

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.643 of 2023**

Arising Out of PS. Case No.-78 Year-2020 Thana- SAKRA District- Muzaffarpur

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ARUN SAH SON OF LATE MAHADEV SAH R/O VILL.- BAZI RAUT,
P.S.- SAKRA, DISTT.- MUZAFFARPUR

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

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Appearance :

For the Appellant/s	:	Mr. Ajay Kumar Thakur Ms. Vaishnavi Singh Mr. Ritwik Singh
For the Respondent/s	:	Mrs. Abha Singh, APP

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**CORAM: HONOURABLE MR. JUSTICE NAWNEET KUMAR
PANDEY**

CAV JUDGMENT

Date : -29-07-2024

I have already heard the learned counsel for the appellant and the learned APP for the State.

2. This appeal has been preferred on behalf of the appellant against the judgment of conviction dated 30.11.2022 and order of sentence dated 20.12.2022, passed by learned 2nd Additional District and Sessions Judge-cum-Special Judge, N.D.P.S. Act, Muzaffarpur in N.D.P.S. Case No. 11 of 2020, arising out of Sakra P.S. Case No. 78 of 2020, whereby the appellant was convicted under Sections 20(b)(ii)(C) and section 22(C) of the N.D.P.S. Act, hereinafter to be referred to as ‘the



Act', and sentenced him to undergo R.I. for ten years and a fine of Rs. 1,00,000/- each under Section 20(b)(ii)(c) and Section 22(c), respectively, of the Act. Both the sentences were directed to run concurrently. In default of payment of fine amount, the appellant was further directed to undergo S.I. for two years.

3. The prosecution case, in brief, is that the informant Rajesh Kumar, ASI (P.W.3), got a secret information that the appellant and one Sonu Sah had concealed *ganja* in their scrap shop. The informant entered sanha no. 805 in the station diary on 26.02.2020 and after informing the superior officials, he constituted a raiding party/team, comprising ASI Mahesh Kumar (P.W.4), ASI Ram Uday Sharma (P.W.1), ASI Chaitu Ram (P.W.2) and the members of the armed forces. The informant requested Pankaj Kumar (P.W.6), who was the Circle Officer, to be part of the raiding team. Thereafter, the raiding team proceeded to the place of occurrence with necessary kits and papers. When the raiding team reached to the scrap shop of the appellant, some of the labourers and persons assembled there. In presence of two independent witnesses Ashok Kumar (P.W.7) and Shri Bagwan Kumar (not examined). The scrap shop was searched and 32 packets of *ganja*, weighing 10 kg



each was recovered from his shop. The raiding team weighed the contraband by borrowing digital weighing machine from a nearby shopkeeper. The labourers and the independent witnesses apprised the raiding party that the appellant might be present at his house. Then the raiding team went to the house of the appellant and he was arrested in course of fleeing away. Some persons also assembled there and in presence of two independent witnesses Sanjay Kumar (not examined) and Sushil Kumar (P.W.8), 10 packets of ganja containing five kg each, in total, 50 kgs were recovered. It has also been mentioned in the FIR that from the dickey of his swift car bearing registration number BR-06M-7811, two digital weighing machines, one packet weighing 15 kg, one packet of eight kg and eight packets of 4.5 kg each containing *ganja* were recovered. The seizure list was prepared in presence of the above-mentioned two independent witnesses. The appellant disclosed that he along with his brother Santosh kumar and Sonu Sah used to deal in illicit business of *ganja*.

4. On the basis of the *fardbayan* of the informant (Ext.4), the formal FIR was drawn and the case was registered under Sections 20(b), 22(b) 27(a) of the Act on 26.02.2020 at about 12.30 noon. Thereafter, the investigation was carried out



and the charge sheet no. 371 of 2020 (Ext.7) was submitted against the appellant by the Investigating Authorities on 22.05.2020 under Sections 120B of the IPC and Sections 20(b)/20(c) and 27(a) of the Act. As co-accused Santosh Sah and Sonu Sah were absconding, the investigation was kept pending against them.

