

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.1159 of 2017

Arising Out of PS. Case No.-62 Year-2016 Thana- SINGHESHWAR District- Madhepura

Deo Narayan Yadav Son of Late Yugo Yadav Resident of Village- Gauripur,
Ward No.- 13, P.S.- Singheshwar, District- Madhepura

... .. Appellant

Versus

The State of Bihar

... .. Respondent

Appearance :

For the Appellant	:	Mr. Vijay Kumar Sinha, Advocate Mr. Praveen Kumar Agrawal, Advocate
For the State	:	Mr. Dilip Kumar Sinha, Addl. P.P.

CORAM: HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD
and
HONOURABLE MR. JUSTICE SHAILENDRA SINGH
ORAL JUDGMENT
(Per: HONOURABLE MR. JUSTICE SHAILENDRA SINGH)

Date : 11-07-2024

Heard Mr. Vijay Kumar Sinha, learned counsel
appearing for the appellant and Mr. Dilip Kumar Sinha, learned
Additional Public Prosecutor for the State.

2. The instant appeal has been filed against the judgment and order dated 02.08.2017 and 08.08.2017 respectively, passed by the learned Sessions Judge-cum- Special Judge, Madhepura in N.D.P.S. Special Case No. 02 of 2016, arising out of Singheshwar P.S. Case No. 62 of 2016 whereby and whereunder the appellant has been found and held guilty for the offences punishable under Sections 20, 22 and 24 of the Narcotic Drugs and Psychotropic Substances Act (in short 'NDPS Act'). The appellant has been



sentenced to undergo rigorous imprisonment for 20 years (twenty years) with a fine of Rs. 1,00,000/- (Rs. One Lac only) for the offence under Section 20 of the NDPS Act and in default of payment of fine, he has been further directed to undergo rigorous imprisonment for 04 years (four years). The appellant has been sentenced to undergo rigorous imprisonment for 20 years (twenty years) and a fine of Rs. 1,00,000/- (Rs. One Lac only) has also been imposed upon him for the offence under Section 22 of the NDPS Act and in default of payment of fine, he has been further directed to undergo rigorous imprisonment for 04 years (four years) and for the offence under Section 24 of the NDPS Act, he has been awarded the same punishment like the other above-mentioned offences. All the sentences have been ordered to run concurrently.

Prosecution Story:-

3. The substance of the prosecution story is as follows:-

On 20.03.2016, on the basis of a secret information a police team, consisting of seven police personnel and led by a police inspector, Ramesh Chandra Upadhyay, posted at Sadar Police Station, Anchal, Madhepura, raided the residential house of the appellant and in the presence of two independent persons namely, Ajay Kumar and Anil Kumar the house of the appellant



was searched. Upon search, 20 small paper packets (*puriya/sachets*) and 12 small packets made of a plastic material, were recovered and it was suspected that these packets contained *Ganja* like material and on the spot the appellant and his son, Ashok Yadav, were found and apprehended. On interrogation, they stated before the police that they brought and smuggled the seized narcotic material *Ganja* from Nepal country for the purpose of selling and they used to sell such contraband after packaging it in small packets, thereafter, in the presence of Ajay Kumar and Anil Kumar, the inside area of the house of the appellant was searched and from a corner of his house, two plastic sacks containing about 22 Kg *Ganja* like material were recovered. Regarding the seized *Ganja* like material which was found in two sacks, it was revealed by the appellant and his son that the said narcotic material was also brought from Nepal country with an intention to sell the same in the local market.

4. The informant, S.I. Rajesh Chaoudhary, the then S.H.O. of Singheshwar police station recorded his self statement (Ext.-4) upon which basis, the formal FIR bearing Singheshwar P.S. Case No. 62 of 2016 was registered under Sections 20, 22 and 24 of the NDPS Act which set the criminal law in motion.



5. After investigation, the police chargesheeted the appellant and his son Ashok Yadav, thereafter, cognizance of the alleged offences was taken by the learned Special Court. The appellant and co-accused Ashok Yadav, son of the appellant, were charged with the offences under Sections 20, 22 and 24 of the NDPS Act.

