

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.412 of 2017

Arising Out of PS. Case No.-264 Year-2015 Thana- BAHADURGANJ District- Kishanganj

Hasibul Islam S/o Nazrul Islam Resident of Rani Nagar, Purabpara
Godhanpada, P.S. Rani Nagar, District Murshidabad W.B.

... .. Appellant/s

Versus

The State Of Bihar

... .. Respondent/s

with

CRIMINAL APPEAL (DB) No. 476 of 2017

Arising Out of PS. Case No.-264 Year-2015 Thana- BAHADURGANJ District- Kishanganj

ABINASH MANDAL @ ABHINASH MANDAL S/o Ajit Mandal At present
Resident of Village- Bhola More, Murhi Factory, P.S. Bhakat Nagar, District-
New Jalpaiguri W.B., Permanent Address- Resident of- Raychenga Ansha,
P.S.- Falakata No.- 2, District- Jalpaiguri, West Bengal.

... .. Appellant/s

Versus

The State Of Bihar

... .. Respondent/s

Appearance :

(In CRIMINAL APPEAL (DB) No. 412 of 2017)

For the Appellant : Mr. Uma Shankar, Advocate
Mr. Kamlesh Kumar Sharma, Advocate
Mr. Gyan Prakash, Advocate
Mr. Karandeep Kumar, Advocate

For the State : Mr. Sujit Kumar Singh, APP

(In CRIMINAL APPEAL (DB) No. 476 of 2017)

For the Appellant : Mr. Kamlesh Kumar Sharma, Advocate
Mr. Uma Shankar, Advocate

For the State : Mr. Ajay Mishra, APP

CORAM: HONOURABLE MR. JUSTICE VIPUL M. PANCHOLI

and

HONOURABLE MR. JUSTICE DR. ANSHUMAN

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE VIPUL M. PANCHOLI)

Date : 10-12-2024



Both the appeals are filed under Section 374(2) of the Code of Criminal Procedure, 1973 (hereinafter referred to as 'the Code') against the judgment of conviction dated 31.01.2017 and order of sentence dated 04.02.2017, passed by learned Additional District & Sessions Judge-II, Kishanganj in Special Case No.108/2015 (CIS No.138/2015), arising out of Bahadurganj P.S. Case No.264/2015, whereby the appellants have been convicted for the offences punishable under Sections 20(b)(ii)C of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as 'the NDPS Act') and they have been sentenced to undergo R.I. for 15 years and to pay a fine of Rs.1,50,000/- (Rs. One Lakh Fifty Thousand) each for the offences punishable under Sections 20(b)(ii)C of the Act and in default of payment of fine, the appellants have been sentenced to undergo additional imprisonment for one year.

2. The brief case of the prosecution is that on 10.09.2015 at 08:15 hours, the Sub Inspector received secret information that a white coloured Maruti Suzuki car bearing number WB-06-D-2070 is coming from Siliguri in which a large quantity of *ganja* is loaded. He informed his senior officers over telephone and lodged a *Sanha* and as per the instructions, formed a team of police force and reached near village Prem Nagar on State Highway 377 E



along with the team members at 08:40 hours and informed the team members about the information received and started waiting for the said Maruti car. It is further stated that at about 09:45 hours, a white Maruti car was seen coming from Lohagada towards Prem Nagar. About 100 meters before Prem Nagar, the driver of the car stopped the car on seeing the police force and started running towards the west. He was caught with the help of the police force. The arrested persons were informed in writing to be searched before the magistrate under section 50 of the Narcotic Drugs and Psychotropic Substances Act, 1985 and with their consent, they were searched before the Circle Officer, Bahadurganj. During the search at around 10:15 a.m., one Samsung mobile and another Nokia mobile were found from the arrested person who gave his name as Hasibul Islam and one Nokia mobile and Rs. 1170/- were found from the other arrested person Abhinash. While searching Maruti car Suzuki WB-06-D-2070, 27 packets of *ganja* kept in its dickey were recovered. On demand for the documents, they did not show any paper. It is further stated that the recovered *ganja* was weighed and it included 3 packets of 15 kg, 3 packets of 10 kg, 9 packets of 5 kg, 6 packets of 3 kg and 6 packets of 2 kg., a total of 150 kg *ganja* was recovered which was seized in front of two independent witnesses



and a seizure list was prepared, a copy of which was given to the accused. Both the arrested accused told that the owner of the recovered and seized Maruti car is Pradeep Heera, with whom they deal in buying and selling *ganja*. It is further stated that two packets of 50 gms. each were made and kept as sample before the Circle Officer.

2.1. On the basis of the statement (Ext. 02) of informant Vijay Kumar, Bahadurganj P.S. Case No. 264/2015, dated 10.09.2015 under Sections 20, 22, 23 of the NDPS Act was registered against Hasibul Islam, Abinash Mandal and Pradeep Heera at Bahadurganj Police Station and after investigation, charge sheet under Sections 20, 22 and 23 of the Act was submitted against Hasibul Islam and Abinash Mandal and cognizance was taken in the case by order dated 13.01.2016.

