

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.1474 of 2019**

Arising Out of PS. Case No.-39 Year-2018 Thana- GOVERNMENT OFFICIAL COMP.
District- East Champaran

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1. Osihar Sahani @ Osiar Sahani Son of Manager Sahani Resident of Village-Laxmipur Madhumalati (Sapaha), P.S-Sugauli, District-East Champaran.
 2. Sukhari Sahani @ Ramashray Sahani Son of Late Gorakh Sahani @ Kalicharan Sahani Resident of Village-Laxmipur Nayka Tola, Madhumalti, P.S-Sugauli, District-East Champaran.

... .. Appellant/s

Versus

The Union Of India through Bikash Kumar, Intelligence Officer, Narcotics Control Bureau, Patna Patna.

... .. Respondent/s

For the Appellant/s	:	Mr. Ajay Kumar Thakur, Adv Smt. Kiran Thakur, Adv Md. Imteyaz Ahmad, Adv Mr. Ritwik Thakur, Adv Ms. Vaishnavi Singh, Adv
For the UOI	:	Mr. Praveen Kumar Sinha, Sr. Panel Counsel for Union of India

CORAM: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH

and

HONOURABLE MR. JUSTICE NAWNEET KUMAR

PANDEY

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH)

Date : 07-10-2023

The appellants have preferred this appeal under Section 374(2) of the Code of Criminal Procedure against a judgment of conviction dated 15.10.2019 and an order of sentence dated 18.10.2019 passed by the learned Sessions Judge



cum Special Judge, NDPS Act East Champaran, Motihari, in NDPS Case No. 45 of 2018/NCB Case No. PZU/V/39/18 whereby and whereunder, the appellants have been convicted and sentenced as under :-

Appellant Osihar Sahani

Penal Provision	Sentence		
	Imprisonment	Fine (Rs.)	In default of fine
Section 20(b)(ii)(C) of the NDPS Act	Rigorous imprisonment for 12 years	1,25,000/-	S.I for six months

Appellant Ramashray Sahani

Penal Provision	Sentence		
	Imprisonment	Fine (Rs.)	In default of fine
Section 20(b)(ii)(C) of the NDPS Act	Rigorous imprisonment for 12 years	1,25,000/-	S.I for six months

2. According to the prosecution’s case, an Inspector of SSB Gur Bakash Singh (PW-1) posted at D.Coy, 71 BN. Koraiya, Motihari, received an information from the headquarters on 07.08.2018, that a huge quantity of *ganja* was in the process of being smuggled near Jhitkahiya Middle School in the district of Motihari. Based on the said information, a team was constituted which proceeded for action in the leadership of PW-1 at 9:35 P.M. on 07.08. 2018. At about 10:15



P.M., they reached the place and contacted two local persons, namely Sanjay Kumar, a Chowkidar and Ranjan Kumar, who, on request agreed to become independent witnesses of the operation planned to be conducted by the SSB team. Soon thereafter, they noticed three persons near the boundary wall of the school carrying with them some suspicious materials packed in bags. In the presence of the said two independent witnesses, PW-1 disclosed his identity to the said three persons. On enquiry they disclosed their names as Osihar Sahani, Sukhari Sahani (appellants) and Rajan Kumar. On interrogation, they confessed before PW-1 that the bag contained *ganja*. Thereafter, all the three persons were given notice under Section 50 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the 'NDPS Act' in short), giving them option to be searched either before a magistrate or before a gazetted officer. They opted to be searched in the presence of a gazetted officer and accordingly all the three persons and the two witnesses with the raiding team returned to the SSB camp. A personal search of all the three persons, so apprehended, was conducted in the presence of Sunil Kumar Paswan (PW-3), Assistant Commandant, SSB. Consequent upon search, ten packets containing *ganja* were recovered from all the three bags



which were opened. The substance appeared *prima facie* to be *ganja*. An information was given to Narcotics Control Bureau, Patna (NCB). A written communication dated 08.08.2018 is there on record by way of Exhibit-5, addressed to the Regional Director, NCB, Patna.

