

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.4960 of 2023

Arising Out of PS. Case No.-31 Year-2018 Thana- N.C.B (GOVERNMENT OFFICIAL)
District- Bhagalpur

=====

Sachidanand Rai S/O Bolat Rai R/O Village- Didarganj, Ward No. 72,
P.S- Didarganj, Distt.- Patna.

... .. Appellant

Versus

The Union Of India Through Narcotics Control Bureau, Patna Bihar

... .. Respondent

With

CRIMINAL APPEAL (SJ) No. 4756 of 2023

Arising Out of PS. Case No.-31 Year-2018 Thana- N.C.B (GOVERNMENT OFFICIAL)
District- Bhagalpur

=====

Birbahadur Rai Son Of Late Badlu Rai R/O Vill - Didarganj, Ward No.
72, P.S. - Didarganj, Distt. - Patna

... .. Appellant

Versus

The Union of India through NCB, Patna, Zonal Unit Bihar

... .. Respondent

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Appearance :

For the Appellant	:	Mr.Sudhir Kumar Singh, Advocate Mr.Rahul Rathour, Advocate Ms.Soni Kumari, Advocate Mr.Shankar Prasad, Advocate
For the N.C.B.	:	Mr.Awadhesh Kumar Pandey, C.G.C. Mr.Arvind Kumar, C.G.C. Mr.Lokesh, Advocate

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CORAM: HONOURABLE MR. JUSTICE CHANDRA SHEKHAR JHA
ORAL JUDGMENT

Date : 25-09-2024

Heard learned counsel for the appellants in both
these appeals and learned Central Government Counsel for
the Union of India.

2. The present memo of appeals have been filed for
setting-aside the judgment of conviction dated 18.08.2023
and order of sentence dated 11.09.2023 passed by learned



XIVth Additional District and Sessions Judge, Bhagalpur in connection with N.D.P.S. Case No. 15/2018, arising out of N.C.B. P.S. Case No. 31 of 2018, whereby and whereunder the learned trial court has awarded the sentence to the appellants/convicts under Section 20(b)(ii)(c) of the Narcotic Drugs and Psychotropic Substances Act (hereinafter referred to as the "N.D.P.S. Act") to undergo rigorous imprisonment for ten (10) years and fine of Rs. 1,00,000/- each, in default of payment of fine, each shall undergo additional rigorous imprisonment for two years, further sentenced to undergo R.I. for ten (10) years each and fine of Rs. 1,00,000/- under Section 25 of the N.D.P.S. Act, and in default of payment of fine, each shall undergo R.I. for one year. The learned trial court ordered that all the sentences shall run concurrently.

3. The brief facts of this case, which appears from the version of complainant/PW-6, who is an Intelligence Officer of Narcotic Control Bureau (in short 'NCB'), Patna Zonal Unit, that he received an information on 05.07.2018 at about 12:30 hours that a white Bolero Jeep having



Registration No. WB33A 2702 carrying huge quantity of Ganja is coming from Tripura to Vaishali via Guwahati-Siliguri-Purnia-Bhagalpur and in its transit will cross Naugachia, Bhagalpur in the night at about 22:00 P.M. He communicated this information to the Superintendent, NCB, Patna, who constituted a team of NCB, comprising complainant/ informant and other intelligence officers. The complainant further alleged that said team reached near Hospital Chowk Khagra, Vikramshila Setu Road, Parbatta, Naugachia, Bhagalpur at about 20:45 hours on the same day and contacted patrolling police. The team of NCB shared the secret information with the officer-in-charge of Parbatta Police Station, who was present there. Thereafter, on the request of complainant, two persons namely, Sunny Singh and Chandan Rajak, who were present there, agreed to become independent witnesses during search and seizure of contraband, if so required. The complainant stated that joint team of NCB and Parbatta Police reached near Khagra-Vikramshila Setu Road and after some time, at about 21:15 hours, a white colour Bolero Jeep bearing Reg. No. WB33A