2.2. During course of trial, the prosecution has examined 5 witnesses, namely, PW-1 Vijay Kumar, PW-2 Dhaneshwar Mandal, PW-3 Sanjiv Kumar, PW-4 Kailash Nat and PW-5 Shripat Yadav.

3. Heard Mr. Uma Shankar and Mr. Kamlesh Kumar Sharma, learned Advocates for the appellants, Mr. Sujit Kumar Singh, learned Additional Public Prosecutor for the State in Criminal Appeal (DB) No.412 of 2017 and Mr. Ajay Mishra,



learned Additional Public Prosecutor for the State in Criminal Appeal (DB) No.476 of 2017.

4. Learned Advocates for the appellants would submit that in the present case, the informant and the members of the raiding party have violated the mandatory provisions contained in Sections 42, 50 and 52A of the NDPS Act. It is further contended that as per the deposition given by PW-1, the informant, secret information was received by him on 10.09.2015 at 08:15 a.m. However, the said witness has admitted that superior officer was informed about the same through mobile phone. Further, the information was recorded in the station diary. However, the prosecution has failed to produce the said information which was recorded by the informant. It is further submitted that PW-5, Shripat Yadav, the Investigating Officer, has stated in the deposition that the name of superior officer who was informed by the informant has not been mentioned in the station diary. It is also submitted that PW-1 has also admitted during cross-examination that due to paucity of time, copy of the secret information was not supplied to the superior officer nor he had stated about his mobile number and mobile number of his superior or rather secret information in the statement which was recorded by him. Learned



counsel, therefore, urged that the informant has violated the provisions contained in Section 42 of the NDPS Act.

5. Learned counsel for the appellants thereafter contended that the prosecution has failed to examine the Circle Officer, Bahadurganj in whose presence alleged *ganja* has been seized. Even the seizure list witness Mohammed was also not examined by the prosecution.

6. Learned counsel for the appellants submits that as per the *fardbeyan* given by PW-1, after the *ganja* was seized, two samples of 50 grams each were taken from the seized *ganja* and the said samples were kept in two plastic packets and thereafter the said packets were sealed in presence of the Circle Officer and the witnesses. However, learned counsel submits that from the deposition given by PW-5, the Investigating Officer, it transpires that the said witness has deposed in para-9 of his examination-in-chief that 27 packets of samples of *ganja* were sent to Calcutta whereas 27 packets of samples of *ganja* were sent to Patna for necessary analysis. Thus, total 54 packets were sent to two different laboratories. Learned counsel, at this stage, has also submitted that as per the Investigating Officer, each sample was of 25 grams which were sent to laboratories. It is contended that as per the FIR, only two samples were obtained from the seized



ganja, i.e., 50 grams each whereas surprisingly total 54 packets containing 25 grams in each packets were sent to two different laboratories. Thus, the prosecution has failed to explain about the aforesaid aspect and, therefore, the report given by the F.S.L., Calcutta will not be helpful to the prosecution.

7. At this stage, it is also pointed out from para-13 of the deposition of PW-5, the Investigating Officer, that after the *ganja* was seized, the same was sent to the FSL after a period of 49 days for analysis.

7.1. Learned counsel, at this stage, have placed reliance upon the following decisions rendered by a Division Bench of this Court as well as by the Hon'ble Supreme Court:

(i) **Ram Chandra Singh vs. State of Bihar**, reported in **2024 SCC OnLine Pat 8258**.

(ii) **Mangilal vs. The State of Madhya Pradesh**, reported in **2023 SCC OnLine SC 862**.

(iii) **Mohammed Khalid & Anr. vs. The State of Telangana**, reported in **(2024) 5 SCC 393**.

(iv) **Gorakh Nath Prasad vs. State of Bihar**, reported in **(2018) 2 SCC 305**.

8. Learned counsel for the appellants further submits that the prohibited *ganja* was not seized from conscious possession



of the appellants. It is submitted that as per the case of the prosecution, police party stopped the vehicle and thereafter both these appellants got down from the car and tried to flee away from the said place. However, raiding party chased them and they were caught after some distance and thereafter when the vehicle was seized, total 150 k.g. *ganja* was found in different packets. Thus, it is submitted that *ganja* was not seized from the conscious possession of the appellants. At this stage, it is contended that as per the case of the prosecution, the owner of the car is Pradeep Heera. However, the said person has not been arrested till date nor the Investigating Officer has collected any evidence with regard to ownership of the car. Both the learned Advocates for the appellants, therefore, urged that these appeals be allowed by quashing and setting aside the impugned judgment of conviction and order of sentence passed by the Trial Court.

9. On the other hand, the learned Additional Public Prosecutors for the State have opposed the present appeals. It is contended that there is no violation of the mandatory provisions of the NDPS Act as alleged. In fact, from the deposition of the prosecution witnesses, it would reveal that the informant and members of the raiding party and thereafter the Investigating Officer have not violated the required procedure prescribed under



the NDPS Act and in fact PW-4, who is a seizure list witness, has also supported the case of the prosecution. It is further submitted that even if there is minor lacuna on the part of the informant and the Investigating Officer in conducting the raid and at the time of sending the samples to the FSL, the benefit of the same may not be given to the appellants-convicts. It is also contended that commercial quantity of 150 k.g. of *ganja* has been recovered and, therefore, looking to the seriousness of the matter, the present appeals be dismissed as the prosecution has proved the proved the case against the appellants beyond reasonable doubt.

