

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.361 of 2019

Arising Out of PS. Case No.-34 Year-2016 Thana- TARABARI District- Araria

1. PAPPU KUMAR Son of Gulab Chand Mandal @ Gulabi Singh Resident of Khari Tola, P.S.- Tarabari, District - Araria.
2. Gulabi Singh @ Gulab Chand Mandal Son of Jhabi Mandal Resident of Khari Tola, P.S.- Tarabari, District - Araria.

... .. Appellants

Versus

The State of Bihar

... .. Respondent

with

CRIMINAL APPEAL (DB) No. 423 of 2019

Arising Out of PS. Case No.-34 Year-2016 Thana- TARABARI District- Araria

PRAVEEN KUMAR MANDAL Son of Kamal Mandal, Resident of Village and P.O-Kuari, Ward No.11, P.S-Kuari Kursakanta, District-Araria.

... .. Appellant

Versus

The State of Bihar

... .. Respondent

with

CRIMINAL APPEAL (DB) No. 456 of 2019

Arising Out of PS. Case No.-34 Year-2016 Thana- TARABARI District- Araria

CHAMRU SINGH Son of Late Bajrangi Singh Resident of Village- Khari Tola, Tarabari, P.S.- Tarabari, Dist- Araria.

... .. Appellant

Versus

The State of Bihar

... .. Respondent

with

CRIMINAL APPEAL (DB) No. 511 of 2019

Arising Out of PS. Case No.-34 Year-2016 Thana- TARABARI District- Araria

SURESH CHOUDHARY Son of late Ramchandra Choudhary Resident of Mohalla - Rambag, P.S.- Purnea Sadar, Distt - Purnea.

... .. Appellant

Versus

The State of Bihar

... .. Respondent

Appearance :

(In CRIMINAL APPEAL (DB) No. 361 of 2019)

For the Appellants : Mr. Ajay Kumar Thakur, Advocate

Mrs. Vaishnavi Singh, Advocate
Mrs. Kiran Kumari, Advocate
For the Respondent : Ms. Shashi Bala Verma, APP
(In CRIMINAL APPEAL (DB) No. 423 of 2019)
For the Appellant : Mr. Mrigendra Kumar, Advocate
Ms. Kusum Kumari, Advocate
For the Respondent : Ms. Shashi Bala Verma, APP
(In CRIMINAL APPEAL (DB) No. 456 of 2019)
For the Appellant : Mr. Ramesh Kumar Singh, Advocate
For the Respondent : Ms. Shashi Bala Verma, APP
(In CRIMINAL APPEAL (DB) No. 511 of 2019)
For the Appellant : Dr. Bidhu Ranjan, Advocate
For the Respondent : Ms. Shashi Bala Verma, APP

CORAM: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH

and
HONOURABLE JUSTICE SMT. G. ANUPAMA CHAKRAVARTHY
ORAL JUDGMENT
(Per: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH)

Date : 24-01-2024

These appeals have been preferred by the appellants under Section 374(2) of the Code of Criminal Procedure, putting to challenge the impugned judgment of conviction dated 27.02.2019 and the order of sentence dated 07.03.2019, passed by learned 1st Additional Sessions Judge-cum-Special NDPS Judge, Araria, arising out of Tarabari P.S. Case No. 34 of 2016, Special NDPS Case No. 17 of 2016, CIS No. 78 of 2016, whereby the appellants have been convicted and sentenced as under:

Cr. Appeal (DB) No. 361 of 2019				
Appellant	Penal Provision	Sentence		
		Imprisonment	Fine (Rs.)	In default of fine
Pappu Kumar	Under Section 20(b)(ii) (C) of NDPS Act	R.I. for 20 years	2,00,000/-	S.I for one year
	Under Section 23(c) of NDPS Act	R.I. for 20 years	2,00,000/-	S.I for one year

