Fifty Thousand and in default of payment of fine to further undergo R.I. for two years.

5. The learned Advocates appearing for the appellants have submitted that the conviction of the appellants is based on no evidence at all. None of the provisions of the N.D.P.S. Act, 1985 with respect to search and seizure have been followed. In fact, the witnesses have not even been identified in the dock. They have further urged that the sampling was done after a long time of the seizure and the material exhibits were not even produced during the Trial.

6. On these grounds, it has been urged that the judgment and order of conviction against all the



appellants be set aside and they be released from custody.

7. A peculiar approach appears to have been adopted by the investigating agency as also the Trial Court in this case.

8. The F.I.R was registered on the self statement of PW-6 that at about 2 'O' Clock in the night of 25.04.2014, a secret information was received by him that many persons have kept *Ganja* in their houses in village Dhamna for sale.

9. In order to verify the aforementioned information, Surendra Rai (PW-6) along with his team comprising Constables, members of S.T.F. etc., proceeded towards village Dhamna and surrounded the village from outside. The houses of the residents of the village were searched and narcotics was recovered from nine of such houses. Five of the appellants were found present in their houses from where huge quantity of *Ganja* kept in sacks were recovered. The house owners of four of such houses from were *Ganja*



was recovered, were not to be found.

10. A seizure list was prepared in presence of two local persons, namely, Shiv Nandan Mahto and Dinesh Prasad (PW-4 and PW-5) respectively.

11. The aforementioned five persons (appellants) were arrested.

12. On the basis of such written report, Barachatti P.S. Case No. 166 of 2014 dated 25.04.2014 was registered for investigation for offences under Sections 20 and 22 of the N.D.P.S. Act, 1985.

13. The investigation was completed with respect to the appellants whereas with respect to four others from whose houses, narcotics were recovered, the investigation was kept pending. The aforementioned appellants were put on trial.

14. The Trial Court, after examining eight witnesses on behalf of the prosecution, convicted and sentenced the appellants as aforesaid.

15. PW-6 during the Trial, has though supported the prosecution case but did not identify anyone of the



appellants in the dock. After laying a picket in the village where raid was conducted, he and his police party entered the village on foot and made recoveries. According to him, there were 100 Constables in the police team. He had got the narcotics weighed at the place of search by a weighing scale, which was brought from the police station. The sacks containing narcotics were identified and sealed. The village comprised 100 to 150 houses. The *Ganja* so recovered, according to PW-6, was brought to the police station and was handed over to the Officer-in-Charge. The arrested persons were sent to jail. He has clearly admitted that the process of search and seizure was not photographed. He had also not informed any Magistrate to remain present at the time of search and seizure or sampling of the narcotics.

16. From his deposition, two things get reflected very clearly viz., that a very casual approach was adopted in entering a village of approximately 150 houses; how were the houses identified and against



which information and how the process of search was conducted remains completely under wraps. A general statement has been made by PW-6 that five of the persons from whose houses recovery was made, were arrested whereas no arrests were made with respect to recovery in four other houses against whose house owners, investigation is still pending.

17. From the F.I.R and his deposition, we do not get any idea as to compliance of the provisions concerning search. We do not even get any idea whether before the search, the police party gave their own search to satisfy the house owners that the narcotics was not being planted. How was the sampling done is not known to PW-6 for the reason that though he claims that the sampling had been done at the place of search but no details have been provided by him, especially when huge quantity of narcotics was recovered and stored in large number of sacks.

18. Thus, the deposition of PW-6 is required to be



discounted so far as sampling of such narcotics is concerned. The statement of PW-6 that from the narcotics so recovered, samples were drawn at the place of occurrence, does not inspire confidence. He also does not claim to have followed the Miranda principle before entering the houses of the appellants. There is a further flaw in the prosecution case which is very glaring. There is no statement with respect to reducing the information received by him in writing and dispatching it to superior police officers as ordained under Section 42 of the N.D.P.S. Act, 1985. What was the information and the lead was against which of the persons, thus remains unknown. It also appears rather queer to us that a big sized village would be raided by the police party comprising 100 police and S.T.F. personnel and without any specific information, nine houses would be searched. Had the information been reduced in writing and transmitted to superior police officers as required under the Act, the Trial Court might not have darted in the dark with



respect this aspect of the matter.

19. The case was investigated by R.K. Mandal/PW-2 who took over the investigation on 25.04.2014 only. He recorded the further statements of the members of the police party and had obtained permission from the Trial Court for drawing samples from the seized consignment of narcotics. The samples were sent to the Forensic Science Laboratory for testing. He had submitted the chargesheet against the appellants. In his cross - examination, he had admitted that he took the permission of the Court for sampling and sending it to the F.S.L. after approximately three months of the search and seizure on 22.07.2014. However, he could not identify anyone of the appellants in the dock and has ascribed delay to be the reason for his failing memory. After how many days of the requisition filed by him for seeking permission, the order came forthcoming could not be stated by PW-2.

20. Thus, from his evidence also, we do not find



whether sample was drawn in his presence or in the presence of a Magistrate or its photography was done. How was the sample sent to the F.S.L. is not known.