2702 was found coming, which was asked to stop by the NCB team and found that two persons were present inside the vehicle, who disclosed their names as Sachidanand Rai and Birbahadur Rai (appellants herein). The complainant alleged that both persons including the vehicle were searched in presence of members of the NCB team and independent witnesses and found that 123 nos. of packets wrapped in brown coloured adhesive tape, was concealed in secret cavities i.e. roof, middle seat and floor of aforesaid Bolero Jeep. While opening all the packets, dry brown coloured substance, like Ganja was found. The same was tested with DD Kit, which responded positive for "Ganja". Thereafter, whole consignment and vehicle were seized. All seized 123 packets were weighed, which was found total of 226 kgs. of Ganja. Thereafter, all 123 packets were divided into two lots marked as lot A (containing P1 to P32 (32 packets) and Lot B (containing P33 to P123 (91 packets). Thereafter, search-cum-seizure list and test memo in triplicate were also prepared on the spot and signatures of concerned officers, independent witnesses and both accused



persons (appellants/convicts) were obtained on the search-cum-seizure list. The entire process of search-cum-seizure was started at 21:51 hours on 05.07.2018 and ended at 23:45 hours on the same day.

4. On the basis of aforesaid written application, NCB registered NCB Crime Case No. 31/2018 dated 05.07.2018 under Section 8 and 20(b)(ii)(c), 25, 27A & 29 of the N.D.P.S. Act, 1985. After conclusion of investigation, cognizance was taken by the learned Spl. Trial Court, Bhagalpur on 30.01.2019. The charges were framed against the accused persons/appellants on 25.03.2019 under Section 20(b)(ii)(c), 25 of the N.D.P.S. Act, 1985.

5. Learned trial court explained the aforesaid charges to appellants/accused, which they pleaded "not guilty" and claimed to be tried.

6. To established its case before the learned trial court, the prosecution altogether examined total of **Eight (8)** witnesses, namely, PW-1 Sunny Kumar @ Sunni Singh, PW-2 Dhiraj Kumar, PW-3 Navin Kumar Jha, PW-4 Chandan Rajak, PW-5 Shiv Kumar Yadav, PW-6 Amar Shankar, PW-7



Rajan Kumar and PW-8 Parimal Banarjee.

7. The prosecution relied upon following documentary evidences also as to substantiate its case during trial, which are as under:

Exhibit No(s).	List of documents
Exhibit-P1	Confessional Statement of Sachidanand Rai
Exhibit-P2	Signature of PW-2 on fifth page of seizure list
Exhibit-P3	Permission application addressed to the learned District & Sessions Judge, Bhagalpur by the informant
Exhibit-P4	Carbon copy of Test Memo
Exhibit-P5	Carbon copy of individual search of Birbahadur Rai
Exhibit-P6	Carbon copy of individual search of Sachidanand Rai
Exhibit-P7	Medical examination of accused persons
Exhibit-P8	Confessional statement of Birbahadur Rai
Exhibit-P9	Statement of Sanni Singh u/s 67 NDPS Act
Exhibit-P10	Left and right hand impression of Sachidanand Rai and Birbahadur Rai on forwarding report
Exhibit-P11	Memo of arrest of Birbahadur Rai
Exhibit-P12	Memo of arrest of Sachidanand Rai
Exhibit-P13	Carbon copy of Jama Talasi of Birbahadur Rai
Exhibit-14	Carbon copy of Jama Talasi of Sachidanand Rai
Exhibit-15	Notice u/s 67 of NDPS to Birbahadur Rai
Exhibit-16	Notice u/s 67 of NDPS to Sachidanand Rai
Exhibit-17	Notice u/s 67 of NDPS to Sanni Singh
Exhibit-18	Notice u/s 67 to Chandan Singh
Exhibit-19	Certificate of registration & Insurance paper of seized vehicle
Exhibit-20	Receipt of GUABARI TOLL, PLAZA NH-31© WEST BENGAL



