

**IN THE HIGH COURT OF JUDICATURE AT PATNA**  
**CRIMINAL APPEAL (DB) No.474 of 2018**

Arising Out of PS. Case No.-716 Year-2012 Thana- BETTIAH CITY District- West  
Champaran

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1. Ashraf Ali Ansari @ Ashraf Ali, Son of Safik Ansari, Resident of Village/Mohalla- Chaudharana, Police Station- Arrah Town, District- Bhojpur.
  2. Bablu Hazam, Son of Nizamuddin Hazam, Resident of Village/Mohalla- Khetari, Police Station- Arrah Town, District- Bhojpur.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

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**Appearance :**

|                    |   |                                                                                          |
|--------------------|---|------------------------------------------------------------------------------------------|
| For the Appellants | : | Mr. Sanjeev Kumar, Advocate<br>Mr. Raushan Raj, Advocate<br>Mr. Sitesh Kashyap, Advocate |
| For the State      | : | Ms. Shashi Bala Verma, APP                                                               |

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**CORAM: HONOURABLE MR. JUSTICE MOHIT KUMAR SHAH**  
**and**  
**HONOURABLE MR. JUSTICE SHAILENDRA SINGH**  
**ORAL JUDGMENT**  
**(Per: HONOURABLE MR. JUSTICE SHAILENDRA SINGH)**

**Date : 17-06-2025**

Heard Mr. Sanjeev Kumar, learned counsel for the appellants and Ms. Shashi Bala Verma, learned APP for the State.

2. The present criminal appeal has been preferred by the appellants namely, Ashraf Ali Ansari @ Ashraf Ali and Bablu Hazam against the judgment of conviction and order of sentence dated 20.02.2018 passed by the court of learned 5<sup>th</sup> Additional Sessions Judge, Bettiah, West Champaran, in connection with Trial No. 32 of 2013 arising out of Bettiah



Town P.S. Case No. 716 of 2012 registered under sections 20, 22, 23, 24, 27A and 29 of the Narcotic Drugs And Psychotropic Substances Act, 1985 (in short 'NDPS Act'), whereby the appellants have been convicted under Section 20(b)(ii)(c) of the NDPS Act and sentenced to undergo rigorous imprisonment for 15 years with a fine of Rs. 1,00,000/- (rupees one lakh) each.

**Prosecution Story :-**

**3.** The prosecution story in brief as it appears from the FIR is as follows :-

In the night of 05.10.2012 at 2:30 A.M., the informant, namely, Naresh Kumar, Sub-Inspector-cum-Station House Officer of Town police station, Bettiah got a secret information that an infamous and absconding accused Samir Ansari had sent his shooter Ali to shoot one Punnu Srivasatav, a resident of Gulabbagh and the said shooter intended to and is going to make murder attempt on Punnu Srivasatav in the morning of that day. Thereafter, he (informant) recorded a sanha in the police register and also informed the Superintendent of Police (in short 'SP'), Bettiah about the said secret information and then, as per the direction given by the SP, Bettiah, a special police team led by Sub-Divisional Police Officer (in short 'SDPO'), Sadar Bettiah, was constituted in which SHOs of



Muffasil P.S., Natun P.S., Bariya P.S., Srinagar Pujha P.S., Panpatiya P.S., Manuaapul P.S. and also, some other police officials, namely, Yusuf Ansari, Pramod Kumar Rai, Anil Ram, Pramod Prasad, Mukesh Kumar, Narendra Kumar, Om Prakash Chauhan and Vijay Kumar Sinha, who were posted at the said police stations respectively, were made the members of the said police team and they were divided in four sub teams. As per the informant, he, police Sub-Inspector Yusuf Ansari, Sub-Inspector Vijay Kumar Sinha, Sub-Inspector Anil Ram, all posted at Nagar police station and SHO of Srinagar Pujha P.S. got an instruction to keep vigil and watch at Power House Chowk while the other police officials were deputed at other places. At about 5:30 A.M., a black colour pulsar motorcycle was seen coming from the eastern side which was signaled by the police officials to stop but the riders started fleeing upon seeing the police party, nonetheless they were apprehended by the police officials with the help of other police officials. Thereafter, two persons namely, Pankaj Mohan Singh, a resident of Lal Bazar and Md. Alam, a resident of Nanji Chowk, both under Nagar police station Bettiah, who were passing near to that place during the relevant time, were made witnesses by the police party, in whose presence the intercepted motorcycle bearing