6. The prosecution examined altogether seven witnesses which are as under:-

P.W.-1:- Bipin Kumar

P.W.-2:- Dablu Kumar Ram

P.W.-3:- Manoj Kumar Yadav

P.W.-4:- Anil Kumar Yadav

P.W.-5:- Ajay Kumar

P.W.-6:- Rajesh Chaudhary

P.W.-7:- Shambhu Kumar

7. Apart from the Oral Evidence, the prosecution proved the following documents and got them exhibited which are as follows:-

Ext.-1:- Signature of Anil Kumar on seizure list,

Ext.-1/1:- Signature of the witness Ajay Kumar on seizure list,



Ext.-2:- Writing & signature of A.S.I., Shambhu Kumar
on the seized bag,

Ext.-2/1:- Signature of A.S.I., Shambhu Kumar on
another seized bag,

Ext.-3:- Seizure list,

Ext.-4:- Self written statement,

Ext.-4/1:- An endorsement for institution of case

Ext.-4/1:- Formal F.I.R.,

Ext.-5:- Charge sheet,

Ext.-6:- Report received from Forensic Science
Laboratory, Patna.

Ext.-6/1:- Report of the Chemical Examiner, Custom
House, Chemical Laboratory, Kolkata.

8. Apart from this, the prosecution also produced the
material objects before the trial Court and got them exhibited as
material exhibits which are as under:-

Material Ext. I:- A sealed bag

Material Ext. II:- An another sealed bag

Material Ext. III:- A sealed bag of red colour

9. After the completion of prosecution's evidence, the
statement of the appellant was recorded in which he denied the
main circumstances appearing against him from the prosecution's



evidences and claimed himself to be innocent but did not reveal any specific defence.

Defence Evidence:-

10. The appellant examined three persons in oral defence evidence and produced two original Ration Cards in documentary evidence in support of his and co-accused's defence which are as follows:-

D.W.-1:- Gopal Sah,

D.W.-2:- Gajendra Yadav

D.W.-3:- Pappu Kumar Yadav

Ext. A:- An original Ration Card issued in the name of Veena Devi W/o Ashok Yadav.

Ext. A/1:- An original Red Ration Card issued in the name of Ashok Kumar Yadav, S/o Dev Narayan Yadav.

Findings of the trial court:-

11. The learned trial court deemed the evidence of P.W.-1, P.W.-2, P.W.-3 and P.W.-6 to be trustworthy and also placed reliance upon the Forensic Science Laboratory (in short 'F.S.L.') report as corroborative evidence to the prosecution's case and in the paragraph no. 21 of the judgment, the learned trial court discussed the evidences of the said witnesses. The learned trial court placed reliance upon the evidence of D.W.1, D.W.-2 and



D.W.-3 in respect of the specific defence of the co-accused, Ashok Yadav, as to his residing separately from the appellant and having no concern with the affairs of the appellant and also placed reliance upon Ext. A and Ext. A/1 in respect of the said defence of the co-accused Ashok Yadav and consequently, the learned trial court acquitted the co-accused Ashok Yadav of the offences charged while held the appellant guilty of the offences for which he was charged.

Arguments on behalf of the appellant:-

12. Mr. Vijay Kumar Sinha, learned counsel appearing for the appellant submits that the testimonies of P.W.-1, P.W.-2, P.W.-3 and P.W.-6 who are said to be the members of the raiding party are not reliable as their evidence is contradictory with regard to the time of raid at the alleged place, with regard to specific places of recoveries and the police inspector, Ramesh Chandra Upadhyay, who led the raiding party, was not examined. The FIR as well as Seizure Memo is completely vague in respect of the weight of the seized contrabands and during trial, the prosecution could not give the details with regard to the place and time when the seized contrabands were weighed. From the FIR, it is clearly evident that the seized materials including the contrabands were not sealed at the place of recovery and in this regard, P.W.-6