Exhibit-21	Photo copy of Driving license of Sachidanand Rai
Exhibit-22	Photo copy of driving license of Birbahadur Rai.
Exhibit-22/1	Permission of judicial remand dated 17.12.2020
Exhibit-23	Receipt of Malkhana
Exhibit-24	Compliance under Section 57 of the NDPS Act of search cum seizure and information of arresting.
Exhibit-25	Initial on receipt of Bolero vehicle
Exhibit-26	Writing and signature of complaint petition
Exhibit-27	Application dated 17.07.2018
Exhibit-28	Letter for obtaining of criminal history of Birbahadur Rai and Sachidanand Rai.
Exhibit-29	Search list of the house of Sachidanand Rai
Exhibit-30	Search list of the house of Birbahadur Rai
Exhibit-31	CRCL, test report of Kolkata
Exhibit-32	Notice-67 which was sent to Ajay Bhagat
Exhibit-33	Notice-67 and handing over
Exhibit-33/1	Application on 28.09.2018
Exhibit-34	Letter dated 05.10.2018 addressed to NCB Guwahati
Exhibit-35,25/1 to 35/3	Carbon copy of original letter addressed to officer-in-charge Raghapur and Vaishali
Exhibit-36	Request letter for CAF and CDR
Exhibit-37	Request letter for sending CAF
Exhibit-38	Report called from to IDEA, Boring Road, Patna
Exhibit-39	Original copy of call for report from AIRTEL, Patna regarding CAF and CDR.
Exhibit-39/1	Photo copy of register of NCB of dues dated 10.05.2022 (one page)
Exhibit-40	Application u/s 52A(2) dated 10.05.2022.
Exhibit-41	Photograph dated 10.05.2022.
Exhibit-42	Certification of destruction.

8. After examination of prosecution witnesses and



by taking note of evidence and incriminating circumstances as surfaced during trial, statement of accused persons/appellants was recorded under Section 313 of the Cr.P.C. on 28.02.2023 which was denied by the appellants/convicts in totality by claiming their complete innocence and false implication.

9. On the basis of evidences as surfaced during the trial, the learned trial court convicted and sentenced the appellants/convicts, in aforesaid terms. Being aggrieved of which present appeal was preferred.

10. Hence, the present appeal.

Submission on behalf of the appellants/convicts

11. Mr. Sudhir Kumar Singh, learned counsel appearing on behalf of the appellants/convicts submitted that particularly from the deposition of testimony of PW-1 and PW-5, the time of recovery and receiving information are altogether different as raised through complaint petition/F.I.R., which makes the entire story of recovery of contraband/Ganja false on its face.

12. It is submitted that alleged recovery was made



about 9:15 p.m., while alleged white coloured Bolero vehicle was coming from Guwahati side. It is submitted that the mandatory provision of Section 42, 50 and 52A of the N.D.P.S. Act not appears to be followed in the present case, as it transpired from the testimony of prosecution witnesses and, on this ground alone, the conviction, as recorded by the learned trial court be quashed and set-aside.

13. It is also submitted by learned counsel that mandatory provision of law regarding seizure, sampling and sealing ('S.S.S.') also not appears to be followed, which further makes conviction doubtful.

14. It is submitted that the seized contraband was not produced during the trial before the court and even the destruction certificate, which is available on record, not appears to be proved. In support of his submission learned counsel for the appellants/convicts relied upon the legal reports of Hon'ble Supreme Court as available through **Yusuf @ Asif Vs. State [2023 SCC Online SC 1328]; Simarnjit Singh Vs. State of Punjab [2023 SCC Online SC 906]** and **Mangilal Vs. State of Madhya Pradesh**



[2023 SCC Online SC 862].