registration No. BR22M/2639 was checked and when the two persons who were riding on the motorcycle were asked about their names, they disclosed their names as Ashraf Ali Ansari @ Ashraf Ali (appellant No. 1) and Bablu Hazam (appellant No. 2). Both the appellants were searched by the police party in the presence of Pankaj Mohan Singh and Md. Alam. From the rear part of the waist of Ashraf Ali Ansari, a semi automatic pistol, made in USA, was recovered and the same was found to be loaded with a magazine, in which five live bullets were found. From the right front pocket of the jeans pant of accused Ashraf Ali, two pudiyas (small packets) containing brown coloured substance, wrapped in white plastic material were recovered, which weighed about 20 gram and upon questioning, the said accused disclosed the seized material as to be Nepali *Charas*, however he could not produce any document to justify his possession of the seized motorcycle, firearms and narcotic material and also could not give satisfactory answer for keeping these articles in his possession. From the left part of the waist of accused Bablu Hazam, the police party recovered a countrymade semi-automatic pistol, made in USA, and loaded with a magazine, in which, five live bullets were found. Thereafter, the motorcycle was searched and two yellow colour



plastic packets were found in the Dicky of the motorcycle and from the said packets, a total 63 brown coloured small balls were found and upon questioning, both the accused/appellants disclosed these materials to be Nepali Charas, which was found to be 2 Kg upon weighing and the appellants also revealed that one person namely Samir Ansari had given them the seized narcotic material with a direction to take it from Birganj (in Nepal) to Banaras. Thereafter, the informant in the presence of other police officials as well as independent witnesses Pankaj Mohan Singh and Md. Alam, seized the accused persons' motorcycle, pistols along with bullets, mobile phones and narcotic materials, regarding which a seizure memo was also prepared on the spot with the signature of all the concerned police officials including the independent witnesses, of which one copy was given to the arrested accused persons who also made their signature upon the second copy of the seizure memo with regard to receipt thereof. As per the informant, regarding the recovery of motorcycle and illegal firearms, it was decided to prepare a separate report. According to the informant, despite best efforts, the presence of an Executive Magistrate could not be secured at the time of preparation of the seizure memo.

4. On the basis of the above-mentioned details of



the incident relating to search and seizure of the alleged articles, the informant Naresh Kumar, the then SHO of Town police station Bettiah, recorded his self statement (Ext.-2) and on the basis of the same, a formal FIR bearing Town (Bettiah) police station Case No. 716 of 2012 was registered, under sections 20, 22, 23, 24, 27A and 29 of NDPS Act against the appellants and one person namely Samir Ansari, which set the criminal law in motion.

5. After the completion of investigation, the appellants were chargesheeted for the alleged offences vide chargesheet No. 93/2013 dated 31.03.2013 and the investigation was kept pending against the third accused Samir Ansari and the FSL report of the seized contrabands was produced by the prosecution before the trial court during the course of trial.

6. Both the appellants stood charged for the offence under section 20(b)(ii)(C) of NDPS Act which was read over and explained to them in Hindi, to which they pleaded not guilty and claimed to be tried for the charged offence.

7. During the trial the prosecution examined seven prosecution witnesses who are as follows :-

|      | Name                | Relevancy                           |
|------|---------------------|-------------------------------------|
| PW-1 | Dhananjay Choudhary | A member of search and seizure team |
| PW-2 | Vijay Kumar Sinha   | A member of search and seizure team |
| PW-3 | Yusuf Ansari        | A member of search and seizure team |



|      |                       |                                     |
|------|-----------------------|-------------------------------------|
| PW-4 | Anil Ram              | A member of search and seizure team |
| PW-5 | Naresh Kumar          | Informant                           |
| PW-6 | Pramod Kumar Rai      | Investigating Officer               |
| PW-7 | Jitendra Prasad Singh | Malkhana-in-Charge                  |

**8.** In documentary evidence, the prosecution proved the following documents and got them exhibited, which are as under :-

|            |                                                                                       |
|------------|---------------------------------------------------------------------------------------|
| Ext-1      | Seizure memo                                                                          |
| Ext-1/a    | The signature of the informant on the seizure memo                                    |
| Ext-2      | Fardbeyan                                                                             |
| Ext- 2/a   | The signature of the informant on the fardbeyan                                       |
| Ext- 2/b   | The signature of the SHO Town Bettiah P.S. below the forwarding note on the fardbeyan |
| Ext-2/c    | An endorsement on self-statement of the informant                                     |
| Ext-3, 3/a | Signatures of SHO on formal FIR                                                       |
| Ext -4     | Chargesheet                                                                           |
| Ext -5     | FSL report                                                                            |

**9.** The prosecution also produced the seized narcotic materials before the trial court which were marked as Material exhibits 'I' & 'II'.