Gulabi Singh @ Gulab Chand Mandal	Under Section 20(b)(ii) (C) of NDPS Act	R.I. for 20 years	2,00,000/-	S.I for one year
	Under Section 23(c) of NDPS Act	R.I. for 20 years	2,00,000/-	S.I for one year
Cr. Appeal (DB) No. 423 of 2019				
Appellant	Penal Provision	Sentence		
		Imprisonment	Fine (Rs.)	In default of fine
Praveen Kumar Mandal	Under Section 20(b)(ii) (C) of NDPS Act	R.I. for 10 years	1,00,000/-	S.I for six months
	Under Section 23(c) of NDPS Act	R.I. for 20 years	2,00,000/-	S.I for six months
Cr. Appeal (DB) No. 456 of 2019				
Appellant	Penal Provision	Sentence		
		Imprisonment	Fine (Rs.)	In default of fine
Chamru Singh	Under Section 20(b)(ii) (C) of NDPS Act	R.I. for 10 years	1,00,000/-	S.I for six months
	Under Section 23(c) of NDPS Act	R.I. for 20 years	2,00,000/-	S.I for six months
Cr. Appeal (DB) No. 511 of 2019				
Appellant	Penal Provision	Sentence		
		Imprisonment	Fine (Rs.)	In default of fine
Suresh Choudhary	Under Section 20(b)(ii) (C) of NDPS Act	R.I. for 10 years	1,00,000/-	S.I for six months
	Under Section 23(c) of NDPS Act	R.I. for 20 years	2,00,000/-	S.I for six months

2. A self statement of Sunil Kumar (PW1), the Station House Officer Tarabari Police Station, recorded on 09.05.2016 at 6:30 am at the site where 30 kg Ganja was recovered from a Scorpio vehicle occupied by these appellants, according to the prosecution’s case, is the basis for registration of the concerned Tarabari P.S. Case No. 34 of 2016, disclosing commission of the offences punishable under Sections 20, 22, 23 and 24 of the Narcotic Drugs and Psychotropic Substances Act (NDPS Act). According to him, he had received a secret information to the

effect that Gulabi Singh @ Gulab Chand Mandal (Appellant No. 2) in Cr. Appeal (D.B.) No. 361 of 2019 was planning to sell huge quantity of Ganja which he had brought from Nepal. An information to this effect was transmitted to the Superintendent of Police, Araria, whereupon, the Superintendent of Police, Araria, constituted a raiding team comprising Dhananjay Kumar, SHO Sikti Police Station (PW2), Rama Shankar, SHO Bardaha Police Station (PW4), Vikash Kumar Azad, SHO Kurshakanta Police Station (PW5), the informant (PW-1) and constables Dharmendra Kumar (not examined), Ravindra Sharma (not examined) and Vinay Kumar. The team so constituted left the Police Station at 3:30 am and reached at Dhabra Dhobi Tola at 4:45 am. At about 5:45 am, they noticed a Scorpio vehicle approaching from Khari Tola, which was intercepted by the raiding team. All the occupants of the vehicle attempted to flee away after seeing the police party. All of them were, however, apprehended and they disclosed their names, who are the appellants herein. The self statement further mentions about several persons having gathered at the place of interception. The appellants were searched in the presence of two independent witnesses, namely, Pramod Rajak (DW2) and Dilip Rajak (DW1). In course of search from the vehicle, two white bags were recovered, one of which contained 14kg and other 16kg of

Ganja. In the presence of the aforesaid independent witnesses, the vehicle and the contraband were seized and the seizure list was prepared. The informant further asserted that the appellants Chamru Sah disclosed to him that he had taken Ganja from the house of the appellant Gulabi Singh @ Gulab Chand Mandal with Pappu (an appellant) and he was about to deliver it to one Suresh Chaudhary. He also admitted that he and others indulged in smuggling of Ganja.

3. It is pertinent to mention, at this juncture itself, that the First Information Report does not disclose the preparation of the samples soon after the seizure was made. It also does not mention as to whether the secret information, which the informant had received, was reduced in writing and was duly communicated to the official superior. From Exhibit-3, the Forensic Science Laboratory Report, it transpires, however, that samples were delivered for examination in the Laboratory on 10.06.2016 through Special Messenger, which were dispatched on 06.06.2016. The Forensic Science Laboratory, Patna, upon examination, reached a conclusion that dry, pressed, greenish brown colored flowering and fruiting like vegetable substances contained in plastic jars (A-1 and A-2) were Ganja containing *tetra hydro cannabinol* (THC) as their chief intoxicating ingredient.

4. The police submitted charge-sheet against all these appellants alleging commission of the offence punishable under Sections 20, 22, 23 and 24 of the NDPS Act, whereupon cognizance was taken of the aforesaid offence by the learned Special Judge, Araria. Later, the appellants were charged by the court of commission of the offences punishable under Sections 20(C), 23 and 24 of the NDPS Act. The appellants denied the charge and claimed to be tried.