It is evident from Exhibit-5 that the seizure list was not prepared by the SSB team, after interception and detention of these appellants and co-accused Rajan Kumar. It is the prosecution's case that the packets recovered by the SSB team from the possession of the accused persons were opened and the accused persons themselves had confessed before the SSB team that the said article was *ganja*. It is not in controversy that the SSB officials are empowered officers to conduct search, seizure and carry out arrest in exercise of power conferred under Sections 42 and 43 of the NDPS Act. It is significant, however, that the seizure list was prepared on 09.08.2019 by Bikas Kumar, an Intelligence Officer, NCB, Patna at D.Coy 71BN, SSB, Koraiya, in the presence of the same Sanjay Kumar (not examined) and Ranjan Kumar (not examined), who were requested by PW-1 on 07.08.2018 to become witnesses to the operation proposed to be conducted by the SSB team.

3. In the seizure list, it has been mentioned that the



seized article i.e. 10 packets of *ganja* were recovered from the possession of the accused persons. It is to be kept in mind that those packets were recovered by the SSB personnel on 07.08.2018, in the night and those articles were brought to the SSB Camp with the accused persons and the witnesses in the same night. We find it difficult to accept the entry in the seizure list to the effect that at the time of seizure being made by the NCB officials, two days thereafter on 07.08.2018, the packets of *ganja* were still in possession of the accused persons. Further, seizure is said to have been made in the presence of two independent witnesses, as noted above, on 09.08.2018. Be that as it may, alleging the aforesaid facts in the formal complaint presented before the court, NDPS Case No. 45 of 2018 came to be registered. The accused Rajan Kumar was found to be a juvenile and, therefore, the prosecution against him was separated and these appellants were charged of the commission of the offences punishable under Sections 20(b)(ii)(C) and Section 29 of the NDPS Act. The appellants denied the charge and claimed to be tried.

4. At the trial, the prosecution examined five witnesses, namely, Gur Bakash Singh (PW-1), Krishna Gopal Das (PW-2), who was posted as head constable at 71st BN



D.Coy, Koraiya on the date of occurrence, Sunil Kumar Paswan, Assistant Commandant (PW-3) in whose presence, personal search of the accused persons was conducted, Parmanand Singh (PW-4), who was posted at NCB on 08.08.2018 and had received the information from the SSB about the recovery of *ganja* from the accused persons. PW-5 (Bikas Kumar) is the complainant, who had prepared the seizure memo and filed complaint before the court, leading to registration of the criminal case. In addition to the oral evidence of the prosecution's witnesses, the prosecution brought on record the following documentary evidence in support of the charge:-

Sl. No.	Description	Exhibit Number
1.	Notice U/S 50 of N.D.P.S. Act.	Exhibit-1 to 1/2
2.	Proforma for Recovery	Exhibit-2
3.	Interception Proforma	Exhibit-3
4.	Name and address of SSB personnel involved in seizure procedure	Exhibit-4
5.	Letter dated 08-08-2018 written to the Director, NCB, Patna.	Exhibit-5
6.	Signature of P.W.1 Gur Bakash Singh on the search-cum- seizure list in four pages	Exhibit-6 to 6/3
7.	Signature of P.W.3 Sunil Kumar Paswan on Notice U/s 50 of N.D.P.S. Act	Exhibit-6/4 to 6/6
8.	Signature of PW.3 Sunil Kumar Paswan on seizure list.	Exhibit-6/7
9.	Signature of P.W.4 P.N. Singh on seizure list	Exhibit-6/8
10.	Voluntary statement of accused Sukhari Sahani	Exhibit-7



11.	Voluntary statement of accused Osihar Sahani	Exhibit-7/1
12.	Voluntary statement of accused Rajan Kumar	Exhibit-7/2
13.	Search-cum- seizure list	Exhibit-8
14.	Notice issued U/s 67 of N.D.P.S. Act	Exhibit-9 to 9/2
15.	Arrest Memo	Ext-10 to 10/2
16.	Jama Talashi	Exhibit-11 to 11/2
17.	Notice U/s 67 of N.D.P.S. Act.	Exhibit-12 to 12/1
18.	Voluntary statement of independent witnesses	Exhibit-13
19.	Report of CRCL, Kolkata	Exhibit-14
20.	Godown/ Malkhana Receipt	Exhibit-15
21.	Letter dated 10-08-2018 of the complainant addressed to the Superintendent, N.C.B, Patna	Exhibit-16
22.	Official Complaint	Exhibit-17
23.	Certification paper	Exhibit-18
24.	Destruction Certificate	Exhibit-19
25.	Photograph	Exhibit-20