**10.** After taking the evidences of the prosecution, the statements of both the appellants were recorded under Section 313 of Cr.P.C. giving them an opportunity to explain the circumstances appearing against them from the prosecution's evidences which were flatly denied by them and they claimed themselves to be innocent but they did not take any specific defence in their statements except claiming themselves to be



innocent.

**11.** Here, it is important to mention that the statements of the appellants under Section 313 of Cr.P.C. were recorded two times by the trial court as the FSL report was produced in evidence by the prosecution after closing the prosecution's evidence, for which the prosecution's prayer was allowed under Section 311 of Cr.P.C. by the trial court and due to this reason, the statements of the appellants were again recorded in the light of further new evidence relating to FSL report.

**12.** Both the appellants did not give any evidence in their defence.

**13.** While convicting the appellants, the trial court concluded that the prosecution had succeeded in proving the recovery of alleged narcotic contrabands from appellants' possession, which was found to be *Charas* in chemical examination by the Forensic Science Laboratory (FSL), Patna and the prosecution has also succeeded in proving the recovery of the said contraband from the appellants' physical conscious possession and the evidence of the prosecution's witnesses regarding the search and seizure of the alleged contraband remained consistent. The learned trial court also concluded that the seizure of *Charas*, preparation of seizure list and lodging of



FIR stood proved from the evidence of PW-5 (the informant) and the seized articles were produced before the trial court by PW-7 in sealed condition bearing the signature of the seizing officer PW-5 and the learned trial court did not point out the non-compliance of any mandatory provision of the NDPS Act by the police officials while searching and seizing the alleged contraband as well as sampling from the same.

**Submissions on behalf of the appellants' counsel:-**

14. Mr. Sanjeev Kumar, learned counsel appearing for the appellants has argued that in the present matter as per the prosecution story, the entire process of search and seizure of contrabands was made before two independent witnesses, namely, Pankaj Mohan Singh and Md. Alam but none of them was produced and examined by the prosecution before the trial court, regarding which no explanation has been given by the prosecution and admittedly, the alleged place of recovery was situated at a busy public place but despite that the prosecution failed to examine any independent person to prove the alleged recovery of the contrabands from the physical and conscious possession of the appellants. The prosecution also failed to adduce reliable evidence to prove the factum of drawing of samples from the seized contrabands in a proper manner, in the



presence of a Magistrate and further, the mandatory provision of sub-section 2 of Section 52A of NDPS Act was not followed by the police party and as per prosecution story, two small packets wrapped in white plastic and two other packets wrapped in yellow colour plastic were found in the physical possession of the appellants as well as from their motorcycle. So, in view of these four recovered articles, four representative samples ought to have been drawn from each seized article but in this regard, no step was taken by the I.O. and there is no evidence to show that before drawing the samples, the materials of all these four seized articles were mixed or samples were drawn separately from each packet, hence, the sampling process was completely defective and even the prosecution failed to prove the said sampling with reliable evidence rather the prosecution witnesses made contradictory statements regarding the place of sampling. It has been further submitted that as per the evidence of the informant Naresh Kumar (PW-5), the seized contrabands were sealed at the place of recovery with the seal of Naresh Kumar, S.H.O. of Nagar (Bettiah) P.S., so, if the samples were drawn from the seized contrabands in the presence of a Magistrate then the seized articles must have been sealed again after drawing-up the samples with another seal in the presence of the concerned



Magistrate but as per PW-7, *Malkhana*-in-Charge of the P.S. concerned, who produced the seized contrabands in sealed state before the trial court, the sealed articles were containing the seal of the informant Naresh Kumar which was not possible if the samples had been taken after breaking the first seal of the seized contrabands in the presence of the Magistrate, which shows some manipulation in sealing process of the seized contrabands on the part of the informant or the investigating officer. Learned counsel has further argued that the drawn samples kept in two parcels were handed over to the police vide Memo No. 3312 dated 06.11.2012 by the concerned court at the request of the investigating officer for sending those samples to FSL, Patna but the said parcels reached in the office of FSL, Patna on 19.01.2013 i.e. more than two months later, which creates a strong possibility of tampering with the samples by the special messenger, namely, Satyendra Tiwari or someone else and the said delay could have been explained by the special messenger only, who was not produced and examined by the prosecution. It has been lastly submitted that the provisions of Section 55 of the NDPS Act were also not followed by the investigating officer.