21. Very surprisingly, we have found that though the Trial Court has permitted the report of the F.S.L. to be exhibited as Ext. -5, but the same is not on record. The Trial Court has not even discussed the contents of the report and has got satisfied by taking resort to the provisions contained in Section 293 of the Code of Criminal Procedure. True it is that a report from F.S.L. need not to be proved but the contents must be known whether the report conforms to the accusation that narcotics was stored by the appellants.

22. There is nothing on record including the judgment of the Trial Court to indicate whether the material exhibit was produced before the Court or was substituted by the destruction certificate. All that we have been able to find in the record is the permission of the Trial Court to destroy the narcotics.

23. From the perusal of the deposition of other



members of the police party, we only get to know that almost all of them stood outside the village and did not witness the actual raid and seizure.

24. These set of facts, in conjunction with a complete volte-face by the two seizure list witnesses, namely, PW-4 and PW-5 makes the case absolutely doubtful so far as it relates to the appellants specifically.

25. Thus, none of the provisions of the NDPS Act or the standing instructions which are intended to guide the officers for ensuring a fair procedure, appears to have been followed.

26. The Supreme Court in **Khet Singh vs. Union of India; AIR 2002 SCC 1450, Noor Aga vs. State of Punjab; (2008) 16 SCC 417** and **Union of India vs. Balmukund and others (2012) 9 SCC 161** and several other cases, has categorically held that breach of the standing instructions not only makes the case doubtful but also vitiates the trial. Even a substantial compliance to the provisions contained in



N.D.P.S. Act, 1985 as also the standing instructions would not suffice and it is mandatory on the part of the investigating agency to follow each one of the instructions diligently.

27. There is yet another aspect of the matter which requires to be noted. According to PW-6, the narcotics was seized, sampled and then brought to the police station. PW-2, the I.O. has not stated whether it was sent to *Malkhana* or kept in the police station only. Nothing has been brought on record by the prosecution to demonstrate that those consignments were placed in *Malkhana* as no register of its safe keeping has been produced. Where was the sampling done also is not known. None of the process, as noted above, has been photographed.

28. With these loopholes, it is difficult for us to accept the prosecution version that the sealing of the samples were done appropriately or that those consignments were recovered from the houses of the appellants.



29. We are not happy to record that the records dispatched to this Court does not even contain Ext. 5. In its place, we have found two blank papers. The delay in seeking permission for sampling and the delay in sending the reports further confounds the issue. The date of dispatch and the date of receipt would have been reflected from the Ext. 5, which does not exist in the records.

30. Thus, from none of the aspects of the case, do we find any assurance that the appellants were the persons from whose houses recovery was made and that the recovery was of narcotics. In the absence of any tangible material, thus before us, we have no option but to reject the prosecution case as also the Trial Court judgment and order of conviction.

31. As a denouement, we indicate that the following reasons have plodded us to reject and set aside the judgment and order of conviction:-

(i) Non observance of the mandatory provisions under Sections 40, 42, 50, 52A of



the N.D.P.S. Act, 1985; (ii) Breach of standing instructions no. 1/88 and 1/89 with respect to sampling and photography of such sampling.

(iii) Casual approach adopted by the investigating agency in pooling together all the seized narcotics kept in different sacks and not ensuring identification and its proper seal.

(iv) No definite proof having been offered by the prosecution for the safe-keeping of the narcotics in *Malkhana*.

(v.) Non production of even the destruction report if at all the narcotics were destroyed as a material exhibit.

32. The Supreme Court in **Vijay Jain Vs. State of Madhya Pradesh; (2013) 14 SCC 527** and **Jitendra and another Vs. State of M.P. (2004) 10 SCC 562** has held that non production of material objects before the Court is not only a procedural lapse



but has the potential to vitiate the entire trial. It is not without any purpose that standing instructions have been issued by the Department.

33. Let it be noted that Rules of sampling and disposal have now been framed under N.D.P.S. (Seizure, Storage, Sampling and Disposal) Rules, 2022.

34. For the afore-noted reasons, we set aside the judgment of conviction dated 28.04.2017 and the consequent order of sentence dated 05.05.2017 passed by the learned Additional Sessions Judge-1st -cum Special Judge (N.D.P.S. Act), Gaya in N.D.P.S. Case No. 7/2015 (arising out of Barachatti P.S. Case No. 166 of 2014).

35. As the appellant/Barhan Mahto in Criminal Appeal (DB) No. 619/2017, appellant/Prayag Prasad in Criminal Appeal (DB) No. 620/2017, appellant/Rameshwar Prasad in Criminal Appeal (DB) No. 677 of 2017 and appellant/Shyamdeo Prasad in Criminal Appeal (DB) No. 791 of 2017 are in jail,



they are directed to be set at liberty forthwith unless their detention is required in any other case.

36. Since the appellant/Keshar Prasad in Criminal Appeal (DB) No. 891 of 2017 is on bail, his liabilities under the bail bonds is cancelled.
37. All the above appeals stand allowed.
38. Let a copy of this order be dispatched to the Superintendent of concerned jail for record and compliance.
39. The records of these appeals be also returned to the concerned court below forthwith.

(Ashutosh Kumar, J)

(Shailendra Singh, J)

SunilKumar/-
Rajiv

AFR/NAFR	NAFR
CAV DATE	N/A
Uploading Date	05.07.2023
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