5. On the basis of the material collected during the course of investigation, the special Judge-cum-Sessions Judge, Muzaffarpur took cognizance vide order dated 11.09.2020/25.09.2020 against the appellant under Section 20(b),22(b) and 27(a) of the Act and transferred the case to the court of 5th Additional Sessions Judge, Muzaffarpur for disposal.

6.The charges were framed against the appellant on 17.12.2021 for the offences punishable under Sections 20(b) (ii), (c) and 22(c) and 27(a) of the Act.

7. During trial, eight witnessed were examined on behalf of the prosecution and the followings are the documentary evidences:-

Sr.No.	Exhibit number	Description
1.	Exhibit P-1/PW2	Seizure list (prepared at scrap shop
2.	Exhibit P-2/PW2	Seizure list (prepared at house)
3.	Exhibit 1/1	Signature of P.W.2 on seizure list



4.	Exhibit 1/2	Initial of C.O.(P.W.6)
5.	Exhibit 2/1	Signature of P.W.3 on seizure list.
6.	Exhibit 2/2/	Initial of C.O. (P.W.6)
7.	Exhibit 3	Information to the accused about his rights u/s 50 of the NDPS Act
8.	Exhibit 4	Self statement of P.W.3
9	Exhibit 4/1	Endorsement on self statement
10.	Exhibit P-5	Formal FIR
11.	Exhibit 6	Forwarding Memo dated 27.02.2020
12.	Exhibit P-7	Charge sheet
13.	Exhibit P-2/1	Signature of PW-7 over seizure list P1
14.	Exhibit P3/3	Signature of P.W.8 over seizure list-P2
15.	Exhibit-8	Chemical analysis report

8. P.W.1 Ram Uday Sharma, ASI, is the member of the raiding party. He stated that they got secret information that *ganja* was concealed in the scrap shop of the appellant. On raid, 32 bundles of *ganja* containing 10 kg each were recovered from his shop. The labourers working in the shop apprised that the appellant, who is the owner of the shop, was present in his house. The police raided his house and 109 kg of *ganja* was recovered therefrom and the appellant was arrested from his house. He stated that ASI Chaitu Ram (PW-2) prepared the



seizure list. A four-wheeler was also found at the house of the appellant. (This witness identified the appellant through video conferencing, as the appellant was imprisoned in Khudiram Bose Central Jail, Muzaffarpur). In his cross-examination, this witness has stated that the raiding party could not see any paper relating to the scrap shop of the appellant. Only the labourers told the raiding party that the scrap shop belonged to the appellant. This witness stated that the weighing machine was borrowed from a grocery shop situated nearby. He stated in para-7 that the sampling was done at the police station, after taking 10-20 gm of *ganja* from one packet. In para-14 of his cross-examination, this witness stated that the sampling was done after taking *ganja* from one packet. Rest of the packets were not opened.

9. P.W.2 Chaitu Ram is also a member of the raiding party. He stated that when the raid was conducted in the scrap shop of the appellant, the labourers were sleeping there and they disclosed that the scrap shop was belonging to the appellant. From the scrap shop of the appellant, 32 bundles of *ganja* containing 10 kg each, in total, 320 kgs were recovered. The seizure list was prepared by this witness at the scrap shop itself. He identified his signature on the seizure list which was



marked as Ext.1. As per the deposition of this witness, the labourers present at the shop informed that the shop belonged to the appellant (Arun Sah), who was present at his house at the time of raid. The team raided his house and he was arrested and 10 bundles of *ganja* containing five kg each were recovered. From his Swift car, ten bundles of *ganja* were recovered. The seizure list (Ext.2) was prepared in presence of this witness which was in his handwriting. In para-10 of his deposition, this witness has stated that the sampling was done at the place of occurrence after taking *ganja* from four packets. In para-13, this witness deposed that the informant Rajesh Kumar had weighed the seized *ganja*. In para-18, this witness has stated that total five samples were prepared.

