

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.668 of 2023

Arising Out of PS. Case No.-2 Year-2021 Thana- CHARPOKHARI District- Bhojpur

Umashankar Singh Son of Baliram Singh Resident of village - Jogata, P.S.-
Chandi, Dist.- Bhojpur at Ara

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

with
CRIMINAL APPEAL (DB) No. 669 of 2023

Arising Out of PS. Case No.-2 Year-2021 Thana- CHARPOKHARI District- Bhojpur

Noor Alam Son of Aianul Miyan Resident of Village- Bawandih, Ps- Siswan,
Dist- Siwan

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

Appearance :

(In CRIMINAL APPEAL (DB) No. 668 of 2023)

For the Appellant/s : Mr. Ansul, Advocate
Mr. Chandra Mohan Jha, Advocate
Mrs. Sagrika, Advocate
Mr. Aditya Pandey, Advocate
Mr. Shyam Kishore, Advocate

For the Respondent/s : Ms. Shashi Bala Verma, APP

(In CRIMINAL APPEAL (DB) No. 669 of 2023)

For the Appellant/s : Mr. Ansul, Advocate
Mr. Chandra Mohan Jha, Advocate
Mrs. Sagrika, Advocate
Mr. Aditya Pandey, Advocate
Mr. Shyam Kishore, Advocate

For the Respondent/s : 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 : 22-01-2024

Possession, *inter alia*, of Cannabis plant and Cannabis is an offence punishable under Section 20(b) of the NDPS Act, 1985. The said Section prescribes different punishments under Clause (ii)(A), (ii)(B) and (ii)(C), depending upon the quantity of *ganja* found to be in possession of a person. The provision states that when contravention of any provision of the NDPS Act in relation to cannabis involves commercial quantity, the punishment shall be of rigorous imprisonment for a term which shall not be less than 10 years, which may extend to 20 years with fine.

2. In the present Criminal Appeals, a judgment of conviction and the order of sentence are being assailed whereby the trial court, based on the evidence adduced at the trial has recorded that the prosecution proved beyond doubt that the appellants wherein “possession” of commercial quantity of *ganja* and, therefore, liable for punishment under Section 20(b)(ii)(C) of the NDPS Act.

3. Based on the materials on record and the submissions advanced on behalf of the parties, in our opinion, the core issue which requires determination in the present case is as to whether the prosecution was successful in proving at the trial that the contraband (*ganja*) was in possession of these appellants.

4. 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 and the order of sentence dated 24.05.2023, passed by learned Additional District and Sessions Judge-VIII, Bhojpur at Ara in NDPS Case No. 01 of 2021, arising out of Charpokhari P.S. Case No. 02 of 2021, whereby the appellants have been convicted and sentenced as under:

Cr. Appeal (DB) No. 668 of 2023				
Appellant	Penal Provision	Sentence		
		Imprisonment	Fine (Rs.)	In default of fine
Umashankar Singh	Under Section 8/20(b)(ii) (C) of NDPS Act	R.I. for 11 years	1,00,000/-	S.I for six months
Cr. Appeal (DB) No. 669 of 2023				
Appellant	Penal Provision	Sentence		
		Imprisonment	Fine (Rs.)	In default of fine
Noor Alam	Under Section 8/20(b)(ii) (C) of NDPS Act	R.I. for 11 years	1,00,000/-	S.I for six months

5. All the sentences have been ordered to run concurrently.

6. A Sub-Inspector of police, posted as Officer Incharge of Charpokhari Police Station in the District of Bhojpur (PW-1) is the informant of Charpokhari P.S. Case No. 02 of 2021, levelling offences punishable under Section 8/20(b)(ii)(C) and Section 27 of the NDPS Act. The FIR is based on the self-statement of the informant recorded by him on the first floor of a

building under construction belonging to one Amarendra Kumar Singh. According to the FIR, the informant had received a secret information to the effect that huge quantity of illicit foreign liquor was available in the said house for commercial transaction.

