

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.71 of 2023

Arising Out of PS. Case No.-184 Year-2020 Thana- BUXAR District- Buxar

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Brijpal, Son of Rajole Resident of L1/1339, Gali No.7, Sangam Bihar Devoli,
P.S.- Name Sarai, South Delhi, District- Delhi, State- Delhi

... .. Appellant

Versus

The State of Bihar

... .. Respondent

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Appearance :

For the Appellant/s : Mr. Chandra Mohan Singh, Advocate

For the Respondent/s : Ms. Abha Singh, APP

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CORAM: HONOURABLE MR. JUSTICE CHANDRA SHEKHAR JHA
ORAL JUDGMENT

01.10.2024.

At the outset, it is important to mention that this appeal was taken on board under the caption **“For Orders”** where initially prayer of bail and suspension of sentence under Section 389(1) of the Cr.P.C. was raised by learned counsel appearing on behalf of the appellant but, after short argument, it is submitted that he is ready for final hearing of the appeal, which was not objected by learned APP and, therefore, this appeal is being finally heard under aforesaid caption. Submission for final hearing is raised mainly in view of Section 374(4) of the Cr.P.C., where every such appeal is to be



decided within six months of its filing.

2. This appeal has been preferred by the appellant/convict under Section 374(2) of the Code of Criminal Procedure (hereinafter referred to as 'the Code') challenging the impugned judgment of conviction dated 15.10.2022 and order of sentence dated 18.10.2022 passed by learned Additional Sessions Judge-XI, Buxar, in N.D.P.S. Case No. 08/2020 (arising out of Buxar (Town) P.S. Case No. 184 of 2020, whereby the concerned Trial Court has convicted the appellant/convict for the offences punishable under Sections 20(b)(ii)(C) of the Narcotics Drugs and Psychotropic Substances Act (for short N.D.P.S. Act.) and he has been sentenced to undergo rigorous imprisonment for ten years with fine of Rs. 1,00,000/- and in default of payment of fine to further undergo rigorous imprisonment for six months for the offence punishable under Section 20(b)(ii)(C) of the N.D.P.S. Act, rigorous imprisonment for ten years and fine of Rs.



1,00,000/- and in default of payment of fine, to further undergo rigorous imprisonment for six months for the offence punishable under Section 22(C) of the N.D.P.S. Act, rigorous imprisonment for ten years with fine of Rs.1,00,000/- and in default of payment of fine further to undergo R.I. for six months, R.I. for ten years under Section 27A of N.D.P.S. Act with fine of Rs. 1,00,000/- in default, to undergo R.I. for six months, further R.I. for ten years with fine of Rs. 1,00,000/- under Section 29 of the N.D.P.S. Act in default of payment of fine, to undergo R.I. for six months and further the appellant was ordered to undergo R.I. for one year under section 51 of the Disaster Management Act, 2005. However, all aforesaid sentences have been ordered to run concurrently.

3. The prosecution story as per FIR is that on 13.05.2020 at 09.05 AM, the informant received a secret information that some illegal psychotropic substance was being transported in Grey colour Hyundai



Sports car through Buxar-Kochas Marg to UP. It has further been alleged in the FIR that the informant/PW-2, Circle Officer, Satyendra Kumar and other members of Police were directed to take necessary action. A *sanha* was registered by informant regarding this and proceeded to that place with investigation kit and police force along with Circle Officer. The informant started vehicle checking at 09.35 and during aforesaid checking, the police stopped the alleged vehicle at about 10.50 AM. A valid vehicle pass was issued by SDM Saket Delhi dated 11.05.2020 attached on front glass of the car bearing No. UP76L4827, upon which, the name of appellant, namely, Brijpal was written. Due to lock-down, no independent witness was found, therefore, in presence of two constables, namely, Manish Kumar (P.W.-4) and Deepak Kumar Rana (P.W.-3), the alleged car was searched by the informant and police personnel in accordance with law and after compliance of Section 50 of the N.D.P.S. Act. Notice under Section 50 of



