

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.681 of 2012

Arising Out of PS. Case No.-132 Year-2007 Thana- MUZFFARPUR COMPLAINT CASE

District- Muzaffarpur

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Birja Prasad ,S/O Sri Sahdeo Prasad, Resident Of Village Agarwa, P.S- Jitna
District- East Champaran.

... .. Appellant/s

Versus

The Union of India

... .. Respondent/s

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Appearance :

For the Appellant/s	:	Mr. Hemendra Prasad Singh, Sr. Advocate Dr. Anurag Krishan Tiwary, Advocate Mr. Anil Kumar, Advocate
For the Respondent/s	:	Mr. Amit Pandey, Sr. S.C.

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CORAM: HONOURABLE MR. JUSTICE PURNENDU SINGH
CAV JUDGMENT

Date : 23-06-2026

Heard Mr. Hemendra Prasad Singh, learned senior
counsel assisted by Dr. Anurag Krishan Tiwary, learned counsel
appearing on behalf of the appellant and Mr. Amit pandey,
learned counsel for the Union of India.

2. The present appeal has been filed under Section
374(2) r/w Section 389 (1) of the Code of Criminal Procedure
challenging the judgment of conviction dated 28.05.2012 and
order of sentence dated 30.05.2012 passed by the learned 6th
Additional Sessions Judge, Muzzafarpur, in NDPS Case No.
132/07-08, S.T. 3/08, whereby and whereunder, the appellant
has been convicted for the offence punishable under Sections 20
(b) (ii) C of the NDPS Act and have been sentenced to undergo
Rigorous Imprisonment for 10 years and fine of Rs. 1 lakh.



BRIEF FACTS OF THE CASE

3. The prosecution case, in brief, is that on 29.12.2007 the customs officials under the supervision of Dinesh Kumar, Superintendent, Customs (P) Division, Muzaffarpur, conducted preventive checking near Kanti Thermal Power Station situated on N.H.-28. During the course of checking, a Basant Bus coming from Dhaka towards Muzaffarpur was intercepted and searched. The accused persons, namely Birja Prasad, Smt. Rambani Khatun and Rozidan Khatun, were found sitting together on a long seat of the bus. Upon search, total 20 Kg. net charas was allegedly recovered from their possession, out of which 10 Kg. was recovered from the bag of accused Birja Prasad and 5 Kg. each from accused Rambani Khatun and Rozidan Khatun. The prosecution further alleged that the two female accused, who were of Nepali origin, were travelling under the guidance of accused Birja Prasad and were concealing the contraband in specially designed cloth bags wrapped around their waists. The seized contraband was allegedly intended to be delivered at Patna to one Sanjai, resident of Khodaganj, District Kalaiya (Nepal), who was stated to be known to accused Birja Prasad. The recovered contraband was seized under Section 43 of the N.D.P.S. Act in presence of independent witnesses and the



accused persons were arrested. Thereafter, samples were drawn and sent for chemical examination and as per the report of the Chemical Examiner, the samples tested positive for resinous extract of plant *Cannabis Sativa* (*Charas*). On the basis of the complaint instituted by the prosecution, cognizance of the offence was taken on 15.05.2008 by the learned Sessions Judge, Muzaffarpur and the charges were framed against the accused persons on 21.01.2009, to which they pleaded not guilty and claimed to be tried. The trial proceeded and all the accused were convicted under Sections 20 (b)(ii)(C) of the NDPS Act.

ARGUMENT ON BEHALF OF THE APPELLANT

4. Learned Senior counsel appearing on behalf of the appellant submitted that the impugned judgment of conviction and order of sentence passed by the learned Trial Court are wholly illegal, arbitrary and contrary to the facts and evidence available on the record. It has been contended that the prosecution has miserably failed to establish the alleged recovery from the conscious and exclusive possession of the appellant beyond all reasonable doubts. The learned counsel emphasised that the alleged recovery was made from a bag and not from the physical possession of the appellant and, therefore, the mandatory requirement of proving conscious possession has



not been satisfied. It was also argued that the prosecution witnesses have made contradictory and inconsistent statements with regard to the alleged search, seizure and recovery and such contradictions go to the root of the prosecution case. The independent witness, namely PW7, who is the *khalasi* of the bus, has not fully supported the prosecution story and there is no reliable independent corroboration of the alleged seizure.

