

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.489 of 2018

Arising Out of PS. Case No.-7 Year-2014 Thana- MOTIHARI TOWN District- East
Champaran

Md. Mojamil Son of Noor Mohammad, Resident of Village- Masahi, P.S.-
Chhauradano, Dist- East Champaran.

... .. Appellant

Versus

The State of Bihar

... .. Respondent

with
CRIMINAL APPEAL (DB) No. 277 of 2018

Arising Out of PS. Case No.-7 Year-2014 Thana- MOTIHARI TOWN District- East
Champaran

Jabiullah S/o Sheikh Majid, R/o Village- Masahi, P.S.- Chhoradano, District-
East Champaran.

... .. Appellant

Versus

The State of Bihar

... .. Respondent

with
CRIMINAL APPEAL (DB) No. 471 of 2018

Arising Out of PS. Case No.-7 Year-2014 Thana- MOTIHARI TOWN District- East
Champaran

Noor Alam Son of Sheikh Sah Mohammad, Resident of Village-Masahi, P.S.-
Chhoradano, District East Champaran.

... .. Appellant

Versus

The State of Bihar

... .. Respondent

Appearance :

(In CRIMINAL APPEAL (DB) No. 489 of 2018)

For the Appellant/s : Ms. Nivedita Nirvikar, Sr. Adv.
Mr. Bimal Kumar, Adv.

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

(In CRIMINAL APPEAL (DB) No. 277 of 2018)

For the Appellant/s : Mr. Umesh Chandra Verma,, Adv.

For the Respondent/s : Mr. Binod Bihari Singh, APP

(In CRIMINAL APPEAL (DB) No. 471 of 2018)

For the Appellant/s : Mr. Umesh Chandra Verma, Adv.

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



CORAM: HONOURABLE MR. JUSTICE A. M. BADAR
and
HONOURABLE MR. JUSTICE HARISH KUMAR
CAV JUDGMENT
(Per: HONOURABLE MR. JUSTICE HARISH KUMAR)

Date : 02-08-2023

All the three appeals have been preferred by the respective appellants against the judgment of conviction dated 20.01.2018 and the consequent order of sentence dated 29.01.2018, passed by the learned 1st Additional Sessions Judge-cum-Special Judge, N.D.P.S. Act, East Champaran, Motihari in N.D.P.S. Case No. 07 of 2014 and, as such, with consent of the parties, the same are being heard together and disposed of by this common order.

2. The appellants Md. Mojamil (in Cr. Appeal (DB) No. 489 of 2018) and Noor Alam (in Cr. Appeal (DB) No. 471 of 2018) stood charged separately for the offences punishable under Sections 20(b)(ii)(C) and 23(c) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred as “NDPS Act, 1985”) for recovery of 5 Kg. and 4 ½ Kg. *charas* from their respective possession. The appellant Jabiullah (in Cr. Appeal (DB) No. 277 of 2018) stood charged under Sections 20(b)(ii)(B) and 23(b) of the NDPS Act for recovery of 500 gm. *charas* from his conscious possession.

3. During trial, the aforementioned respective charges



stand proved and the appellant Md. Mojamil (in Cr. Appeal (DB) No. 489 of 2018) and Noor Alam (in Cr. Appeal (DB) No. 471 of 2018) have been found guilty for the offences punishable under Section 20(b)(ii)(C) of the NDPS Act, 1985 and sentenced to suffer rigorous imprisonment for a term of twelve years with a fine of Rs. 1,00,000/- (one lac) and in default of payment of fine to further suffer an additional period of imprisonment for a term of six months whereas the appellant Jabiullah (in Cr. Appeal (DB) No. 277 of 2018) has been sentenced to suffer rigorous imprisonment for a term of five years with a fine of Rs. 50,000/- (fifty thousand) and in default of payment of fine to further suffer an additional period of imprisonment for a term of three months.

4. Shorn off unnecessary details, the prosecution case based upon the written report of the informant Jitendra Deo Dipak (P.W.4) is that on 07.01.2014, while he was posted as Sub Inspector, In-charge of Naka No. 3, Motihari, he got an information from the S.H.O. Motihari Town P.S. that some persons are moving at the Railway Station Chowk with stolen articles, whereupon he rushed there and conducted a raid along with other police personnel. On noticing them, the three suspects tried to flee away but were promptly nabbed by them,



in the meantime, Police Inspector-cum-SHO Motihari Town also arrived there. On being interrogated, the apprehended accused disclosed their names as Noor Alam, Md. Mojamil and Jabiullah. All residents of Masahi P.S. Chhauradano, East Champaran, Motihari. In presence of two independent witnesses, namely, Mukesh Patel and Vicky Patel, a search was made and from possession of Noor Alam, suspicious materials contained in nine plastic bags were recovered. Further from possession of Jabiullah, one packet and likewise from possession of Md. Mojamil, ten packets of suspicious materials were recovered. The apprehended appellants disclosed that all the plastic packets are containing *charas* which was purchased from Nepal and the same are being taken to Ratlam (Rajasthan) for sale.

