

IN THE HIGH COURT OF JUDICATURE AT PATNA

CRIMINAL APPEAL (DB) No.1081 of 2019

Arising Out of PS. Case No.-70 Year-2017 Thana- GOVERNMENT OFFICIAL COMP.

District- East Champaran

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1. Sheikh Imtiazuddin @ Giyasuddin, aged about 30 years, male, S/o Sheikh Ayub, Resident of Village- 43, Ekbalpur Lane, P.S.- Ekbalpur, P.O.- Khidderpur, Kolkata-700023.
 2. Sujay Das, aged about 30 years, male, S/o Gopal Das, Resident of Mohalla- Rampur Madhyapara, Ward-11, Maheshtalla (M), P.S.- Maheshtalla, District- South 24, Pargana, West Bengal-700141

... .. Appellant/s

Versus

The Union of India through the Deptt. of N.C.B., New Delhi, Bihar.

... .. Respondent/s

with

CRIMINAL APPEAL (DB) No. 865 of 2019

Arising Out of PS. Case No.-70 Year-2017 Thana- GOVERNMENT OFFICIAL COMP.

District- East Champaran

Seikh Wazid, male, aged about 33 years, Son of Seikh Hamid, Resident of Village - 7 B, H/6, Rajb Ali Lane, P.S.- Ekbalpur, Kolkata- 700023.

... .. Appellant/s

Versus

The Union of India through Custom Department, Raxaul, Distt.- East Champaran (Motihari).

... .. Respondent/s



Appearance :

(In CRIMINAL APPEAL (DB) No. 1081 of 2019)

For the Appellant/s : Mr. Sunil Kumar No.III, Advocate
Mr. Bijendra Kumar, Advocate
For the Respondent/s : Mr. Manoj Kumar Singh, CGC
Mr. Ankit Kumar Singh, JC to CGC

(In CRIMINAL APPEAL (DB) No. 865 of 2019)

For the Appellant/s : Mr. Sourendra Pandey, Advocate
For the Respondent/s : Mr. Manoj Kumar Singh, CGC
Mr. Anshuman Singh, JC to CGC

CORAM: HONOURABLE MR. JUSTICE ASHUTOSH KUMAR

and

HONOURABLE MR. JUSTICE VIPUL M. PANCHOLI

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE ASHUTOSH KUMAR)

Date : 08-08-2023

Both the appeals, namely, Criminal Appeal (DB) Nos. 1081 of 2019 and 865 of 2019 have been taken up together and are being disposed of by this common judgment.

2. Mr. Sunil Kumar No. III has appeared for the appellants, viz., Seikh Imtiazuddin @ Giasuddin and Sujay Das in Cr. Appeal (DB) No. 1081 of 2019, whereas Mr. Sourendra Pandey has appeared for the appellant, viz., Seikh Wajid in Criminal Appeal (DB) No.



865 of 2019.

3. Four persons have been put on trial including the appellants, out of whom, only three persons (appellants herein) have been convicted and the fourth accused person, namely, Govind Magar has been acquitted by the Trial Court.

4. All the three appellants have been convicted under Sections 20(b)(ii)(c) and 23(c) of the Narcotic Drugs and Psychotropic Substances Act, 1985, *(hereinafter referred as the N.D.P.S. Act)* vide judgment dated 31.05.2019 passed by the learned 1st Additional Sessions Judge, East Champaran at Motihari in N.D.P.S. Case No. 70 of 2017, CIS No. 221 of 2016 and by order dated 10.06.2019, appellants/Seikh Imtiazuddin @ Giasuddin and Sujay Das have been sentenced to undergo R.I. for 12 years, to pay a fine of ₹ 1 lakh each and in default of payment of fine, to further undergo R.I. for 6 months for the offence under Section 20(b)(ii) (c) of the N.D.P.S. Act. Appellant/Seikh Wajid has been



sentenced to undergo R.I. for 10 years, to pay a fine of ₹ 1 lakh and in default of payment of fine, to further suffer R.I. for 6 months for the offence under Section 20(b)(ii)(c) of the N.D.P.S. Act. All the three appellants have been sentenced to undergo R.I. for 10 years, to pay a fine of ₹ 10,000/- each and in default of payment of fine, to further undergo R.I. for 6 months for the offence under Section 23(c) of the N.D.P.S. Act. The sentences have been ordered to run concurrently.

