

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.311 of 2024

Arising Out of PS. Case No.-27 Year-2017 Thana- KALYANPUR District- East Champaran

Mukesh Kumar Das Son Of Manohar Das Resident Of Village- Govindpur,
Ps- Kalyanpur, Distt- East Champaran

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

Appearance :

For the Appellant	:	Mr. Sharda Nand Mishra, Adv. Mr. Dhananjay Kr. Gupta, Adv. Mr. Dhandev Kumar, Adv. Mr. Atul Kumar, Adv.
For the Respondent/s	:	Mr. Abhay Kumar, APP

CORAM: HONOURABLE MR. JUSTICE CHANDRA SHEKHAR JHA
ORAL JUDGMENT

Date : 03-09-2024

1. Heard learned counsel appearing on behalf of the parties.

2. The present appeal preferred by appellant/convict, namely, Mukesh Kumar Das under section 374(2) of the Code of Criminal Procedure (in short Cr.P.C.) against the judgment of conviction dated 28.11.2023 and order of sentence dated 06.12.2023 rendered by learned 1st Additional Sessions Judge, East Champaran, Motihari in N.D.P.S. Case No. 22 of 2017 (arising out of Kalyanpur Police Station Case No. 27 of 2017), by which the learned trial court has convicted the appellant for the offence punishable under Sections 20(b)(ii)(c) of the N.D.P.S Act, 1985 and sentenced the appellant to undergo rigorous



imprisonment for ten years and fine of Rs. 1,00,000/- (Rupees One Lakh) and in default of payment appellant has to undergo R.I. for 6 months.

3. Brief case of prosecution as per, written complaint lodged by the informant, namely, PW-1 Sanjay Swaroop that on secret information he along with other police force went to intercept the truck in which the *ganja* was carried and as when he and raiding party saw the truck they stopped them thereafter in course of search in 7 different packets weighing 7 kg each, total of 49 kg *ganja* was recovered from the cabin of the truck and in presence of independent witnesses PW-5 and PW-2 a seizure list was prepared and thereafter appellant and other co- accused persons were taken into custody.

4. On the basis of aforesaid information, Kalyanpur Police Station Case No. 27 of 2017 was lodged on 04.03.2017 for the offence under Section 414 of the Indian Penal Code alongwith Section 20, 22 and 23 of NDPS Act against the appellant and other co-accused persons.

5. To established its case before the learned trial



court, the prosecution altogether examined total of seven witnesses, namely, PW-1 Sanjay Swaroop (informant), PW-2 Upendra Yadav, PW-3 Sunil Kumar Tiwari, PW-4 Vijay Kumar Rai, PW-5 Ranjit Sah, PW-6 Bihari Singh, PW-7 Kameshwar Singh (I.O.).

6. The prosecution also exhibited following documents during the trial to substantiate its case which are as:-

Exhibit 1 -Seizure list.

Exhibit 1/1 – Signature of witness Upendra Yadav on Seizure list.

Exhibit 1½ - Signature of witness Vijay Kumar Rai (Gazetted Officer) on Seizure list.

Exhibit 1/3 - Signature of witness on arrest memo.

Exhibit 2/1 – Signature of witness on arrest memo.

Exhibit 3- Arrest memo of accused Nitesh Kumar.



Exhibit 4 – Written report given by informant Sanjay Swaroop dated 04.03.2017.

Exhibit 5- Formal FIR.

Exhibit 6- C.F.S.L. Report.

Exhibit 7- Acceptance recipients of R.F.S.I. Muzaffarpur.

Exhibit 8- Acceptance recipients of C.F.S.L. Kolkata.

Exhibit 9- Charge sheet no. 218/17 dated 25.08.2017

7. On the basis of evidences, as surfaced during the trial, the appellant/convict was examined under Section 313 of the Cr.P.C., where he denied all incriminative evidences as surfaced against him during the trial and claimed his complete innocence and false implication.

8. No witness was examined in defense, neither any documents were exhibited during trial by appellant/convict in his favour.