N.D.P.S. Act was signed by C.O. Satyendra Kumar, informant and two witnesses, Manish Kumar and Deepak Kumar. On being searched, a smart cell phone of OPPO company, another cell phone of LETV company of golden colour, a key pad cell phone of ZIOX company, Rs. 2500/- cash, license card, pan card, two Adhar Cards, Sale letter dated 17.01.2020 were recovered from possession of the accused person. Apart from these articles, 23 packets of *Ganja* like substance, each of 1 kg and 8 packets of *Ganja* like substance, each of 500 gms were recovered from possession of the accused-appellant and marked by informant as S-1 and S-2. Sample of seized article was prepared on a plain paper by the informant, which was signed by informant, C.O. Satyendra Kumar Singh, constable Manish Singh and Deepak Kumar Rana. Seizure list was prepared. On being asked, the accused-appellant told the informant that the alleged 27 kg ganja was given to him by an unknown person and that would be delivered to Rajesh



Singh S/o Kishan Singh, House No. 788, Gali No-9, Sangam Bihar Church, New Delhi and the aforesaid Rajesh had transferred one lakh rupees in account of the said unknown person. The case was registered and accused arrested.

4. On the basis of aforesaid written statement, an FIR was lodged on 13.05.2020 by the Sub Inspector of Police, being Buxar (Town) P.S. Case No.184 of 2020 registered under Sections 417, 418, 419, 420, 467, 468, 471, 188, 269, 270 and 271 of the I.P.C and under Sections 20(b)(ii)(C), 22, 25, 27(a) and 29 of the N.D.P.S. Act and Section 51 of the Disaster Management Act. After investigation, the police submitted charge sheet against the sole accused-appellant, namely, Brijpal vide charge-sheet No. 341 of 2020 dated 30.07.2020 under Sections 20(b) (ii)(C), 22, 27(a) and 29 of the N.D.P.S. Act and Section 51 of Disaster Management Act, 2005 and Sections 417, 418, 419, 420, 467, 471, 188, 269, 270 and 271 of the



Indian Penal Code. Thereafter, cognizance was taken by the Court.

5. The learned trial Court explained the aforesaid charges to appellant/accused, to which, he pleaded “not guilty” and claimed to be tried.

6. To established its case before the learned trial Court, the prosecution has examined altogether seven witnesses. They are:-

P.W. No.	Name of witnesses
P.W.-1	Roushan Kumar (SHO, Dhansoi P.S.)
P.W.-2	Ranjeet Kumar (informant) SHO, Buxar Town P.S.
P.W.-3	Deepak Kumar Rana (Constable)
P.W.-4	Manish Kumar Singh (Constable)
P.W.-5	Ganesh Kumar Mandal
P.W.-6	Pramod Kumar Suman (Constable)
P.W.-7	Uday Shankar Prasad(I.O.)

7. The prosecution relied upon following documentary evidence also as to substantiate its case



during trial, which are as under:-

Exhibit No(s).	List of documents
Exhibit -1	Signature of informant P.W.-2 on seizure list
Exhibit 1/1	Signature of Anchal Adhikari on seizure list
Exhibit 1/2	Signature of accused Brij Pal on seizure list
Exhibit-2	Signature of informant on arrest memo
Exhibit-2/1	Signature of Anchal Adhikari on arrest memo
Exhibit-3	Signature of informant on self written statement
Exhibit-3/1	Signature of Anchal Adhikari on self statement of informant
Exhibit-4	Signature of informant on formal FIR
Exhibit-P-5	FSL Report

8. No oral or documentary evidence was produced during the trial by the appellant.

9. After examination of prosecution witnesses and by taking note of evidence and incriminating circumstances as surfaced during trial, statement of accused person/appellant was recorded under Section 313 of Cr.P.C. which was denied by the appellant in



totality by claiming his complete innocence and false implication.

10. On the basis of evidence as surfaced during the trial, the learned trial Court convicted and sentenced the appellant/convict, in aforesaid terms.