5. After closure of the prosecution's evidence, the appellants were questioned by the trial court under Section 313 of the CrPC, so as to give them an opportunity to explain the incriminating circumstances emerging against them based on the prosecution's evidence. The appellants answered in negative. The trial court, after having appreciated the evidence adduced at the trial, reached a conclusion that the prosecution was able to establish the charge against the appellant of commission of the offence punishable under Section 20(b)(ii) (C) of the NDPS Act.



The trial court, however, reached a conclusion that Section 29 of the NDPS Act had no application, in the facts and circumstances emerging from the evidence adduced at the trial. After having held the appellant guilty of the offence punishable under Section 20(b)(ii)(C) of the NDPS Act, the trial court has sentenced them by the impugned order dated 18.10.2019 to imprisonment and fine, as noted above.

6. Mr. Ajay Kumar Thakur, learned counsel appearing on behalf of the appellant, has submitted that there does not appear to be any justification for preparation of the seizure list nearly two days after the appellants were intercepted and the recoveries were made by the team of SSB officials led by PW-1. He contends that, according to PW-1, the appellants had accepted before the SSB officials soon after they were intercepted that they were carrying *ganja* in the said bags. In such circumstance, instead of causing seizure of *ganja* at the place of interception itself, there was no occasion for PW-1 to have brought the *ganja* with the accused persons and the witnesses to the SSB camp and waited for a formal seizure to be made later by NCB officials, particularly when the Inspector, SSB (PW-1), was empowered to search and seizure under the provisions of the NDPS Act. He has also submitted that on one



hand PW-1 deposed at the trial that the packets were opened and he had sniffed the article present in it and found the same to be *ganja*, PW-4 the seizing authority, deposed that the *ganja* packets were opened in his presence. He has further submitted that evidently the samples were not prepared in the presence of a Magistrate, rather it was done by the seizing officer himself in contravention of the laws laid down by the Supreme Court in the case of *Union of India Vs. Mohan Lal*, reported in (2016) 3 SCC 379. He has further submitted that though, according to the prosecution's case, two samples, each containing 25 gram were drawn by the seizing authority for the same being sent to the Forensic Science Laboratory, the gross weight of *ganja* in the laboratory was found to be 27.9 grams. He submits that the remnant sample was returned to the NCB as is evident from Exhibit-14. He has further submitted that the material exhibits were not produced at the trial and though a destruction report came to be brought on record by way of Exhibit-19, none of the witnesses deposed at the trial about the destruction of *ganja* said to have been recovered from the possession of the appellants. He submits that the entire prosecution's case becomes doubtful in the background of admitted fact that the appellants were apprehended on 07.08.2018 and they were produced before the



court on 10.08.2018. He further contends that because of the failure on the part of the prosecution to produce the samples as material exhibits at the trial, the prosecution cannot be said to have established connection between the chemical report certifying the seized article to be *ganja* and articles said to have been recovered from the possession of these appellants.

7. Learned counsel appearing on behalf of the Union of India, justifying the finding of conviction recorded by the trial court, has submitted that the appellants were simply detained on 07.08.2018 by the SSB officials and, upon receipt of information regarding the interception by the SSB officials, a team of NCB officials had proceeded to Koraiya for taking action in accordance with the provisions under the NDPS Act relating to search, seizure and arrest. He submits that, as a matter of fact, in the present case, the NCB officials had left Patna on 08.08.2018 and on 09.08.2018, the seizure was effected in the presence of the independent witnesses and soon thereafter on 10.08.2018, the appellants were produced before the court and the case was instituted, based on official complaint filed by PW-5. He submits that as all the prosecution's witnesses have supported the prosecution's case and, upon chemical examination, the article recovered from the possession of these



appellants, has been found to be *ganja*. In such circumstance the trial court has rightly convicted these appellants for the offences punishable under Section 20(b)(ii)(C) of the NDPS Act. He, accordingly, contends that there is illegality in the impugned finding of conviction recorded by the trial court.