10. P.W.3 Rajesh Kumar is the informant. He stated in his deposition that on 26.02.2020 he received a secret information at 5.15 a.m. (morning) that the appellant along with Sonu Sah and others was dealing in the illicit business of *ganja*. After receiving that information, a raiding party was constituted. A *senha* was also entered in the station diary bearing *senha* no. 805 dated 26.02.2020 and the information was transmitted to the superior officials of the informant. This witness deposed that from the scrap shop of the appellant, 32 packets of *ganja*



containing 10 kg each was recovered and P.W.2 Chaitu Ram prepared the seizure list. This witness identified his signature on the seizure list, which has been marked as Ext.1/1. The Circle Officer Pankaj Kumar (P.W.6) also put his signature on the seizure list which was marked as Ext. 1/2. The labourers present at the shop informed that the appellant was present in his house. Thereafter, his house was searched and 10 packets of *ganja* containing 15 kg each was recovered from the veranda of his house. From the dickey of the Swift car one packet of 15 kg, one packet of 8 kg and eight bundles of 4.5 kg of *ganja* were recovered. P.W.2 Chaitu Ram again prepared the seizure list, to which this witness was also one of the signatories and he identified his signature (Ext.2/1) on the seizure list. He also identified the signature of Circle Officer on the seizure list which was marked as Ext.2/2. Before conducting search and seizure, he gave a written notice to the appellant which is Ext.3 and the signature of the Circle Officer on that notice is Ext.3/1. This witness recorded his written report which is Ext.4 and the endorsement of the FIR is Ext.4/1. He stated that the formal FIR was in the handwriting of a Munshi, namely, Mahesh Kumar which has been marked as Ext.5. In para-13 of his cross-examination, this witness has stated that he had not seen any



paper regarding the scrap shop of the appellant. This witness could not investigate as to in whose land the shop was situated. In para-16 of his deposition, this witness has stated that the Munshi Mahesh Kumar and Chaukkidar weighed the *ganja*. He deposed in para-15 that they went to the place of occurrence having weighing machine. In para-17, he has stated that he transmitted the information to his superior officials by telephone. In para-18 of his deposition, he has stated that samples were taken from all the 32 packets, but he could not remember the weight of *ganja* taken out from the packets for sampling. He also could not remember as to how many samples were prepared. As per the deposition of this witness, the sampling was done at the scrap shop of the appellant. In para-22 of his deposition, this witness has stated that it was not in his memory as to how much *ganja* was taken out from the packets for sampling which was recovered from the house of the appellant. He also could not remember as to who signed those samples. The seized *ganja* was kept in *Malkhana*, but this witness could not remember the number of *Malkahana* registers whereby the consignment was kept in the said *Malkhana*. In para-27 of his deposition, this witness has stated that there was no testing kits with the raiding party.



11. P.W.4 Mahesh Kumar, ASI, was also a member of the raiding party. He also stated that 32 bundles of *ganja* containing 10 kg each were recovered from the scrap shop of the appellant. The labourers disclosed that the shop was belonging to the appellant. The raiding party went to the house of the appellant and he was arrested when he attempted to flee away. 10 packets of *ganja* containing five kg each were recovered beneath a *chauki* kept in the veranda of the house and from Swift car standing nearby, one packet of 15 kg, one packet of 8 kg and eight packets of 4.5 kg of *ganja* were recovered. The seizure list was prepared by P.W.2. He deposed in para-4 that the raiding team brought the recovered *ganja* and the arrested Arun Sah (appellant) to the police station. In para-14, this witness has stated that the sampling was done after taking *ganja* from one packet. In para-15, this witness has stated that the recovered *ganja* was weighed by one shopkeeper, but he could not remember the name of the shopkeeper who weighed that seized *ganja*. In para-18, this witness stated that *ganja* was brought to the police station by a private pick-up van. In para-21 of his deposition, he stated that sample of *ganja* recovered from the dicky of the Swift car was prepared after taking *ganja* from one packet. Similarly, in para-22, he stated that only one packet



of *ganja* was opened for sampling from the packets, which were seized beneath the *chauki* kept in the veranda of the house of the appellant.