9. Upon the basis of evidences as surfaced



during the trial and also by taking note of the argument as advanced by the learned counsel appearing on behalf of the parties, the learned trial court convicted appellant/convict for the offence under Sections 20(b)(ii)(c) of the N.D.P.S Act, 1985 , where appellant/convict sentenced to undergo for rigorous imprisonment of ten years alongwith fine of Rs. One Lakh.

10. Being aggrieved with aforesaid judgment of conviction and order of sentence, the appellant/convict preferred the present appeal.

11. Hence the present appeal.

Argument on behalf of the appellant/convict:

12. It is submitted by learned counsel arguing on behalf of the appellant/convict, that finding of conviction as recorded by Id. trial court is completely perverse. In support of his submission, it is pointed that mandatory provisions of law *qua* sampling, sealing and seizure of contraband/narcotics appears doubtful from the depositions of prosecution witnesses. It is pointed out that even the independent witnesses who were examined during the trial



completely denied any recovery of contraband before them. It is submitted that these witnesses were not declared hostile by the prosecution during the trial and therefore in view of their depositions, no case of prosecution is made out and therefore the conviction as recorded by Id. trial court is completely bad in eyes of law. It is also submitted that no seized material was produced before the Id. trial court during the trial, neither any destruction certificate in this connection was produced. It is pointed out that all the prosecution witnesses are from the police department and therefore they are interested witnesses as to secure the conviction of appellant being the person of same department and for the said reason also the impugned judgment is appearing questionable. It is further pointed out that no Gazetted officer was appointed while searching the vehicle and therefore the compliance of Section 42 of NDPS Act also not appears followed in present case. Having all such major flaws, which was overlooked by Id. trial court, the impugned judgment of conviction is fit to be quashed and set aside.

13. Learned counsel while traveling over his



argument further submitted that in the present case procedures regarding sampling, sealing and dispatching were not followed as per standing instruction No. 1 of 1988 dated 15.03.1988 of Narcotic Control Bureau, Government of India as issued under Section 52A of the N.D.P.S. Act.

14. In support is his submissions learned counsel relied upon the following reports of Hon'ble Supreme Court as available through **State of Haryana Vs. Jarnail Singh** reported in **(2004) 5 SCC 188**; **Tofan Singh Vs. State of Tamil Nadu** reported in **(2021) 4 SCC 1**; **Union of India Vs. Mohanlal and Another** reported in **(2016) 3 SCC 379**; **Gorakh Nath Prasad Vs. State of Bihar** reported in **(2018) 2 SCC 305**; **Ashok alias Dangra Jaiswal vs. State of Madhya Pradesh** reported in **(2011) 5 SCC 123**; **Jitendra Vs. State of M.P.** reported in **(2004) 10 SCC 562**; and **Noor Aga Vs. State of Punjab & Another** reported in **(2008) 16 SCC 417**.

Argument on behalf of State:

15. Learned APP while opposing appeal submitted that the recovery was made from the truck where



the appellant was the driver. It is submitted that minor contradictions are bound to be surfaced during the trial however, he fairly conceded that no seized materials was produced during the trial before the Court neither any destruction certificate was produced in this regard.

16. In support is his submissions learned APP relied upon the legal report of Hon'ble Apex Court as available through ***Rizwan Khan vs. State of Chhattisgarh*** as reported in ***2020 (9) SCC 627***, and said that turning hostile of independent witnesses not necessarily result in acquittal when the other mandatory provisions appears to be followed by prosecution's party and where the police witnesses also speaks in one voice and also when there is no apparent reason to disbelieve them.

17. In support is his submissions learned APP referred the legal report of Hon'ble Apex Court as available through ***Sahib Singh vs. State of Punjab*** as reported in ***(1996) 11 SCC 685***.

18. I have perused the trial court records carefully and gone through the evidences available on record



and also considered the rival submissions as canvassed by learned counsel appearing on behalf of the parties.