10. We have considered the submissions canvassed by learned counsel appearing for the parties. We have also perused the materials placed on record and the evidence led by the prosecution before the Trial Court. From the materials placed on record, it transpires that the prosecution has examined 5 witnesses. At this stage, we would like to appreciate the entire relevant extract of the depositions of the prosecution-witnesses.

11. PW-1, Vijay Kumar has deposed in his examination-in-chief that he is the informant in the case. The incident is of 10.09.15. On that day, he was posted as S.H.O. in Bahadurganj police station. On 10.09.15 at 8:15 in the morning, secret information was received that a white Maruti Suzuki car bearing



no. WB-06-D-2070 was coming from Silliguri and a large quantity of illegal *ganja* was being smuggled in it. After registering an FIR regarding this information, the senior officer was informed about it through mobile phone. As per the instructions of the senior officer, a team was formed to verify the information and take necessary action. They left the police station at 8:30 hours and reached near N.H. 327E Premnagar. The team members waited for that car to arrive. At around 9:45 hours, a white car was seen coming from Loha Gada. The driver of the car stopped the car about 100 meters before and two persons came out of the car and started running towards the western field. They were chased and caught with the help of the police force. The Circle Officer reached Bahadurganj at around 10:15 a.m. In front of local witnesses Kailash Nat and Md. Shamim, both the arrested persons were searched one by one. During the search, one Samsung Mobile and one Nokia Mobile were recovered from Hashebul Islam. One Nokia Mobile and Rs.1170/- was also recovered from Abinash Mandal. During the search of the said Maruti car, 27 packets of *ganja* kept in the dickey were recovered. When the documents related to the recovered *ganja* were demanded from the two persons, they did not produce them. A seizure list was duly prepared for all the recovered items and they were seized. Witnesses Kailash Nat and



Md. Shamim signed on it and the Circle Officer, Bahadurganj also signed on the seizure list. One copy of the seizure list was given to each of the accused. Regarding the recovered *ganja*, the arrested accused Hashebul Islam and Abinash Mandal told that their partner in the *ganja* business is Pradeep Hira who is a resident of Koonchbihar and the Maruti Suzuki car also belongs to him.

11.1. The said witness has stated in his cross-examination that he received the information on 10.09.2015. Due to lack of time, he did not give written information about the secret information to the senior officer. He did not mention his mobile number or the mobile number of the said senior officer in his written statement. Silliguri via Thakurganj is about 100 K.Ms. from Bahadurganj. Six police stations are situated in Bihar in between. He does not know how many police stations are in Bengal. It takes half an hour to one hour by car to go from Bahadurganj to Thakurganj. He had not informed any police station between Silliguri and Bahadurganj. Prem Nagar is about 1.5-3 K.Ms. from Bahadurganj where they waited for 1½ hours. The jurisdiction of Bahadurganj police station extends 10-12 K.Ms. further from Premnagar. The search was done by the Circle Officer. He is not a narcotic specialist. The said witness has denied



the suggestion that in order to get promotion, he has lodged this false case.

12. PW-2, Dhaneshwar Mandal has deposed in his examination-in-chief that the incident is of 10.9.2015 at 08.45 a.m. When the S.H.O. got the information, he himself reached Premnagar and started waiting for the said car. When the accused persons saw the police, they stopped the car and started running towards the west. They were chased and caught. When their names and addresses were asked, they told their names as Abinash Mandal and Hashebul Islam respectively. The Circle Officer, Bahadurganj was called. 27 packets of *ganja* were found in the vehicle. When it was weighed, its total weight was 150 kg. The witness claims to identify the accused persons in the court.

12.1. The said witness has stated in his cross-examination that the vehicle was caught on the road from Silliguri to Bahadurganj which is NH 327. The place where the vehicle was stopped is under the jurisdiction of Bahadurganj police station. The S.H.O. had received information about the vehicle. The seizure list was prepared by the S.H.O. The seizure list was prepared in front of him. The Circle Officer, Bahadurganj was called. He does not remember after how much time of arrest, the Circle Officer was called. The arrested persons were searched and



mobiles were found with them. This witness voluntarily says that when their clothes were searched, *ganja* was found. The search of the arrested persons in front of the Circle Officer was done by the S.H.O. It is further stated by this witness in his cross-examination that they were also searched in front of the Circle Officer. He was searched by the Circle Officer. The S.H.O. was also searched by the Circle Officer. They had carried out the rest of the search on the orders of the Circle Officer. He does not remember whether the Circle Officer searched the police jeep or not. The car that was seized was a white coloured Maruti Suzuki. He does not know its model number. He knows the registration number of the car. The investigating officer will tell whether the statement of the Circle Officer and the statement of the arrested persons were taken or not. His statement was taken by the investigating officer at the police station. His statement was not recorded at the scene of the incident. It is wrong to say that the accused have been falsely implicated. Both the accused are standing in the dock. The road where the vehicle was caught is not 15-20 feet wide but it is four lane road. The raiding party was already sitting in Prem Nagar and had waited there for about half an hour. When the seized vehicle stopped, he and the S.H.O. were on the road in civil dress. It had stopped 100 meters away from where they were standing. As soon