**15.** In support of the aforesaid submissions, the learned counsel has placed reliance upon the judgment of the



Hon'ble Apex Court passed in the case of **Mohammed Khalid vs. State of Telangana** reported in **AIROnline 2024 SC 134** in which while setting aside the conviction and sentence of the accused for the offence under NDPS Act, the Hon'ble Apex Court took into account the fact that there was no evidence to prove the safe keeping of samples right from time of seizure till the same reached the FSL and the FSL report did not disclose about the panch chits, seals and signature of the accused on samples and also took into account the non-compliance of the provisions of section 52A of the NDPS Act by the investigating officer with regard to the requirement of preparing the inventory and obtaining samples in the presence of jurisdictional Magistrate. The observations made in paragraphs Nos. 20, 21 and 22 of the said judgment are being reproduced herein below for ready reference :-

*“ 20. The two independent panch witnesses i.e. Shareef Shah and Mithun Jana who were associated in the recovery proceedings, were not examined in evidence and no explanation was given by the prosecution as to why they were not being examined.*

*21. Sub-Inspector LW-10, who prepared three samples of ganja, as per the testimony of PW-5, was not examined in evidence. In addition thereto, the prosecution neither examined any witness nor produced any document to satisfy the Court regarding safe keeping of the samples right from the time of the seizure till the same reached the FSL. The official who collected the samples from the police station and carried the same to the FSL was not examined at the trial. From the quoted portion of the evidence of Seizure Officer(Inspector PW-1), it is clear as*



*day light that he handed over one of the three samples to the accused. The witness also admitted that he did not mention about sealing of the samples in the panchnama. Contrary to the evidence of PW-1, PW-5 stated that three samples of ganja were taken out by Sub-Inspector LW- 10 and were handed over to the witness who forwarded the same to the ACP for sending it to FSL. In cross-examination, the witness admitted that he did not file any document to show that the property was kept in malkhana. The malkhana register was not produced in the Court. The FSL report (Exhibit P-11) does not disclose about the panch chits and seals and signature of the accused on samples. The property deposited in the Court(muddamal) was not having any official seals. The witness also admitted that he did not take any permission from the Court for changing the original three packets of muddamal ganja to seven new bags for safe keeping. These glaring loopholes in the prosecution case give rise to an inescapable inference that the prosecution has miserably failed to prove the required link evidence to satisfy the Court regarding the safe custody of the sample packets from the time of the seizure till the same reached the FSL. Rather, the very possibility of three samples being sent to FSL is negated by the fact that the Seizure Officer handed over one of the three collected samples to the accused. Thus, their remained only two samples whereas three samples reached the FSL. This discrepancy completely shatters the prosecution case.*

*22. Admittedly, no proceedings under Section 52A of the NDPS Act were undertaken by the Investigating Officer PW-5 for preparing an inventory and obtaining samples in presence of the jurisdictional Magistrate. In this view of the matter, the FSL report(Exhibit 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. 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.”*



16. Learned counsel has also placed reliance upon the judgment of the Hon'ble Apex Court, passed in the case of **Simarnjit Singh v. State of Punjab**, reported in **AIR 2023 SC (SUPP) 1010** wherein the principles laid down by the Hon'ble Apex Court in the case of **Union of India vs. Mohanlal and Another** reported in **(2016) 3 SCC 379** with regard to the process of drawing of samples have been reiterated and while setting aside the conviction and sentence of the accused/appellant, the Hon'ble Apex court has doubted the prosecution's case on account of sampling from the alleged contraband having not been made as per the guiding principles laid down in the case of **Mohanlal** (supra). The relevant observations made in the paragraphs Nos. 8, 9 and 10 of the said judgment are being reproduced herein below for ready reference: -

*“ 8. 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 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."*

*9. 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 Mohanlall. This creates a serious doubt about the prosecution's case that substance recovered was a contraband.*

*10. Hence, the case of the prosecution is not free from suspicion and the same has not been established beyond a reasonable doubt. Accordingly, we set aside the impugned judgments insofar as the present appellant is concerned and quash his conviction and sentence.”*