7. An information was given to senior police officers in this regard who constituted a raiding team in order to conduct a raid. The said raiding team comprised the informant, Subodh Prasad, Sub-inspector of police, (PW-2), Sanjay Kumar Singh, (PW-6), Constables Pintu Kumar (not examined), Vijay Kumar (not examined), Sanjay Ram (not examined) and Pooja Kumari (not examined). He asserted in the FIR that he reached near the said building under construction with the raiding team and local *chowkidaars*. The moment the police party reached there, 8-10 persons fled away on seeing the police team. Two persons, namely, Noor Alam, appellant in Criminal Appeal (DB) No. 669 of 2023 and Umashankar Singh, appellant in Criminal Appeal (DB) No. 668 of 2023, who were attempting to flee away from the said under construction building, were overpowered by the police team. They did not offer any satisfactory reply to the raiding team. A thorough search was thereafter conducted of the said under construction building, leading to recovery of two wheelers and four wheelers and huge quantity of Indian made foreign liquor.

During the course of search, the informant received an input that on the first floor of the said under construction building, huge quantity of *ganja* was kept. He thereafter informed the Circle Officer, Charpokhari police station, requesting him to come to the said under construction building, whereafter the Circle Officer, Birendra Kumar Singh (not examined) reached there. Since owner of the said under construction building had managed to escape, in the presence of two local villagers, namely, Rajendra Singh (PW-3) and Deepak Kumar (PW-4), the place, where the *ganja* was informed to have been kept was searched. In course of search, 21 plastic bags, each containing 37 Kg of *ganja*, 5 bags, each containing 32 Kg of *ganja*, total 937 Kg (777 kg+160 Kg) was recovered. The *ganja* was seized in the presence of said Rajendra Singh (PW-3) and Deepak Kumar (PW-4). The FIR further disclosed that from each of the 26 bags, 50 grams of *ganja* was taken and total 52 samples were prepared, each of 25 grams, which were marked as A1 to A26 and B1 to B26. Apparently, two sets of samples were drawn for being sent to two different forensic science laboratories. The samples were prepared in the presence of the seizure list witnesses (PW-3 and PW-4) and Circle Officer of the Charpokhari police station, which were sealed and signed by the two witnesses, the Circle Officer and the informant. The

appellants, on interrogation disclosed to the informant that both of them indulged in illicit trafficking of *ganja*, with other accused persons, namely, Amarendra Kumar Singh, Ravi Ranjan Kumar Singh, Umesh Kumar Singh, Santosh Kumar, Sobha Nath Kumar and Mrityunjay Singh. They also disclosed to the police that other accused persons had managed to escape after noticing the presence of police.

8. The police, upon completion of investigation, submitted charge-sheet against all the named accused persons for the offences punishable under Section 8/20(b)(ii)(C) and 27 of the NDPS Act, whereupon cognizance was taken. The appellants and other persons against whom the chargesheet was filed were charged of commission of the offences punishable under Section 8/20(b)(ii)(C) and 27 of the NDPS Act. It transpires from the record that the aforesaid Charpokhari P.S. Case No. 02 of 2021 gave rise to two trials i.e., NDPS Case No. 01 of 2021 against Umesh Kumar Singh, Umashankar Singh, Mrityunjay Singh and Noor Alam and NDPS Case No. 26 of 2021 against Santosh Kumar. Subsequently, on the request of the prosecution, both the trials were amalgamated on 04.11.2022. Accordingly, altogether five persons including these appellants were put on trial, as they had denied the charges and claimed to be tried.

9. At the trial, the prosecution examined altogether six witnesses to substantiate the charge against the persons facing trial, namely, the informant, Om Prakash Kumar (PW-1), seizure list witnesses Rajendra Singh and Deepak Kumar (PW-3 & PW-4), S.I., Subodh Prasad,. a police officer and a member of the raiding team (PW-2), Awdhesh Kumar Singh (PW-5) and Sanjay Kumar Singh (PW-6) the Investigating Officers.