19. As to re-appreciate the evidences, while dealing with present appeal, it would be apposite to discuss the evidences as available on record, which are as under :-

20. From the perusal of records, it appears that, **P.W.-1** is the informant of this case, who is Sanjay Swaroop, who intercepted vehicle bearing registration no. JH-12-B-2995 on 04.03.2017, on the basis of secret information which was informed as to carrying a consignment of contraband i.e., *Ganja*. It appears from his deposition that after intercepting the vehicle the persons who were present inside the cabin were asked for their name, who disclosed his name as Mukesh Kumar Das (driver/appellant) and other person disclosed his name as Nitish Kumar, who was cleaner cum helper. Upon search seven packets were found inside the secret cabin of the truck which upon weighing found total of 49 kg. He identified his signature on seizure list which was prepared in the presence of independent witnesses, namely, Ranjit Sah



(PW-5) and Upendar Yadav (PW-2). Upon his identification, seizure list was exhibited as **exhibit-1** during the trial. He also identified the signature of independent witnesses which upon his identification was exhibited as **exhibit-2**. He also identified his signature and handwriting *qua* arrest memo of appellant which upon identification was exhibited as **exhibit-3** during the trial. He also identified the written report which upon identification was exhibited as **exhibit-4**. He also identified the endorsement regarding lodging FIR, which is in handwriting of one Dinkar Bharti, statement writer of thana, which upon his identification exhibited as **exhibit-5**.

20.1. Upon cross-examination he deposed during the trial that the material was seized from the cabin of the truck and thereafter one packet was opened, from which he came to realized that the same is "*ganja*" and it was about 10:15 AM. The weighing of seized material was done at 10:30 AM and seizure list was also prepared at about 10:30 AM. He never requested to appoint any gazetted officer in this case. The statement of appellant/accused was not recorded at the place of recovery.



It was also deposed by him that he exhibited the seized materials but failed to say anything about exhibits. He also failed to say that he could not say that it appears from his depositions that no proper sampling of seized material was done at the place of occurrence itself. The depositions of informant/PW-1 is completely silent *qua* sampling of seized contraband.

21. PW-2 and PW-5 are Upendra Yadav and Ranjit Sah, both are seizure list witnesses. In their examination-in-chief both of them supported the case of prosecution *qua* recovery. It appears from the examination-in-chief of PW-2 that he could not identify appellant during the trial whereupon cross-examination he stated categorically that nothing was recovered before him and police obtained his signature on blank paper. He shows his complete ignorance about writing contents of seizure list. Whereas, PW-5 identified his signature on seizure list which upon his identification exhibited as exhibit P-1/3. Upon cross-examination he deposed that he also signed on blank paper and nothing was recovered before him. It is important to say



that both seizure list witnesses were not declared hostile by the prosecution and therefore the testimony of these two witnesses are binding to the prosecution. Testimony of these two independent witnesses completely uprooted the case of prosecution qua recovery by closing its all petals which bloomed over statement of PW-1/informant.

22. PW-3 namely Sunil Kumar Tiwari, PW-4 namely Vijay Kumar Rai and PW-6 namely Bihari Singh, all are the member of raiding team, who supported the recovery in the same manner through their examination-in-chief, as it was deposed by PW-1/informant during the trial and same appears not to discussed separately for the sake of brevity.

22.1. PW-4 in his cross-examination stated that he could not remember the registration number of the truck. He also failed to name the driver of the truck. It was deposed by him that he didn't even saw the driving license of the appellant. It was stated that only one packet was opened before him and he could not say even that same was carrying his signature or not. It was deposed by him that the seizure list up to serial number 9 was signed by all persons



of the raiding team. It was stated that entire exercise was carried out at police station. It was stated by him that weighing of contraband was done at place of recovery itself, whereafter total weight of all packets was found as 49 kilograms.

22.2 PW-6 in his cross-examination also stated that only one packet of seized material was opened. He also stated that the seizure list was prepared before him. It was stated that the seized material was carried out to police station with same truck.

22.3. PW-7 is the Investigating officer of this case, who identified the endorsement of Sanjay Swaroop the then SHO, Kalyanpur Police Station (PW-1), which upon his identification was exhibited as exhibit-4. He visited the place of occurrence, he produced all seven packets of *ganja* before the court and after photography sample of 30 grams was taken out from each packets and thereafter same was sealed with signature of Sri. Brajesh Kumar, Id. Judicial Magistrate. The sealed sample was sent to Forensic Science Laboratory, Muzaffarpur and Kolkata and also obtained acknowledgment



of receiving which upon his identification was exhibited as **exhibit P-7 and P-8**. He identified his signature and handwriting upon charge-sheet as submitted by him which upon his identification was exhibited as **exhibit P-9** during the trial.