15. Mr. Awadhesh Kumar Pandey, learned Central Government Counsel (in short 'C.G.C.') appearing on behalf of the Union of India, while opposing the appeal, submitted that the appellants/convicts were apprehended with vehicle carrying commercial quantity of Ganja, which was total of 226 kgs. It is submitted that as per call detail report (CDR), appellants were found in conversation with each other and also with other co-accused persons, which is sufficient to suggest their culpable mental state in view of Section 35 of the N.D.P.S. Act. It is submitted that the sampling was done in terms of law as per the testimony of prosecution witnesses except PW-1. In this context, it is submitted that the sample was drawn from each of the seized packets which after getting mixed up, four sample each of 25 grams was prepared as per law, but fairly conceded that said sampling was not done before Judicial Magistrate in view of Section 52A of N.D.P.S. Act.

16. It is submitted by learned C.G.C. that destruction certificate was produced during the trial as



contraband/Ganja was destroyed in view of the decision of Hon'ble Supreme Court as available through **Union of India Vs. Mohanlal & Anr.** reported in **(2016) 3 SCC 379**, and said certificate was exhibited as **Exhibit-42** during the trial.

17. I have perused the trial court records carefully and gone through the evidences available on record and also considered the rival submissions as canvassed by learned counsel appearing on behalf of the parties.

18. As to re-appreciate the evidences, while dealing with present appeal, it would be apposite to discuss the evidences as available on record.

19. It appears from the deposition of PW-6/informant of this case that he alongwith raiding party and other prosecution witnesses on 05.07.2018 proceeded for Bhagalpur from Patna at about 2:30 P.M. and after arrival at Parbatta, Naugachia, District-Bhagalpur at about 9:15 P.M., found that one white Bolero is coming from Bhagalpur side having Reg. No. WB33A 2702, which was asked to stop and found two persons were sitting inside the cabin, where one was on the driving seat and other was sited beside him.



Upon query, they disclosed their name. The person who was on the driving seat disclosed his name as Birbahadur Rai (appellant of Cr. Appeal (SJ) No. 4756 of 2023), where the person who was sitting beside the driver, disclosed his name as Sachidanand Rai (appellant in Cr. Appeal (SJ) No. 4960 of 2023).

20. It further appears from his deposition that both appellants were told about their rights under Section 50 of the N.D.P.S. Act and, thereafter, by taking their consent, the vehicle was searched where, total of 123 packets was recovered. After opening each of the packets, some dry substance of brown colour like Ganja was found, which after taking small sample (quantity not specified) from each of the packets mixed-up together and thereafter tested by drug detection kit, which upon test, found Ganja. It was further deposed by him that all 123 packets were divided into two lots 'A' and 'B', where all packets were marked from series P1 to P123. In first lot 'A' they took packets from P1 to P33 series, whereas in second lot marked as 'B', they took packets from P33 to P123 series. It was deposed that upon



weighing by electronic weighing machine, the lot 'A' was total found 135 kgs., whereas lot 'B' was total found as 91 Kg. i.e. total of 226 kgs. of Ganja.

21. This Court is unable to gather that how after taking out any quantity of sample from each of the packets, after weighing, it was not found less than 226 kgs. It appears from deposition of PW-6 that the sample was drawn from the lot and not from each of the packets. The two samples each of 25 grams which was taken from lot 'A' was marked as AS1 and AS2, whereas the samples which was taken from lot 'B' was marked as BS1 and BS2. The rest of contraband as per lot 'A' and 'B' were kept in total of 12 Jute bags, where the contraband of lot 'A' was packed in five jute bags and contraband i.e. Ganja of lot 'B' was packed in seven jute bags. It was deposed to be sealed by departmental seal having inscription NCB-1. It was deposed that test memo, search and seizure list was prepared at place of recovery itself. He identified his signature on search-cum-seizure list before the court. He also identified the notice given to appellants under Section 50 of the