5. The information of the aforementioned incident was given to the A.S.P. Motihari. It has also been disclosed by the accused/appellants that there was one another person with them whose name was Baccha Ji. Thereafter, the informant (PW 4) after making a consultation with the concerned department, prepared the seizure list and obtained the signature of the independent witnesses. The copy of the seizure list had been handed over to the respective appellants. The recovered *charas*



was sealed in the presence of the witnesses and the appellants were brought to the police station.

6. On the basis of the aforesaid written report filed by the informant (P.W.4), Motihari Town P.S. Case No. 7 of 2014 was registered on 07.01.2014 for the offences punishable under Section 20/22 of the NDPS Act, 1985.

7. The Investigating Officer of the case took up the investigation and submitted the final report/charge-sheet under Section 173 CrPC against the appellants after keeping further investigation pending against other accused persons.

8. On receipt thereof, the Jurisdictional Court took cognizance of the offences vide order dated 03.06.2014, and the record of the case was transferred to the Court of Special Judge NDPS Act, 1985, East Champaran, Motihari (for short the “Trial Court”) for its disposal.

9. The learned Trial Court framed the charges and duly read over and explained to the appellants to which they denied and claimed to be tried.

10. In order to prove the charges, the prosecution examined six witnesses. They are, P.W.1 Santosh Kumar, Station House Officer of Motihari Town P.S.; P.W.2 Mukesh Patel and P.W.3 Vicky Patel, seizure list witnesses; P.W.4



Jitendra Deo Dipak, Informant of the case who executed search and seizure, P.W.5 Kanhaiya Prasad, Investigating Officer of the case and P.W.6 Dashrath Prasad Yadav, Inspector-cum-Member of Raiding Team.

11. Apart from the oral evidence, the prosecution has proved the following documents in evidence in support of the charges which are as follows:

Sl. No.	Exhibit	Description
1.	Ext.1	Seizure list dt. 07.01.2014 relating to recovery of <i>charas</i> from respective possession of the accused persons.
2.	Ext.2	Formal F.I.R. of Motihari Town P.S.Case no.7/2014
3.	Exts.3 and 3/1	Signature of seizure list witnesses Mukesh Patel and Vikki Patel on the seizure list.
4.	Ext.4	Written application dt. 7.1.2014 (F.I.R.) given by the informant.
5.	Ext.5	Self statement of accused Mojamil dt.8.1.2014 admitting the allegation along with two other co-accused Md. Noor Alam and Jabbiullah who have put their L.T.I on the said statement.
6.	Exts.6 and 6/1	Carbon copy of forwarding application sent to the Director of Forensic Science Laboratory Patna and Director C.F.S.L. Calcutta.



7.	Ext.7	Authorization certificate dt.5.2.2014 authorized by District & Sessions Judge Cum Special Judge for examination of the exhibits of the instant case.
8.	Ext.8	F.S.L report bearing no.1995/14 dt.17.10.2014 received from the office of Director, F.S.L. Patna relating to the examination of the sample of the Exhibits of this case which all the 03 samples have been found to be "CHARAS".
9.	Exts.9 and 9/1	Receiving receipts obtained from C.F.S.L Calcutta and F.S.L, Patna in regard to deposit of sample of seized substance of the instant case respectively.

12. On the other hand, the defence has also got exhibited following documents in their presence which are as follows.

Sl. No.	Exhibit	Description
1.	Exts. A.A/1 and A/2	Arrest Memo of all three accused persons dt. 07.01.2014.

13. After closing the prosecution evidence, the appellants were examined under Section 313 CrPC, in which they denied the evidence put forth by the prosecution witnesses and claimed themselves to be innocent. They completely denied the recovery of contraband from their possession.



14. Finally the learned Trial Court considered the evidences adduced on behalf of the prosecution and having heard the counsel for the defence as well as prosecution found that the prosecution has produced sufficient oral and documentary evidence that the accused persons have committed the offence charged under the NDPS Act, 1985, in respect of recovery of specified quantity of *charas* from their respective possession. Further, the learned Trial Court found that the accused persons have failed to adduce any evidence contrary to the aforesaid presumption of the Trial Court in regard to the commission of the offence charged against them and accordingly the appellants having been found guilty, convicted and sentenced as noted at the inception.