5. It appears to us that because 8 kgs. of *charas* was found in possession of appellants/Seikh Imtiazuddin @ Giasuddin and Sujay Das and 4 kgs. from the appellant/Seikh Wajid, therefore, some distinction has been made with respect to the sentencing.

6. Manoj Kumar (PW-2) is the complainant of this case, who has alleged that he had received a secret information on 27.08.2017 at about 09:30 hours that four accused persons are trying to smuggle in *charas*



from Kathmandu *via* Raxaul. The news was again confirmed by at around 10 O'clock in the day. He, in his capacity as an Inspector, Land Customs Station, directed for putting up a barrier at a place near the border for arresting the accused persons. The team which was constituted, spotted a *tonga* (a carriage drawn by a horse), which was signalled to stop. Four persons were found to be occupying the said *tonga* excluding the person driving it. Two of the persons from the neighborhood were requested to become the witnesses to the search and seizure procedure, both of whom have not been examined at the trial nor their names have been disclosed in the complaint referred to above. The three appellants were found keeping something concealed in their respective bodies, which necessitated their personal search.

7. The complaint further discloses that a notice was given to them under Section 50 of the N.D.P.S. Act for their personal search, intimating to



them that they had the option of having themselves searched before any Magistrate or Gazetted Officer of the Customs.

8. Since all of them agreed to be searched in front of the Custom Officials, they were searched and from the possession of the appellants, a total of 20 kgs. of *charas* was recovered. Seikh Imtiazuddin @ Giasuddin and Sujay Das (Cr. Appeal (DB) No. 1081 of 2019) were keeping 8 kgs. of *charas* each on their bodies, whereas Seikh Wajid (Cr. Appeal (DB) No. 865 of 2019) was found to be in possession of 4 kgs. of *charas*. Some small amount of cash also was recovered from them, the details of which have been provided in the complaint. Such money was never retained by the Customs Department, but returned to their respective owners.

9. The packets of *charas* recovered from each of the appellants were weighed in their presence and of the two independent witnesses. Its valuation was



assessed to be ₹ 40 lakhs on the date of the seizure. Three representative samples, weighing 25 gms. each, was drawn by taking small quantity from each packet recovered from the appellants and were separately marked and sealed in presence of all the appellants and the independent witnesses. It was also signed by all of them.

10. The complaint further discloses that the *panchnama* of the search and seizure formalities were also drawn up and photocopies of such documents were handed-over to the appellants after the formalities were completed. They were also served summons under Section 67 of the N.D.P.S. Act and their voluntary as well as interrogatory statements were recorded under Sections 67 and 68 of the N.D.P.S. Act. In their statements, they admitted that on the persuasion of Govind Magar (since acquitted), they agreed to bring the narcotics into India from Nepal. The entire plan was hatched by Govind Magar, who came from Kathmandu in



Nepal to India *via* Raxaul. The appellants were promised to be paid the mule charges.

11. Thereafter, all the appellants were taken to Primary Health Centre, Raxaul for medical examination and were given time and space to communicate with their family members over telephone. It was only then that they were produced before the District and Sessions Judge, Civil Court, Motihari for their judicial custody on 29.08.2017, when they were remanded to the custody of the Officer-In-charge, Central Jail, Motihari.

12. The seized samples were sent to the Joint Director, Chemical Laboratory, Customs House, Kolkata for chemical examination. The balance of the seized *charas*, weighing appropriately 19.775 kgs., was deposited in Customs Godown at Champaran. The report from the Chemical Laboratory, Kolkata confirmed that those samples responded to the chemical and chromatography test for the resinous extract of plant



cannabis sativa.