made a contradictory statement as he stated that the seized materials were sealed at the place of recovery but no such statement was made by other witnesses and even in the FIR, no details has been given regarding the sealing process at the place of recovery and furthermore, the materials were not sealed in proper manner. It is further argued that the provision of Section 42 of the NDPS Act was not followed by the informant and other police officials and the provisions of Section 52 A of the NDPS Act were also not followed by the investigating officer. The prosecution did not produce the *Malkhana* register in which a relevant entry with regard to the deposition of seized materials in the *Malkhana* is said to have been made by the police official concerned and no explanation was given by the prosecution for non-production of said *Malkhana* register. Hence, the judgment and order impugned convicting and sentencing the appellant for the charged offences are completely bad in the eyes of law and the same are liable to be set aside.

Arguments on behalf of the Respondent State:-

13. On the contrary, Mr. Dilip Kumar Sinha, learned Additional Public Prosecutor appearing for the State has argued that the evidence of P.W.-1, P.W.-2, P.W.-3 and P.W.-6 is completely reliable and as per the evidence of P.W.-6, the seized



materials were sealed at the place of recovery and the same were produced before the trial court in sealed condition which were exhibited as material objects. The appellant was apprehended on the spot with the contrabands and the non-compliance of the provisions of Section 42 of the NDPS Act does not seriously affect the case of prosecution. Hence, the learned trial court has rightly convicted the appellant for the alleged offences and there is no merit in this appeal and the same is liable to be dismissed.

14. We have heard both the sides, gone thorough the evidences available on the record and also perused the statement of the accused/appellant.

Consideration:-

15. The instant matter relates to the recovery of narcotic material namely, *Ganja*, from the residential house of the appellant. It has been alleged in the FIR, which is based on the self-statement of P.W.-6, that on 20.03.2016, acting on a secret information, a police team consisting of seven police personnel and led by a Police Inspector, Ramesh Chandra Upadhyay, posted at Sadar Police Station, Anchal, Madhepura, raided the residential house of the appellant and in the presence of two independent persons namely, Ajay Kumar (P.W.-4) and Anil Kumar (P.W.-5), the house of the appellant was searched. Upon search, 20 small



paper packets (*Puriya*) and 12 small packets made of plastic material, were recovered and it was suspected that the material which was in the said packets was *Ganja* and on the spot, the appellant and his son Ashok Yadav were found and apprehended. On interrogation, they stated before the police that they brought the seized narcotic material *Ganja* from Nepal Country for the purpose of selling and they used to sell such contraband after packaging it in small packets. Thereafter, in the presence of Ajay Kumar and Anil Kumar (independent persons) the house of the appellant was completely searched and then from a corner of his house, two plastic sacks allegedly containing about 22 Kg *Ganja* like material were recovered. Regarding the seized *Ganja* like material which was found in two sacks it was revealed by the appellant and his son that the said narcotic material was also brought from Nepal country with an intention to sell the same in the local market.

16. As per the above prosecution story, the seized narcotic materials were allegedly recovered from the porch (*verandah*) and a corner of the appellant's house. Regarding the credibility of this recovery, we would like to discuss the evidence of the prosecution witnesses who are said to be present at the place of recovery at the time of search and raid.



17. P.W.-1 stated in the cross-examination that he could not reveal the particular part of the appellant's house from where the alleged contrabands were recovered. He further stated in the cross-examination that the appellant and co-accused were found packaging the contraband in small packets when their house was raided. But such fact has not been revealed in the FIR. As per this witness, at the time of search the appellant, co-accused and a lady were present in the raided house. Regarding the presence of said lady, other prosecution witnesses remained silent and on being cross-examined regarding the total family members residing in the raided house, the witness could not have given any answer and showed his ignorance on the said point.

18. P.W.-2, Dablu Kumar Ram, who is said to be a member of the raiding party, stated in the chief-examination that other members of the raiding party were proceeding ahead him and he was behind them, when he reached at the place of recovery, the seizure list was being prepared. He deposed in the cross-examination that he did not go inside the courtyard of the appellant's house. The evidence of this witness does not seem to be sufficient to prove the alleged recovery of contrabands from the residential house of the appellant.



