

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.885 of 2023

Arising Out of PS. Case No.-302 Year-2017 Thana- BARHARA District- Bhojpur

Jodha Paswan, Son Of Late Megha Paswan R/O Village- Dhusaria, P.S.-
Barahara, District- Bhojpur. Appellant/S

Versus

The State of Bihar. Respondent/s

with

CRIMINAL APPEAL (SJ) No. 2430 of 2021

Arising Out of PS. Case No.-302 Year-2017 Thana- BARHARA District- Bhojpur

Santosh Rai, Son of Chara Rai, Resident of Village -Ghusaria, P.S. Barahara,
District- Bhojpur. Appellant/S

Versus

The State of Bihar. Respondent/s

with

CRIMINAL APPEAL (SJ) No. 2746 of 2021

Arising Out of PS. Case No.-302 Year-2017 Thana- BARHARA District- Bhojpur

1. Sunil Kumar Singh @ Chatur Singh, Son of Late Bhagwant Singh, Resident
of Village- Dhusariya, Babura, P.S.- Barhara, District- Bhojpur, Pin Code-
02163 (Bihar).
2. Birendra Singh, Son of Late Raghubir Singh @ Late Suraj Bansh Singh,
Resident of Village- Dhusariya, Babura, P.S.- Barhara, District- Bhojpur, Pin
Code- 02163 (Bihar).

... .. Appellant/s

Versus

The State of Bihar. Respondent/s

Appearance :

(In CRIMINAL APPEAL (SJ) No. 885 of 2023)

For the Appellant/s : Mr. Raju Kumar Singh, Advocate
Mr. Praveen Kumar, Advocate
Ms. Anju Kumari Sinha, Advocate

For the Respondent/s : Mr. Mukeshwar Dayal, APP

(In CRIMINAL APPEAL (SJ) No. 2430 of 2021)

For the Appellant/s : Mr. Raju Kumari Singh, Advocate

For the Respondent/s : Mr. A.M.P. Mehta, APP

(In CRIMINAL APPEAL (SJ) No. 2746 of 2021)

For the Appellant/s : Mr.Uday Kumar, Advocate
Mr. Subhen Sarkar, Advocate

For the Respondent/s : Ms. Anita Kumari Singh, APP

CORAM: HONOURABLE MR. JUSTICE CHANDRA SHEKHAR JHA
ORAL JUDGMENT

'Date : 23-07-2024

1. At the outset, it is important to mention



that all above named appeals are disposed herewith through this common judgment, as same arises out of NDPS Case No. 34/2017, arising out of Barahara P.S. Case No. 302/2017 disposed by learned 4th Additional Sessions Judge-Cum-Special Judge, Excise, Bhojpur, Ara.

2. Heard Mr. Raju Kumar Singh, Advocate assisted by Mr. Praveen Kumar, Advocate and Ms. Anju Kumari Sinha, Advocate appearing for the appellant/convict and Mr. Mukeshwar Dayal, learned APP appearing for the State in Cr. Appeal (SJ) No. 885 of 2023), Mr. Raju Kumar Singh, learned counsel appearing for the appellant and Mr. A.M.P. Mehta, APP appearing for the State in Cr. Appeal (SJ) No. 2430 of 2021 and Mr. Uday Kumar, Advocate assisted by Mr. Subhen Sarkar appearing for the appellants/convicts and Ms. Anita Kumari Singh, learned APP appearing for the State in Cr. Appeal (SJ) No. 2746 of 2021.

3. All above mentioned appeals preferred



under Section 374 (2) of the Criminal Procedure Code (in short Cr.P.C.) challenging the judgment of conviction dated 28.01.2021 and order of sentence dated 30.01.2021 rendered by learned IVth Additional Sessions Judge-Cum-Special Judge, Excise, Ara, Bhojpur in NDPS Case No. 34/2017, arising out of Barahara P.S. Case No. 302/2017 for the offence punishable under Section 20(b)(II)(c) of the Narcotic Drugs and Psychotropic Substance Act and, are ordered to undergo rigorous imprisonment for 10 years and a fine of Rs. 1,00000/- (Rupees one lacs), and in default of payment of fine, they shall have to undergo simple imprisonment for a period of six months. The period already undergone shall be set off. Both the sentences will run concurrently.

4. The brief prosecution case, as it appears from the written information of informant/PW-5 that on secret information, raid was conducted in the house of appellants/convicts, and in same series, where, at first instance from the house of appellant/convict, namely



Sunil Kumar Singh @ Chatur Singh in Cr. Appeal (SJ) No. 2746 of 2021 was raided, where upon search, in three plastic packets, ganja were recovered, which upon weighing found 50 Kg in each plastic packets, total of 150 grams. Thereafter raid was conducted in the house of appellant/convict Birendra Singh, appellant of Cr. Appeal (SJ) No. 2746 of 2021, where in two bags, two quintals of ganja was recovered, thereafter the raid was conducted in the house of Santosh Rai of Cr. Appeal (SJ) No. 2430 of 2021, where from his straw store house, one quintal of *ganja* in two cotton bags (Bora) each of 50 Kg was recovered and lastly from the house of appellant/convict Jodha Paswan of Cr. Appeal (SJ) No. 885 of 2023, 45 Kg of ganja was recovered. None of the appellants/accused were found at their residents at the time of conducting raid.