13. One Brajesh Kumar Tripathi, a Judicial Magistrate Ist Class, certified on 19.11.2017 that the balance consignment could be destroyed and disposed off. The Special Judge, Motihari, on such certification, permitted the destruction of the balance *charas* and the destruction certificate was preserved as primary evidence of the seized narcotics.

14. The case, therefore, was lodged against the appellants under Sections 20(b)(ii)(c) and 23(c) of the N.D.P.S. Act.

15. The Trial Court, after having examined nine witnesses on behalf of the prosecution and one on behalf of the defense and on perusal of various documents produced by the parties, convicted and sentenced the appellants as aforesaid.

16. Aforesaid Govind Magar, however, was acquitted as there was no evidence against him of being in possession of any narcotics or dealing in narcotics in



any manner whatsoever.

17. Mr. Sunil Kumar No. III and Mr. Sourendra Pandey, the learned Advocates for the appellants have very strenuously argued that none of the mandatory provisions of the N.D.P.S. Act, especially Sections 42, 52(A) or 57 have been complied with, which makes the prosecution case highly doubtful, entitling the appellants to seek their acquittal. Even the names of the two independent witnesses before whom the search and seizure procedures were completed was not disclosed in the complaint petition nor were they examined at the trial. No explanation also has been offered by the prosecution for withholding their names and not bringing them to the witness stand. Lastly, it has been submitted that no inventory was made before a Magistrate in accordance with the provisions contained in Clause 2 of Section 52(A) of the N.D.P.S. Act, which was a clear breach of the statutory provisions as also the standing instructions of the N.C.B. as well as the



mandate of the Supreme Court decision in ***Union of India Vs. Mohanlal & Anr.; (2016) 3 SCC 379.***

18. Apart from this, it has been submitted that from the deposition of the witnesses, it clearly appears that the two independent persons did not know how to read and write but the exhibits disclose that they had appended their signature on the seizure documents.

19. The appellants are at a loss to know as to who were these people, who were shown to be the witnesses on paper but neither named in the complaint nor brought before the Trial Court.

20. Mr. Sourendra Pandey has also attempted to demonstrate that the requisite quantity of the sample was not sent to the Chemical Laboratory, Kolkata as some of the samples were more than the requisite weight, whereas some were deficient, though only nominally.

21. All these aspects, if seen together, the argument runs, the appellants are entitled to benefit of



doubt. On the rationale of the judgment by the Trial Court, making a distinction between the appellants/Seikh Imtiazuddin @ Giasuddin and Sujay Das on one hand, and appellant/Seikh Wajid, on the other, only on the basis of the difference in the quantity of narcotics recovered, even though, in both the cases it was more than commercial quantity, it has been pointed out that different sentences have been awarded to the two set of appellants. This further reflects non-application of mind by the Trial Court so far as the sentence is concerned.

22. Despite there being no evidence with respect to the offence under Section 23(c) of the N.D.P.S. Act, all the three appellants have been convicted and sentenced for the said offence also.

23. In that connection, it has been argued on behalf of the appellants that neither the *tonga* (horse drawn carriage) was searched nor any effort was made to confiscate the same. The driver of the *tonga* was also never interrogated. Thus, for all practical purposes, there



is no evidence on record that the appellants were found inside the territorial limits of India while coming from a foreign country/Nepal. Section 23(c) of the N.D.P.S. Act is a substantive offence, which could not have been presumed by the Court.

24. In order to appreciate the afore-noted contentions, we have carefully examined the evidence on record and the documents exhibited in support of the prosecution.