N.D.P.S. Act. It is apparent from his deposition that seizure and sampling was done at place of recovery itself and not before the Magistrate, which is apparently in violation of Section 52A of N.D.P.S. Act. His entire deposition is silent whether any compliance of Section 42 of the N.D.P.S. Act was made in this case. It appears from his deposition that seized sample was sent for forensic examination to Kolkata and rest of contrabands kept in 12 jute bags deposited with NCB Malkhana. Almost all prosecution witnesses have deposed on same line regarding recovery of 226 kgs. of Ganja from aforesaid white Bolero vehicle and, therefore, same not required any further discussion for the sake of brevity. However, major contradiction, which is appearing from deposition of PW-1 is regarding the time of recovery of contraband/Ganja, as it appears from paragraph '3' of his cross-examination that occurrence i.e. recovery took place somewhere between 1:30/2:00 P.M., he was the seizure list witness and he put his signature without going through its contents.

22. PW-4 namely, Chandan Rajak, who is also the



seizure list witness failed to disclose any specified time *qua* recovery, though he said that he remains at the place of recovery for about 2 to 3 hours, but he could not collect the time period out of his memory.

23. Testimony of these two seizure list witnesses *qua* recovery falsified the entire case on the ground of timing of recovery as raised through present complaint petition/F.I.R. Moreover, these two seizure list witnesses as per version of complaint petition itself, appears to be arranged witnesses for the reason that they appeared to be agree for witnessing the recovery upon persuasion of informant/PW-6. In that sense, they cannot be categorized as independent witnesses.

24. One of the major contradiction in support of false implication and also as to doubt the case of prosecution was pointed out by learned counsel that PW-6 who is informant/complainant of this case, deposed that he arrived at Bhagalpur at 8:30 P.M. and thereafter he contacted S.H.O. Parbatta Police Station, who deposed during the trial as PW-5, but it transpired from the deposition of PW-5 itself,



that he was aware about this raid since 12.30 A.M. as he received telephonic call of PW-6 regarding present raid. This contradiction is not having of such convincing value which may create a doubt *qua* entire crime in question/recovery of contraband.

25. From the deposition of almost all prosecution witnesses including PW-6/ informant it appears that compliance of section 42 of the N.D.P.S. Act not followed in the present case. Compliance of Section 52A of the N.D.P.S. Act is admittedly not followed in present case as it appears from the deposition of PW-6/informant and also from deposition of PW-5 and other prosecution witnesses. It also appears that sampling was done at the place of recovery and not before the Magistrate.

26. In this context, it would be apposite to reproduce paragraph '11, 12, 13, 15 & 16' of the judgment of Hon'ble Apex Court in **Yusuf @ Asif's** case (supra), which reads as under:-

"11. For the sake of convenience, relevant sub-sections of Section 52A of the NDPS Act are reproduced hereinbelow:

"52A. Disposal of seized narcotic drugs and



psychotropic substances.-

(1) -----

(2) Where any [narcotic drugs, psychotropic substances, controlled substances or conveyances] has been seized and forwarded to the officer-in-charge of the nearest police station or to the officer empowered under section 53, the officer referred to in sub-section (1) shall prepare an inventory of such [narcotic drugs, psychotropic substances, controlled substances or conveyances] containing such details relating to their description, quality, quantity, mode of packing, marks, numbers or such other identifying particulars of the [narcotic drugs, psychotropic substances, controlled substances or conveyances] or the packing in which they are packed, country of origin and other particulars as the officer referred to in sub-section (1) may consider relevant to the identity of the [narcotic drugs, psychotropic substances, controlled substances or conveyances] in any proceedings under this Act and make an application, to any Magistrate for the purpose of-

(a) certifying the correctness of the inventory so prepared; or

(b) taking, in the presence of such Magistrate, photographs of [such drugs or substances or conveyances] and certifying such photographs as true; or

(c) allowing to draw representative samples of such drugs or substances, in the presence of such Magistrate and certifying the correctness of any list of samples so drawn.

(3) Where an application is made under subsection (2), the Magistrate shall, as soon as may be, allow the application.