19. P.W.-3, Manoj Kumar Yadav, who is also stated to be a member of the raiding party, deposed in the cross-examination that all the members of the raiding party including him entered into the house of the appellant and then from a room situated in southern side, packets of *Ganja* were recovered and from another room situated in northern side, two plastic sacks were found being concealed beneath the land which were recovered after removing the soil with the help of spade and hands. According to this witness, the major part of the seized contraband, which is said to be in two plastic sacks were recovered from the land and the same were found buried and concealed under the land. But such statement has not been made by other prosecution witnesses including the informant and they simply stated that from the corner of the house of the appellant the alleged sacks containing approximately 22 Kg *Ganja* were recovered. So a serious contradiction appears in between the evidence of P.W.-3 and other witnesses of the prosecution regarding the exact place of recovery of the alleged plastic sacks in which the major part of the contraband is said to have been found. The contradiction creates a serious doubt in the credibility of the recovery of the alleged contrabands from the residential house of the appellant.



20. It has come out in the evidence of P.W.-1 that a female family member of the appellant along with him and his son were present in the residing place at the time of raid. The appellant has taken the defence that he had separated from his son namely, Ashok Yadav (co-accused) prior to the recovery of the alleged contrabands and he had no concern with the affairs of his son at the time of recovery. Regarding the jointness between the appellant and his son Ashok Yadav, no investigation was made by the investigating officer and on this point P.W.-1 could not have revealed any relevant fact showing the appellant's jointness with his son rather P.W.-4 and P.W.-5, who are said to be independent witnesses of the search and seizure, stated in their chief-examination that the appellant was living separate from his son Ashok Yadav.

21. When a narcotic contraband is said to have been recovered from a residential house and two or more persons being relatives are found residing in such place and it is not the case of prosecution that the recovery has been made from the person of one member of such family then in order to hold such member or more members of such family to be guilty of keeping such contraband, it must be proved by the prosecution that such family member or members was/were having his/their conscious



possession over the seized contraband. In the instant matter, from the evidence of the material witnesses of the prosecution, it would only appear that the appellant was simply found being present at the raided place which is said to be his and his son's residential house. Though, P.W.-1 stated in the cross-examination that the appellant and his son (co-accused) were found packaging the alleged contraband in small packets at the time of raid but the said statement does not get corroboration from the FIR and the evidence of other prosecution witnesses who are also said to be present at the time of search and raid at the place of recovery. As per prosecution, the recovery of the contrabands was made in the presence of two independent persons namely, Ajay Kumar and Anil Kumar who were examined as P.W.-4 and P.W.-5 respectively. But P.W.-4 said nothing in support of the prosecution story in the chief-examination rather he supported the defence taken by the appellant as to his separation from his son Ashok Yadav having taken place before the raid.

22. P.W.-5, Ajay Kumar, went hostile and he simply proved his signature upon the seizure list but stated that the police got his signature upon blank paper. The prosecution failed to elicit any material fact in the cross-examination of this witness to



support its case. Accordingly, the evidence of both the witnesses goes against the prosecution.

23. As per the prosecution story narrated in the FIR, the alleged place of recovery which is said to be the residential house of the appellant, was raided in the morning at 7:30 A.M. But in this regard, P.W.-1 and P.W.-2 revealed contradictory facts. Both the witnesses stated in the cross-examination that they left the police station at 4:00 A.M. and reached at Singheshwar police station at 4:30 A.M. P.W.-2 stated that they stayed at Singheshwar police station for 10-15 minutes. P.W.-1 stated that the distance between the alleged place of recovery and Singheshwar police station was only 1½ Km which was covered by the police party within 5-6 minutes. Thus, in the light of the evidence of both witnesses, it is clearly evident that the police party must have reached at the raiding place before 5:00 A.M, if the story of raid at the residential house of the accused is believed. But as per the FIR, the said place of recovery was raided at 7:30 A.M. The contradiction regarding the time of raid at the alleged place, creates a serious doubt in the prosecution story.