10. In addition to oral evidence of the prosecution's witnesses, the prosecution also brought on record following documentary evidence to establish the charge:

Sl. No.	Exhibit No.	Description
1.	P-1	Search-cum-seizure list of recovered marijuana (ganja)
2.	P-2	Signature of the Circle Officer on the Search-cum-seizure list.
3.	P-3	Self written statement of the informant.
4.	P-4	Signature of the witness Rajinder Singh on the Search-cum-seizure list.
5.	P-5	Signature of the witness Deepak Kumar on the Search-cum-seizure list.
6.	P-6	Application given to the Learned District and Sessions Judge for permission to examine the seized exhibits.
7.	P-7	Signature of the Investigating Officer on the arrest memo of accused Umesh Kumar Singh and Mrityunjay Singh.
8.	P-8	Carbon copy of the test memo dated 18.01.2021.
9.	P-9	Chargesheet No. 194/21 dated 07.06.2021.
10.	P-10	Chargesheet No. 130/22 dated 12.07.2022
11.	P-11	Sample, weight and sealing report of the exhibits seized by Smt. Ranjita Kumari, JM, 1 st Class.
12.	P-12	Examination report of F.S.L. Patna

11. After closure of the prosecution's evidence, the accused persons were questioned under Section 313 of the CrPC, so as to given them an opportunity to explain the circumstances emerging against them based on the evidence adduced at the trial.

12. We are placing on record in the present judgment, the questions which were, according to the trial court, contained incriminating circumstances emerging from the evidence of the witnesses:

Noor Alam of Cr. Appeal (DB) No. 669 of 2023

प्रश्न: आपके विरुद्ध यह साक्ष्य है की दिनांक 01.11.2021 को ग्राम दुलौर टोला सिमराओं में नहर किनारे थाना चरपोखरी जिला भोजपुर के अमरेंद्र कुमार सिंह उर्फ वि .पि .मंडल के निर्माणाधीन माकन से मादक पदार्थ गांजा , बोरा सहित किलो बरामद हुआ था एवं वह से भागने के क्रम में आपको गिरफ्तार किया गया?

उत्तर: जी नहीं।

प्रश्न : आपके विरुद्ध यह भी साक्ष्य है की आपने अन्य अभिकयुक्तों के साथ मिलकर सडयंत्र कर बहार से अवैध तरीके से गांजा, मादक पदार्थ चोरी छुपे लाते थे और दुलौर टोला सिमराओं में अमरेंद्र कुमार सिंह उर्फ वि. पि .मंडल के निर्माणाधीन मकान में रखकर आसपास के लोगो को बेचते थे?

उत्तर : जी नहीं।

Umashankar Singh of Cr. Appeal (DB) No. 668 of 2023

प्रश्न: आपके विरुद्ध यह साक्ष्य है की दिनांक 01.11.2021 को ग्राम दुलौर टोला सिमराओं में नहर किनारे थाना

चरपोखरी जिला भोजपुर के अमरेंद्र कुमार सिंह उर्फ वि .पि .मंडल के निर्माणाधीन माकन से मादक पदार्थ गांजा , बोरा सहित किलो बरामद हुआ था एवं वह से भागने के क्रम में आपको गिरफ्तार किया गया?

उत्तर: जी नहीं।

प्रश्न : आपके विरुद्ध यह भी साक्ष्य है की आपने अन्य अभिकयुक्तों के साथ मिलकर सडयंत्र कर बहार से अवैध तरीके से गांजा, मादक पदार्थ चोरी छुपे लाते थे और दुलौर टोला सिमराओं में अमरेंद्र कुमार सिंह उर्फ वि . पि .मंडल के निर्माणाधीन मकान में रखकर आसपास के लोगो को बेचते थे?

उत्तर : जी नहीं।

13. The defense got examined one witness on behalf of the appellant Noor Alam, so as to take plea of *alibi* on his behalf.

14. After having appreciated the evidence adduced at the trial, the trial court acquitted Mrityunjay Singh, Umesh Kumar Singh and Santosh Kumar of the charges framed against them on the ground that the prosecution could not prove their guilt beyond doubt. The trial court was of the view that based merely on the disclosures made by these appellants about their involvement in commission of the offences, they could not be held guilty. The trial court, however, concluded that the prosecution was successful in proving the charge against these appellants for commission of the offences punishable under Section 8/20(b)(ii)(C) of the NDPS

Act, in its impugned judgment of the conviction dated 24.05.2023. By a subsequent order of the same date, the trial court sentenced the appellants to imprisonment and fine as has been stated above. This is the background in which the appellants have assailed the trial court's judgment of conviction and the order of sentence.