**Submissions on behalf of State :**

17. On the other hand, Ms. Shashi Bala Verma, learned APP appearing for the State has argued that although the prosecution could not produce and examine two independent witnesses, namely, Pankaj Mohan Singh and Md. Alam, before whom the entire process of search and seizure of the alleged contrabands was made but all the other witnesses, who are police officials, remained fully consistent to the prosecution story and merely due to non-examination of the said private persons, the prosecution's case can not be thrown out completely. The prosecution's witnesses, including the informant have deposed and established that the seized contrabands were sealed at the spot and seizure memo was also prepared at the spot and this evidence has not been impeached by the appellants. So far as the process of sampling is concerned, no sort of illegality has been done by the



investigating officer as he had filed an application before the court concerned, upon which a Magistrate was deputed, before whom the samples were drawn and thereafter, the samples were handed over in sealed condition to Special Messenger to deposit it at FSL Patna and in chemical examination, the seized narcotic contrabands have been found to be *charas*. Learned APP has further argued that the seized contrabands were produced before the trial court in sealed condition and the appellants are not entitled to get any benefit merely on account of some delay in handing over the drawn samples to FSL Patna by the Special Messenger Satyendra Tiwari and in this regard, the investigating officer was not cross-examined by the appellants and if he was cross-examined on the said negligence then the delay could have been explained and furthermore, such delay is a mere procedural lapse, hence, the trial court has rightly convicted the appellants for the charged offence under the provisions contained in the NDPS Act, thus, there is no merit in this appeal.

**Consideration and Analysis : -**

18. We have heard both the sides, perused the evidences available on the record of the trial court and also gone through the statements of the accused persons and given thoughtful consideration to the above-mentioned submissions



advanced by both the sides.

19. It is a well settled principle of criminal jurisprudence that in serious offences like the offences under NDPS Act, stricter degree of proof is required to convict the accused and in this regard, the principle laid down by the Hon'ble Apex Court in the case of **Mousam Singha Roy & Ors. vs. State of West Bengal** reported in (2003) 12 SCC 377 is relevant.

20. In the matter of recovery of narcotic substance, the procedure of search, seizure, sampling and sealing of the contraband has much significance though any sort of procedural illegality or lapses in conducting any of these processes will not render the prosecution's case to be unbelievable completely unless, on account of such procedural lapses, it is shown that the same has caused serious prejudice to the accused.

21. Now, we come to the present case. The instant matter relates to the recovery of narcotic substance namely charas, semi-automatic pistols with loaded magazine, motorcycle and mobile phones from the possession of the appellants. In the present matter, the appellants faced trial only in respect of the recovery of alleged narcotic contraband and in relation to other seized articles another proceeding was drawn as



per the prosecution, so, the trial court confined itself only to the extent of recovery of narcotic contraband and accordingly, framed the charge for the offence under section 20(b)(ii)(c) of NDPS Act against the appellants. Both the appellants have assailed the judgment impugned mainly on five grounds. *First* is that two independent persons namely Pankaj Mohan Singh and Md. Alam, who, as per prosecution, witnessed the entire process of search and seizure, were not produced by the prosecution without any explanation and the conviction of the appellants is mainly based on the evidence of police officials who were highly interested in the success of the prosecution's case. *Second* ground is that the prosecution failed to prove the sampling process rather there are several circumstances which make the said sampling process to be highly doubtful and further, the provisions of section 52A of the NDPS Act were not followed by the police in true spirit. *Third* ground is that the prosecution failed to prove the safe keeping of the seized narcotic contraband as well as the samples drawn, right from the time of seizure till the same reached the FSL, Patna. *Fourth* ground is that the prosecution failed to prove the factum of receiving of secret information with regard to the appellants, who were allegedly sent by the co-accused Samir Ansari, which



was the basis of the action taken by the police party while in this regard, communication was made with the SP, Bettiah, upon whose direction a police team consisting of several police officials of several police stations was constituted but in this regard, no sort of written material showing the reduction of such information or communication in writing was produced by the prosecution, which could have been produced if the same had been reduced in writing. *Fifth* ground is that compliance of the provisions of section 57 of the NDPS Act has not been made.

**22.** Now, we shall discuss the evidences of the prosecution witnesses to find out the substance in the aforesaid grounds taken by the appellants as well as to evaluate the trial court's conclusion.

**23.** The prosecution's witness Dhananjay Choudhary (PW-1) has deposed in his chief examination that the seizure list was prepared at the spot of recovery. He deposed in the paragraph No. 5 of his cross-examination that the seized charas was sealed at the place of occurrence, upon which the then SHO put his own seal and the recovered charas was weighed at the spot of recovery and the SHO had brought the weighing machine with him. He further stated in the paragraph No. 14 of his cross-examination that the seized contraband was



found in open condition which was sealed at the spot of occurrence. He further stated that the independent persons were residents of a mohalla situated nearby the place of recovery. In the paragraph No. 23 of his cross-examination, he stated that an arrest memo in respect of the accused/appellants was also made along with the seizure list.