22.4. Upon cross-examination it was stated by him that he could not remember the registration number of the truck. He also could not collect the driving license of appellant. He was informed by SHO/PW-1, namely, Sanjay Swaroop. It was stated by him that "*ganja*" was handed over to him by SHO/PW-1. He visited place of occurrence later on and was not present at the time of recovery. He also said to search the house of appellant but did not find anything incriminating. It was stated that *ganja* was in seven packets where each packets was of 7 kilogram.

23. With aforesaid factual aspects, oral and documentary evidences in hand, it appears apposite to discuss the relevant legal ratios as settled through different legal reports of Hon'ble Supreme Court in these context, which are as under:-



24. In the matter of Full Bench decision of Hon'ble Bombay High Court in the case of **Jayantilal Modi and Another Vs. State of Maharashtra** reported in **[2001 (2) Mh.L.J. 615]**, it was held while answering the reference in the following terms:

"In respect of an offence under the Narcotics Drugs and Psychotropic Substances Act, 1985, it is necessary for the empowered officer to comply with the provisions of Section 42, even when the information received by him is regarding the commission of an offence in a public place of the like mentioned in the explanation to Section 43."

25. In this context, it would be further apposite to refer paragraph '9' of the legal report in the matter of **State of Haryana Vs. Jarnail Singh (supra)** which reads as under:-

"9. Sections 42 and 43, therefore, contemplate two different situations. Section 42 contemplates entry into and search of any building, conveyance or enclosed place, while Section 43 contemplates a seizure made in any public place or in transit. If seizure is made under Section 42 between sunset and sunrise, the requirement of the proviso thereto has to be complied with. There is no such provision in Section 43 of the Act and, therefore, it is obvious that if a public conveyance is searched in a public place, the officer making the search is not required to record his satisfaction as contemplated by the proviso to Section 42 of the NDPS Act for searching the vehicle between sunset and sunrise."



26. Further, Hon'ble Supreme Court held through **Ashok** (supra), **Jitendra** (supra), and **Gorakh Nath Prasad** (supra) that conviction of the appellant of the case unsustainable as prosecution failed to produce the material exhibits (ganja) during the trial.

27. It would be apposite to reproduce in this connection paragraph 6, 8 and 13 of the judgment of Hon'ble Supreme Court in the case of **Gorakh Nath Prasad** (supra) which are as under :-

"6. The NDPS Act provides for a reverse burden of proof upon the accused, contrary to the normal rule of criminal jurisprudence for presumption of innocence unless proved guilty. This shall not dispense with the requirement of the prosecution to having first establish a prima facie case, only whereafter the burden will shift to the accused. The mere registration of a case under the Act will not ipso facto shift the burden on to the accused from the very inception. Compliance with statutory requirements and procedures shall have to be strict and the scrutiny stringent. If there is any iota of doubt the benefit shall have to be given to the accused.

8. The remaining prosecution witnesses being police officers only, it will not be safe to rely upon their testimony alone, which in any event cannot be sufficient evidence by itself either with regard to recovery or the seized material being ganja. No explanation has also been furnished by the prosecution for non-production of the ganja as an exhibit in the trial. The benefit of doubt will,



therefore, have to be given to the appellant and in support of which learned Senior Counsel Shri Rai has relied upon Jitendra v. State of M.P. (2004) 10 SCC 562 and reiterated in Ashok alias Danga Jaiswal v. State of Madhya Pradesh (2011) 5 SCC 123 as follows:

"12. *Last but not the least, the alleged narcotic powder seized from the possession of the accused, including the appellant was never produced before the trial court as a material exhibit and once again there is no explanation for its non-production. There is, thus, no evidence to connect the forensic report with the substance that was seized from the possession of the appellant or the other accused.*

13. *It may be noted here that in Jitendra v. State of M.P., (2004) 10 SCC 562, on similar facts this Court held that the material placed on record by the prosecution did not bring home the charge against the accused beyond reasonable doubt and it would be unsafe to maintain their conviction on that basis. In Jitendra (supra), the Court observed and held as under: (SCC pp. 564-65, paras 5-6)*