as the vehicle stopped, all the people of the raiding team ran. He does not remember whether he signed any paper or not. He did not cooperate in the paperwork. Separate seizure list was not made for mobile and money. He does not remember whether a separate seizure list was made for the search of the body and the search of the vehicle which was seized. Both were searched. The accused went about 200 meters towards the west of the road. They were caught at a distance of about three hundred feet. No house or shop is situated there. He did not weigh the *ganja*. He does not remember the name of the person who weighed it. All the *ganja* was weighed using an electronic scale. The seized *ganja* was weighed one by one. The seized packets were weighed and brought to the police station. They were brought to the police station after being sealed. The accused were made to sign on the packets in front of him. He does not remember whether the accused were made to sign or not. The three officers and the accused had signed on the seized cloth with a sketch pen. He does not know who is the owner of the vehicle? The arrested accused is not the owner of that vehicle. The witness has denied the suggestion that the S.H.O. lodged the case to get promotion and he gave false testimony because he was his accomplice.



13. PW-3, Sanjiv Kumar has deposed in his examination-in-chief that the incident is of 10.09.2015 and he was driving the jeep. A white coloured Maruti was coming from Silliguri. On seeing the police force and the jeep, the vehicle was stopped and two persons got out of it and ran. They were chased and caught. When the S.H.O. asked their name and address, they told their names. The dicky of the vehicle was opened in presence of the Circle Officer. 27 packets of *ganja* were recovered from the dicky of the car. Mobile phones were also recovered from the apprehended persons.

13.1. The said witness has stated in his cross-examination that he was in the jeep and he did not catch the accused. He was sitting in the police jeep from the beginning till the end. The arrested people were brought to the police station. The seizure list was prepared there. It was prepared in front of the Circle Officer. It is not known how the FIR was written. It is wrong to say that nothing was recovered from the accused.

14. PW-4, Kailash Nat has deposed in his examination-in-chief that the incident is of 10.09.2015. He was going to the field. There were police on the way. A police vehicle and another white coloured vehicle were parked there. 27 packets were recovered from the white coloured vehicle. People were calling it



ganja. The seizure list was prepared there and a mobile phone was also recovered. He had signed it. Both persons standing in the court are the same people from whose car the packets were recovered.

14.1. The said witness has stated in his cross-examination that his house is situated in Premnagar. There is a red light area in Bahadurganj in Pregnagar. His house is situated in that area. Sometimes raids are conducted by Bahadurganj police station in the red light area. People are caught, but he has never been caught. His family does not do that work. People live there out of fear of the police. The distance of the police station from Premnagar is about 2 K.Ms.. There is a main road there, he does not know its name. He does not know whether it is N.H. or S.H. It is not that *Daroga Ji* called him. He signed with the understanding that seizure means attachment. He does not know the contents of the seizure list.

15. PW-5, Shripat Yadav, who is investigating officer of the case, has deposed in his examination-in-chief that he was posted in Bahadurganj police station on 10.09.2015. He visited the place of incident. The scene of the incident is the road situated in Prem Nagar. He recorded the statement of witnesses Kailash Nat and Mohammed of the seizure list. He recorded the re-statement of



the informant. He also recorded the statements of Dhaneshwar Mandal, Babulal Singh, Abhay Kumar, Ajit Kumar and Sanjeev Kumar. The seized articles were sent to F.S.L. on the order of the court. The accused was arrested and brought to the court along with evidence. Application was given for sampling of the seized exhibits and after obtaining the order, sampling was prepared and sent for analysis. Supervision note was received. On the basis of statements of witnesses, observation of the scene of incident and investigation report, finding the case true, charge sheet 36/15 dated 31.12.15 was submitted against accused Hasibul Islam and Abinash Mandal under sections 20, 22 and 23 of the Act and investigation continued against Pradeep Heera. The witness claims to identify both the accused in the court.

15.1. The said witness has stated in his cross-examination that It is not mentioned at what time he took over the charge of investigation of this case. The time of lodging the FIR is 09:30 a.m. He started the investigation at 12:30 p.m. The time of visiting the place of incident is not recorded in the diary. It is not recorded in the diary as per whose advice he inspected the place of incident. The statement of Mohammed is not recorded in the diary. He had recorded the statement of Mohammed Shamim. It is further stated by the said witness in his cross-examination that the