The prosecution's witness Vijay Kumar Sinha (PW-2), who is stated to be a member of the police party, stated in his examination-in-chief that the seizure list in respect of all seized materials including the narcotic contraband was prepared at the spot of recovery, of which, one copy was given to the accused, who were arrested at the place of occurrence. In paragraph No. 3 of his cross-examination, he deposed that the seized charas was not weighed at the place of occurrence and he revealed the weight of the seized contrabands as per his estimation.

The prosecution's witness Yusuf Ansari (PW-3), who was also a member of the police party, stated in his examination-in-chief that the seizure memo was prepared at the spot of recovery before two independent witnesses and both the accused/appellants were arrested who disclosed that the narcotic contrabands had been given to them by the co-accused Samir Ansari. When he was cross-examined on the point of sampling,



he stated that he did not remember the fact as to whether the samples were drawn on the spot or not.

The prosecution's witness Anil Ram (PW-4) has stated in his examination-in-chief that the seized charas was weighed by the SHO Naresh Kumar and they came at the place of recovery with a weighing machine and the samples were taken at the place of occurrence, upon which the Case No. was not written at that time. He further stated in the paragraph No. 6 of his cross-examination that the SHO, Naresh Kumar, prepared his self-statement at the place of occurrence and also prepared the arrest memo of the accused at the same time.

**24.** Now, we come to the evidence of the informant (PW-5) who was posted as the then SHO of the police station concerned and his evidence is very important. He has deposed in his examination-in-chief that on 05.10.2012, he was posted as SHO of Bettiah Nagar police station and on that day at about 2:30 A.M. he received a secret information to the effect that one Samir Ansari has made a plan to murder one Punnu Srivasatav and for executing the said plan, he has sent his shooter and in the morning of that day, his shooter would attack Punnu Srivasatav. Thereafter, he informed the Superintendent of Police, Bettiah, about the said secret information, upon whose



direction a police team under the leadership of Sub-Divisional Police Officer (SDPO) was constituted with the Station House Officers (SHOs) and other police officials of several police stations. He further stated in his examination-in-chief that on that day in the morning at about 5:30 A.M. a motorcycle was seen coming from the eastern side, which was being ridden by two persons. They signaled the riders to stop their motorcycle but upon seeing the police party, they (riders) made an attempt to flee away instead of stopping but they were apprehended by the police party and thereafter, in the presence of two independent persons, namely, Pankaj Mohan Singh and Md. Alam, they as well as their motorcycle were searched. Upon searching, various contrabands, as mentioned in the preceding paragraph No. 3, were recovered. He has further stated in paragraphs Nos. 8, 9 and 10 of his examination-in-chief that in respect of the recovered firearms and charas, the seizure list was prepared at the spot of recovery, of which one copy was also given to the accused, after taking their signatures upon it. The witness accepted the seizure list to be in his writing and also accepted his signature upon it, which were marked as Ext. '1' and '1/a'. According to him, the seizure list as well as his self statement was prepared at the spot of recovery and thereafter,



the Sub-Inspector Pramod Kumar was appointed as investigating officer to investigate the case pertaining to the said recoveries of contrabands. In cross-examination, he (PW-5/informant) has stated that in respect of arresting of the accused/appellants, the arrest memo was prepared at the spot and the seized contrabands were weighed with the help of a weighing machine which was taken from a passerby who was passing by along with his cart near the place of recovery. He further deposed in the paragraph Nos. 21 and 24 of his cross-examination that the recovered charas was sealed at the place of occurrence and he did not take samples from it and he did not send the seized material to FSL, Patna and in this regard, the investigating officer could give the details.

**25.** The prosecution's witness Pramod Kumar (PW-6) is the investigating officer of the present matter. He stated in paragraph No. 5 of his examination-in-chief that the seized Nepali charas was sent to FSL, Patna.

The prosecution's witness Jitendra Prasad Singh (PW-7) was the then Malkhana-in-Charge of the concerned police station and he was not a member of the police party who had apprehended the accused/appellants and had recovered the alleged contrabands and his evidence is relevant to the extent of



keeping the seized contrabands in police malkhana and producing the same before the trial court. He had deposed in his examination-in-chief that he had brought the seized articles before the trial court from Bettiah Town Malkhana and the Charas produced before the trial court was in a sealed state. While recording the examination-in-chief of this witness, the trial court found that the articles which had been produced was sealed, whereafter the seal was broken at the direction of the trial court and upon opening the seal, two packets containing the alleged charas were found which were marked as material exhibits 'I' and 'II' and as per this witness, the total weight of the said packets was about 2 kg. In cross-examination, he has deposed that he brought the seized materials from Bettiah Town Malkhana for complying with the court's order and there was signature of the then SHO Naresh Kumar upon the seized materials which were produced by him in the trial court.