'5. The evidence to prove that charas and ganja were recovered from the possession of the accused consisted of the evidence of the police officers and the panch witnesses. The panch witnesses turned hostile. Thus, we find that apart from the testimony of Rajendra Pathak (PW 7), Angad Singh (PW 8) and Sub-Inspector D.J. Rai (PW 6), there is no independent witness as to the recovery of the drugs from the possession of the accused. The charas and ganja alleged to have been seized from the possession of the accused were not even produced before the trial court, so as to connect them with the samples sent to the forensic science laboratory. There is no material produced in the trial, apart from the interested testimony of the police officers, to show that the charas and ganja were seized from the possession of the accused or that the samples sent to the forensic science laboratory were taken from the drugs seized from the possession of the accused. ...



6.... The best evidence would have been the seized materials which ought to have been produced during the trial and marked as material objects. There is no explanation for this failure to produce them. Mere oral evidence as to their features and production of panchnama does not discharge the heavy burden which lies on the prosecution, particularly where the offence is punishable with a stringent sentence as under the NDPS Act. In this case, we notice that panchas have turned hostile so the panchnama is nothing but a document written by the police officer concerned.' "

28. It is further apposite to reproduce the paragraph 27, 28, 29, 30, 31, 32, 55, 56, 57 & 58 of the judgment of Hon'ble Supreme Court in the case of **Noor Aga** (supra) as to understand the implication of Section 35 and 54 of the Act, which are as under:-

"27. Section 43, however, empowers an officer of any department mentioned in Section 42 to detain and search any person who he has reason to believe has committed an offence punishable under the Act in a public place. Section 50 provides for the conditions under which search of persons is to be conducted. Section 51 provides for application of the Code of Criminal Procedure, 1973 insofar as they are not inconsistent with the provisions of the Act. Section 52 provides for disposal of persons arrested and articles seized.

***28.** Section 52-A provides for disposal of seized narcotic drugs and psychotropic substances; sub-section (2) whereof reads as under:*

"52-A. (2) Where any narcotic drug or psychotropic substance has been seized and forwarded to the officer in charge of the nearest police station or to the officer empowered under Section 53, the officer



referred to in sub-section (1) shall prepare an inventory of such narcotic drugs or psychotropic substances containing such details relating to their description, quality, quantity, mode of packing, marks, numbers or such other identifying particulars of the narcotic drugs or psychotropic substances or the packing in which they are packed, country of origin and other particulars as the officer referred to in sub-section (1) may consider relevant to the identity of the narcotic drugs or psychotropic substances in any proceedings under this Act and make an application, to any Magistrate for the purpose of—

(a) certifying the correctness of the inventory so prepared; or

(b) taking, in the presence of such Magistrate, photographs of such drugs or substances and certifying such photographs as true; or

(c) allowing to draw representative samples of such drugs or substances, in the presence of such Magistrate and certifying the correctness of any list of samples so drawn.”

29. *Indisputably, the proper officers of the 1962 Act are authorised to take action under the Act as regards seizure of goods, documents and things.*

30. *We may notice Section 110 of the 1962 Act, sub-section (1) whereof reads as under:*

"110. Seizure of goods, documents and things.—

(1) If the proper officer has reason to believe that any goods are liable to confiscation under this Act, he may seize such goods:

Provided that where it is not practicable to seize any such goods, the proper officer may serve on the owner of the goods an order that he shall not remove, part with, or otherwise deal with the goods except with the previous permission of such officer.

(1-A) The Central Government may, having regard to the perishable or hazardous nature of any goods, depreciation in the value of the goods



with the passage of time, constraints of storage space for the goods or any other relevant consideration, by notification in the Official Gazette, specify the goods or class of goods which shall, as soon as may be after its seizure under sub-section (1), be disposed of by the proper officer in such manner as the Central Government may, from time to time, determine after following the procedure hereinafter specified.