8. We have perused the impugned judgment and order of the trial court and we have carefully scrutinized the evidence adduced at the trial.

9. The parties have not controverted the factual position that PW-1 was competent to exercise power of search, seizure and arrest under Section 43 of the NDPS Act. We are of the firm view that, in this case, Section 42 of the NDPS Act shall have no application, rather Section 43 of the NDPS Act will apply, in view of clear case of the prosecution that the recovery was made by the SSB officials from a 'public place', as defined by the explanation under Section 43 of the NDPS Act, which includes any public conveyance, hotel, shop, or other place intended for use by, or accessible to, the public. The appellants were intercepted by the SSB officials at a public place near the boundary wall of a school which cannot be said to be not accessible to public. The officers mentioned in Section 42 of the NDPS Act are vested with the power of search, seizure



and arrest under Section 43 of the NDPS Act, which reads as under:-

“43. Power of seizure and arrest in public place.-- Any officer of any of the departments mentioned in section 42 may

(a) seize in any public place or in transit, any narcotic drug or psychotropic substance or controlled substance in respect of which he has reason to believe an offence punishable under this Act has been committed, and, along with such drug or substance, any animal or conveyance or article liable to confiscation under this Act, any document or other article which he has reason to believe may furnish evidence of the commission of an offence punishable under this Act 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;

(b) detain and search any person whom he has reason to believe to have committed an offence punishable under this Act, and if such person has any narcotic drug or psychotropic substance or controlled substance in his possession and such possession appears to him to be unlawful, arrest him and any other person in his company.

Explanation.-- For the purposes of this section, the expression "public place" includes any public conveyance, hotel, shop, or other place intended for use by, or accessible to, the public.”

10. It is the case of PW-1 himself that the appellants had accepted that they were carrying ganja in the said bag. In such situation, PW-1 cannot be said to have simply detained the appellants and taken them to the SSB Office without formally arresting them. They were in the custody of the officials of the SSB right from the time of interception till they were produced before the court on 10.08.2018. The plea that the appellants



were not arrested till the seizure was made by the NCB officials on 09.08.2018, is not acceptable to this court in the facts and circumstances of the case. Secondly, two seizure list witnesses were found by the SSB officials at the time of interception on 07.08.2018 who agreed to be witnesses to the proposed action of the SSB official. It is rather intriguing that on 09.08.2018 also, the same witnesses were there in the SSB Camp Office to become witness to the preparation of seizure by the NCB officials. In that background, absence of seizure list witnesses at the trial assumes significance. No seizure list witness was produced by the prosecution at the trial. In such circumstance, in the court's opinion, the prosecution cannot be said to have proved beyond all reasonable doubts recovery of contraband articles from the possession of these appellants.

11. Secondly, it is the prosecution's case that homogeneous mixture was prepared by the seizing official Bikash Kumar, (PW-5). The samples were not drawn in the presence of a Magistrate, as stipulated under section 52(A)(2)(b) of the NDPS Act in the light of the Supreme Court's decision in the case of **Mohanlal (supra)**.

12. It has been laid down in the case of **Mohanlal (supra)** that soon after the seizure of narcotic



drugs/psychotropic and controlled substance is effected, the officer concerned must approach the Magistrate with an application under Section 52(A)(2) of the NDPS Act for sampling. The sampling, Supreme Court has emphasized, must be done under the supervision of a Magistrate in the light of the discussion in paragraph nos. 15 to 19 of the said judgment. We consider it beneficial to reproduce the aforesaid paragraph nos. 15 to 19:-

“15. It is manifest from Section 52-A(2)(c) (supra) that upon seizure of the contraband the same has to be forwarded either to the officer-in-charge of the nearest police station or to the officer empowered under Section 53 who shall prepare an inventory as stipulated in the said provision and make an application to the Magistrate for purposes of (a) certifying the correctness of the inventory, (b) certifying photographs of such drugs or substances taken before the Magistrate as true, and (c) to draw representative samples in the presence of the Magistrate and certifying the correctness of the list of samples so drawn.