15. In order to make proper appreciation, the relevant evidence of prosecution witnesses are propounded hereinbelow:

16. Santosh Kumar P.W.1, who happens to be S.H.O. Motihari Town P.S. stated in his examination-in-chief that on 07.01.2014 at 8 hours, he got the information that some persons were wandering near Railway Station, Motihari with stolen articles whereupon he made a *sanha* entry and directed the Officer-in-charge of Motihari Naka No.3 Jitendra Deo Dipak (P.W.4) for verification of the information. He further stated that



he had also gone there with police constables and found that P.W.4 had already apprehended three accused persons and on search being made by P.W.4 in presence of independent witnesses Mukesh Patel (P.W.2) and Vicky Patel (P.W.3), nine packets of *charas* were recovered from possession of Noor Alam and ten packets *charas* from possession of Mojamil whereas one packet of *charas* was recovered from possession of Jabiullah. Total weight of seized 20 packets *charas* was found to be 20 Kg. One accused whose name was disclosed as Bachha Mian fled away. He identified his signature upon the seizure list of seized *charas*. He also deposed that the independent witnesses had put their signatures on the seizure list which was duly identified by him. Further, he identified the accused persons in the dock.

17. In his cross-examination, he stated that the accused persons were apprehended outside of the main gate of Railway Station, Motihari, upon the flank of the road, just 2-3 minutes prior to his arrival. He further stated that before search of the accused persons, his search was also taken but no document in this regard was made. The weight of the packet of *charas*, recovered from the possession of the accused persons, had not been taken separately. He further testified that the



charas was recovered from the bag kept by accused Noor Alam. It was also recovered from the Jacket of accused Jabiullah and from the wrapped *chadar* kept in the hands of accused Mojamil.

18. Mukesh Patel (P.W.2) and Vicky Patel (P.W.3), are the seizure list witnesses, who had identified their respective signatures on the seizure list but they refused to identify the appellants. They stated in their cross examination, that they put their signature on the dictate of the police personnel. Vicky Patel (P.W.3) further stated that his signature was obtained on a plain paper, which contained only the signature of Mukesh Patel (P.W.2). Both the witnesses also stated that while they were putting their signatures, neither there was any material nor any accused was present.

19. Jitendra Deo Dipak (P.W.4), the Informant-cum-Seizing Officer, stated in his examination-in-chief that on 07.07.2014, while he was posted as In-charge Police Officer of Motihari Naka No.3, he got information that some persons having stolen property would board the train, he proceeded towards Station Chowk, Motihari along with raiding party. He further deposed that having seen the police personnel, all the three accused persons tried to flee away but were promptly nabbed by them. They disclosed their names as Noor Alam, Md.



Mojamil and Jabiullah, who are the appellants in this case. He also testified that in the presence of two independent witnesses, namely, Mukesh Patel (PW 2) and Vicky Patel (PW 3), search was made by him and, in the course of which, nine packets of *charas* wrapped in a *chadar* was recovered from the possession of Noor Alam. The weight of recovered contraband was 4.5 Kg. He also recovered one packet of *charas* weighing 500 gm. from the jacket of accused Jabiullah. He further recovered 10 packets of *charas* from the bag of accused Mojamil. The weight of which was 5 Kg. During the course of interrogation, the accused persons disclosed that they had purchased the seized *charas* from Nepal and were going to Ratlam (Rajasthan) for its sale. He had prepared the seizure list. Railway ticket was also recovered, which had also been mentioned. He also identified all the accused persons, who were present in the court.

20. In his cross-examination, he stated that as there was no weighing machine, the weight of the seized contraband had not been made through weighing machine. He assessed the weight of each of the packets through the measurement of his finger and found its weight as 500 gm. All the seized packets of *charas* were of the same size. This witness also stated that he had not given a separate identification mark upon the seized



packets of *charas*, which was recovered from the possession of respective appellants. He handed over the seized materials to S.H.O. Town P.S. Motihari. The S.H.O. was present at the police station. He also stated that he neither took the photographs of the seized substance nor prepared an inventory of it.

21. Kanhaiya Prasad (P.W.5), who happens to be Investigating Officer of the case, stated in his examination-in-chief that he had taken the charge of the investigation of the case on 07.01.2014. During the course of the investigation, he had recorded the re-statement of the informant (P.W.4) and other witnesses, namely, Santosh Kumar (P.W.1), Dashrath Prasad Yadav (P.W.6), Mukesh Patel (P.W.2) and Vicky Patel (P.W.3), who had supported the prosecution case. He also inspected the place of occurrence. This witness further deposed that he had recorded the self-statement of all the three accused persons and they had put their signature(s) and admitted their guilt. He had produced the seized material before the Magistrate for taking out the sample after getting permission from the court. On receipt of the permission, he sent the sample for its chemical examination to FSL Patna and CFSL, Kolkata. He further deposed that he had submitted charge-sheet without sending the sample to the laboratory for its chemical examination due to



lack of manpower but kept the further investigation pending. This witness was further recalled on 07.12.2017. He further stated that during the course of further investigation, he had sent the sample of seized substance on 07.06.2014 through Constables Sanjay Kumar and Vishanu Kumar to the CFSL, Kolkata and FSL, Patna for its examination. However, the sample was returned due to mistake that in place of writing FSL, Patna it had been mentioned FSL, Muzaffarpur on the envelope. P.W.5 further deposed that on 11.08.2014, he had filed a petition before the Court for correction and on 20.08.2014, he produced the sample of seized substance to the office of Director FSL, Patna, and got its receipt. He further handed over the charge of further investigation to Station House Officer on account of his transfer on 12.09.2014. He identified the accused persons, who were present in the court.