24. As per the FIR, the police party proceeded towards the residential house of the appellant on the basis of a secret information. But the prosecution failed to bring any evidence to



show that the said information was written down and thereafter, it's copy was sent to the Superior Police Officer by the Officer-in-Charge of the concerned police station before proceeding towards the place of recovery. The prosecution failed to show any urgency and expediency in proceeding towards the appellant's house without complying with the mandatory provision of Section 42 of NDPS Act. In the case of ***Karnail Singh vs. State of Haryana*** reported in (2009) 8 SCC 539, the Constitution Bench of the Hon'ble Apex Court observed that:

“While total non-compliance with requirements of sub-sections (1) and (2) of Section 42 is impermissible, delayed compliance with satisfactory explanation about the delay will be acceptable compliance with Section 42. To illustrate, if any delay may result in the accused escaping or the goods or evidence being destroyed or removed, not recording in writing the information received, before initiating action, or non-sending of a copy of such information to the official superior forthwith, may not be treated as violation of Section 42. But if the information was received when the police officer was in the police station with sufficient time to take action, and if the police officer fails to record in writing the information received, or fails to send a copy thereof, to the official superior, then it will be a suspicious circumstance being a clear violation of Section 42 of the Act.”

25. P.W.-6, Rajesh Chaudhary, who is informant of this case, deposed in the cross-examination that he did not give any written information to his senior police officer and also did not get



any permission for raiding the alleged place. From this statement it is clearly apparent that the informant as well as the police inspector, Ramesh Chandra Upadhayay who led the police party, did not record the secret information regarding the availability of the alleged contrabands in the residential house of the appellant and also none of them gave any written information to their superior police officer regarding their act of proceeding towards the alleged raiding place and regarding non-compliance of the provision of Section 42 of NDPS Act, no any explanation was given by P.W.-6 while recording his evidence.

26. Here, it is important to mention that the prosecution did not produce and examine the police inspector, Ramesh Chandra Upadhaya, who led the raiding party.

27. From the perusal of the FIR it does not appear that the seized contrabands which are said to have been found in the small packets and two sacks were weighed at the place of recovery by the informant and other police officials who were the members of the raiding party and the total weight of the seized contrabands found in two sacks was estimated as being 22 kg but in the seizure list (Ext.-3), no such estimated weight was revealed and even the weight of the contraband found in 32 small packets was also not disclosed in the seizure list. P.W.-1, P.W.-2 and P.W.-3 said nothing



regarding any attempt of the police party to measure the weight of the seized contrabands. On this point, the evidence of P.W.-6 is also very important as he is the informant and was the then S.H.O. of the police station concerned, he also remained silent regarding weighing of the alleged contrabands. Though he revealed the specific weight of the narcotic material including the sacks which were seized but his statement also appears to be vague as he could not have revealed the exact weight of the said contraband after excluding the weight of the sacks. Furthermore, the witness could not have revealed the weight of the contraband which is said to have been found in 32 small packets. Accordingly, in view of the evidence of P.W.-1, P.W.-2, P.W.-3 and P.W.-6 as well as in the light of the seizure list (Ext.-3), this Court forms an opinion that the informant as well as other police members of the raiding party did not make any attempt to weigh/measure the exact weight of the seized contrabands. In order to attract a specific offence under NDPS Act, the prosecution is bound to prove the exact weight of the seized contraband but in this matter, the prosecution failed to discharge the said burden.

28. The FIR does not go to show that the seized contrabands including other articles such as sacks, small packets made of plastic material and paper were sealed at the spot of



recovery. Though, such materials and contrabands could be sealed at the police station if the concerned police official had no proper time or opportunity to seal the same at the spot but in this regard, some explanation should have been given by the police officials concerned. The purpose of sealing a contraband immediately is to avoid any chance of tampering with the seized materials. Where an article which is relevant to an offence, is sealed then such seal should have specific mark over it so that it can be proved during the trial and after the completion of sealing process, one sample of seal must be taken on a blank paper with signatures of the witnesses of search and seizure and thereafter, the same should also be sealed separately and during trial, it must be proved before the trial court and should be matched with other seals which have been affixed on the seized materials, and such procedure is necessary to prove the authenticity of the sealing procedure. But in the instant matter, such procedure was not adopted by the police party and even P.W.-1, P.W.-2 and P.W.-3 did not say anything regarding any kind of sealing process in respect of the seized materials at the place of recovery. In this regard, the evidence of P.W.-6, informant, is very important. He has stated in the cross-examination that the seized materials were sealed at the house of the appellant. But in this regard, other prosecution witnesses P.W.-