16. Sub-section (3) of Section 52-A requires that the Magistrate shall as soon as may be allow the application. This implies that no sooner the seizure is effected and the contraband forwarded to the officer-in-charge of the police station or the officer empowered, the officer concerned is in law duty-bound to approach the Magistrate for the purposes mentioned above including grant of permission to draw representative samples in his presence, which samples will then be enlisted and the correctness of the list of samples so drawn certified by



the Magistrate. In other words, the process of drawing of samples has to be in the presence and under the supervision of the Magistrate and the entire exercise has to be certified by him to be correct.

17. The question of drawing of samples at the time of seizure which, more often than not, takes place in the absence of the Magistrate does not in the above scheme of things arise. This is so especially when according to Section 52-A(4) of the Act, samples drawn and certified by the Magistrate in compliance with sub-sections (2) and (3) of Section 52-A above constitute primary evidence for the purpose of the trial. Suffice it to say that there is no provision in the Act that mandates taking of samples at the time of seizure. That is perhaps why none of the States claim to be taking samples at the time of seizure.

18. Be that as it may, a conflict between the statutory provision governing taking of samples and the Standing Order issued by the Central Government is evident when the two are placed in juxtaposition. There is no gainsaid that such a conflict shall have to be resolved in favour of the statute on first principles of interpretation but the continuance of the statutory notification in its present form is bound to create confusion in the minds of the authorities concerned instead of helping them in the discharge of their duties. The Central Government would, therefore, do well, to re-examine the matter and take suitable steps in the above direction.

19.XX
There is in our opinion no manner of doubt that the seizure of the contraband must be followed by an application for drawing of samples and certification as contemplated under the Act. There is equally no doubt that the process of making any such application and



resultant sampling and certification cannot be left to the whims of the officers concerned. The scheme of the Act in general and Section 52-A in particular, does not brook any delay in the matter of making of an application or the drawing of samples and certification. While we see no room for prescribing or reading a time-frame into the provision, we are of the view that an application for sampling and certification ought to be made without undue delay and the Magistrate on receipt of any such application will be expected to attend to the application and do the needful, within a reasonable period and without any undue delay or procrastination as is mandated by sub-section (3) of Section 52-A (*supra*). We hope and trust that the High Courts will keep a close watch on the performance of the Magistrates in this regard and through the Magistrates on the agencies that are dealing with the menace of drugs which has taken alarming dimensions in this country partly because of the ineffective and lackadaisical enforcement of the laws and procedures and cavalier manner in which the agencies and at times Magistracy in this country addresses a problem of such serious dimensions.”

13. In the present case, the sampling having not been done under the supervision of a Magistrate, despite clear direction issued by the Supreme Court in the case of **Mohanlal (*supra*)**, the prosecution cannot be said to have established the charge against the appellants beyond all reasonable doubts.

14. Lastly, in the present case, five witnesses have been examined, three of whom i.e. PW-1, PW-2 and PW-3 are



SSB personnel, who were posted at SSB Camp, D. Coy-71 BN, Koraiya Camp, whereas rest of the two are the officials of NCB. No seizure list witness has been examined. In such circumstance, taking a holistic view of the entire case, we are of the considered opinion that appellants deserve to be acquitted of the charge of the offence punishable under section 20(b)(ii)(C) of the NDPS Act by giving them benefit of doubt.

15. Accordingly, the impugned judgment of conviction dated 15.10.2019 and order of sentence dated 18.10.2019 passed by the learned Sessions Judge cum Special Judge, NDPS Act East Champaran, Motihari, in NDPS Case No. 45 of 2018/NCB Case No. PZU/V/39/18, are hereby set aside.

16. The appeal is allowed.

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

Chakradhari Sharan Singh, J)

(Nawneet Kumar Pandey, J)

ranjan/HR-

AFR/NAFR	NAFR
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