5. On the basis of aforesaid written information, Barahara P.S. Case No. 302 of 2017 was registered, whereupon investigation, the charge sheet



was submitted for the offences punishable under Sections 20(b)(ii)(c) of the NDPS Act, against aforesaid appellants/convicts.

6. Learned trial court took cognizance of aforesaid case on the basis of materials available on records collected during investigation against all above-named appellants/accused, whereas charges were framed against all appellants/accused on 12.04.2019 under Sections 20(b)(ii)(c) of the NDPS Act, which they pleaded "not guilty" and claimed tried.

7. To establish its case before the learned trial court, the prosecution altogether examined total of seven witnesses, namely, **PW-1** Ashok Kumar Singh (Constable), **PW-2** is Upendra Sharma (Constable), **PW-3** Suryadeo Singh (Constable), **PW-4** Arun Kumar (Magistrate and member of raiding team), **PW-5** Kundan Kumar (Informant), **PW-6** Kumar Saurab (D.I.U. Incharge) and **PW-7** Akhilesh Kumar (S.I. and I.O. of the case).



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

Exhibit 1 to 4 - Signature of Magistrate Arun Kumar on four seizure list.

Exhibit 5, 5/1, 5/2, 6, 6/1 ,6/2 , 7, 7/1, 7/2, 8, 8/1, 8/2- Signature of informant, witness Jawahar and Muni shankar Paswan on four seizure list.

Exhibit 9 & 9/1 - Self written statement and endorsement of informant respectively.

Exhibit 10 - Application for verification

Exhibit 11- Application for warrant.

Exhibit 12 to 12/3 - Arrest memo of four accused persons.

Exhibit 13 - Confessional statement of



accused Sunil Kumar Singh.

Exhibit 14 – Charge-sheet.

Exhibit 15 – F.S.L. report.

9. No witness was examined in defence during trial as well as no document was exhibited in defence. Statement of convicts/appellants were recorded under Section 313 of the Criminal Procedure Code (Cr.P.C.), where they shown their complete innocence by denying the incriminating evidence appears against them during the trial.

10. Learned Trial Court, after completion of trial, convicted all above-named appellants/accused under Section 20(b)(II)(c) of the Narcotic Drugs and Psychotropic Substance Act. Upon such conviction, all above-named appellants/accused were sentenced for 10 years of rigorous imprisonment alongwith fine. Aggrieved thereof present appeal preferred by appellants/accused under Section 372(2) of Cr.P.C.

11. Hence, the present appeal;



12. Learned counsel appearing on behalf of appellants/accused submitted that the mandatory provisions regarding compliance of Section 42 of the NDPS Act not appears to be followed while searching the premises of the appellants/convicts. It is also pointed out that the compliance of Section 52 A of the NDPS Act not appears to be followed. The seized *ganja* was not produced before the trial court, neither satisfactorily explanation regarding destruction of same was furnished during the trial. It is also submitted that recovered ganja was not sealed properly and its sampling was also not done as per established principle of law. In support of his submission, learned counsel relied upon the report of ***State of Haryana Vs. Jarnail Singh*** reported through ***2004 (5) SCC 188***, also relied upon the report of ***Ashok Alias Dangra Jaiswal Vs. State of Madhya Pradesh*** reported through ***2011 (5) SCC 123***, ***Jitendra and Another Vs. State of M.P.*** reported as ***2004 (10) SCC 562*** , ***Gorakhnath Prasad Vs. State***



of Bihar (2018) 2 SCC 305 and also relied upon the report of **Vijay Jain Vs. State of M.P. (2013) 14 SCC 527**. It is also pointed out by learned counsel that the standing order No. 1 of 1988 not appears to be followed in present case and in support of his submission, he relied upon the legal report of **Noor Aga Vs. Vs State of Punjab** reported through **2008 (16) SCC 417**.

13. The learned APP while opposing the appeal submitted that there is recovery of huge commercial quantity of *ganja*/contraband which was made from the house of appellants/convicts, where entire search was made in presence of the Magistrate. It is also submitted that the samples were taken from each of the packets and therefore, there is no irregularities as far sampling of recovered *ganja*/contraband are concerned. It is also pointed out that merely on the ground as the seizure is not supported by any independent witnesses, the conviction as recorded by



learned trial court, which is otherwise convincing cannot be questioned. It is further pointed out that the sample which were sent for forensic laboratory of Patna and Kolkatta, where report received from the laboratory of Patna, clearly suggest that recovered contraband was ganja and in view of all such evidence, recording of conviction by learned trial court through impugned judgment cannot be put under doubt.