1, P.W.-2 and P.W.-3 did not say anything to support the statement of P.W.-6 and in the FIR also, no details of the sealing process was given by the informant. Furthermore, P.W.-6 stated in the cross-examination that there was no any specific mark on the seal and nothing was written on the same. The said statement was made by this witness after seeing the sealed sacks and carry bag (*jhola*) in the court. Thus, the evidence of this witness clearly goes to show that the alleged seized narcotic materials were not sealed in proper manner and in this regard, the statement of this witness does not get corroboration from the evidence of other prosecution witnesses which casts a serious doubt in the prosecution story.

29. As per seizure memo, Ext.-3, 20 small packets made of paper, 12 small packets made of plastic material containing '*Ganja*' like material and two white plastic sacks containing '*Ganja*' like material were recovered and seized by the police party. These seized materials were detailed in the seizure memo at paragraph no. 4 of Ext.- 3. But according to P.W.-6, investigating officer, a red colour bag (*Jhola*) was also recovered along with 32 packets containing '*Ganja*'. The witness identified the bag when it was produced before him in the trial court and the same was marked as Material Ext.- I and at that time, the bag was in sealed condition. But there is no details of this bag in the seizure memo



and P.W.-1, P.W.-2 and P.W.-3 who were members of the raiding party and witnessed the search and seizure proceeding at the raiding place, said nothing regarding the recovery of the red colour bag (*Jhola*) from the place of recovery. The prosecution failed to explain the contradiction coming in the evidence of the prosecution witnesses with regard to the recovery of said bag and furthermore, the seizure memo Ext.-3 remained silent regarding the recovery of bag. The contradiction creates a serious doubt in the recovery of other alleged articles, detailed in the seizure memo.

30. The P.W.-6, the then S.H.O. of Singheshwar police station, who recorded his self statement which set the criminal law in motion, stated before the trial court in his evidence that the investigating officer brought the seized materials from Singheshwar police station's property room/evidence room (*Malkhana*) and in this regard, necessary entry was made in the *Malkhana* register which could be produced by the investigating officer. P.W.-7, investigating officer, also accepted the factum of making entry in the *Malkhana* register in connection with the incident but the prosecution failed to produce the *Malkhana* register before the trial court which also caused an adverse effect to the reliability of the prosecution's case.



31. In the present matter, the alleged contrabands were recovered on 20.03.2016 but the samples taken from the seized contrabands were sent to F.S.L., Patna, on 10.06.2016, two months twenty days after the recovery and the same was received at F.S.L. Patna on 13.06.2016.

32. The Chowkidar Fanak Paswan, special messenger, who carried the samples to the F.S.L., Patna, was not produced and examined by the prosecution. The prosecution has not been able to explain the delay of 3 days which took place on the part of the special messenger in delivering the samples at F.S.L. Furthermore, the delay of 2 months and 20 days in getting the samples from the seized contrabands has also not been explained by the prosecution. In every offence particularly in the offences punishable under NDPS Act, it should be proved by the prosecution that the special messenger had received the samples in sealed condition and thereafter, he delivered the same at F.S.L. without any delay in the same sealed condition and in order to rule out any possibility of tampering with the samples, the special messenger who carried and deposited the samples at F.S.L. should be examined. But in the present matter, the prosecution did not take any attempt to produce the police chowkidar, Fanak Paswan, special messenger, who is said to have received the samples and deposited the same at F.S.L.,



Patna. So, the appellant could not have gotten a chance to testify the intactness of the samples which were received by the F.S.L. upon which basis, the expert's opinion with regard to the nature of samples was given by the F.S.L. Department. This lacuna on the part of the prosecution makes it's case weak.