25. The complainant has been examined as PW-2, who has supported the prosecution case in its entirety. Though he has named the two independent witnesses before whom the search and seizure procedure were conducted, namely, Arun Kumar and Ramesh Patel, but has not given any reason for not disclosing their names in the complaint petition or for not bringing them forward as the prosecution witnesses. All the formalities under Section 50 of the N.D.P.S. Act is stated to have been complied with, which is further confirmed by the



documents brought on record on behalf of the prosecution. Exhibits-3, 9 and 10 have been proved, which is a definite evidence that the appellants were detained, searched and only on being satisfied that they were in possession of narcotics without any explanation, they were arrested and prosecution was initiated against them. The arrest *memo* has also been proved. PW-2 has, without missing out on any point whatsoever, narrated before the Trial Court the process through which the samples were drawn, sealed and specifically numbered differently in order to maintain the identity of the samples drawn from the consignment of narcotics possessed by each of the appellants. The samples, according to PW-2, were dispatched without any delay to the Kolkata Laboratory and the balance of the narcotics was seized and, thereafter, with the permission of the Court, destroyed.

26. However, PW-2, in his cross-examination, as has been rightly pointed out by the



learned Advocates appearing for the appellants, the secret information received by him was not reduced in writing nor any report with respect to such receipt of information was ever transmitted to the superior officer within the stipulated time under Section 42 of the N.D.P.S. Act.

27. For the sake of completeness, we reproduce the exact provision contained in sub-Clause (2) of Section 42 of the N.D.P.S. Act, which is as hereunder:

"Where an officer takes down any information in writing under Sub-Section (1) or records grounds for his belief under proviso thereto, he shall within 72 hours send a copy thereof to his immediate official superior."

28. However, as an explanation, we find that PW-2 has stated before the Trial Court that in the raiding team, one Sanjeev Kumar was the senior-most officer. In the normal process, the Deputy Commissioner of the Customs Department always heads such team,



but in the present case, the requisite information was sent to the Deputy Commissioner only verbally.

29. Mr. Sourendra Pandey for one of the appellants has vehemently argued that oral information does not fit in the scheme of the N.D.P.S. Act as the inbuilt checks and safeguards are only to ensure that no person is falsely implicated in a case under the N.D.P.S. Act, which entails very severe punishment. Reliance on such oral compliance of the mandatory provisions of the N.D.P.S. Act is no compliance at all, much less any substantial compliance.

30. However, we find from the Trial Court records that all the members of the raiding team, who have been examined at the trial, have stated in unison that the procedure to be followed under Section 50 of the N.D.P.S. Act was complied with and only on the appellants having agreed to be searched before the raiding team, that a search was conducted. Though, none of them also have given any explanation for not



naming the independent seizure-list witnesses or bringing them as prosecution witnesses to prove the case, but in the present set of facts, such lapse does not appear to have vitiated the prosecution case in any manner whatsoever. The requirement for independent witnesses is for ensuring that the raiding team does not act whimsically. It is one of the important safeguards which cannot be lightly flouted or breached. The sole purpose of bringing in this safeguard is to ensure that no innocent person is falsely framed by the investigating agency. However, in a line of decisions by the Supreme Court, it has been held that testimony of an official witness cannot be rejected on the ground of non-corroboration by independent witnesses. In ***Rizwan Khan Vs. The State of Chhattisgarh; (2020) 9 SCC 627***, while agreeing with the proposition in ***Surinder Kumar Vs. The State of Punjab; (2020) 2 SCC 563***, it has been held that examination of independent witness may not be an indispensable requirement and is not



necessarily fatal to the prosecution case, if otherwise, the prosecution story is believable.

31. In ***State (Govt. of NCT of Delhi) Vs. Sunil & Another; (2001) 1 SCC 652***, the Supreme Court, taking a pragmatic view of the matter, has held that it is only an archaic notion that actions of the Police Officer should be approached with initial distrust. It is time now to start placing at least initial trust on the actions and the documents produced by the police. At any rate, the Court cannot start with the presumption that the Police records are untrustworthy. The Supreme Court has gone on to state that as a proposition of law, the presumption would be other way around. That official acts of the police have been regularly performed is a wise principle of presumption and recognized even by the Legislature. While saying so, the Supreme Court had also cautioned that if the formalities are not complete, that could be chipped in for deciding the case with the aid of other factors and only if it is found that either the



accused has been prejudiced or the case has not been proved to the hilt, would such lapses be relied upon for discrediting the prosecution version.