12. P.W.5 Uday Kumar Singh, is the Investigating Officer. This witness has stated that after taking the charge of investigation, he proceeded to the place of occurrence. In para-2 of his deposition, he described the situation of the scrap shop and in para-3 of his deposition, he described the situation of the house of the appellant. This witness recorded the confessional statement of the appellant. He recorded the statement of the witnesses. This witness has stated that on 28.02.2020, he produced the samples in court and on the same day he received the order of the court to send the samples to the Central Forensic Science Laboratory, Calcutta as well as the Forensic Science Laboratory, Gannipur, Muzaffarpur. First set of samples was sent to Calcutta laboratory and the second set was sent to Gannipur laboratory. After completion of investigation, this witness submitted the charge sheet no.371/2020 against the appellant. He identified his signature on the charge sheet which has been marked as Ext.7. In para-18 of his deposition, this witness has stated that during investigation he could not see any paper relating to the scrap shop. In para-21, this witness has



stated that he could not record the deposition of the shopkeeper who weighed the seized *ganja*. In para-22 of his deposition, he stated that the sampling was done by the informant in presence of this witness. Sampling was done after taking *ganja* from all the packets. In para-23 he stated that before preparation of samples, all the packets of *ganja* were sealed. This witness could not see quantity of *ganja* taken out for sampling. This witness in para-27 deposed that he did not record entry number in the case diary relating to the seized articles, which were kept in the *Malkhana*.

13. P.W.6 is the Anchaladhikari, who, at the request of the informant, accompanied the raiding party. As per his deposition, the scrap shop of the appellant was searched in his presence. This witness identified his signature on the seizure list Ext.1/2. This witness stated that 32 bundles of *ganja* weighing 10 kg each were recovered from the scrap shop of the appellant. On the information of the labourers, the house of the appellant was raided and he was arrested during the course of fleeing away. One bundle of 15 kg of *ganja*, one bundle of 8 kg of *ganja* and eight bundles of 4.5 kg of *ganja* were recovered beneath the *chauki* kept in the veranda of the appellant's house. The seizure list was prepared in presence of this witness and he



identified his signature on the seizure list which has been marked as Ext.2/2. In para-20 of his deposition, this witness deposed that one of the packets was opened in his presence, and without extracting *ganja* therefrom the packet was re-sealed.

14. P.W.7 Ashok Kumar is one of the seizure list witnesses of the first seizure list and he identified his signature on seizure list Ext. P-2/1. In para-3, this witness stated that the police obtained his signature on blank paper. In para-8 he stated that no *ganja* was recovered from the scrap shop of the appellant.

15. P.W.8 Sushil Kumar is also seizure list witness. He identified his signature the seizure list (Ext.P-3/3. In para-3, this witness has stated that when he puts his signature on that paper, it was blank. In para-4 of his deposition, this witness has stated that no substance like *ganja* was recovered in his presence.

16. After conclusion of the prosecution evidence, the appellant was questioned under Section 313 of the CrPC for enabling him to explain the incriminating circumstances appeared in evidence against him. He denied the questions in negative. He stated that the vehicle wherefrom *ganja* is alleged to have been recovered was not belonging to him. He also stated



that the house wherefrom the *ganja* is alleged to have been recovered was the joint house of five brothers of the appellant.

17. The learned counsel for the appellant submitted that there are material contradictions in the depositions of the witnesses that make the prosecution case doubtful and unbelievable. As per his submission, P.W.3 in his cross-examination in para-17, has stated that he had recorded the information in writing in station diary no. 805 and he gave information about it to his superior officials via telephone. But he fails to remember the time of making the said calls. Further, P.W.5 (I.O.) has stated in para-30 of his deposition that the secret information received by the informant was not included in the station diary. The information regarding arrest of the accused was not given by him to the senior officials, nor any evidence showed that anyone else gave information to the superior officials. It has been submitted by the learned counsel that non-transmission of the information to the superior officials is fatal to the prosecution case. Further submission of the learned counsel is that P.W.1, who is one of the members of the raiding party does not say anything in his examination-in-chief about any sample being drawn up. But in para-7 he stated that one packet of *ganja* was opened and 10-20 gm of *ganja* was