seized *ganja* belongs to Pradeep Heera. It has come to light in the investigation that the accused persons had delivered it. Kailash was not standing at the time of inspection of the place of incident. His house is there. He was standing on the road. Md. Shamim was standing. No policeman was standing there earlier. 7-8 more people were there whose names are not mentioned in the case diary. They were not the witnesses. The statement of the Circle Officer, Bahadurganj, in whose presence search was made, has not been mentioned in the diary. His statement was not recorded. The name of superior officer, who was informed by the informant, has not been mentioned in the diary. He has not filed any application for recording the statement of the accused under Section 164 of the Code. During investigation, Vijay Kumar gave the sample of the seal, this fact is not written in the diary. Where did he keep that sample, it is not mentioned in the diary. He had given 27 packets along with the application in the court. All the packets were sent. A total of 54 packets were made, out of which 27 packets were sent to Kolkata and 27 packets to Patna. The packet of the sample is not in the court. The packet of the sample is not available at the police station also. The F.S.L. sample was of 25 grams each. 27 pouches of samples each were kept in two wooden boxes and sent for examination. It was also sealed. Both the sealed boxes were



received from the court. The date of receipt 26.11.2015 is mentioned in the diary. He went to the police station with the boxes and kept in the police station for two-three days. There is no mention of the *Malkhana* register or the *Malkhana* number in the case diary. The copy of the *Malkhana* register is not attached to the diary. The seized exhibits are not before him. The witness has denied the suggestion that he conducted a biased investigation and chargesheet has been submitted without facts and evidence. During the supplementary investigation, F.S.L. report has been filed after submitting the charge sheet. He had seen the vehicle. It was a Maruti Suzuki. He cannot tell name of its model. He had not done any investigation regarding the registration of the vehicle. He had gone to the R.T.O. of Koonchbihar, which is not mentioned in the diary. He was not in the raiding party. The statement of the accused persons was taken and they said that they are innocent. The seized *ganja*, the accused persons and both the samples were brought to the police station. They are still in the *Malkhana*. It took 49 days from the day of seizure to sending the *ganja* for analysis. Investigation was done under Sections 20, 22 and 23 of the Act. This section is applicable for smuggling of *ganja*. All the provisions of this Act were followed in the investigation. Sampling was done, statements of witnesses were taken and seized items



were examined by the expert. Criminal history of the accused was not ascertained. The houses of the accused were not visited and the addresses given were not verified. Avinash Mandal was a passenger in the vehicle that was caught. It is not true that Avinash was wrongly arrested. It is not true that his entire investigation is faulty.

16. We have re-appreciated the entire relevant evidence led by the prosecution before the Trial Court. We have also considered the submissions canvassed by learned counsel appearing for the parties. It would reveal from the evidence led by the prosecution that the informant, Vijay Kumar got secret information on 10.09.2015 at 08:15 a.m. that one white coloured Maruti Suzuki Car bearing registration no.WB-06D-2070 is coming from Silliguri and in the said vehicle, huge quantity of illegal *ganja* is being transported. The informant thereafter recorded the said secret information in the station diary and informed his superior officer on mobile phone and on the basis of the oral instruction given by the superior officer, with a view to verify such information, the informant formed a team of raiding party. Thereafter they proceeded in the police vehicle at about 08:30 a.m. and reached near NH 327E, Prem Nagar and thereafter at about 09:45 a.m., the said car was seen coming from Loha Gada



and after seeing the members of the raiding party, the driver of the car stopped the vehicle 100 meters before and two persons got down from the car and tried to flee away. However, they were chased and caught by the members of the raiding party. It is also stated that thereafter the car was searched in presence of two independent witnesses, namely, Kailash Nat and Md. Shamim. It is also stated that with a view to comply the provisions contained in Section 50 of the NDPS Act, the Circle Officer, Bahadurganj, namely, Saihul Haque was called and in presence of the witnesses and the Circle Officer, search was carried out in the car and mobile phones were seized and total 27 packets of different weight were found in the car which were also seized. From the seized articles, two samples of 50 grams each were taken and thereafter the same were sealed in two plastic packets in presence of the witnesses and the Circle Officer. The said samples were described as S1 and S2.

17. The prosecution has examined the said informant as PW-1, who has narrated in the examination-in-chief about the secret information received by him and with regard to the search carried out by the members of the raiding party in presence of two witnesses and the Circle Officer. However, during cross-examination, PW-1 has specifically admitted that he did not send secret information which was written by him to the superior



officer. He has also admitted that in the station diary entry, he has also not mentioned his mobile number and mobile number of his superior officer to whom the information was given. Further, the said witness has admitted that the distance between Bahadurganj and Silliguri is 100 k.m. and in between there are six police stations which are situated in the State of Bihar and he did not inform any of the police stations which are situated between Silliguri and Bahadurganj. The said witness has also admitted that the consent given by the accused with regard to their search and his letter with regard to the same are not attached with his self recorded statement. He has also admitted that search was carried out by the Circle Officer.

17.1. It is pertinent to note that PW-2 and PW-3 are the members of the raiding party who deposed the same thing which has been deposed by PW-1, the informant.

18. PW-4 is one of the seizure list witnesses. However, during cross-examination, the said witness has admitted that Prem Nagar situated in Bahadurganj is a red light area and his house is situated in the said area. The police authorities from Bahadurganj frequently used to carry out the raid in the said area. A case was also registered against him with regard to theft and the said case



was registered in the same police station. He has further admitted in para-4 that he is not aware about the contents of the seizure list.