32. We have found from the documents on record that a prompt action was taken by the raiding team of the Land Customs Station at Raxaul and there was more than substantial compliance of all the mandatory provisions except for making of inventory or of drawing the samples in presence of a Magistrate.

33. Section 52(A) of the N.D.P.S. Act deals with disposal of seized Narcotics Drugs and Psychotropic Substances Act. The section emphasizes that whichever narcotic drugs, psychotropic substances or controlled substances or the conveyances are seized, ought to be forwarded to the officer-in-charge of the nearest police station or to the officer empowered under Section 53. Before doing that, an inventory shall be prepared, containing such details relating to the description, quality, quantity, mode of packing, marks and numbers



with other identifying particulars of such seized drugs, and an application would be made to a Magistrate for the purposes of certifying the correctness of the inventory so prepared; or taking, in the presence of such Magistrate, photographs of such drugs and certifying such photographs as true or allowing the drawing of representative samples of each of the drugs or substances and certifying the correctness of any list so drawn.

34. The section further emphasizes that every Court trying the offence under the N.D.P.S. Act would treat the inventory, the photographs and any list of samples drawn and certified by the Magistrate as primary evidence in respect of such offence.

35. In the present case, no effort though appears to have been made for intimating any Magistrate before whom the samples could have been drawn but that itself, would be no ground to disbelieve the correctness of the sampling procedure and sending it



to the chemical laboratory for testing whether it is narcotic. We say so for the reason that though in ***Union of India Vs. Mohanlal & Anr. (supra)***, the Supreme Court, on an analysis of Section 52(A) of the N.D.P.S. Act, found that a Magistrate is required to oversee the process of sampling, but, more often than not, that was not being done. The explanation, perhaps, was that according to Section 52(A)(4) of the N.D.P.S. Act, samples drawn and certified by the Magistrate in compliance with sub-Sections (2) and (3) of Section 52(A), constitute primary evidence for the purpose of the trial, especially in the absence of production of the narcotics so seized. But there is no provision in the N.D.P.S. Act, which mandates the taking of samples at the time of seizure, but the statutory provisions governing the taking of samples in various standing orders issued by the Central Government, such requirement of the presence of Magistrate at the time of sampling is insisted upon. The Supreme Court, thus, was



of the view that even under such a situation, when two provisions stand in juxtaposition, with a conflict, such conflict ought to be resolved in favour of the Statute on the first principles of interpretation, but the continuance of the statutory notification in its present form, might create confusion in the minds of the authorities concerned while discharging their duties. It was, therefore, suggested at that occasion, that the Central Government would do better in re-examining the matter and taking suitable steps in the afore-noted direction.

36. This observation in ***Union of India Vs. Mohanlal and Anr.*** (*supra*) led to the Standing Orders No. 1 of 1988 / 1989 respectively being followed normally. However, in the present, a new rule has been enacted under the name and style of Narcotic Drugs and Psychotropic Substances (Seizure, Storage, Sampling and Disposal) Rules, 2022. These rules are be prospective in operation but, *mutatis mutandis*, are similar to the standing instructions, referred to earlier,



especially with respect to the necessity of the samples being drawn in presence of the Magistrate.

37. In the present case, it appears from the records that the samples, of course, were not drawn before the Magistrate, but the photographs were taken at the time of search of the body of the appellants. The afore-noted photographs were annexed as Annexure-2 to the complaint petition.

38. We further find from the records that the samples were sent to the laboratory through an Assistant, namely, Sudhir Kumar and that the inventory was certified by a Magistrate, who found that the balance of the narcotics, after the samples were drawn, could be destroyed. Thereafter, necessary permission was obtained from the Special Judge, Motihari for its destruction.

39. Thus, the whole purpose of drawing the samples before the Magistrate, inventorising it to ensure fairness as also for the purposes of retaining the primary



evidence in the wake of destruction of the balance narcotics, has been served.

40. Thus, only because a Magistrate was not present when samples were drawn, we have no other reasons to doubt the correctness of the prosecution version that the appellants were carrying narcotics with them.