22. In cross-examination, he stated that the witnesses quizzed by him, had not told about the weight of seized substance nor did the seizure list contain the separate weight of seized substance recovered from the respective accused persons. He has also not mentioned in the case diary whether the seized packets were kept at Thana *Malkhana*. He testified that there was no independent witness present at the time of recording the



statements of accused by him. Exhibits 6 and 6/1 do not bear the signature of Magistrate but Exhibit 6/1 bears only his signature. He further stated that the fact related to certification of seized substance by the Magistrate had not been mentioned in the case diary nor it was mentioned where the seized substance kept and from where it was produced before the Magistrate for taking out the sample. He further deposed that he had not given any petition before the court for destruction of the seized substance. Further Exhibit 9/1 does not bear his name and Exhibit-6 series and Exhibit-7 do not bear the signature of the learned Magistrate. He had also not taken the photographs of seized substance.

23. Dashrath Prasad Yadav (P.W.6) is the A.S.I. -cum- Member of Raiding Team, stated that being a Member of the Raiding Team, under the leadership of S.I. Jitendra Deo Dipak (P.W.4), they went near Railway Station, Motihari, where all the three accused persons were apprehended and, in course of search, in presence of independent witnesses, nine packets of *charas* were recovered from the bag of accused Noor Alam, ten packets of *charas* from the accused Mojamil and one packet *charas* from another accused. A seizure list of seized *charas* and rail ticket was prepared in the presence of independent



witnesses. The total weight of seized substance was found to be 20 Kg. He also identified all the accused persons present in the court.

24. In cross-examination, he deposed that he had not seen the seized substance after opening its packets. The names of accused persons had not been written in the seized packets. His statement was also recorded by the Investigating Officer. He had not stated before the Investigating Officer that total weight of seized substance was of 20 Kg. Further, he had also not been searched.

25. We have heard Ms. Niveditta Nirvikar, learned senior advocate duly assisted by Mr. Bimal Kumar, learned advocate for the appellants in all the appeals. Mr. Ajay Mishra, Mr. Binod Bihari Singh and Mr. Abhimanyu Sharma learned Additional Public Prosecutors for the State.

26. Learned senior advocate appearing on behalf of the appellants has painstakingly taken us to the deposition of the aforementioned witnesses and shown the inconsistencies found in the statement of the witnesses. She vehemently submitted that there is no compliance of Section 50 of the NDPS Act, 1985, inasmuch as the appellants were not produced before the Judicial Magistrate. From the records and the deposition of the



witnesses, it would manifest that the recovered contraband has never been weighed nor it has been segregated or marked that from which of the appellants, which of the suspected packets have been recovered. Instead of segregating or separately marking the plastic packets, the witnesses who were police personnel mixed up the seized substance. She has further drawn the attention of this Court to the deposition of P.Ws.2 and 3, who are the seizure list witnesses, but they have denied the fact that any such recovery has been made from the possession of the appellants rather they have stated in their cross-examination that they have put their signatures in a plain paper on the dictate of *Daroga Ji*. They further stated that at the time of putting their signatures, neither there was any material nor anyone was present. They have also stated that their statements were never recorded by the police. With reference to the aforesaid statements, learned senior counsel further submitted that as the P.Ws.2 and 3, who were the seizure list witnesses, have not supported the factum of any recovery. Thus, the prosecution case appears to be doubtful that too when P.Ws.2 and 3 have not been declared hostile. Ms. Nirvkiar next submitted that the conviction of the appellants is based on their self confession, recorded under Section 67 of the NDPS Act, 1985, which is not



at all admissible in view of the mandate of the Hon'ble Supreme Court in the case of *Tofan Singh v. State of Tamil Nadu [(2021) 4 SCC 1]*. Another contention on behalf of the appellants is that there is no compliance of Section 52(A) of the NDPS Act, 1985, and, thus, illegalities committed in drawing up the sample of the seized contraband. During the course of the trial, none of the witnesses have come out with any explanation that where the seized substance was kept after the seizure being made, till the production of the same before the Magistrate. Neither *Malkhana* register was produced nor any witness was examined with respect to the facts that where it was kept. She lastly submitted that there is lack of compliance with the prescribed procedure under the NDPS Act, 1985 at all the stages. In order to buttress the aforementioned contention, she relied upon the judgments of this Court as well as the Apex Court rendered in *Ashok Alias Dangra Jaiswal v. State of Madhya Pradesh [(2011) 5 SCC 123]*, *Mohinder Kumar v. State, Panji, Goa [(1998) 8 SCC 655]*, *Union of India v. Mohanlal and Another [(2016) 3 SCC 379]*, *State of Punjab vs. Baldev Singh [(1999) 6 SCC 172]* and *Jagat Prasad v. State of Bihar and Another [(2022) 1 PLJR 568]*.