11. Being aggrieved with aforesaid judgment of conviction and order of sentence, the appellant/accused has preferred the present appeal.

12. Hence, the present appeal.

**Arguments on behalf of the
appellant/convict:**

13. It is submitted by learned counsel appearing for appellant that it is apparent from the testimony of PW-2, namely, Ranjeet Kumar, who is the informant of this case, that Search, Sealing and Seizure (SSS) of seized contraband/*Ganja* was not made as per mandatory provisions available under NDPS Act. It is submitted that compliance of Section 42 of the N.D.P.S. Act also not appears to be followed.



14. Learned counsel further submitted that the mandatory compliance of Section 52-A of the N.D.P.S. Act was not made in this case and on this score alone, the impugned judgment of conviction required to be set aside.

14.1. It is further submitted that sampling of seized material was not done at spot itself and further there are material contradictions surfaced amongst the different prosecution witnesses. It is further pointed out that even an attempt to search independent witness was not made by prosecution during seizure of the contraband and mere under the garb of COVID like situations, the availability of independent witnesses was overlooked. It is also pointed out that neither seized material was produced before the Court during the trial, as material exhibits nor any certificate regarding its destruction was produced and on this score also, the judgment of conviction is fit to be set aside/quashed.

14.2. 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. The learned APP, Ms. Abha Singh while appearing on behalf of the State submitted that the vehicle in issue was occupied by the appellant only and therefore, it cannot be said that he was not under the knowledge as to carrying the consignment of contraband i.e. *Ganja*. It is submitted that sampling was done in terms of law as per the testimony of prosecution witnesses, particularly PW-2 and if there is any flaw that is due to prevailing of extraordinary situation like COVID-19, whereas it was fairly conceded that sampling was not made before the Judicial Magistrate in view of Section 52-A of N.D.P.S. Act or appears to be destructed in view of **Union of India vs. Mohanlal**



[(2012) 7 SCC 712]. It was also conceded that no certificate regarding destruction of contraband was produced during the trial. The learned APP further pointed out that the search was made in presence of the Circle Officer (C.O.) of the area, who was there in capacity of Executive Magistrate and, therefore, it appears that entire Search, Sealing and Seizure was made in presence of Executive Magistrate, as such, same cannot be viewed with doubt. Hence, it is submitted that impugned judgment under appeal is not required to be interfered on the grounds, as submitted above.

16. 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.

17. As to re-appreciate the evidences, while dealing with present appeal, it would be apposite to



discuss the evidences as available on record.

18. It appears from the perusal of record and the submissions raised by the parties that the most important witness of this case is PW-2 Ranjeet Kumar, who is also the informant of this case. He received information from his Senior Officers on 13.05.2020 that one i-10 Car (further stated as one light motor vehicle) was coming from the side of Sadar Hospital, Buxar and going towards Uttar Pradesh, which was loaded with *Ganja*. Upon such information, he (PW-2) constituted a team consisting of C.O. Buxar, A.S.I. Raushan Kumar (PW-1), Constable Manish (PW-4), Pramod (PW-6), Ganesh (PW-5), Deepak Rai (PW-3). At that point of time, due to COVID lockdown, the movement of vehicle was less. He found that one vehicle from Buxar town-side is coming towards Chausa, which was asked to stop and was checked, upon checking, the driver of the vehicle was informed about the secret information that he is carrying the contraband i.e. *Ganja*. The consent of



search was given by the said driver, upon which, the vehicle was searched and thereafter, from its dickey, 23 packets, each containing 1kg of Ganja were recovered from a bag. Similarly, from another bag 8 packets, each of $\frac{1}{2}$ kg i.e. total of 4 kg was recovered and thus, from two bags total of 27 kg of Ganja was recovered from the dickey of the aforesaid vehicle. As there was no independent witness due to lockdown, therefore, two Constables of the raiding team was asked to be the witness of Search, Seizure and Sampling. It was said that electronic weighing machine was with them, which upon weighing, found that the total weight of contraband about 27 kgs. All the seized material was sealed at the place of occurrence itself. It was found during checking that the permission to drive in COVID lockdown was not issued in favour of the driver rather it was issued in name of different person, as the driver disclosed his name as Brijpal (appellant) who was the resident of Delhi. He collected I-Card of the appellant, which was