14. This Court perused the materials available on record and taken note of submission as advanced by learned counsel appearing on behalf of the parties, where it appears that re-appreciation of evidences as available on record is required for just and proper disposal of these appeals.

15. PW-1 is Ashok Kumar Singh supported the occurrence and recovery in the manner, as it was explained through FIR which is Exhibit-9/1. He also deposed that no accused persons/appellants were arrested at the place of occurrence. It was deposed that



the entire seized materials were brought to police station, where further proceedings was carried out.

15.1 Upon cross-examination, he stated that the weighing of contraband/ganja was not done before him. He did not sign any paper at place of recovery and he also never entered into the house during raid. It was also stated by him that the seizure list was not prepared before him. He also stated that the recovery of 45 Kg of *ganja* from the house of appellant/convict Jodha Paswan, he was informed by SHO. From the deposition of this witness, it appears that the sampling and seizure was not carried out before him, neither any search formalities in terms of Section 42 of the NDPS Act was followed by raiding party.

16. PW-2 is Upendra Sharma, he also supported the recovery of contraband from the houses of appellants/convicts in terms of FIR. He deposed that 100 grams of ganja was taken as sample and thereafter, the entire recovered ganja was sealed. He also deposed



that when persons refused to be witness of seizure, the local Choukidar put his signature as witness, he also affirmed that during raid, appellants/convicts were not present. It was deposed by him that after completing paper formalities, seized material was brought to the police station. He failed to identify the accused/appellants during the trial. It was stated by him that at the time of recovery, several co-villagers were present at the place of occurrence. He categorically stated that he did not sign FIR and seizure list.

17. PW-3 is Surya Deo Singh, who was the member of raiding party. He also supported the quantity and manner of recovery, as available through FIR. He also affirmed that the accused/appellants were not available at the time raid.

17.1 Upon cross-examination, he stated that at the time of raid, he was standing outside the house, therefore he cannot said that from where the contraband/*ganja* was recovered. He also stated in



cross-examination that entire paper work was carried out at police station. He did not sign any paper at the place of recovery. No family members of accused/appellants were called at the time of weighing contraband.

18. PW-4 is Arun Kumar, who is Block Statistical Officer before whom, the entire search was conducted and recovered ganja was sealed and sampling was done. He also supported the recovered of contraband in the manner as it is stated in FIR by informant/PW-5. He was appointed as Magistrate for aforesaid raid, seizure and sampling.

18.1 Upon cross-examination, he failed to depose as whether he signed any paper at the place of recovery. He could not even remember signing of paper at police station. He also failed to recollect whether he signed on seized sample.

19. PW-5 is the informant, namely, Kundan Kumar. He supported the recovery and stated to obtained the signature of independent witnesses for all



recoveries of *ganja*, which were alleged to be made from the houses of appellants/convicts. It also appears from his deposition that compliance of Section 42 of NDPS Act is not appears to be followed. It was stated that the house of Birendra Singh appellant/convict was opened. It was stated that seized ganja was sealed by his private seal. He also proved formal FIR i.e. Barhara P.S. Case No. 302 of 2017 and on his identification, it was Exhibited as Exhibit -9/1. It appears from his deposition that though he supported the appointment of Executive Magistrate i.e. PW-4 on his request for raiding purposes but it is nowhere appears to be stated that the search and seizure was made in his presence.

20. PW-6 is Kumar Saurab, who is D.I.U. In-charge. He also supported the recovery of *ganja*/contraband in terms of exhibit 9/1.

21. PW-7 is Investigating Officer of this case. From his deposition, it appears that places of recovery of *ganja*/contraband is the "house" of



accused/appellants. It was stated by him that 25 grams of sample, which was given to him was not weighed by him personally and he simply mentioned it in case diary. It was stated that even after the direction of the court, sample was kept in Malkhana and was not sent for forensic laboratory. He categorically deposed that the box of sample and envelop are missing the signature. It was also stated by him that the seized material not produced before the court. He did not received any report regarding contraband from either of the forensic laboratory i.e. from Patna and Kolkata.

