

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.185 of 2008**

1. Sarila Devi, w/o Sri Ram Das Sao
2. Sita Devi, wife of Jagdish Sao
Both resident of Kalali Road, Barh, Police Station- Barh, District-Patna
... .. Appellant/s

Versus

State Of Bihar
... .. Respondent/s

Appearance :

For the Appellant/s	:	Mr. Ajay Kumar Thakur, Advocate
	:	Ms. Vaishnavi Singh, Advocate
	:	Mr. Pranshu Singh, Advocate
	:	Mr. Ritwik Thakur, Advocate
For the Respondent/s	:	Mr. A. M. P. Mehta APP

**CORAM: HONOURABLE MR. JUSTICE RAMESH CHAND MALVIYA
ORAL JUDGMENT**

Date: 29-04-2025

Heard Mr. Ajay Kumar Thakur, assisted by Ms. Vaishnavi Singh, Mr. Pranshu Singh and Mr. Ritwik Thakur, learned counsel for the appellants and Mr. A. M. P. Mehta, learned APP for the State.

2. The present appeal has been filed under Section 374 (2) of Code of Criminal Procedure, 1973 (hereinafter referred as 'Cr.P.C') challenging the judgment of conviction and order of sentence dated 20.12.2007 passed in G.R. No. 01 of 2005 in connection with Chandi P.S. Case No. 207 of 2005 passed by the learned Additional District and Sessions Judge-cum-Special Judge, Nalanda, Biharsharif, whereby and where-under the appellants have been convicted under Section 20(ii)(c) of the Narcotic Drugs and Psychotropic



Substances Act, 1995 (hereinafter referred to as the 'Act') and has been sentenced to undergo rigorous imprisonment for 10 years and fine of Rs. 1,00,000/- each and in default of payment of fine further imprisonment for 1 year and 3 months.

3. The prosecution case as per written report (Ext.2) given by Officer-In-charge Chandi P.S., Gopalji Singh (PW7) is that on 12.8.05 he was checking the vehicles to detect and find out illegal fire-arms to maintain law and order. Armed forces were also with him. He started checking in front of the police station. In the meantime, he received a secret information that Kumhrar bus bearing no. BR-1P-9261 was coming from Patna and in that bus, two ladies aged about 40-45 years were also coming. They were carrying Ganja and proceeding to Biharsharif. He also received information that these ladies sell Ganja. At this information, the officer-in-charge directed his subordinates to check Kumhrar bus and started waiting for the same. At about 9.15 AM, Kumhrar bus reached near Thana gate, he signaled the driver to stop the bus. Thereafter, the informant, Hawaldar and other police personnel started checking the Passengers and their luggage. During checking, he witnessed two ladies sitting in the middle of the bus on the left side. Both those ladies had bags in their front which they had covered with their *Saries*. On query, these ladies accepted that luggage. When



the bag was checked, it was detected that Ganja was retain in that bag in a plastic tide with tape. The officer-in-charge got them down from the bus and inquired about their names and address. They disclosed the same. Then the bundles kept inside the bag was weighed and it was found that both the bags were containing Ganja 10 Kg each. On demand of papers, they aid not file any paper nor replied any satisfactory answer. Thereafter, in presence of independent witnesses, seizure list was prepared and the copy was made over to the accused persons. They also put their L.T. I. on the seizure list.

4. On the basis of this written report, Chandi P.S. case no. 207 of 2005 dated 12.8.05 under Section 22 of the N.D.P.S. Act was registered and the case was investigated. on completion of investigation, charge-sheet under Section 22 of the N.D.P.S. Act was submitted against both the accused persons.

5. On behalf of the prosecution, total nine witnesses were examined to substantiate the charges leveled against the accused/appellant, out of them, PW-1 Shiv Shankar Prasad, PW-2 Dinesh Singh, PW-3 Akhilesh Prasad, PW-4 Binod Kumar, PW-5 Gilori Prasad Yadav and PW-6 Urmila Devi, PW-7 Gopal Ji Singh, PW-8 Md. Sadrul Zama, PW-9 Arvind Kumar Singh and has also exhibited certain documents.



6. PW-1 and PW-2, who are seizure list witnesses, have been declared hostile by the prosecution. PW-3 and 4, who are driver and khalasi of the bus in question have also been declared hostile by the prosecution.

7. PW-5 Gilori Prasad Yadav, a constable (hawaldar) and a member of the raiding team. He stated in his examination-in-chief that the officer in-charge received information that two women are carrying explosive substances. Sacks were checked and after bringing it down it was weighed which came to be 10 kg each. During cross-examination, in paragraph 3 he stated that he and other constables did not enter the bus. In paragraph 4 he stated that he does not know who checked the ladies. The bus went after the ladies got down and then seizure list was prepared and ganja was weighed. In paragraph 7 he has denied the suggestion that the recovery was from beneath the seat of the bus and not from the ladies.