33. As per Section 52 A of the NDPS Act, every Officer-in-Charge of the police station or any other empowered police officer who has received the seized narcotic drugs is bound to prepare an inventory of such seized contraband giving the relevant details such as description, quality, quantity, mode of packing, marks, etc. and thereafter, he shall make an application to any Magistrate for the purpose of certifying the correctness of the inventory so prepared. The Magistrate shall also permit the police officer to take the photographs of the seized contrabands and thereafter, shall certify the photographs. The Magistrate shall allow the police officer to draw the representative samples from the seized drugs and substance in his presence and thereafter, he or she shall certify the correctness of the list of samples so drawn. The Hon'ble Supreme Court in its judgment rendered in the case of *Yusuf @ Asif vs. State* in *Criminal Appeal No. 3191 of 2023* while dealing with the provisions of Section 52 A of the NDPS Act, observed as under : -



“12. A simple reading of the aforesaid provisions, as also stated earlier, reveals that when any contraband/narcotic substance is seized and forwarded to the police or to the officer so mentioned under Section 53, the officer so referred to in sub-section (1) shall prepare its inventory with details and the description of the seized substance like quality, quantity, mode of packing, numbering and identifying marks and then make an application to any Magistrate for the purposes of certifying its correctness and for allowing to draw representative samples of such substances in the presence of the Magistrate and to certify the correctness of the list of samples so drawn.

13. Notwithstanding the defence set up from the side of the respondent in the instant case, no evidence has been brought on record to the effect that the procedure prescribed under sub-sections (2), (3) and (4) of Section 52A of the NDPS Act was followed while making the seizure and drawing sample such as preparing the inventory and getting it certified by the Magistrate. No evidence has also been brought on record that the samples were drawn in the presence of the Magistrate and the list of the samples so drawn were certified by the Magistrate. The mere fact that the samples were drawn in the presence of a gazetted officer is not sufficient compliance of the mandate of sub-section (2) of Section 52A of the NDPS Act.

14. It is an admitted position on record that the samples from the seized substance were drawn by the police in the presence of the gazetted officer and not in the presence of the Magistrate. There is no material on record to prove that the Magistrate had certified the inventory of the substance seized or of the list of samples so drawn.”

34. The Hon’ble Apex Court in above referred case placed reliance on its own judgment passed in the case of **Union**



of India vs. Mohanlal and Another reported in ***(2016) 3 SCC 379*** and with regard to the consequence of non-compliance of the provisions of Section 52A of NDPS Act, finally observed in the paragraph no. '16' of above referred judgment which is as follows : -

“16. In the absence of any material on record to establish that the samples of the seized contraband were drawn in the presence of the Magistrate and that the inventory of the seized contraband was duly certified by the Magistrate, it is apparent that the said seized contraband and the samples drawn therefrom would not be a valid piece of primary evidence in the trial. Once there is no primary evidence available, the trial as a whole stands vitiated.”

35. In the case of ***Md. Samsul vs. Union of India*** passed in ***Criminal Appeal (DB) No. 310 of 2016*** with analogous Case of ***Md. Firoz vs. Union of India*** passed in ***Criminal Appeal (DB) No. 292 of 2016***, the Hon'ble Division Bench of this Court, while dealing with a criminal matter involving the recovery of heavy quantity of *Ganja* from a Tanker lorry took into account the non-compliance of the mandatory provisions of the NDPS Act in respect of search, seizure, preparation of inventory, photographing of the seized materials etc. against the prosecution as observed in paragraph nos. 30, 31 and 35 of the said judgment which are being reproduced as under:-