(1-B) Where any goods, being goods specified under sub-section (1-A), have been seized by a proper officer under sub-section (1), he shall prepare an inventory of such goods containing such details relating to their description, quality, quantity, mark, numbers, country of origin and other particulars as the proper officer may consider relevant to the identity of the goods in any proceeding under this Act and shall make an application to a Magistrate for the purpose of—

(a) certifying the correctness of the inventory so prepared; or

(b) taking in the presence of the Magistrate, photographs of such goods, and certifying such photographs as true; or

(c) allowing to draw representative samples of such goods, in the presence of the Magistrate, and certifying the correctness of any list of sample so drawn.

(1-C) Where an application is made under sub-section (1-B), the Magistrate shall, as soon as may be, allow the application.”

31. *Indisputably, the Central Government has issued guidelines in this behalf being Standing Order 1 of 1989 dated 13-6-1989 which is in the following terms:*

"WHEREAS the Central Government considers it necessary and expedient to determine the manner in which the narcotic drugs and psychotropic substances, as specified in Notification No. 4/89 dated 29-5-1989 [F. No.



664/23/89-Opium, published as S.O. 381(E)], which shall, as soon as may be, after their seizure, be disposed of, having regard to their hazardous nature, vulnerability to theft, substitution and constraints of proper storage space;

Now, therefore, in exercise of the powers conferred by sub-section (1) of Section 52-A of the Narcotic Drugs and Psychotropic Substances Act, 1985 (61 of 1985) (hereinafter referred to as 'the Act'), the Central Government hereby determines that the drugs specified in the aforesaid notification shall be disposed of in the following manner...."

These guidelines under the Standing Order have been made under the statute, and heroin is one of the items as substances listed for disposal under Section I of the Standing Order.

32. *Paras 3.1 and 6.1 of the Standing Order read as under:*

"Preparation of inventory

3.1. After sampling, detailed inventory of such packages/containers shall be prepared for being enclosed to the panchnama. Original wrappers shall also be preserved for evidentiary purposes.

Certificate of destruction

6.1. A certificate of destruction (in triplicate) (Annexure III) containing all the relevant data like godown entry no., file no., gross and net weight of the drugs seized, etc. shall be prepared and duly endorsed by the signature of the Chairman as well as members of the Committee. This could also serve the purpose of panchnama. The original copy shall be posted in the godown register after making necessary entries to this effect, the duplicate to be retained in the seizure case file and the triplicate copy will be kept by the Disposal Committee."

55. *The provisions of Section 35 of the Act as*



also Section 54 thereof, in view of the decisions of this Court, therefore, cannot be said to be ex facie unconstitutional. We would, however, keeping in view the principles noticed hereinbefore, examine the effect thereof vis-à-vis the question as to whether the prosecution has been able to discharge its burden hereinafter.

Burden of proof

56.*The provisions of the Act and the punishment prescribed therein being indisputably stringent flowing from elements such as a heightened standard for bail, absence of any provision for remissions, specific provisions for grant of minimum sentence, enabling provisions granting power to the court to impose fine of more than maximum punishment of Rs 2,00,000 as also the presumption of guilt emerging from possession of narcotic drugs and psychotropic substances, the extent of burden to prove the foundational facts on the prosecution i.e. "proof beyond all reasonable doubt" would be more onerous. A heightened scrutiny test would be necessary to be invoked. It is so because whereas, on the one hand, the court must strive towards giving effect to the parliamentary object and intent in the light of the international conventions, but, on the other, it is also necessary to uphold the individual human rights and dignity as provided for under the UN Declaration of Human Rights by insisting upon scrupulous compliance with the provisions of the Act for the purpose of upholding the democratic values. It is necessary for giving effect to the concept of "wider civilisation". The court must always remind itself that it is a well-settled principle of criminal jurisprudence that more serious the offence, the stricter is the degree of proof. A higher degree of assurance, thus, would be necessary to convict an accused. In State of Punjabv. Baldev Singh [(1999) 6 SCC 172 : 1999 SCC (Cri) 1080] it was stated: (SCC p.*



199, para 28)

"28. ... It must be borne in mind that severer the punishment, greater has to be the care taken to see that all the safeguards provided in a statute are scrupulously followed."