19. PW-5 is the Investigating Officer who has carried out the investigation. It would reveal from his deposition that the owner of the *ganja*, i.e., Pradeep Heera was not found and the investigation was kept pending against him. He has also admitted that the Circle Officer of Bahadurganj, in whose presence the seizure was made, his statement was not recorded by him. He has also admitted that in the self statement of the informant where there is reference of *Sanha*, the said *Sanha* has not been written in the case diary. He has also admitted that he had not mentioned the name of the superior officer, to whom the informant has given the information on telephone, in the case diary. He has not made verification with regard to the same. Now, it is important to note that in para-9 of the examination-in-chief, he has stated that he had sent 27 packets containing 25 grams of *ganja* in each packets to FSL, Calcutta and also sent another 27 packets each of 25 grams to Patna. Thus, he had sent total 54 packets to two different laboratories. It is further stated that he had received the packets on 26.11.2015 which were kept in the police station up to 29.11.2015 and thereafter he had personally gone to the concerned FSL, Calcutta as well as Patna and handed over the said packets for



necessary analysis. The said witness has further stated that after the *ganja* was seized, the samples were sent to the concerned laboratories after 49 days. Thus, it is not in dispute that the ganja was seized on 10.09.2015. However, it was sent only after 49 days. From the record, it is also revealed that FSL, Calcutta received the said samples on 04.12.2015. Thus, there is gross delay in dispatching the samples.

20. From the aforesaid evidence, it can be said that the informant after getting secret information though stated that same was recorded in writing in the station diary, however, the said information was not produced before the court. Further, it is revealed that the informant informed about the secret information to his superior officer on telephone, the details with regard to his mobile number as well as mobile number and name of his superior officer are not produced before the court. We are, therefore, of the view that there is violation of provisions contained in Section 42 of the NDPS Act.

21. It further transpires from the evidence that it is specific case of the informant in his self recorded statement that the Circle Officer, Bahadurganj was called and in presence of him and two witnesses, search was carried out and thereafter from the seized ganja, two samples (50 grams each) which was described as



S1 and S2 were obtained and kept in two packets. However, from the deposition of the Investigating Officer, it would reveal that he had sent total 54 packets each containing 25 grams to two different laboratories situated at Calcutta and Patna. Learned Additional Public Prosecutors have failed to explain with regard to the aforesaid aspect as to how the Investigating Officer prepared total 54 packets each containing 25 grams for sending the same to the FSL for analysis. It is required to be recalled that as per the informant, only two samples were obtained from the seized *ganja* each of 50 grams and the same were kept in two packets. It is also admitted by the Investigating Officer that after search and seizure was carried out, 54 packets were sent for analysis only on 29.11.2015, i.e., after more than 2 ½ months. It is also revealed from the report given by the FSL, Calcutta that the samples were received only on 04.12.2015 whereas as per the case of PW-5, the Investigating Officer, 54 packets were received in the police station on 26.11.2015 and on 29.11.2015 he personally had gone to the aforesaid two FSLs. for handing over the same. Thus, it appears that the Investigating Officer had taken approximately eight days time in handing over the sample to FSL, Calcutta which creates doubt and in fact from the evidence led by the prosecution,



it is absolutely clear that there is violation of provisions contained in Sections 50 and 52A of the NDPS Act.

22. Even the Circle Officer as well as another seizure list witness have not been examined by the prosecution. Further, PW-4, who is one of the witnesses of seizure list, is not a trustworthy witness. As per his deposition, his house is situated in the red light area which is situated under Bahadurganj police station and the police use to carry out the raid in the said area. One case was also registered against him and in fact during cross-examination, he has also admitted that he does not know about the contents of the seizure list.

23. In the case of **Ram Chandra Singh** (supra), the Division Bench of this Court observed in paragraphs 21 and 22 as under:-

“21. It further appears from the deposition of PW-6 that the narcotics were kept in the *Malkahana* of the police station for all this while. The only evidence that we have on record is the report of the Forensic Science Laboratory that the samples sent in connection with this case was found to be *Ganja*, as it contained Tetrahydrocannabinol (THC) which is a chief intoxicating ingredient of *Ganja*. The report itself indicates that the memo was prepared on 07.03.2014, *i.e.*, after about more than two months of the seizure. The same was sent by special messenger which was received in the F.S.L. on 10.03.2014.

22. In the absence of any evidence with respect to drawing of samples from the seized *Ganja* and the reason for the



delayed dispatch of the sample to the Forensic Science Laboratory makes the entire story of the prosecution doubtful.”

23.1. From the aforesaid observation made by the Division Bench of this Court, it is revealed that in the absence of any evidence with respect to drawing of samples from the seized *Ganja* and the reason for the delayed dispatch of the sample to the Forensic Science Laboratory makes the entire story of the prosecution doubtful. It is pertinent to note that in the said case, there was a delay of about more than two months in dispatching the samples whereas in the present case, there is a delay of more than 2 ½ months in dispatching the samples to the concerned FSLs.