**26.** From the discussion of the evidence of above prosecution witnesses, one thing is quite clear that as per the prosecution case, the seizure memo/seizure list and the arrest memo of the accused were prepared at the spot at the time of recovery and arrest of the accused but the prosecution failed to produce the arrest memo of the accused and as per these



witnesses including the informant Naresh Kumar, the seized contrabands were sealed at the spot of recovery with the seal of then SHO Naresh Kumar. But regarding the sampling, these witnesses made contradictory statements as Anil Ram (PW-4) stated that the samples were drawn at the spot of recovery while Naresh Kumar (PW-5), the informant, stated that he did not draw the samples from the seized contrabands. As per the provisions of section 52A(2) of the NDPS Act, upon receiving the seized Narcotic Drugs or Psychotropic Substances or controlled substances, which have been seized, the Officer-in-Charge of the concerned police station or the officer empowered under section 53 of the NDPS Act shall have a bounden duty to prepare an inventory of such seized contraband giving the details relating to their description, quality, quantity, mode of packing, marks, number, etc as required by the provisions of the said section and thereafter, the officer must file an application before the concerned court for deputation of a Magistrate for the purpose of certifying the correctness of the inventory so prepared or taking the photographs of relevant materials in the presence of such Magistrate or certifying such photographs as true and also for allowing to draw representative samples from such seized drugs or substances in the presence of such



Magistrate and certifying the correctness of the list of samples so drawn. But in the instant matter, in order to prove this procedure the prosecution has failed to give any kind of evidence, though during the course of argument, learned APP has drawn the attention of this Court towards an application which is said to have been filed by the investigating officer before the trial court for deputation of a Judicial Magistrate for compliance of the provisions of section 52A of the NDPS Act and for drawing the necessary samples from the seized contrabands, which has been perused by us but during the trial the prosecution did not take any pain to get this application proved by the evidence of the investigating officer before the trial court, however, upon perusal of this application it appears that a Judicial Magistrate namely Sri. D.K. Bhaskar was deputed to seal the samples who made his endorsement on that very application to the effect that the seized materials were sealed before him but except this he did not make any other endorsement, which was not sufficient to prove the compliance of the provisions contained in section 52A of the NDPS Act, as, the same does not show the condition of the articles which were produced before him in a sealed state, the kind of seal which was available at that time, number of samples drawn, weight of



samples as well as the kind of seal which was used in resealing the seized contrabands after drawing the samples from it and the kind of seal which was used in sealing the drawn samples and apparently the concerned Magistrate acted in a very casual manner.

27. As per the provisions of section 52A of the NDPS Act, the process of drawing of samples has to be done in the presence and under the supervision of a Magistrate and the entire process has to be certified by him as to be correct. In this regard, the observation made by the Hon'ble Apex Court in the case of **Union of India vs. Mohanlal** (supra) in the paragraph No. 16, being relevant, is being reproduced herein below : -

*“ 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.”*



In the present matter, the prosecution has failed to prove the compliance of the provisions of section 52A of the NDPS Act. Though an application was filed by the investigating officer before the trial court for deputing a Magistrate, whereafter a Magistrate was also deputed but there is no evidence to show the process of making an inventory with regard to the seized contrabands as well as photographing the same in the presence of the deputed Magistrate and he simply endorsed the fact on the application filed by the investigating officer that the seized materials were sealed before him. The said endorsement is not sufficient to prove the compliance of section 52A of the NDPS Act and further, the prosecution remained very careless in proving the factum of deputation of Magistrate as well as the sealing process before him as the relevant application of the investigating officer was not proved by the prosecution. Furthermore, regarding the type of seal which was initially used by the SHO of the concerned police station in sealing the alleged contraband, the kind of seal which was used in resealing the alleged contrabands before the deputed Magistrate, the relevant details with regard to the Case No., quantity of contrabands which were found in the sealed packets upon