27. *Per contra*, learned Additional Public Prosecutors



appearing on behalf of the State while refuting the contention of the appellants, submitted that in the present case, there is no application of the provision under Section 42(2) as well as 50 of the NDPS Act, 1985 because of the fact that there had been confidential information received by the P.W.4 (informant) only with respect to stolen articles and not in regard to any narcotic substance, but in course of search, *charas* like narcotic substance was recovered from all the appellants. Non-production of the seized materials before the Court during the course of trial is also not fatal to the prosecution case because the seized materials had been produced before the Court at the time of taking out its sample. Moreover, the witnesses are consistent on the point of recovery of *charas* from the conscious and exclusive possession of the appellants. He further submitted that the sample of seized substance was chemically examined and it has been found to be *charas*. The appellants have also voluntarily confessed their guilt. Moreover, the discrepancies, if any, are trifling in nature, not suffice to shake the very foundation of the prosecution case and, as such, the same is required to be ignored.

28. This Court has given anxious consideration to the submissions made on behalf of the parties and carefully perused



the materials available on record.

29. Before discussing the merit of the case, this Court deems it apt and proper to highlight the procedure framed for drawing up the sample of the narcotic which has been taken note of by this Court in various cases. The Narcotic Control Bureau, Government of India, time to time issued Standing Instruction in relation to the mode and manner of drawing a sample of the narcotics.

30. The relevant clauses of Standing Instruction No. 1/88 are as follows:-

1.5 Place and time of drawal of sample

Samples from the Narcotic Drugs and Psychotropic Substances seized must be drawn on the spot of recovery, in duplicate, in the presence of search (Panch) witnesses and the person from whose possession the drug has been recovered, and mention to this effect should invariably be made in the panch nama drawn on the spot.

1.6 Quantity of different drugs required in the sample

The Quantity to be drawn in each sample for chemical test should be 5 grams in respect of all narcotic drugs and psychotropic substances except in the cases of Opium, Ganja and *Charas/Hashish* where a quantity of 24 grams in



each case is required for chemical test. The same quantities should be taken for the duplicate sample also. The seized drugs in the packages/containers should be well mixed to make it homogeneous and representative before the sample in duplicate is drawn.

1.7.- Number of samples to be drawn in each seizure case

(a) In the case of seizure of a single package/container one sample in duplicate is to be drawn. Normally it is advisable to draw one sample in duplicate from each package/container in case of seizure of more than one package/container.

(b) However, when the package/containers seized together are of identical size and weight, bearing identical markings and the contents of each package given identical results on colour test by U.N. Kit, conclusively indicating that the packages are identical in all respect/packages/container may be carefully bunched in lots of 10 packages/containers. In case of seizure of Ganja and Hashish, the packages/containers may be bunched in lots of 40 such packages/containers. For each such lot of packages/containers, one sample in duplicate may be drawn.

(c) Whereafter making such lots, in the case of Hashish and Ganja, less than 20 packages/containers remain, and in case of other drugs less than 5 packages/containers remain, no



bunching would be necessary and no samples need be drawn.

(d) If it is 5 or more in case of other drugs and substances and 20 or more in case of Ganja and Hasish, one more sample in duplicate may be drawn for such remainder package/containers

(e) While drawing one sample in duplicate from a particular lot, it must be ensured that representative drug in equal quantity is taken from each package/container of that lot and mixed together to make a composite whole from which the samples are drawn for that lot.

31. From the aforementioned relevant clauses of Standing Instruction, it is evident that where more than one containers/packages is found, it is mandated to draw a sample(s) from each of the individual container/package and test each of the sample with the field test kit. If the containers/packages are identical in shape, size and weight then lots of 10 of 40 packages may be prepared and, thereafter, representative samples from each container/package in a particular lot are to be drawn, mixed and sent for testing.

32. The Supreme Court in **Khet Singh v. Union of India [AIR 2002 SC 1450]**, while considering an identical issue held that the instructions issued by the Narcotics Control Bureau, New Delhi, are to be followed by the officer in-charge



of the investigation of the crimes coming within the purview of the NDPS Act, 1985 even though these instructions do not have the force of law. They are intended to guide the officers and to see that a fair procedure is adopted by the officer-in-charge of the investigation.