issued in two different names. He also seized mobile of the appellant and Rs. 2,500/-. A seizure list was prepared for all seized materials, which was signed by the members of the raiding team and also by Circle Officer. He identified the seizure list during the trial, which upon, his identification, exhibited as **Exhibit-1**. He also identified the signature of Circle Officer, which upon his identification, exhibited as **Exhibit-1/1**. He also identified the signature of appellant over said seizure list, which upon his identification, exhibited as **Exhibit-1/2**. He also identified his signature on arrest memo of the appellant which upon his identification exhibited as **Exhibit-2**. He also identified the signature of C.O. on arrest memo of appellant, which upon his identification, was exhibited as **Exhibit-2/1**. He reported the aforesaid information through computer typed application to S.H.O. Town, District-Buxar. He identified his signature on his written information, which upon his identification, exhibited as **Exhibit-3**. He also



identified the signature of Circle Officer over said written information, which upon his identification, was exhibited as **Exhibit-3/1**. He identified the writing of Thana Manager, namely, Varsha Jain, who said to written the formal FIR, which upon his identification, was exhibited as **Exhibit-4**.

18.1. Upon cross-examination, it was stated by him that the seized material was not before him. It was also stated that the Circle Officer did not disclose his post below his signature. He failed to disclose the station diary entry regarding information. He did not even enquire about the seized vehicle. It was categorically stated by him that on sealed article there was no signature of any witness, seizure list was also not signed. It also appears from his examination-in-chief that the sampling was done in very illegal manner as sample was not drawn from each of the packets and moreover the weight of sample was also not specified.

19. **PW-1** is **Raushan Kumar**, who was



posted as A.S.I. in Buxar Town Police Station and was also the member of the raiding team. He narrated almost same story regarding recovery of 27 kgs. of Ganja on 13.05.2020 from a vehicle where the appellant was driver, as it was deposed by PW-2 and the same was not required to be repeated again for the sake of brevity. He failed to disclose the number of seized vehicle carrying consignment of contraband/Ganja. It was stated that traffic remains available on Buxar Chausa road but on that particular day, due to lockdown it was less. Seized material was also not produced before him. He failed to disclose that from where weighing machine was brought.

20. **PW-3** is **Deepak Kumar Rana**, who was the member of the raiding team and was posted in Town P.S. Buxar as a constable. It appears from his examination-in-chief that recovered Ganja was between 27-28 kgs. The seized material was not even produced before him. He failed to disclose about the exact number



of vehicle, which was being checked on that day but, subsequently, stated that 25-30 vehicles were checked. He also failed to disclose that from where the weighing machine was brought. His statement was not recorded by Police Inspector i.e. PW-7 during the course of investigation, which is sufficient to gather that he deposed first time during the trial as PW-3.

21. **PW-4** is **Manish Kumar Singh**, who was also posted on 13.05.2020 in Buxar Town Police Station as Constable and was also the member of the raiding team. He narrated the recovery in the same manner as it was deposed by PW-2/informant. It was stated that recovered quantity of Ganja was 27 kg. The seized material was also not produced before him during the trial. The sealed material was also not bearing his signature. It was deposited in *Malkhana* by Ranjeet Sir (PW-2/informant). He failed to disclose the Entry No. of *Malkhana*. On contrary, it was stated that Buxar Chausa road is a busy road.



22. **PW-5** is **Gangesh Kumar Mandal**, who also supported the occurrence by stating that recovery was 27 kg of Ganja.

22.1. Upon cross-examination, he was unable to disclose the vehicle number. He failed to disclose whether sealing was made before him or not, the sealed material was not produced before him. He did not sign over seal. It was stated by him that the seized material was weighed at *Thana* contrary to the earlier statement of the prosecution witnesses that it was weighed at place of occurrence itself.