8. PW-6 Urmila Devi, a member of raiding team stated in her examination-in-chief that Bada Babu got the ladies down and did paperwork. She claimed to identify the accused, but is giving different names in identification. During cross-examination, in paragraph 2 she stated that Bada Babu had received information on his mobile. In paragraph-3 she stated that in the police station the paperwork was done. The ladies



were kept at the police station for one day and one night. In paragraph-4 she failed to give the number of the bus.

9. PW-7 Gopal Ji Singh, the informant of the present case stated in his examination-in-chief that the weight of the contraband came to be 10 kg each and seizure list was prepared on the spot. During cross-examination, in paragraph-3 he stated that he cannot say about any other passenger or any other article in the bus. He did not make a station diary entry on the basis of secret information. He could not say that from whom he received secret information and whether he received it through mobile or not. In paragraph-4 he stated that the sacks were kept beneath the seat in front of the seat of the ladies and he had taken out the sacks from beneath the seat. There was no mark or name on the sacks. In paragraph-5 he stated that the seized articles were kept in malkhana.

10. PW-8 Md. Sadrul Zama, member of raiding team. During cross-examination, in paragraph 2 he stated that the seized articles were sealed in a cloth. The sacks were not seized, but were returned. Sealing was done in presence of witnesses and seal was affixed on which witnesses had signed and accused had also put their thumb impression. No gazetted officer was present. In paragraph-3 he stated that the bus was filled with passengers and both the ladies were seated on one



seat. He did not conduct search or seizure.

11. Learned counsel for the appellants submitted that the impugned judgment of conviction and the order of sentence passed by learned trial Court are not sustainable in the eye of law or on facts. The trial Court has not applied its judicial mind and has failed to properly appreciate the evidence on record. He further claimed that the prosecution has failed to prove its case against the appellants beyond shadow of all reasonable doubts. For raising presumption under Sections 35 and 54 of the Act, the prosecution is first required to prove the foundational facts of the alleged offence beyond shadow of all reasonable doubts against the accused/appellants. But the prosecution has badly failed to prove its case against the appellants as per legally admissible evidence on record. To substantiate his claim, learned counsel for the appellants submitted that the NDPS Act is a stringent penal statute providing severe punishment. Hence, the legislature has also provided safeguards against false implications of any person. Sections 42 and 50 of the NDPS Act provide for mandatory procedure in regard to search and seizure, but the same has not been complied with by the prosecution in this case. He has also referred to Standing Instruction 1 of 1988 and Standing Order No. 2 of 1988, issued under the NDPS Act by the Central



Government providing procedure for search, seizure and sampling and for chemical examination of the contraband. But even the rules provided in these standing orders are not complied with by the prosecution. Hence, the Prosecution case against the accused/Appellants is rendered doubtful and unreliable.

12. Learned counsel further submitted that independent witnesses in regard to the search and seizure have been examined during the trial by the Prosecution have been declared hostile. He further submitted that despite legal requirement under Section 50 of the NDPS Act, the appellants were not apprised of their rights to be searched in the presence of Gazetted Officer/Magistrate. He further submitted that the seized goods were not sealed on the place of occurrence, nor does the seizure list bear the signature of the appellants as a witness to the preparation of the seizure list. Moreover, seized goods are required to be deposited in specially designated godown within 48 hours of the seizure in packed and sealed condition with proper identification particulars of the case. But it is not clear when the seized goods were deposited and where.

13. Learned counsel for the appellants lastly contended that in view of the aforesaid facts and circumstances,



the prosecution has failed to prove beyond all reasonable doubts that contraband was recovered from the possession of the appellants. Hence, the prosecution case against the appellants fails on this ground alone. The alleged confession is also not admissible. So, the appellants should have been acquitted from the conviction as sentenced against them.

14. However, learned APP for the State has vehemently defended the impugned judgment of conviction and order of sentence, submitting that there is no illegality or infirmity in them. 20 Kg Ganja has been recovered from the conscious possession of the appellants and hence, culpable mental state of the appellants is presumed under Section 35 of the NDPS Act and presumption of commission of the offence of illegal possession of the contraband stands raised under Section 54 of the NDPS Act and it was for the appellants to rebut the presumption of legally admissible evidence. But no evidence has been adduced by the appellants to rebut the presumption of their *mens rea* and the illegal possession of the contraband. He also submits that search, seizure and sampling of the contraband has been done as per law and there is no illegality involved in it.