taken out. He stated that the sampling was done at the police station. In para 14 he says that only one packet of ganja was opened, but P.W.2 who also happens to be a member of the raiding party stated in para-10 of his deposition that the samples were drawn from four bundles at the place of occurrence. P.W.3 (informant) in his examination-in-chief in para-8, stated that he had drawn samples from the recovered *ganja* at the place of occurrence, but in para-18 he stated that 32 packets of *ganja* were opened for sampling at the scrap shop of the appellant. He did not remember how much of *ganja* was taken out for sampling and how many samples were drawn. In para-21 he stated that apart from the scrap shop of the appellant, sampling was also done at the house of the accused. P.W. 4 who is also a member of the raiding team, states in para-14 of his deposition that one packet of *ganja* was opened for sampling at the scrap shop of the appellant. In para-15 he says that he did not know as to who signed on the samples. P.W. 5 (I.O.) in para-22 states that the samples were drawn by the informant (P.W.3) at the police station. He stated further that all the packets were opened for sampling and some *ganja* was taken out from all the packets. P.W.6 is the Circle Officer, who in his examination-in- chief, has not stated anything about sealing and sampling of *ganja*, but



during his cross-examination in para-13 he states that the packets of *ganja* recovered from the scrap shop were not opened at the place of occurrence. All the packets were sent to the police station. It has further been submitted that P.W.1 in para-6 says that the C.O. and SHO had weighed the recovered *ganja*. To the contrary, P.W.3 (informant) stated in para-16 of his deposition that *ganja* was weighed by the *Munshi* and *Chaukidar* in the police station. The submission of the learned counsel for the appellant is that there are material contradictions in the deposition of the witnesses in respect of search and seizure of the contraband which make the prosecution case unbelievable/ untrustworthy.

18. The learned counsel for the appellant submitted further that both the seizure list witnesses did not support the prosecution case. P.W.7 Ashok Kumar, though identified his signature on the seizure list, but he stated that the police obtained his signature on blank paper. Similarly, P.W.8 Sushil Kumar, also stated that when he signed the seizure list it was blank.

19. Further submission of the learned counsel for the appellant is that as per the deposition of the Investigating Officer (P.W.5), he produced the samples in court on 28.02.2020



and on the same day he received the order of the court to send the samples to the Forensic Science Laboratory, but Ext.8 which is the report of the Forensic Science Laboratory, discloses that the sample was received in the office of the F.S.L. on 13.03.2020, as such, there is delay of 13 days for sending the samples in the Laboratory and the delay in transmitting the contraband to the Forensic Science Laboratory has not been explained.

20. It has further been submitted by the learned counsel for the appellant that the material exhibit was never produced before the court during trial. Non-production of material exhibit during trial makes the prosecution case as suspicious and no conviction can be made.

21. On the other hand, the learned APP for the State submitted that the raiding team raided the scrap shop and also the house of the appellant and a huge quantity of *ganja* was recovered in presence of the independent witnesses. He submitted that the prosecution has successfully proved its case, and on the basis of the evidences the learned court below convicted the appellant and sentenced him, as indicated above. As per his submission, the judgment of conviction and order of sentence does not require interference of this Court.



22. After hearing both the sides at length and after carefully perusal of the evidences, it appears that a number of material contradictions are there in the statement of the witnesses which make the prosecution case as doubtful.

23. P.W.4 Mahesh Kumar, who is an ASI and was a member of the raiding party, stated in para-15 of his deposition that *ganja* was weighed by one shopkeeper, whereas the informant (P.W.3) stated that *ganja* was weighed by *Munshi* Mahesh and one *Chaukidar*. There is also contradiction in the depositions of the witnesses in respect of the place, where the sampling of the seized *ganja* was prepared. P.W.1 Ram Uday Sharma states that the sampling was done at the police station, whereas P.W.2 Chaitu Ram says that the sampling was done at the place of occurrence. P.W.2 stated in his deposition that sampling was done after taking *ganja* from four packets, whereas P.W.1 says that the sampling was done after taking *ganja* from one packet. P.W.3, Rajesh Kumar (the informant), in his deposition, stated that *ganja* was weighed by *Munshi* Mahesh and *Chaukidar*. P.W.5 Uday Kumar Singh states that sampling was done after taking *ganja* from all the packets in his presence..