opening it and the quantity of the samples etc., there is no evidence on record of this case to prove the same. Here, it is important to mention that the FSL report (exhibits- '5') issued from the office of the Director, FSL, Patna shows that two parcels containing the samples were handed over to the special Messenger GR/208 Satyendra Tiwari vide Memo No. 3312 dated 06.11.2012, which were to be delivered in the office of FSL, Patna but the same was received in the said office on 19.01.2013, after more than two months and regarding the said inordinate delay in reaching of the parcels at the office of FSL, Patna, there is no explanation and admittedly, the drawn samples remained in the custody of the said messenger for more than two months, which creates a great possibility of tampering with the samples and to explain the situation, the best person was the special messenger Satyendra Tiwari but he was not produced and examined by the prosecution before the trial court. Accordingly, we find the sampling process of the seized contrabands, as claimed by the prosecution to be highly doubtful which is fatal to the case of the prosecution. In this matter, as per the prosecution's case, the entire proceeding of search, seizure of contrabands and sealing of the same was conducted before two independent persons, namely, Pankaj Mohan Singh



and Md. Alam who were residents of a nearby locality but none of them have been produced and examined by the prosecution and no explanation has been put forth. Though in a criminal case, particularly, in an offence relating to the recovery of prohibited contrabands, the case of the prosecution can not be thrown out entirely mainly owing to non-examination of the independent persons as prosecution witnesses, who are said to be the witnesses of search, seizure and sampling process but there must be some explanation for not producing such independent persons and the prosecution's negligence in not producing them can be taken into consideration particularly when there is non-compliance of the provisions of section 52A of the NDPS Act and also when there is strong circumstance creating a serious doubt about the sampling process. In this regard, the observations made by the Hon'ble Apex Court in the case of **Mohammed Khalid (supra)**, as discussed in the paragraph No. 15 of this judgment is relevant. Though the instant matter is not covered with the provisions of section 42 of the NDPS Act, as, according to the prosecution story, the police party proceeded to the place of recovery after getting a secret information that the co-accused Samir Ansari instructed his shooters to kill one Punnu Srivasatav and the said shooters were



going to kill Punnu Srivasatav in the morning of the day of recovery and when the accused persons came on a motorcycle at the alleged place then they were apprehended and on search, the alleged contrabands were found and recovered from their possession and motorcycle. However, in order to make the prosecution's said basis as to acting of the police officials on the basis of secret information, to be strong and reliable, the prosecution ought to have proved the said secret information as according to the prosecution, after receiving the said secret information, communication was made between the concerned police official and the SP, Bettiah and thereafter, a police team consisting of several police officials was constituted, so, in this regard, there must be some written entries in the relevant registers of the concerned police stations of which officials participated in the alleged search and seizure and the same could have been proved easily by the prosecution if there was some substance in it but in this regard, no attempt has been made by the prosecution, which creates a doubt about the prosecution's story.

**Conclusion :-**

**28.** For the above-mentioned reasons, we find the sampling process from the seized contrabands, as claimed by the



prosecution, to be highly doubtful and the provisions of section 52A of the NDPS Act have not been followed in its true letter and spirit and the prosecution has failed to prove the safe keeping of the samples right from the time of taking the same from the seized contrabands till it reached to the office of FSL, Patna and moreover, there is reasonable circumstance, as discussed above to show a strong possibility of tampering with the drawn samples during the period when it remained in the custody of the special messenger for a period of more than two months and we have also taken into account the non-examination of two independent persons without any explanation before whom the entire process of search, seizure and sealing of the alleged contrabands was made, to be against the prosecution. Accordingly, we conclude that the judgment and order impugned, convicting and sentencing the appellants for the charged offence to be not sustainable in the eyes of law as the above-mentioned procedural lapses have caused a serious dent in the prosecution's case which is not ignorable and the learned trial court has wrongly held the appellants guilty for the said offence, thus we find merit in the present appeal, hence the same stands allowed and the impugned judgment of conviction and order of sentence dated 20.02.2018, passed by the learned



5<sup>th</sup> Additional Sessions Judge, Bettiah, West Champaran, in Trial No. 32 of 2013 is hereby set aside.

29. The appellant No. 1, namely, Ashraf Ali Ansari @ Ashraf Ali is in judicial custody, so, he is directed to be released forthwith in the present matter, if his custody is not required in any other case.

30. The appellant No. 2, namely, Bablu Hazam is already on bail, so, the bail bonds furnished by him as well as his sureties are hereby cancelled and he is discharged from the liabilities arising from his bonds.

31. Let the LCR be sent back to the trial court forthwith.

32. Let the judgment's copy be sent to the trial court as well as jail authority concerned for information and needful compliance.

(Shailendra Singh, J)

I agree.

(Mohit Kumar Shah, J)

(Mohit Kumar Shah, J)

annu/-

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