33. In *Noor Aga v. State of Punjab [(2008) 16 SCC 417]*, the Supreme Court after giving thoughtful consideration to the guidelines issued under the NDPS Act, in the Standing Order, observed in paragraphs 89 to 91 as under:

“89. Guidelines issued should not only be substantially complied, but also in a case involving penal proceedings, vis-à-vis a departmental proceeding, rigours of such guidelines may be insisted upon. Another important factor which must be borne in mind is as to whether such directions have been issued in terms of the provisions of the statute or not. When directions are issued by an authority having the legal sanction granted therefor, it becomes obligatory on the part of the subordinate authorities to comply therewith.

90. Recently, this Court in State of Kerala & Ors. v. Kurian Abraham (P) Ltd. & Anr. [(2008) 3 SCC 582], following the earlier decision of this Court in Union of India v. Azadi Bachao Andolan [(2004) 10 SCC 1] held that statutory instructions are mandatory in nature.



91. The logical corollary of these discussions is that the guidelines such as those present in the Standing Order cannot be blatantly flouted and substantial compliance therewith must be insisted upon for so that sanctity of physical evidence in such cases remains intact. Clearly, there has been no substantial compliance of these guidelines by the investigating authority which leads to drawing of an adverse inference against them to the effect that had such evidence been produced, the same would have gone against the prosecution.”

34. Be it noted that in the instant case, there is no evidence to the effect that the contraband substance so recovered in 20 plastic packets had ever been tested for verification. The P.Ws. 1, 4, 5 and 6 are consistent in their deposition that at no point of time, the recovered substance was weighed. P.Ws. 1, 4 and 5 have consistently deposed before the Court that the seized contraband substance were not even visible or seen from the outside of the packets. The P.Ws. 1 and 4, who were present at the time of search and seizure have concluded that the seized substances were *charas* because of the confession of the appellants. There is no evidence on record that the 20 packets of *charas* packed in a plastic bag were assigned separate serial number or they have been weighed separately.



35. That apart, the P.W.5 (I.O.) in his deposition in para-26, shown his ignorance as to where the seized contraband was kept and from where it has been brought to produce before the learned Trial Court, the same has not been mentioned in the case diary.

36. Further, the contention of the appellants with regard to the non-assessment of the weight of the recovered substance from the possession of the appellants also finds support from the deposition of the witnesses, who consistently testified that at no point of time the weight of the seized substance has been made.

37. P.W.4 (informant) in para-13 of his cross-examination categorically deposed before the Court that the weight of the packets was assessed through the measurement of his fingers. Likewise, P.Ws. 1 and 5 (I.O.) stated in paras-13 and 14 of their respective depositions before this Court that the weight of the substance contained in the plastic bags had never been done.

38. The P.W.5 (I.O.) of the case also testified that no separate *marka* was made on the recovered plastic packets suggesting which packet was recovered from which of the accused persons. The aforesaid fact has also been corroborated



by the deposition of P.Ws. 1 and 4 (informant).

39. This Court also finds that there is no evidence at all on record, suggesting that after seizure of the contraband (*charas*) from the appellants, where it was kept. Neither the *Malkhana* In-charge was examined during the trial nor the register of the *Malkhana* was produced before this Court to suggest that there was any entry of seized contraband in the *Malkhana*.

40. Section 52(3) of the NDPS Act, 1985, stipulates that every person arrested and every article seized under Sub Section 2 of Section 41, Sections 42, 43 or 44 of the Act shall be forwarded without unnecessary delay to (a) the officer in-charge of the nearest police station, or (b) the officer empowered under Section 53 of the NDPS Act, 1985. Since the appellants were arrested by the police personnel, hence, the seizing officer was required to keep the sealed packages containing contraband and other seized articles in his safe custody till they are deposited in the *Malkhana* with a forwarding memo indicating the case no., name of the accused person, reference of the test memo, description of drugs, drug wise number of packages and quantity and total number of all packages. He was required to take acknowledgment of receipt for such deposit from the



Malkhana In-charge and the same was required to hand over to the Investigating Officer. The seizing officer or any of the witness has laid no evidence to show that the seized substance was deposited in *Malkhana* and thereafter it was produced before the Trial Court for getting permission for sampling. The aforementioned defects/deficiency certainly makes the prosecution case doubtful.

41. The further contention of the appellants regarding the case having been based on the confessional statement of the appellants under Section 67 of the NDPS Act, 1985 is also fatal to the prosecution. A three Judges Bench of the Supreme Court in **Tofan Singh (supra)** while considering the issue in question held that the officers, who are invested with the powers under Section 53 of the NDPS Act, 1985 are “police officers” within the meaning of Section 25 of the Evidence Act and, therefore, any confessional statement made before them would attract the bar of Section 25 of the Evidence Act, 1872 and cannot be taken into account to convict an accused.