15. Mr. Ansul, learned counsel appearing on behalf of the appellants has submitted that the prosecution miserably failed to establish any case against these appellants of their possession of *ganja* or that they were selling, purchasing or transporting the same so as to constitute an offence under Section 20(b) of the NDPS Act. He has submitted that the confessional statement of these appellants, said to have been made before the informant during the search, has no evidentiary value at all and beyond that there is absolutely nothing against these appellants on the point of possession or otherwise dealing with *ganja*. He has further argued that the prosecution did not produce the material exhibits at the trial. The samples returned by the forensic science laboratories were also not produced as material exhibits. The samples, according to the prosecution's case, were sent for forensic examination to Central Forensic Science Laboratory, Chandigarh and Forensic Science Laboratory, Patna. Central Forensic Science Laboratory, Chandigarh returned the samples

without examination and report on the ground that the requisitions sent to it for examination did not contain adequate information. He has referred to the report of the Forensic Science Laboratory, Patna (Exhibit-12) to submit that even the said report does not contain the description of the seal, sent for forensic examination which was the reason why the Central Forensic Science Laboratory, Chandigarh had returned the samples. He has further argued that apparently, the samples were not drawn in the presence of a Magistrate which is a mandatory requirement under Section 52A(2)(b) of the NDPS Act. Circle Officer, he submits, is not a Magistrate for the purpose of section 52A(2)(b) of the NDPS Act. He has also argued that whereas according to the prosecution's case, seizure was made on 01.01.2021 itself and the FIR was registered on the said date, the FIR was received in the court, belatedly on 04.01.2021 in defiance of the statutory requirement under section 157 of the CrPC.. He has also argued that there is no justification for inordinate delay in transmission of the samples to the Forensic Science Laboratory. He has argued that for the first time, a request was made to the Special Court for forwarding the samples to the Forensic Science Laboratory after seventeen days. The delay of nearly seventeen days in making the application has remained unexplained. He has further submitted

that there is no evidence as to how the so called seized *ganja* was kept after seizure in safe custody to avoid any chance of manipulation.

16. Learned Additional Public Prosecutor defending the finding of conviction has submitted that the prosecution ably proved at the trial that these appellants were present in the semi-constructed building and were apprehended when they were attempting to flee away. According to her, recovery of *ganja* from the said under construction building coupled with the fact that these appellants were attempting to escape gives rise to only inference that they had the knowledge of presence of *ganja* and to avoid criminal action, they were fleeing away. She contends that there is no illegality in the finding of conviction requiring this Court's interference.

17. We have perused the impugned judgment of the trial court as well as the Lower Court's Record. We have gone through the evidence of the prosecution's witnesses and perused the documentary evidence adduced by the prosecution at the trial. We have given out thoughtful consideration to the rival submissions made on behalf of the parties.

18. It is manifest on plain reading of the FIR and the evidence of the witnesses including the Investigating Officer that

there is no evidence against the appellants other than the fact that they were seen by the raiding police team attempting to flee away from the semi-constructed building, whereafter they were apprehended. The raid was conducted in the background of a secret information regarding presence of huge quantity of alcohol in the said under construction building. In course of search, the informant is said to have received information regarding presence of huge quantity of *ganja* also in the said building. There is no evidence at all as to who gave the information regarding presence of *ganja*.