23. **PW-6** is **Pramod Kumar Suman** who also supported the occurrence and recovery of contraband i.e. of 27 kg from the vehicle where the appellant was driver on 13.05.2020.

23.1. Upon cross-examination, it was stated that seized material was not produced before him during the trial. He did not even sign the seal. It was stated that Malkhana Register was signed by Ranjeet



Kumar/PW-2. It was also stated by him that the seized material was weighed in Police Station. This fact of weighing contraband at Police Station as deposed by PW-5 appears contrary to rest of the prosecution witnesses.

24. **PW-7** is the Investigation Officer of this case, who is Uday Shankar Prasad and was posted as A.S.I. in Town Police Station on 13.05.2020. He received investigation report of present case bearing Buxar (Town) P.S. Case No. 184 of 2020 on 13.05.2020. During investigation, he recorded the statements of seizure list witnesses, informant and other prosecution witnesses including Constable Deepak Kumar, who categorically stated as PW-3 that his statement was not recorded by Daroga Ji. After concluding the investigation, he submitted the charge-sheet against appellant through Charge-Sheet No. 341/2020.

24.1. Upon cross-examination, he failed to



disclose the number of seized vehicle. It was stated that seized material was sealed by S.H.O. i.e. PW-2/informant and the Circle Officer. He failed to state whether seal was put under signature of any witness or not. Seizure list witness was not produced before him during the trial. It was stated that for chemical examination 40 gms of seized contraband was taken out from each of the seized packets as a sample. No statement of Gazetted Officer was recorded. He never visited the house of appellant in connection with investigation. He did not mention the exhibit mark of seized materials in case diary. He only mentioned Mark-SI and Mark-S2, which was not produced before him during the trial.

25. From the aforesaid discussions of the evidences as available on record, it appears that whether the weighing of seized contraband at spot appears doubtful, as two prosecution witnesses PW-5 and PW-6 stated that the weighing was done at Police Station, if it



is so, then Sealing, Sampling and Seizure of seized material at place of recovery itself is appearing doubtful. All prosecution witnesses including informant/PW-2 and Investigating Officer/PW-7 categorically stated during trial that seized contraband was not produced before them. They are also silent about destruction of contraband and also to produce any certificate before the Court. Withdrawal of sample of seized contraband, before Judicial Magistrate is also not appears available out of testimony of prosecution witnesses, which appears straightway violation of mandatory provisions of law as available under Section 52A of N.D.P.S. Act. The compliance of Sections 42 and 50 of N.D.P.S. Act also appear doubtful, whereas a mere formal attempt regarding search notice under Section 50 of N.D.P.S. Act appears available.

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 vitiated."

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."

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 provisions of Sampling, Seizure and Sealing (SSS) not appears to be followed in this case beside non-compliance of Section 52-A of the N.D.P.S. Act. There are major contradictions also surfaced amongst the testimony of the prosecution witnesses, who are none but the members of raiding team and were present at the place of occurrence from very beginning of raid to its conclusion.

30. Therefore, it can be said safely that prosecution could not established its case beyond all reasonable doubt during the trial, the benefit of which must be extended to the appellant/convict.

31. Hence, the appeal stands allowed.



32. Accordingly, the impugned judgment of conviction dated 15.10.2022 and order of sentence dated 18.10.2022 respectively passed by learned Additional Sessions Judge-XI, Buxar in N.D.P.S. Case No. 08/2020 arising out of Buxar (Town) P.S. Case No. 184 of 2020 is hereby quashed and set aside. Consequently, the appellant is acquitted of the charges levelled against him.

33. Since appellant namely, Brijpal is in custody, he is directed to be released forthwith, if his presence is not required in any other case.

34. Fine, if any paid by appellant be returned to him immediately.

35. Let a copy of this judgment be sent to learned trial court along with Trial Court Record.

(Chandra Shekhar Jha, J.)

Shubham/Jyoti/-

AFR/NAFR	NAFR
CAV DATE	NA
Uploading Date	08.10.2024
Transmission Date	08.10.2024