15. At this stage, I would like to appreciate the relevant extract of entire evidence led by the prosecution and



defence before the Trial Court

16. On deeply studied and scrutinized all evidences, it is evident to note here that the case as set up by the prosecution is regarding recovery of narcotics from a vehicle which was stopped during transit. In order to come to a conclusion on the issue that does Section 50 of the NDPS, Act vitiates the judgment or not? In the case of *State of Himachal Pradesh Versus Pawan Kumar (2005(4) SCC 350)* where in course of checking of bus at sa bus stand it was noticed that respondent (Pawan Kumar) was carrying a bag which was slipped out from the rear door of the bus and subsequently on chase he was apprehended along with the bag. The same was seized under seizure memo and subsequently found to be opium (contraband article/substance which led to his trial in which he was found guilty under Section 18 of the NDPS Act and sentenced to undergo rigorous imprisonment for 10 years. On appeal preferred by the convict it was found that there was non compliance with the mandatory provision of Section 50 of the NDPS Act. while effecting search and seizure and therefore the recovery of opium from the possession of the accused was not established. The matter was carried to the Hon'ble Supreme Court. The Hon'ble Supreme Court considered the materials in order to decipher whether a seizure or search of a bag will



constitute seizure or search from/of a person. The Hon'ble Supreme Court after referring to several interpretation including the dictionary meaning of the 'person' held in paragraph no. 11, 12, 13 of the report as under: -

“11. A bag, briefcase or any such article or container, etc. can, under no circumstances, be treated as body of a human being. They are given a separate name and are identifiable as such. They cannot even remotely be treated to be part of the body of a human being. Depending upon the physical capacity of a person, he may carry any number of items like a bag, a briefcase, a suitcase, a tin box, a thaila, a jhola, a gathri, a holdall, a carton, etc. of varying size, dimension or weight. However, while carrying or moving along with them, some extra effort or energy would be required. They would have to be carried either by the hand or hung on the shoulder or back or placed on the head. In common parlance it would be said that a person is carrying a particular article, specifying the manner in which it was carried like hand, shoulder, back or head, etc. Therefore, it is not possible to include these articles within the ambit of the word “person” occurring in Section 50 of the Act. 12. An incriminating article can be kept concealed in the body or clothing or coverings in different manner or in the footwear. While making a search of such type of articles, which have been kept so concealed, it will certainly come within the ambit of the words “search of person”. One of the tests, which can be applied is, where in the process of search the human



body comes into contact or shall have to be touched by the person carrying out the search, it will be search of a person. Some indication of this is provided by sub-section (4) of Section 50 of the Act, which provides that no female shall be searched by anyone excepting a female. The legislature has consciously made this provision as while conducting search of a female, her body may come in contact or may need to be touched and, therefore, it should be done only by a female. In the case of a bag, briefcase or any such article or container, etc., they would not normally move along with the body of the human being unless some extra or special effort is made. Either they have to be carried in hand or hung on the shoulder or back or placed on the head. They can be easily and in no time placed away from the body of the carrier. In order to make a search of such type of objects, the body of the carrier will not come in contact of the person conducting the search. Such objects cannot be said to be inextricably connected with the person, namely, the body of the human being. Inextricable means incapable of being disentangled or untied or forming a maze or tangle from which it is impossible to get free. 13. The scope and ambit of Section 50 of the Act was examined in considerable detail by a Constitution Bench in State of Punjab v. Baldev Singh and para 12 of the Report is being reproduced below (SCC p.190)

“12. On its plain reading, Section 50 would come into play only in the case of a search of a person as distinguished from search of any premises etc. However, if the empowered officer, without any prior



information as contemplated by Section 42 of the Act makes a search or causes arrest of a person during the normal course of investigation into an offence or suspected offence and on completion of that search, a contraband under the NDPS Act is also recovered, the requirements of Section 50 of the Act are not attracted.” The Bench recorded its conclusion in para 57 of the Report and sub-paras (1),(2),(3) and (6) are being reproduced below: (SCC pp. 208-10) “57. On the basis of the reasoning and discussion above, the following conclusions arise:

(1) That when an empowered officer or a duly authorized officer acting on prior information is about to search a person, it is imperative for him to inform the person concerned of his right under sub-section (1) of Section 50 of being taken to the nearest gazetted officer or the nearest Magistrate for making the search. However, such information may not necessarily be in writing.

(2) That failure to inform the person concerned about the existence of his right to be searched before a gazetted officer or a Magistrate would cause prejudice to an accused.