22. It would be apposite to quote Section 42 of the NDPS Act, which is quoted below:-

"42. 2. Power of entry, search, seizure and arrest without warrant or authorisation.—(1) Any such officer (being an officer superior in rank to a peon, sepoy or constable) of the departments of central excise, narcotics, customs, revenue intelligence or any other department of the Central Government including para-military forces or armed forces as is empowered in this behalf by general or special order by the Central Government, or any such officer (being an officer superior in rank to a peon, sepoy or constable) of the revenue, drugs control, excise, police or any



other department of a State Government as is empowered in this behalf by general or special order of the State Government, if he has reason to believe from personal knowledge or information given by any person and taken down in writing that any narcotic drug, or psychotropic substance, or controlled substance in respect of which an offence punishable under this Act has been committed or any document or other article which may furnish evidence of the commission of such offence or any illegally acquired property 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 is kept or concealed in any building, conveyance or enclosed place, may between sunrise and sunset, —

(a) enter into and search any such building, conveyance or place;

(b) in case of resistance, break open any door and remove any obstacle to such entry;

(c) seize such drug or substance and all materials used in the manufacture thereof and any other article and any animal or conveyance which he has reason to believe to be liable to confiscation under this Act and any document or other article which he has reason to believe may furnish evidence of the commission of any offence punishable under this Act or furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act;

and

(d) detain and search, and, if he thinks proper, arrest any person whom he has reason to believe to

have committed any offence punishable under this Act:

1[Provided that in respect of holder of a licence for manufacture of manufactured drugs or



psychotropic substances or controlled substances granted under this Act or any rule or order made thereunder, such power shall be exercised by an officer not below the rank of sub-inspector:

Provided further that] if such officer has reason to believe that a search warrant or authorisation cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place at any time between sunset and sunrise after recording the grounds of his belief.

(2) Where an officer takes down any information in writing under sub-section (1) or records grounds for his belief under the proviso thereto, he shall within seventy-two hours send a copy thereof to his immediate official superior.

23. 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.”

24. 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.....”

25. One of the most important provision i.e. Section 52-A of the N.D.P.S. Act has been made for the disposal of the seized Narcotic Drugs and Psychotropic Substances. The said provision requires preparation of an inventory of the seized property in presence of the Magistrate after taking photographs and certifying such photographs to be true and allowing to draw representative samples of such drugs and substances in the presence of such Magistrate and certifying the correctness of any list of sample so drawn. In case the aforesaid procedure is followed notwithstanding anything contained in the Code of Criminal Procedure, every court trying an offence under the N.D.P.S. Act is required to



treat the inventory, the photographs of Narcotic Drugs or Psychotropic Substances and any list of samples drawn and certified by the Magistrate as primary evidence in respect of such offence.

26. Similarly in **Vijay Jain (*supra*)**, the Hon'ble Supreme Court in para '12' held as under:-

"12. We are thus of the view that as the prosecution 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."

27. Based on the aforesaid analysis of the evidence and law, I am of the view that the entire investigation of the case was perfunctory. The defects in



investigation are substantial and go to the root of the identity of the alleged contraband Ganja alleged to be recovered from the house of the appellants. The glaring lapses on the part of the prosecution during investigation would certainly affect the credibility of the prosecution case. The case of the prosecution is based only on the oral testimony of official witnesses with the arrest of the appellants. The evidence on behalf of the prosecution does not inspire confidence also because of the several discrepancies highlighted hereinabove in discussion.

28. In view of aforesaid analysis of evidence and law, this Court is of the view that entire prosecution of this case was perfunctory. None of the prosecution witnesses suggest that Section 42 of the NDPS Act was complied with. Even the informant/PW-5 was silent on this issue, whereas searching was done at the place of recovery is also doubtful. Seized materials/*ganja* was not produced during the trial before the learned trial court. Neither any satisfactory explanation was supplied as to



destroy it. It also appears from the deposition of prosecution witnesses that co-villagers/independent witnesses were present at the place of recovery but no attempt was made to find out independent witnesses, where conviction as recorded by the learned trial court was secured on the basis of official witnesses only.

29. Precisely, evidence as adduced by the prosecution during the trial does not inspire confidence, because of the several discrepancies highlighted hereinabove.

30. In view of aforesaid facts and circumstances, it appears that prosecution has failed to establish its case beyond reasonable doubt during the trial.

31. Accordingly, above-mentioned appeals stand allowed.

32. The impugned judgment of conviction dated 28.01.2021 and order of sentence dated 30.01.2021 passed by learned IVth Additional Sessions



Judge-Cum-Special Judge, Excise, Ara, Bhojpur in NDPS Case No. 34/2017, arising out of Barahara P.S. Case No. 302/2017 are hereby set aside.

33. All above named appellants are acquitted from the charges levelled against them, by giving benefit of doubt.

34. Appellant namely, Jodha Paswan is in custody in connection with this case, he is directed to be released forthwith, if not required in any other case. Rest of appellants are on bail and they are discharged from their liabilities of bail bonds.

35. Office is directed to send back the trial court records along with a copy of the judgment to the court below forthwith.

(Chandra Shekhar Jha, J)

veena/-

AFR/NAFR	NAFR
CAV DATE	NA
Uploading Date	26.07.2024
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