5. At the trial, the prosecution examined seven witnesses with the informant as PW 1. PW 2, PW 4 and PW 5 were the members of the raiding team. The Investigating Officer deposed as PW 3. PW6, not an official witness, did not support the prosecution's case. He has, however, not been declared hostile to the prosecution's case. PW7, another unofficial witness, did not support the prosecution's case and he came to be declared hostile at the instance of the prosecution. As has been noted hereinabove while referring to the contents of the FIR, seizure list was prepared, according to the informant, in the presence of Pramod Rajak and Ddilip Rajak. They did not depose at the trial as prosecution's witnesses, rather they were examined by the defence as DW1 and DW2.

6. In addition to the oral evidence of the prosecution witnesses, the prosecution brought on record the following documentary evidence to substantiate the charge against these appellants:

S.N.	Particular	Exhibit Number
1.	Self statement of the Informant	Exhibit-1
2.	Formal FIR	Exhibit-2
3.	Seizure List	Exhibit-3
4.	FSL report	Exhibit-4
5.	CC of Spl. (NDPS) Case No. 18/16.	Exhibit-5
6.	CC of Spl. (NDPS) Case No. 01/14.	Exhibit-6

7. After closure of the prosecution's evidence, the appellants were examined under Section 313 of the CrPC so as to give them an opportunity to explain the incriminating circumstances emerging against them based on the evidence adduced by the prosecution. They denied such circumstances and reiterated their plea of innocence.

8. Therefore, the defence witnesses have deposed that their signatures were obtained on a plain paper at the instance of village Chowkidar. They denied in their cross-examinations about the recovery of any contraband in their presence or preparation of any seizure list.

9. The trial court, after having appreciated the evidence adduced at trial, has recorded conviction of these appellants and has sentenced them to imprisonment and fine as has been noted at the outset.

10. Mr. Ajay Kumar Thakur, learned counsel appearing on behalf of the appellant in Cr. Appeal (DB) No. 361 of 2019, has submitted that in the present case there has been complete breach of mandatory statutory requirements under Section 42 and 51 of the NDPS Act. He argued that as mandatorily required under Section 42 of the NDPS Act, it was imperative on the part of the informant to have reduced the secret information in writing and forwarded the same to his official superior. He contends that there is no evidence led at the trial by the prosecution to the effect that the secret informant was never reduced in writing. In support of his submission, he has placed reliance on the Supreme Court's decision in case of *Boota Singh and others Vs. State of Haryana* reported in (2021) 19 SCC 606 and *Dharamveer Prasad Vs. The State of Bihar and others*, reported in (2020) 12 SCC 492.

11. With reference to noncompliance of the requirements of drawing of samples in the presence of a Magistrate as required under Section 52A(b) of the NDPS Act, he has placed reliance on the Supreme Court's decision in case of *Union of India Vs.*

Mohan Lal and another reported in **(2016) 3 SCC 379**, which decision has subsequently been followed in a recent decision in case of *Mangilal Vs. State of Madhya Pradesh* reported in **2023 SCC Online SC 862: 2023/INSC/634**. Reliance has also been placed in this regard on yet another decision in case of *Bothilal Vs. Intelligence Officer Narcotics Control Bureau*, reported in **2023 SCC Online SC 498: 2023/INSC/432**. He has further submitted that there has been apparent delay of nearly a month in sending the sample to the Forensic Science Laboratory, which is also a reason why the trial court ought not to have recorded conviction. Reliance has been placed in this regard on Supreme Court's decision in case of *State of Uttar Pradesh Vs. Hansraj*, reported in **(2018) 18 SCC 355**. Furthermore, he contends, failure on the part of the prosecution to produce at the trial the material exhibits said to have been seized by the police completely demolishes the prosecution's case of recovery and amounts to failure on the part of the prosecution to prove recovery of any incriminating substance from the possession of these appellants. He has accordingly submitted that the finding of the trial court of conviction verges on perversity and requires interference by this Court. The prosecution cannot be said to have established the charges against the appellants based on the evidence adduced at

the trial, in view of the patent failure on the part of the prosecution to follow mandatory requirements under the provisions of NDPS Act, he contends.