41. True it is that in an Act like N.D.P.S. Act, 1985 with reverse burden, any breach of the statutory provision has to be read in favor of the accused and against the prosecution, but such insistence in the present set of facts would lead to anomalous results.

42. In ***Mohan Lal Vs. State of Punjab; (2018) 17 SCC 627***, though there is an observation that in the nature of reverse burden of proof, the onus will lie on the prosecution to demonstrate, on face of it that the investigation was fair, judicious and with no circumstance that may raise doubt about its veracity, such observations are limited to only ensuring that the



trial procedure is fair. Such observation is based on substantive constitutional foundations and principles of criminal jurisprudence, but it is not always that the prosecution is required to be doubted in favour of the accused persons.

43. In ***Mukesh Singh Vs. State (Narcotics Branch of Delhi; (2020) 10 SCC 120***, the Constitution Bench of the Supreme Court has gone on to state that there is no reason to doubt the credibility of the case on ground of the complainant only investigating the case or any minor breach of any one of the provisions of the N.D.P.S. Act, especially when the case does not appear to be faltering at the seams.

44. The circumstances of this case do not reflect that a raw deal has been handed over to the accused persons and that there is a possibility of their false implication.

45. Thus, we find that the secret information led to the arrest of the appellants from whose



possession, narcotics were recovered. The samples were drawn on the spot before the raiding team and were numbered appropriately. Without any delay, the samples were sent to the chemical laboratory, which test report was in affirmation of the assertion that it was narcotics and not anything else. With due permission, the balance of the narcotic consignment was destroyed. All the members of the raiding team, who have been brought as prosecution witnesses, have specifically supported the prosecution case.

46. We, thus, do not entertain any doubt that only for the absence of any independent witness having been examined at the trial, the case against the appellants is necessarily false.

47. However, we do agree with the submissions advanced on behalf of the appellants that only because of the difference in weight of the narcotics held by each one of the appellants, they ought not to have been sentenced differently. Breach of law is always



a breach of law and in the present case, even the lower quantity of 4 kgs. of *charas* would be more than the commercial quantity, which was possessed by the appellant/Seikh Wajid, who has been sentenced for 10 years, whereas, the other two appellants have been sentenced for 12 years under Section 20(b)(ii)(c) of the N.D.P.S. Act.

48. We, therefore, deem it appropriate to and modify the sentence of the appellants/Seikh Imtiazuddin @ Giyasuddin and Sujay Das in Criminal Appeal (DB) No. 1081 of 2019 to 10 years from 12 years and affirm the sentence of 10 years given to appellant/Seikh Wajid in Cr. Appeal (DB) No. 865 of 2019.

49. We also reckon that there is no evidence, whatsoever, for conviction of the appellants under Section 23(c) of the N.D.P.S. Act.

50. We, therefore, find the conviction and sentence of the appellants under the aforesaid section to



be bad in the eyes of law.

51. We, therefore, set aside the conviction of the appellants under Section 23(c) of the N.D.P.S. Act and the sentence imposed on them.

52. Thus, the conviction of the appellants under Section 20(b)(ii)(c) of the N.D.P.S. Act is confirmed and the sentence of the appellants/Seikh Imtiazuddin @ Giasuddin and Sujay Das in Criminal Appeal (DB) No. 1081 of 2019 is reduced to a period of 10 years from 12 years.

53. The appeals are dismissed with partial modification in the sentence of the appellants/Seikh Imtiazuddin @ Giasuddin and Sujay Das in Criminal Appeal (DB) No. 1081 of 2019.

54. Let a copy of this judgment be dispatched to the Superintendent of the concerned Jail forthwith for compliance and record.

55. The records of these appeals be returned to the Trial Court forthwith.



56. Interlocutory application/s, if any, also stand disposed off accordingly.

(Ashutosh Kumar, J)

(Vipul M. Pancholi, J)

Sachin/Praveen-II

AFR/NAFR	AFR
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