42. During the course of submission, the learned senior counsel also contended that there is no compliance of Section 50 of the NDPS Act, 1985, which is mandatory in nature and non-adherence to the provision of Section 50 of the



Act, vitiates the conviction. Section 50 of the NDPS Act, 1985, mandates the empowered officer to inform the person to be searched that he has a right to be searched in the presence of Gazetted Officer or a Magistrate. Merely because the appellants did not make a request to the officer on his own that the search should be conducted in the presence of such officer, it cannot be held that there was no need to inform them of their right.

43. With regard to the aforesaid contention, from the facts on record, it is evident that this is a case of chance recovery of contraband, as from the FIR it is evident that the informant, (P.W.4) raided the place of occurrence on receipt of information with regard to loitering of some suspected persons with stolen materials and there had never been any knowledge or information with regard to trafficking or concealment of narcotic drugs and psychotropic substance.

44. The issue raised by the learned senior counsel for the appellants has been answered by the Constitution Bench of the Hon'ble Apex Court in the case of **State of Punjab v. Baldev Singh (supra)**. The relevant paragraphs thereof are quoted hereinbelow for proper appreciation of the issue.

“25. The questions considered above arise frequently before the trial courts. Therefore we find it necessary to set out our conclusions which are as follows:



(1) If a police officer without any prior information as contemplated under the provisions of the NDPS Act makes a search or arrests a person in the normal course of investigation into an offence or suspected offences as provided under the provisions of CrPC and when such search is completed at that stage Section 50 of the NDPS Act would not be attracted and the question of complying with the requirements thereunder would not arise. If during such search or arrest there is a chance recovery of any narcotic drug or psychotropic substance then the police officer, who is not empowered, should inform the empowered officer who should thereafter proceed in accordance with the provisions of the NDPS Act. If he happens to be an empowered officer also, then from that stage onwards, he should carry out the investigation in accordance with the other provisions of the NDPS Act.

(2-A) Under Section 41(1) only an empowered Magistrate can issue warrant for the arrest or for the search in respect of offences punishable under Chapter IV of the Act etc. when he has reason to believe that such offences have been committed or such substances are kept or concealed in any building, conveyance or place. When such warrant for arrest or for search is issued by a Magistrate who is not empowered, then such search or arrest if carried out would be illegal. Likewise only empowered officers or duly authorized officers as



enumerated in Sections 41(2) and 42(1) can act under the provisions of the NDPS Act. If such arrest or search is made under the provisions of the NDPS Act by anyone other than such officers, the same would be illegal.

(2-B) Under Section 41(2) only the empowered officer can give the authorization to his subordinate officer to carry out the arrest of a person or search as mentioned therein. If there is a contravention, that would affect the prosecution case and vitiate the conviction.

(2-C) Under Section 42(1) the empowered officer if has a prior information given by any person, that should necessarily be taken down in writing. But if he has reason to believe from personal knowledge that offences under Chapter IV have been committed or materials which may furnish evidence of commission of such offences are concealed in any building etc. he may carry out the arrest or search without a warrant between sunrise and sunset and this provision does not mandate that he should record his reasons of belief. But under the proviso to Section 42(1) if such officer has to carry out such search between sunset and sunrise, he must record the grounds of his belief.

To this extent these provisions are mandatory and contravention of the same would affect the prosecution case and vitiate the trial.



(3) Under Section 42(2) such empowered officer who takes down any information in writing or records the grounds under proviso to Section 42(1) should forthwith send a copy thereof to his immediate official superior. If there is total non-compliance of this provision the same affects the prosecution case. To that extent it is mandatory. But if there is delay whether it was undue or whether the same has been explained or not, will be a question of fact in each case.

(4-A) If a police officer, even if he happens to be an 'empowered' officer while effecting an arrest or search during normal investigation into offences purely under the provisions of CrPC fails to strictly comply with the provisions of Sections 100 and 165 CrPC including the requirement to record reasons, such failure would only amount to an irregularity.

(4-B) If an empowered officer or an authorised officer under Section 41(2) of the Act carries out a search, he would be doing so under the provisions of CrPC namely Sections 100 and 165 CrPC and if there is no strict compliance with the provisions of CrPC then such search would not per se be illegal and would not vitiate the trial.

The effect of such failure has to be borne in mind by the courts while appreciating the evidence in the facts and circumstances of each case.