12. The submissions so advanced by Mr. Thakur have been adopted by learned counsel appearing in Cr. Appeal (DB) No. 423 of 2019, Cr. Appeal (DB) No. 456 of 2019 and Cr. Appeal (DB) No. 511 of 2019 while assailing the impugned judgment of conviction and the order of sentence passed by the trial court.

13. Ms. Shashi Bala Verma, learned Additional Public Prosecutor has defended the finding of conviction and has submitted, firstly, that once DW 1 and DW 2 identified their signatures on the seizure list, they could not have denied the contents of the seizure list by taking a plea that they had put their signatures on a plain paper. She argues that apparently the defence witnesses were gained over by these appellants and based on their depositions, the court may not doubt preparation of seizure list in accordance with the statutory prescriptions. She has submitted that minor deviation from the requirements under the NDPS Act while causing search, seizure and drawing of samples is of inconsequential nature and should not be the basis for interfering with the impugned judgment which is based on a comprehensive

evaluation, appreciation and assessment of the evidence adduced at the trial.

14. We have perused the impugned judgment and order of the trial court carefully and have gone through the trial court's records. We have given our thoughtful considerations to the rival submissions advanced on behalf of the parties.

15. There is no evidence as to when, how and where the samples were drawn. The FIR does not disclose anything about drawing of the samples. There is nothing on record to suggest that any application was made by Investigating Officer or any other officer before the Court for deputing a Magistrate for drawing of samples. PW 4, who was a member of the raiding team, in his evidence, deposed that the samples were drawn by the informant (PW 1). The law on this point is well settled in case of **Mohanlal** (supra), wherein the Supreme Court has clearly held in paragraphs 15 to 17 as under:-

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

Magistrate and certifying the correctness of the list of samples so drawn.

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

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

16. Relying on the said decision, the Supreme Court, in case of **Bothilal** (supra), did not approve the drawing of samples by the police officer who had seized the contraband and held that the seizure not being in conformity with the requirements laid

down in case of **Mohanlal** (supra), the prosecution's case that the substance, which was recovered, was contraband becomes doubtful. Similarly, in a later decision in case of **Mangilal** (supra), the Supreme Court reiterated the mandatory requirement of making an application to the Magistrate for drawing of samples soon after a seizure is made with reference to the provisions under Section 52A(2) of the NDPS Act. Explaining the reason for strict compliance of the said provision, the Supreme Court observed in case of **Mangilal** (supra) that the objective behind the provision is to have an element of supervision by the Magistrate over disposal of seized contraband. Paragraph 5 of the said decision is relevant and is being re-produced herein below:-

“5. Sub-section (2) of Section 52A of the NDPS Act mandates a competent officer to prepare an inventory of such narcotic drugs with adequate particulars. This has to be followed through an appropriate application to the Magistrate concerned for the purpose of certifying the correctness of inventory, taking relevant photographs in his presence and certifying them as true or taking drawal of samples in his presence with due certification. Such an application can be filed for anyone of the aforesaid three purposes. The objective behind this provision is to have an element of supervision by the magistrate over the disposal of seized contraband. Such inventories, photographs and list of samples drawn with certification by Magistrates would constitute as a primary evidence. Therefore, when there is non-compliance of Section 52A of the NDPS Act, where a certification of a

magistrate is lacking any inventory, photograph or list of samples would not constitute primary evidence.”

17. Further, in case of ***Yusuf @ Asif Vs. State***, reported **(2023) SCC Online SC 1328: 2023 INSC 912**, the Supreme Court, reiterating the same view, has held that the samples must be drawn in presence of a Magistrate and the list thereof on being certified alone would constitute primary evidence for the purpose of the trial.

18. It can be easily inferred from the evidence adduced at the trial that the prosecution miserably failed to carry out the mandatory requirements stipulated under Section 52A(3) of the NDPS Act and in such circumstance as the prosecution failed to conclusively prove that the samples, which were sent to Forensic Science Laboratory for examination, were drawn from the substance seized by the raiding team from the possession of these appellants. The said doubt deepens for the failure on the part of the prosecution to produce the seized contraband substance as material exhibit at the trial. It is manifest that no evidence as regards destruction of the contraband was adduced at the trial nor material exhibits were produced. The failure on the part of the prosecution to produce the material exhibits at the trial is fatal to the prosecution's case.