19. Be that as it may, it appears that for satisfying the requirement of Section 52A(2)(b) of the NDPS Act, the informant considered it proper to inform the Circle Officer for carrying out the duty of search, seizure and preparation of samples. It is the prosecution's case that the samples were prepared in presence of two seizure list witnesses and the said Circle Officer. It is a law well settled in case of ***Union of India v. Mohanlal* reported in (2016) 3 SCC 379**, that drawing of samples must be held in presence of a Magistrate. The expression "Magistrate" falling under Section 52A(2)(b) of the NDPS Act has been dealt with by a Division Bench of this Court in case of **Mange Ram Vs. The**

State of Bihar in Cr. Appeal (DB) No. 808 of 2021, wherein it has been clearly held in paragraph 23 as under:-

“It is not at all in controversy that the place where the search was conducted, recovery was made by the police does not fall within any metropolitan area. Sub-Section (2) of Section 52A uses expressions “any Magistrate” and “such Magistrate”. The prefix “any” cannot be said to be qualifying the word “Magistrate” to mean either Executive or Judicial Magistrate. In our opinion, the word “Magistrate” is not qualified under subsection(2) of Section 52A otherwise and, therefore, applying Section 3 of the CrPC, it can be conclusively held that the word “any Magistrate” underlying Section 52A(2) of the Act means any Judicial Magistrate. The Circle Officer, in our opinion, cannot be said to be a Magistrate for the purpose of exercise of function under Section 52A(2) (b) of the NDPS Act.”

20. In such view of the matter, we have no hesitation in reaching a conclusion that the samples were not drawn in the presence of a Magistrate soon after the seizures were made, according to the prosecution’s case, as stipulated under Section 52A(2)(b) of the NDPS Act. Further, there is no justification at all, emerging from the evidence of the prosecution’s witnesses for delay in transmission of the samples to the forensic science laboratories. In the present case 17 days after the seizure, an

application was made before the learned Special Court, seeking an order for sending the samples to the forensic science laboratories. From the report of the Forensic Science Laboratory (Ext. 12), it appears that the samples were dispatched on 23.01.2021 through a special messenger for Forensic Science Laboratory, Patna which was received in the FSL, Patna on 29.01.2021.

21. We find substance in the submissions made on behalf of the appellants that the report does not contain any information relating to "mode in which the parcel was found to be packed on receipt and description of seal". The spaces under the said heading in the report have been left blank.

22. It is also noteworthy that the two witnesses who deposed as seizure list witnesses were village *chowkidaars*. From the deposition of PWs 3 and 4, it is apparent that they did not support the prosecution's case that the seizure was carried out in their presence. Though, they proved their signatures on the seizure list, it can be easily discerned from their depositions that they did not support the prosecution's case of seizure of the contraband and preparation of seizure list in their presence. Further, they did not identify the appellants apparently, because of darkness.

23. In the present case, we find that the except for the fact that the appellants were seen fleeing away from the said under

construction building, there is no evidence against them of possession or otherwise dealing with the seized *ganja*. The seizure list has not been proved to have been prepared in the presence of seizure list witnesses. The samples were not drawn in presence of Magistrate as required under Section 52A(2)(b) of the NDPS Act. There has been a delay in receipt of FIR before the Magistrate and sending of samples to the Forensic Science Laboratory. Material exhibits were not produced at the trial. In the said background, we do not consider it safe to uphold the conviction of the appellants based on the evidence of two Investigating Officers (PWs 5 and 6), the informant (PW-1) and a member of the raiding team (PW-2). The evidence of the Investigating Officer goes to suggest that no due care was taken for safe storage of the contraband.

24. We are, thus, of the view that failure on the part of the prosecution to draw samples in the presence of a Magistrate was a major lacuna. The prosecution failed to adhere to one of the important safeguards under Section 52A(2)(b) of the NDPS Act. The prosecution cannot be said to have proved the charge against the appellant beyond all reasonable doubt.

25. For the reasons noted above, the appellants stand acquitted of the charge of offence punishable under Sections 8/20(b)(ii)(C) of the NDPS Act.

26. Accordingly, the impugned judgment of conviction and the order of sentence dated 24.05.2023, passed by learned Additional District and Sessions Judge-VIII, Bhojpur at Ara in NDPS Case No. 01 of 2021, arising out of Charpokhari P.S. Case No. 02 of 2021 are hereby set aside.

27. These appeals are allowed.

28. The appellants are in custody. Let them be released from jail forthwith, if not required in any other case.

(Chakradhari Sharan Singh, J)

(G. Anupama Chakravarthy, J)

Nishant/-

AFR/NAFR	NAFR
CAV DATE	NA
Uploading Date	31.01.2024
Transmission Date	31.01.2024