(See also Ritesh Chakarvarti v. State of M.P. [(2006) 12 SCC 321 : (2007) 1 SCC (Cri) 744])

57. *It is also necessary to bear in mind that superficially a case may have an ugly look and thereby, prima facie, shaking the conscience of any court but it is well settled that suspicion, however high it may be, can under no circumstances, be held to be a substitute for legal evidence.*

58. *Sections 35 and 54 of the Act, no doubt, raise presumptions with regard to the culpable mental state on the part of the accused as also place the burden of proof in this behalf on the accused; but a bare perusal of the said provision would clearly show that presumption would operate in the trial of the accused only in the event the circumstances contained therein are fully satisfied. An initial burden exists upon the prosecution and only when it stands satisfied, would the legal burden shift. Even then, the standard of proof required for the accused to prove his innocence is not as high as that of the prosecution. Whereas the standard of proof required to prove the guilt of the accused on the prosecution is "beyond all reasonable doubt" but it is "preponderance of probability" on the accused. If the prosecution fails to prove the foundational facts so as to attract the rigours of Section 35 of the Act, the actus reus which is possession of contraband by the accused cannot be said to have been established."*

29. Standing Instruction "No. 1 of 1988" dated



15.03.1988 of Narcotics Control Bureau, Government of India issued under Section 52A of the N.D.P.S. Act prescribes the detailed procedure for sampling, sealing and despatching the seized sample to the laboratory for test. Clauses 1.4, 1.5, 1.6 and 1.9 of the Standing Instruction No. 1 of 1988 dated 15.03.1998 read as under:

"1.4 If the drugs seized are found in packages/containers, the same should be serially numbered for purposes of identification. In case the drugs are found in loose form, the same should be arranged to be packed in unit containers of uniform size and serial numbers should be assigned to each package/ container. Besides the serial numbers, the gross and net weight, particular of the drug and the date of seizure should invariably be indicated on the packages. In case sufficient space is not available for recording the above information on the package, a Card Board label, should be affixed with a seal of the seizing officer and on this Card Board label, the above details should be recorded.

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.

***1.9** It needs no emphasis that all samples must be drawn and sealed; in the presence of the accused, Panchnama witnesses and seizing officer and all of them shall be required to put their signatures on each sample. The official seal of the seizing officer should also be affixed. If the person, from whose custody the drugs have been recovered, wants to put his own seal on the sample, the same may be allowed on both the original and the duplicate of each of the samples.”*

30. The question as to whether the compliance of the guidelines issued by Standing Instruction No. 1 of 1988 would vitiate the trial was considered by the Hon’ble Supreme Court in **Khet Singh Vs. Union of India** since reported in **(2002) 4 SCC 380**, **Noor Aga Vs. State of Punjab** since reported in **(2008) 16 SCC 417** and **Union of India Vs. Balmukund and others** since reported in **2009 (12) SCC 161**.

31. In **Khet Singh** (supra) after examining the said issue the Hon’ble Supreme Court held in para 10 as under:



"10. 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, 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....."

32. In **Noor Aga (supra)** after giving thoughtful consideration to the guidelines issued under the N.D.P.S. Act in the Standing Order the Hon'ble Supreme Court observed in paras 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 therefore, 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."

33. In this context, it would be further apposite to refer paragraph '6' of the legal report in the matter of **Sahib Singh case (supra)** which reads as under:-

6. *Having gone through the record we find much substance in each of the above contentions. Before conducting a search the police officer concerned is required to call upon some independent and respectable people of the locality to witness the search. In a given case it may so happen that no such person is available or, even if available, is not willing to be a party to such search. It may also be that after joining the search, such persons later on turn hostile. In any of these eventualities the evidence of the police officers who conducted the search cannot be disbelieved solely on the ground that no independent and respectable witness was examined to prove the search but if it is found — as in the present case — that no attempt was made even by the police officer concerned to join with him some persons of the locality who were admittedly available to witness the recovery, it would affect the weight of evidence of the police officer, though not its admissibility. We next find from the record*



that the arms and ammunition allegedly recovered from the appellant and seized were not packeted and sealed. In Amarjit Singh v. State of Punjab [1995 Supp (3) SCC 217 : 1995 SCC (Cri) 828] this Court has observed that non-sealing of the revolver at the spot is a serious infirmity because the possibility of tampering with the weapon cannot be ruled out. From the record we further find that there is no evidence to indicate with whom the revolver was after its seizure by PW 3 till it was sent to the Arms Expert for testing through Head Constable Baita Singh. This missing link also weakens the prosecution case. For all these infirmities we are of the view, that the appellant is entitled to the benefit of reasonable doubt.