24. From perusal of the materials available on



record, it appears that the seizure list witnesses did not support the prosecution case. The Hon'ble Supreme Court in the case of ***Sanjeet Kumar Kumar Singh @ Munna Kumar Singh Vs. State of Chhattishgarh (2022 SCC Online SC 1117)*** reversed the order of conviction on the ground of infirmity in the depositions of seizure list witnesses. Paragraph nos. 31 and 32 of the decision are extracted hereinbelow:-

“31. Therefore, it is clear that the I.O. examined as PW-7 claims to have done everything only in the presence of independent witness. But those independent witness not merely denied their presence and participation but also came up with an explanation as to how their signatures found a place in those documents.

32. In such circumstances, a serious doubt is cast on the very search and seizure allegedly made by PW-7. But unfortunately, both the Special Court and the High Court went by the law in theory, without applying the same to the facts of the case.”

25. It also appears that requirement of Section 42(2) of the Act has also not been complied with. Section 42(2) of the Act requires that the information received by the police



official should be reduced in writing and shall be transmitted to the superior official within 72 hours. In the present case, neither the informant, nor any of the witnesses deposed in their examinations-in-chief that the information was transmitted to the superior police official.

26. In the case of ***Koluttumottil Razak Vs. State of Kerala***, reported in ***(2000) 4 SCC 465***, the Hon'ble Supreme Court held that non-compliance of Section 42(1) and 42(2) of the Act is fatal to the prosecution case. The relevant para-6 of that decision is being extracted hereinbelow.

“6. It is a mandate of Section 42 of the Act that when an officer referred to in sub-section (1) thereof “has reason to believe from personal knowledge or information given by any person and taken down in writing” (emphasis supplied) that any narcotic drug or psychotropic substance is kept or concealed he may detain and search, and, if he thinks proper, arrest any person whom he has reason to believe to have committed any offence under the Act. The other requirement of law is that the officer who takes down the information in writing or records grounds for his belief shall forthwith send a copy thereof to his immediate official superior. A three-Judge Bench of this Court held in Abdul Rashid



Ibrahim Mansuri v. State of Gujarat that non-compliance with the requirements of Section 42(1) and (2) would render the resultant search and seizure suspect, though that by itself may not vitiate the proceedings.”

27. It also appears that the material exhibit was not produced before the court during trial. The Hon’ble Supreme Court in the case of ***Vijay Jain Vs. State of M.P.***, reported in ***(2013) 14 SCC page 527*** has been pleased to hold that the conviction cannot be upheld due to non-production of the seized material before the trial court. Para-12 of the said decision is being extracted hereinbelow:-

“12. We are thus of the view that as the prosecution case has not produced the brown sugar before the court and has also not offered any explanation for non-production of the brown sugar alleged to have been seized from the appellants and as the evidence of the witnesses (PW 2 and PW 3) to the seizure of the materials does not establish the seizure of the brown sugar from the possession of the appellants, the judgment of the trial court convicting the appellants and the judgment of the High Court maintaining the conviction are not sustainable.”



28. It also appears that the direction given by the Hon'ble Supreme Court in respect of search and seizure in the case of *Union of India Vs. Mohanlal and another (2016) 3 SCC 379*, has also not been complied with by the informant or the witnesses(including the Investigating Officer), which mandates that the sample of the contraband must be prepared at the spot at the time of recovery itself.

29. As such, there is a number of infirmities discussed above in respect of search, seizure, sampling and non-production of contraband in the court below which occurred in this case that make the search and seizure as doubtful. The material contradictions occurred in the depositions of the witnesses, as indicated above, also makes the prosecution case as doubtful. As such, the conviction cannot be based on the basis of such doubtful materials detected during the course of trial.

30. On the basis of the abovenoted observation, the judgment of conviction dated 30.11.2022 and order of sentence dated 20.12.2022, passed by learned 2nd Additional District and Sessions Judge-cum-Special Judge, N.D.P.S.Act, Muzaffarpur in N.D.P.S. Case No. 11 of 2020, arising out of Sakra P.S.Case No. 78 of 2020, are set aside and the appeal is accordingly allowed.



31. The appellant is directed to set at liberty
forthwith, if not wanted in any other case.

(Nawneet Kumar Pandey, J)

HR/-

AFR/NAFR	NAFR
CAV DATE	27.06.2024
Uploading Date	30. 07.2024
Transmission Date	30.07.2024