“30. All other witnesses in the case are the Inspectors, Superintendents and Constables of the Department of Customs. It further appears that the inventory of the seized Ganja could not be proved and the entry register of the Malkhana/Go-down where the seized Ganja was kept and from where it is said to have been taken out for destruction has not been proved. The Ext.11 which is said to be the data showing destruction of seized/confiscated narcotic drugs on 17.01.2013 at M/s Smirti Paper Mills (Pvt.) Limited, Mehuli Road, Chitma, Patna City, has not been prepared in presence of the Magistrate. No photograph has been taken nor any evidence has been brought on record to show that prior to destruction of Ganja any step was taken for certification of correctness of the inventory. According to sub-section 2 of Section 52 (A) the inventory was required to be prepared giving all details such as the description, quality, quantity, mode of packing, marks, numbers or such other identifying particulars of the narcotic drugs, psychotropic substance controlled substances and conveyances or the packing in which they are packed, country or origin and other particulars which may be required to identify the narcotic drugs, psychotropic substance controlled substances and conveyances. An application was required to be made to a Magistrate for the purpose of certifying the correctness of the inventory so prepared and then it was incumbent upon the department to take in the presence of such Magistrate, photographs of such drugs substances or conveyances and certifying such photographs as true was required to be made.

31. We also find that there has been violation in the matter of taking samples of the Ganja. According to Clause (c) of sub section 2 of Section 52 (A) a representative sample of such drugs or substance was required to be drawn in presence of Magistrate and the Magistrate was required to certify the correctness of the list of samples so drawn. These provisions have been violated with punity by the department



and no step in this regard was taken to comply the provisions of N.D.P.S. Act.

35. In the given facts of the case and the evidences available on the record, we have no option but to hold that in this case none of the statutory provisions as regards, search, seizure, preparation of inventory, destruction of the contraband articles, certifications etc. which are in the nature of mandatory requirements to be followed have been complied with by and on behalf of the prosecution. The learned trial Court has not correctly appreciated the law on the subject and the mandatory provisions of the N.D.P.S. Act which provides for severe punishment only after proof of compliance with the statutory safe-guards could not be properly appreciated by the learned Trial Court.”

36. In the instant matter, the prosecution has not given any evidence to show that the samples taken from the seized contrabands were drawn by the police officer concerned in the presence of a Magistrate. There is no material to show that an inventory of the seized materials including contrabands, was made by the Investigating Officer in the presence of a Magistrate. So, the provisions of Section 52A of NDPS Act were completely violated in the present case by the police officer concerned, which is fatal to the prosecution and the trial of the appellant can be deemed as a whole stands vitiated.

37. The prosecution could not have given any evidence to show the appellant's involvement in the smuggling of the



narcotic materials from Nepal country into Indian territory, and in this regard, the prosecution mainly placed reliance upon the appellant's own statement which is not admissible in the eye of law.

Conclusion:-

38. After having discussed the relevant evidences of the prosecution we reach to this conclusion that there is a serious contradiction with regard to the time when the alleged place which is said to be the residential house of the appellant was raided by the police party, the seizure memo has no details of the weight of the seized contrabands and the prosecution failed to bring any evidence to show when and where and how the seized contrabands were weighed and the police officer concerned did not comply with the provisions of Sections 42 and 52 A of the NDPS Act and regarding the non-compliance of these provisions, no explanation was given by the prosecution and the valid and provable sealing procedure was not adopted by the police party with regard to the seized materials and there is a serious contradiction in the evidence of material prosecution witnesses with regard to the parts or locations of the alleged place of recovery from where the seized contrabands are said to have been recovered and furthermore, some material witnesses such as police inspector Ramesh Chandra



Upadhyay who led the raiding party, special messenger, who received the samples and deposited the same at F.S.L., were not produced and examined by the prosecution. So, in the light of these circumstances going against the prosecution, we are not persuaded to affirm the judgment impugned and the same appears to be perverse, as such, it is not sustainable in the eye of law. In the result, the judgment and order impugned convicting and sentencing the appellant for the charged offences are hereby set aside and the instant appeal stands allowed.

39. The appellant is in jail, hence, he is directed to be released at once if his custody is not required in any other matter.

40. Let the judgment’s copy be sent to the trial Court concerned for needful.

(Rajeev Ranjan Prasad, J)

(Shailendra Singh, J)

maynaz/-

AFR/NAFR	AFR
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