(3) That a search made by an empowered officer, on prior information, without informing the person of his right that if he so requires, he shall be taken before a gazetted officer or a Magistrate for search and in case he so opts, failure to conduct his search before a gazetted officer or a Magistrate may not vitiate the trial but would render the recovery of the illicit article suspect and vitiate the conviction



and sentence of an accused, where the conviction has been recorded only on the basis of the possession of the illicit article, recovered from his person, during a search conducted in violation of the provisions of Section 50 of the Act.

(6) That in the context in which the protection has been incorporated in Section 50 for the benefit of the person intended to be searched, we do not express any opinion whether the provisions of Section 50 are mandatory or directory, but hold that failure to inform the person concerned of his right as emanating from sub-section (1) of Section 50, may render the recovery of the contraband suspect and the conviction and sentence of an accused bad and unsustainable in law.”

17. The Apex court specifically mentioned in above judgment that a bag, briefcase or any such article or container, etc. can, under no circumstances, be treated as body of a human being. They are given a separate name and are identifiable as such. They cannot even remotely be treated to be part of the body of a human being. But in the particular facts of the case the alleged seizure/ recovery from the bags carried by the appellants cannot be said to be a search of the person of the accused/appellants as the bags were recovered from the bus and not from the possessions of the appellants as the appellants did not concealed the said article in the body or clothing or coverings in different manner or in the footwear. This court,



therefore, finds no merit in the submission of the learned counsel for the appellants that the non compliance with Section 50 of the NDPS, Act has vitiated the judgment. The said contention stands rejected. Further, the contention raised by the learned counsel for the appellants that there is non-compliance of Section 52A of the NDPS Act. On this regard it is important to point out that the said Section 52A of the NDPS, Act came enforce in the year 2011 but the present case is of the year 2005. So the said Section would not apply in the present case.

18. This court on critical examination of the entire evidence on record and after considering the submissions advanced by the rival parties reiterates its view that there is serious doubt with regard to the seizure effected by the informant. It is not proved beyond shadow of all reasonable doubt that the samples so collected and sent for chemical examination and found to be contraband/article was, in fact, drawn from the bags which was carried by the appellants. There is contradictory evidence on record with regard to the actual manner and weight of the sample which was drawn. There is unexplained delay of nearly 2 months in sending the collected sample for chemical analysis.

19. Thus, in the opinion of this court, on the basis of materials /evidence available on record the charges



cannot be said to have been proved beyond all reasonable doubts. The doubts which have crept into the mind of the court definitely entitles the appellant to get benefit of doubt and this court grants the same.

20. Further, there are many contradictions in the deposition made by the prosecution witnesses as PW-1, 2, 3 and 4 have been declared hostile who were seizure list witnesses, driver and khalasi of the bus creating reasonable doubt in the prosecution case. PW-5 in his deposition stated that he got information that two women are carrying explosive substances. PW-6 in her deposition stated that she claimed to identify the appellants but gave different names in identification and PW-7 received information on his mobile phone. PW-7 informant of the present case in his deposition stated that he did not make any station diary entry on the basis of secret information and could not say that from where he received the secret information and whether he received it through mobile or not. PW-7 further stated in his deposition that no mark or name on the sacks was present. PW-8 in his deposition stated that seized article were seized in a cloth and the sacks were not seized but were returned. He stated that no gazette officer was present at the time of seizure. PW-9 in his deposition stated that he gave an application for sending seized articles for FSL and articles were



not sealed. In para-4 of PW-9 deposition he stated that there is no FSL report.

21. After incorporating the aforesaid facts, this Court safely holds that the learned trial Court failed to scrutinize the evidence brought on record regarding deficiencies, drawbacks and infirmities crept during course of trial and passed the impugned judgment in complete ignorance of criminal jurisprudence and passed this judgment. Moreover, there are discrepancies regarding the sequence of events and the presence of individuals at the place of occurrence. Considering this fact, prosecution has failed to establish this case beyond shadow of all reasonable doubts, therefore, in such circumstances, it may not be proper to convict the appellants/accused on the materials available on record. Hence, the judgment of conviction and order of sentence in this present matter is fit to be set aside.

22. Hence, the Judgment of conviction and order of sentence dated 13.01.2023 passed by the learned Additional District and Sessions Judge-cum-Special Judge, Nalanda, Bihar Shariff in G.R. No. 01 of 2005 (arising out of Chandi P.S. Case No. 207 of 2005) is set aside and the accused/appellants are acquitted from the charges leveled against them. As the



appellants are on bail, they are discharged from the liability of their bail bonds.

23. Accordingly, this appeal stands allowed.

24. Office is directed to send back the trial court records and proceedings along with a copy of this judgment to the trial court, forthwith, for necessary compliance, if any.

(Ramesh Chand Malviya, J)

Mayank/-

AFR/NAFR	NAFR
CAV DATE	N/A
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