24. In the case of **Mangilal** (supra), the Hon’ble Supreme Court has observed in paragraphs 6, 7 and 8 as under:-

6. The obvious reason behind this provision is to inject fair play in the process of investigation. Section 52A of the NDPS Act is a mandatory rule of evidence which requires the physical presence of a Magistrate followed by an order facilitating his approval either for certifying an inventory or for a photograph taken apart from list of samples drawn. In due compliance of Section 52A(1) of the NDPS Act the Ministry of Finance (Department of Revenue) issued a Notification No. G.S.R. 339(E) dated 10.05.2007 which furnishes an exhaustive manner and mode of disposal of drugs ending with a certificate of destruction:

“4. Manner of disposal



- 1) Where any narcotic drug or psychotropic substances has been seized and forwarded to the officer-in-charge of the nearest police station or to the officer empowered under section 53, of the Act, or if it is seized by such an officer himself, he shall prepare an inventory of such narcotic drugs or psychotropic substances as per Annexure 1 to this notification and apply to any Magistrate under sub-section (2) of section 52A as per Annexure 2 to this notification.
- 2) After the Magistrate allows the application under sub-section (3) of section 52A, the officer mentioned in clause (1) above shall preserve the certified inventory, photographs and samples drawn in the presence of the Magistrate as primary evidence for the case and submit details of the drug consignments to the Chairman of the Drug Disposal Committee for a decision by the committee on the disposal. The officer shall send a copy of the details along with the drug consignments to the officer-in-charge of the godown.

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4.2 Mode of disposal of drugs.

- (i) Opium, morphine, codeine and thebaine shall be disposed of by transferring to the Government Opium and Alkaloid Works under the Chief Controller of Factories.
- (ii) In case of drugs other than the drugs mentioned in clause (i), the Chief Controller of Factories shall be intimated by the fastest means of communication available, details of drug consignments that are ready for disposal.
- (iii) The Chief Controller of Factories shall indicate within 15 days of the date of receipt of the communication, the quantities of drugs, if any, that are required by him to supply as samples under Rule 67B.
- (iv) Such quantities of drugs, if any, as required by the Chief Controller of Factories under clause (iii) shall be transferred to him and the remaining quantities of drugs shall be destroyed as per the procedure outlined in para 4.1.2.



- (v) Destruction shall be by incineration in incinerators fitted with appropriate air pollution control devices, which comply with emission standards. Such incineration may only be done in places where adequate facilities and security arrangements exist. In order to ensure that such incineration may not be a health hazard or polluting, consent of the State Pollution Control Board or Pollution Control Committee, as the case may be, should be obtained. Destruction shall be carried out at the presence of the Members of the Drug Disposal Committee.

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4.4 Certificate of destruction.

A certificate of destruction (in triplicate) containing all the relevant data like godown entry number, gross and net weight of the drugs seized, etc., shall be prepared and signed by the chairman and members of the Drug Disposal Committee as per format at Annexure 3. The original copy shall be pasted in the godown register after making necessary entries to this effect, the duplicate to be retained in the seizure case file and the triplicate copy will be kept by the Drug Disposal Committee. Details of disposal of drugs shall be reported to the Narcotics Control Bureau in the Monthly Master Reports.”

7. To be noted, the aforesaid notification was in existence at the time of the commission of the offence alleged in the case on hand, stood repealed with effect from 23.12.2022 vide Notification No. G.S.R.899(E). In any case a notification issued in derogation of the powers conferred under sub-section (1) of Section 52A of the NDPS Act can never contradict the main provision, particularly sub-Section (2). However, any guideline issued by way of a notification in consonance with Section 52A of the NDPS Act has to be followed mandatorily.

8. Before any proposed disposal/destruction mandate of Section 52A of the NPDS Act requires to be duly complied with starting with an application to that effect. A Court should be satisfied with such compliance while deciding the case. The onus is entirely on the prosecution in a given case to satisfy the Court when such an issue arises for consideration. Production of seized material is a factor to establish seizure followed by recovery. One has to remember that the provisions of the NDPS Act are both stringent and rigorous and therefore the burden heavily lies on the prosecution. Non-production of a physical evidence would lead to a negative inference within the



meaning of Section 114(g) of the Indian Evidence Act, 1872 (hereinafter referred to as the Evidence Act). The procedure contemplated through the notification has an element of fair play such as the deposit of the seal, numbering the containers in seriatim wise and keeping them in lots preceded by compliance of the procedure for drawing samples. The afore-stated principles of law are dealt with *in extenso* in *Noor Aga v. State of Punjab*, (2008) 16 SCC 417:

“89. Guidelines issued should not only be substantially complied with, 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 therefor, it becomes obligatory on the part of the subordinate authorities to comply therewith.

90. Recently, this Court in *State of Kerala v. Kurian Abraham (P) Ltd.* [(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 with 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.

92. Omission on the part of the prosecution to produce evidence in this behalf must be linked with a second important piece of physical evidence that the bulk quantity of heroin allegedly recovered indisputably has also not been produced in court. The respondents contended that the same had been destroyed. However, on what authority it was done is not clear. Law requires that such an authority must flow from an order passed by the Magistrate. Such an order whereupon reliance has been placed is Exhibit PJ; on a bare



perusal whereof, it is apparent that at no point of time had any prayer been made for destruction of the said goods or disposal thereof otherwise. What was necessary was a certificate envisaged under Section 110(1-B) of the 1962 Act. An order was required to be passed under the aforementioned provision providing for authentication, inventory, etc. The same does not contain within its mandate any direction as regards destruction.