(4) Notwithstanding anything contained in the Indian Evidence Act, 1872 (1 of 1872) or the Criminal Procedure Code, 1973 (2 of 1974), every court trying an offence under this Act, shall treat the inventory, the photographs of [narcotic drugs, psychotropic substances, controlled substances or conveyances] and any list of samples drawn under sub-section (2) and certified by the Magistrate, as primary evidence in respect of such offence."

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.

15. In **Mohanlal's** case, the apex court while dealing with Section 52A of the NDPS Act clearly laid down that it is manifest from the said provision that upon seizure of the contraband, it has to be forwarded either to the officer-in-charge of the nearest police station or to the officer empowered under Section 53 who is obliged to prepare an inventory of the seized contraband and then to make an application to the Magistrate for the purposes of getting its correctness certified. It has been further laid down that the samples drawn in the presence of the Magistrate and the list thereof on being certified alone would constitute primary evidence for the purposes of the trial.

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



vitiating."

27. In **Simarnjit Singh's** case (supra), the Hon'ble Apex has held in paragraph **9 and 10**, which reads as under:

"**9.** In paragraphs 15 to 17 of the decision of this Court in **Mohanlal's** case, it was held thus:

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

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

17. The question of drawing of samples at the time of seizure which, more often than not, takes place in the absence of the Magistrate does not in the above scheme of things arise. This is so especially when according to Section 52-A(4) of the Act, samples drawn and certified by the Magistrate in compliance with subsections (2) and (3) of Section 52-A above constitute primary evidence



for the purpose of the trial. Suffice it to say that there is no provision in the Act that mandates taking of samples at the time of seizure. That is perhaps why none of the States claim to be taking samples at the time of seizure."

10. Hence, the act of PW-7 of drawing samples from all the packets at the time seizure is not in conformity with the law laid down by this Court in the case of **Mohanlal**. This creates a serious doubt about the prosecution's case that substance recovered was a contraband.

28. It would be further apposite to reproduce paragraph 6, 8 and 9 of the **Mangilal's** case (supra), which reads 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.”

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."

9. On the issue of seizure in the presence of Magistrate, we wish to place reliance upon the decision of this Court in *Union of India v. Mohanlal*, (2016) 3 SCC 379:

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



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

18. Be that as it may, a conflict between the statutory provision governing taking of samples and the Standing Order issued by the Central Government is evident when the two are placed in juxtaposition. There is no gainsaid that such a conflict shall have to be resolved in favour of the statute on first principles of interpretation but the continuance of the statutory notification in its present form is bound to create confusion in the minds of the authorities concerned instead of helping them in the discharge of their duties. The Central Government would, therefore, do well, to reexamine the matter and take suitable steps in the above direction."

29. In view of aforesaid discussion of evidence and by taking a guiding note of settled legal ratio as discussed above, it appears that the mandatory provision of sampling, seizure and sealing not appears to be followed in this case, beside non-compliance of Section 52A of the N.D.P.S. Act, and, therefore, it can be said safely that prosecution could not established its case beyond all reasonable doubts during the trial, benefit of which must be extended to the appellants/convicts.



30. Accordingly, both above-named appellants/convicts (of both appeals), are hereby acquitted by giving them benefit of doubts from the charges leveled against them by the learned Trial Court. Impugned judgment stands quashed/set-aside.

31. Both the appeals stand allowed.

32. Since appellant namely, Sachidanand Rai (in Cr. Appeal (SJ) No. 4960 of 2023) is in custody, he is directed to be released forthwith, if his presence is not required in any other case.

33. Appellant namely, Birbahadur Rai (in Cr. Appeal (SJ) No. 4756 of 2023) is on bail, he is discharged from the liabilities of bail bonds and sureties. Fine, if any, deposited, be returned to the appellant immediately.

34. Let copy of this judgment be sent to learned trial court alongwith Trial Court Record.

(Chandra Shekhar Jha, J.)

Rajeev/-

AFR/NAFR	NAFR
CAV DATE	NA
Uploading Date	07.10.2024
Transmission Date	07.10.2024