34. In this context, it would be further apposite to refer paragraph nos. 12 and 13 of the legal report in the matter of ***Rizwan Khan case (supra)*** which reads as under:-

"12. *It is settled law that the testimony of the official witnesses cannot be rejected on the ground of non-corroboration by independent witness. As observed and held by this Court in catena of decisions, examination of independent witnesses is not an indispensable requirement and such non-examination is not necessarily fatal to the prosecution case [see Pardeep Kumar [State of H.P. v. Pardeep Kumar, (2018) 13 SCC 808 : (2019) 1 SCC (Cri) 420]].*

13. *In the recent decision in Surinder Kumar v. State of Punjab [Surinder*



Kumar v. State of Punjab, (2020) 2 SCC 563 : (2020) 1 SCC (Cri) 767] , while considering somewhat similar submission of non-examination of independent witnesses, while dealing with the offence under the NDPS Act, in paras 15 and 16, this Court observed and held as under : (SCC p. 568)

"15. The judgment in Jarnail Singh v. State of Punjab [Jarnail Singh v. State of Punjab, (2011) 3 SCC 521 : (2011) 1 SCC (Cri) 1191] , relied on by the counsel for the respondent State also supports the case of the prosecution. In the aforesaid judgment, this Court has held that merely because prosecution did not examine any independent witness, would not necessarily lead to conclusion that the accused was falsely implicated. The evidence of official witnesses cannot be distrusted and disbelieved, merely on account of their official status.

16. In State (NCT of Delhi) v. Sunil [State (NCT of Delhi) v. Sunil, (2001) 1 SCC 652 : 2001 SCC (Cri) 248] , it was held as under : (SCC p. 655)

'It is 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 made by the police. At any rate, the court cannot start with the presumption that the police records are untrustworthy. As a proposition of law, the presumption should be the other way around. That official acts of the police have been regularly performed is a wise principle of presumption and recognised even by the legislature.'"

Conclusion

35. On the basis of deposition of aforesaid



prosecution witnesses, who are from the same department it appears that they deposed *qua* recovery of contraband/*ganja* in stereotype manner. From their depositions it can be gathered safely that sampling and seizure was not done properly. The compliance of Section 42 of NDPS Act also appears doubtful. No Executive Magistrate was appointed for the search of contraband, which was made inside the cabin of the truck. It also appears that the though sampling was done before the Magistrate but it was not produced during the trial. No destruction certificate was even produced. Entire prosecution is silent regarding drawing of representative samples. Further PW-2 and PW-5, who are the seizure list witnesses and was not declared hostile by the prosecution completely denied that any recovery as alleged was made before them. PW-2 even failed to identify the appellant during the trial.

36. In view of above discussed evidences, it can be gathered safely that prosecution failed to answer various material questions which was essential to prove the foundational aspect as to import the provision of "reverse



burden” of proof upon appellant by importing the provision of presumption.

37. Accordingly, appeal stands allowed.

38. The impugned judgment of conviction dated 28.11.2023 and order of sentence dated 06.12.2023 rendered by learned 1st Additional Sessions Judge, East Champaran, Motihari in N.D.P.S. Case No. 22 of 2017 (arising out of Kalyanpur Police Station Case No. 27 of 2017) is hereby set aside/quashed.

39. Appellant namely, Mukesh Kumar Das is in custody in connection with this case, he is directed to be released forthwith, if not required in any other case. Fine, if any paid, by appellant, be returned to him immediately.

40. Office is directed to send back the trial court records and proceedings along with a copy of this judgment to the trial court, forthwith.

(Chandra Shekhar Jha, J)

Sudha/-

AFR/NAFR	NAFR
CAV DATE	NA
Uploading Date	10.09.2024.
Transmission Date	10.09.2024.