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95. The High Court proceeded on the basis that non-production of physical evidence is not fatal to the prosecution case but the fact remains that a cumulative view with respect to the discrepancies in physical evidence creates an overarching inference which dents the credibility of the prosecution. Even for the said purpose the retracted confession on the part of the accused could not have been taken recourse to.

96. Last but not the least, physical evidence relating to three samples taken from the bulk amount of heroin was also not produced. Even if it is accepted for the sake of argument that the bulk quantity was destroyed, the samples were essential to be produced and proved as primary evidence for the purpose of establishing the fact of recovery of heroin as envisaged under Section 52-A of the Act.

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100. Physical evidence of a case of this nature being the property of the court should have been treated to be sacrosanct. Non-production thereof would warrant drawing of a negative inference within the meaning of Section 114(g) of the Evidence Act. While there are such a large number of discrepancies, if a cumulative effect thereto is taken into consideration on the basis whereof the permissive inference would be that serious doubts are created with respect to the prosecution's endeavour to prove the fact of possession of contraband by the appellant. This aspect of the matter has been considered by this Court in *Jitendra v. State of M.P.* [(2004) 10 SCC 562 : 2004 SCC (Cri) 2028] in the following terms : (SCC p. 565, para 6)

“6. ... In the trial it was necessary for the prosecution to establish by cogent evidence that the alleged quantities of *charas* and *ganja* were seized from the possession of the accused. The best



evidence would have been the seized materials which ought to have been produced during the trial and marked as material objects. There is no explanation for this failure to produce them. Mere oral evidence as to their features and production of panchnama does not discharge the heavy burden which lies on the prosecution, particularly where the offence is punishable with a stringent sentence as under the NDPS Act.””

25. In the case of **Mohammed Khalid** (supra), the Hon’ble Supreme Court has observed in paragraphs 26 and 27 as under:

“26. Admittedly, no proceedings under Section 52-A of the NDPS Act were undertaken by the investigating officer PW 5 for preparing an inventory and obtaining samples in the presence of the jurisdictional Magistrate. In this view of the matter, the FSL report (Ext. P-11) is nothing but a waste paper and cannot be read in evidence. The accused A-3 and A-4 were not arrested at the spot.

27. The offence under Section 20(b)(ii)(C) deals with production, manufacture, possession, sale, purchase, transport, import or export of cannabis. It is not the case of the prosecution that the accused A-3 and A-4 were found in possession of ganja. The highest case of the prosecution which too is not substantiated by any admissible or tangible evidence is that these two accused had conspired sale/purchase of ganja with A-1 and A-2. The entire case of the prosecution as against these two accused is based on the interrogation notes of A-1 and A-2.”

26. In the case of Gorakh Nath Prasad (supra), the Hon’ble Supreme Court has held that it is the duty of the prosecution to first establish *prima facie* case of genuine recovery of contraband from possession of accused before burden of proof stands reversed onto accused. Mere fact of FSL report being



available, is no conformation either of seizure or that what was seized was ganja, in absence of production of seized item in court as an exhibit. No explanation was given by the prosecution for such non-production and, therefore, non-production of seized material is fatal to prosecution case.

26.1. In the present case also, it was not produced before the court and in fact, as observed hereinabove, as per informant, two samples of 50 grams each were obtained from the seized articles which were sealed in two different packets whereas the Investigating Officer sent total 54 packets each containing 25 grams to two different FSLs. which creates serious doubt and, therefore, the FSL report submitted by Calcutta is not helpful to the case of the prosecution.

27. Keeping in view the aforesaid decisions rendered by the Hon'ble Supreme Court as well as this Court, if the evidence, as discussed hereinabove, is examined, we are of the view that the prosecution has violated the mandatory provisions contained in Sections 42, 50 and 52A of the NDPS ACT and prosecution has also failed to prove the case against the appellants-convicts beyond reasonable doubt.

28. Accordingly, both these appeals stand allowed. The impugned common judgment of conviction dated 31.01.2017 and



order of sentence dated 04.02.2017, passed by learned Additional District & Sessions Judge-II, Kishanganj in Special Case No.108/2015 (CIS No.138/2015), arising out of Bahadurganj P.S. Case No.264/2015, are hereby quashed and set aside. The appellants are acquitted of the charges levelled against them by the learned Trial Court.

28.1. Appellant Abinash Mandal @ Abhinash Mandal in Criminal Appeal (D.B.) No. 476 of 2017) is on bail. He is discharged from the liabilities of his bail-bond.

28.2. Since appellant, namely, Hasibul Islam (in Cr. Appeal (D.B.) No. 412 of 2017) is in jail, he is directed to be released from jail custody forthwith, if his presence is not required in any other case.

(Vipul M. Pancholi, J.)

(Dr. Anshuman, J.)

Sanjay/-

AFR/NAFR	NAFR
CAV DATE	NA
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