19. Further, it is the prosecution's case that the vehicle seized by the police was not carrying any registration number, the prosecution has not been able to establish any connection between these appellants and the vehicle.

20. The last but not the least, the police is said to have seized the contraband on 09.05.2016, which was sent for forensic examination on 06.06.2016, nearly one month thereafter. Reliance has rightly been placed by learned counsel for the appellants on the Supreme Court's decision in case of *Hansraj* (supra), wherein the Supreme Court affirmed the judgment of the Allahabad High Court acquitting the accused primarily on the ground of delay in sending the samples to the Forensic Science Laboratory.

21. We further find, in the present case, that the prosecution did not lead any evidence regarding manner in which contraband substance, said to have been recovered by the police were safely stored. At the cost of repetition, we mention that the prosecution neither proved destruction of the seized contraband nor did it produce the same before the trial court as material exhibit.

22. In case of *Ashok v. State of M.P.*, reported in (2011) 5 SCC 123, the Supreme Court has held that in the absence of production of the contraband as material exhibit before the trial

court there was no evidence to connect the forensic report with the substance that was seized from the possession of the appellant of that case.

23. In case of *Vijay Jain v. State of M.P.*, reported in **(2013) 14 SCC 527**, the Supreme Court reiterated the view expressed in case of *Jitendra v. State of M.P.*, reported in **(2004) 10 SCC 562** and observed that in a trial of an offence under the NDPS Act, it is necessary for the prosecution to establish by the cogent evidence that the alleged quantities of the contraband goods were seized from the possession of the accused and the best evidence to prove the said fact was to produce during the trial, the seized materials as material objects and where the contraband material, alleged to have been seized, are not produced and there is no explanation to failure to produce the contraband material by the prosecution, mere oral evidence that that the materials were seized from the accused would not be sufficient to make out an offence under the NDPS Act particularly when the *panch* witnesses turned hostile. The views expressed in case of *Vijay Jain* (supra) and *Ashok* (supra) has been reiterated in case of *Vijay Pandey v. State of U.P.*, reported in **(2019) 18 SCC 215**, wherein it has been held that where the prosecution failed to produce the said seized sample itself, mere production of laboratory report that the sample tested

was narcotics cannot be conclusive proof by itself. The sample seized and that tested have to be correlated, the Supreme Court has held.

24. We also find that there is no evidence to the effect that the secret information received by the informant was reduced in writing much less the same having been transmitted to immediate official superior, which is one of the mandatory conditions for carrying out a search without warrant under Section 42 of the Act. Primarily on the ground of failure to the requirement under Section 42 of the NDPS Act, the Supreme Court in case of *Dharamveer Prasad* (supra), relying on constitutional bench decision in case of *Karnail Singh v. State of Haryana*, reported in (2009) 8 SCC 539 acquitted the appellant of that case.

25. For the reason noted above, the prosecution cannot be said to have proved recovery of any substance found to be Ganja in chemical examination from possession of these appellants. Their conviction recorded by the trial court requires interference. They deserve to be acquitted by giving them benefit of doubt.

26. Accordingly, the impugned judgment of conviction dated 27.02.2019 passed by learned 1st Additional Sessions Judge-cum-Special NDPS Judge, Araria, arising out of

Tarabari P.S. Case No. 34 of 2016, Special NDPS Case No. 17 of 2016, CIS No. 78 of 2016, is hereby set aside. The appellants stand acquitted of the charge of commission of offences punishable under Sections 20(b)(ii)(c) and 23(c) of the NDPS Act. The order of sentence dated 07.03.2019, also stands set aside.

27. The appellants, namely, Pappu Kumar and Gulabi Singh @ Gulab Chand Mandal of Cr. Appeal (D.B.) No. 361 of 2019 are in custody. Let them be released forthwith, if not required in any other matter.

28. The appellants, namely, Praveen Kumar Mandal of Cr. Appeal (D.B.) No. 423 of 2019, Chamru Singh of Cr. Appeal (D.B.) No. 456 of 2019 and Suresh Choudhary of Cr. Appeal (D.B.) No. 511 of 2019 are on bail. They stand discharged from the liabilities of the bail bonds and the sureties, if any.

(Chakradhari Sharan Singh, J)

(G. Anupama Chakravarthy, J)

Pawan/-

AFR/NAFR	NAFR
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