(5) On prior information the empowered officer



or authorised officer while acting under Sections 41(2) or 42 should comply with the provisions of Section 50 before the search of the person is made and such person should be informed that if he so requires, he shall be produced before a gazetted officer or a Magistrate as provided thereunder. It is obligatory on the part of such officer to inform the person to be searched. Failure to inform the person to be searched and if such person so requires, failure to take him to the gazetted officer or the Magistrate, would amount to non-compliance of Section 50 which is mandatory and thus it would affect the prosecution case and vitiate the trial. After being so informed whether such person opted for such a course or not would be a question of fact.

(6) The provisions of Sections 52 and 57 which deal with the steps to be taken by the officers after making arrest or seizure under Sections 41 to 44 are by themselves not mandatory. If there is non-compliance or if there are lapses like delay etc. then the same has to be examined to see whether any prejudice has been caused to the accused and such failure will have a bearing on the appreciation of evidence regarding arrest or seizure as well as on merits of the case.”

45. In the case of **Mohinder Kumar v. State, Panji, Goa (supra)** while considering an identical issue, the learned Trial Court, after analyzing the provisions of the Act, 1985, has



held that if a police officer, without prior information, makes a search and effects arrest of persons and if during such a search he stumbles on a chance recovery of any narcotic drugs or psychotropic substance and if he happens to be a police officer who is not empowered under the Act to effect search and seizure, he should inform the empowered officer as required by the Act, 1985, if he himself happens to be the empowered officer, then from that stage onwards the investigation must be carried out in accordance with the provisions of the Act.

46. From the record it does not transpire that from the date of seizure of the contraband till the application filed before the learned Magistrate for its sampling, where the contraband was kept, the prosecution is silent. This makes the entire prosecution case doubtful. Though, the contraband was brought before the learned Magistrate but admittedly the same was without any specific *marka* and identification as to from whose possession and as to what quantity, it has been recovered. However, the sample was sent to the Forensic Science Laboratory, Patna, for its chemical examination and the FSL report dated 18.10.2014 has been produced before the Trial Court and marked as Ext.8 on 23.11.2017, certainly before the closure of the examination of all the witnesses.



47. The aforementioned report suggests that “the dark greenish brown coloured slab like solid substances contained in the tin boxes marked as 1, 2 & 3 as described above was found to be CHARAS. CHARAS also known as Hashish is the resinous exudate of the flowering & fruiting tops of the female plant of Cannabis sativa containing Tetra Hydro Cannabinol (THC) as their chief intoxicating ingredient.”

48. The point, which also emerging from the record and needs to be highlighted is that even after going through the entire records this Court does not find any material suggesting that there is any compliance of Section 52A(1) which mandates the authority to initiate action for disposal of the contraband.

49. In the case of **Union of India v. Mohanlal and Another (supra)**, the Hon’ble Supreme Court having taken note of the Standing Instructions issued by the Narcotic Control Bureau, Government of India, pleased to enunciate the guidelines for disposal of the seized narcotic and directed to ensure its compliance strictly.

50. This Court also cannot lose sight of the fact that the seizure list witnesses P.Ws.2 and 3, have completely denied the factum of any recovery and seizure from the possession of the appellants but, surprisingly, they have not been declared



hostile. Needless to observe that in the aforementioned facts the deposition of the seizure list witnesses cannot be made any basis of conviction.

51. This Court also finds the testimonies of P.Ws. 1 and 4 are inconsistent in respect to the recovery of contraband as P.W.1 in his deposition stated that contraband was recovered from a bag kept by the appellant Noor Alam whereas P.W.4 in his deposition stated that the same was recovered from the possession of the appellant Noor Alam kept in a wrapped *chadar*. The witnesses are consistent that they had never seen the contraband substance by opening the plastic bag and only on the confessional statement of the appellants, they came to the conclusion that the recovered substance is nothing but *charas* resulting into institution of the FIR and set the law into motion.

52. Thus, on the appreciation of the entire evidence, this Court is of the opinion that there are serious infirmities in the prosecution evidence. Hence, the judgment of conviction and consequent order of sentence passed by the learned Trial Court cannot be sustained.

53. This Court, therefore, hold that the appellants are entitled to be acquitted. Accordingly, the appeals are allowed. The impugned judgment of conviction dated 20.01.2018 and the



consequent order of sentence dated 29.01.2018, passed by the learned 1st Additional Sessions Judge-cum-Special Judge, N.D.P.S. Act, East Champaran, Motihari in N.D.P.S. Case No. 07 of 2014, are hereby set aside.

54. The appellants Md. Mojamil (in Cr. Appeal (DB) No. 489 of 2018), Jabiullah (in Cr. Appeal (DB) No. 277 of 2018) and Noor Alam (in Cr. Appeal (DB) No. 471 of 2018) are acquitted of the charges levelled against them. They are directed to be set at liberty forthwith unless their dentention is required in any other case.

(Harish Kumar, J)

A.M. Badar, J.

(A. M. Badar, J)

rohit/-

AFR/NAFR	AFR
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