5. It was further submitted that all the witnesses examined by the prosecution, except PW7, are official witnesses and no independent witness from the locality or from among the passengers of the bus was examined, though the alleged seizure was made at a public place. The learned counsel contended that the mandatory provisions of the N.D.P.S. Act relating to fair search and seizure were not complied with in their true spirit and the prosecution failed to establish an unbroken chain regarding seizure, sealing and safe custody of the alleged contraband. It was also submitted that the prosecution has failed to produce any cogent material to prove that the appellant had any nexus with the co-convicts or with the alleged person at Patna to whom the contraband was allegedly to be delivered. The entire allegation regarding complicity of the appellant is based on the alleged statement of the co-accused taken in



custody that appellant is the one, who had instructed to deliver the contraband, which is based merely on suspicion and not on any legally admissible evidence.

6. Learned Senior counsel had also submitted that the learned Trial Court failed to appreciate the evidence in its proper perspective and without considering the material contradictions appearing in the evidence of the prosecution witnesses no. 1, 3 and 6. It was also informed that the appellant remained on bail throughout the period of trial and never misused the privilege granted to him. On the above ground, learned counsel seeks that the impugned judgment of conviction and order of sentence dated 28.05.2012 and 30.05.2012 respectively be quashed and set aside and the appellant be acquitted of the charges levelled against him.

ARGUMENT ON BEHALF OF THE RESPONDENTS

7. *Per contra*, learned senior standing counsel for the Union of India while opposing the appeal submitted that the learned District court, after considering all the evidences on record and exhibits submitted on behalf of the parties during the course of trial, has rightly convicted the appellants for said offences as the offences alleged against the appellants appears to be serious in nature and also constitutes cognizable offence.



8. Learned counsel further submitted that the authorities in exercise of power under Section 43, which refers to the power of seizure and arrest in public place by the officers mentioned in Section 42. He further submitted that nowhere it is provided in Section 43 of the Act that the procedure contemplated under Section 42 has to be followed.

9. He submitted that the Hon'ble Supreme Court in ***State of Haryana vs. Jarnail Singh & Ors.*** reported in **(2004) 5 SCC 188** clearly held that "Section 42 and 43 contemplate two different situations. Section 42 contemplates entry into and search of any building, conveyance or enclosed place, while Section 43 contemplates a seizure made in any public place or in transit. If seizure is made under Section 42 between sunset and sunrise, the requirement of the proviso thereto has to be complied with. There is no such proviso in Section 43 of the Act and, therefore, if a public conveyance is searched in a public place, the Officer making the search is not required to record his satisfaction as contemplated by the proviso to Section 42 of the NDPS Act for searching the vehicle between sunset and the sunrise. In the instant case, the tanker was moving on the public highway when it was stopped and searched. Section 43, therefore, clearly applied to the facts of the case. Thus there was



no requirement of the Officer conducting the search to record the grounds of his belief as contemplated by the proviso to Section 42. More so, when Superintendent of Police was also a member of the searching party.

10. He further submitted that the admission of the co-accused is sufficient proof that the appellant was in conscious possession of the alleged contraband *Charas*. No interference is required with the judgment passed by the learned trial Court.

ANALYSIS AND CONCLUSION

11. Heard the parties.

12. I have perused the lower court records and proceedings and also taken note of the arguments canvassed by learned counsel appearing on behalf of the parties.

13. The learned trial court, on the basis of materials as collected during the course of investigation, passed the Judgment of conviction dated 15.12.2010 and order of sentence dated 21.12.2010 for the offences under Section 20 (b)(ii) (C) of NDPS Act

14. During the trial, the prosecution has examined altogether seven witnesses, namely:

(i) (P.W.-1)- Dinesh Kumar

(ii) (P.W.-2)- Lal deo Rajak



(iii) (P.W.-3)- Vinod Prasad Singh

(iv) (P.W.-4) - Meena Devi

(v) (P.W.-5)- Shankar Prasad Rai

(vi) (P.W.-6)- Sahadeo Choudhary

vii) (P.W.-7).- Umesh singh

15. From the perusal of the records, the statement of prosecution witnesses are as follows:

(i) P.W.1 –P.W.1 Dinesh Kumar, Superintendent, Customs (P) Division, Muzaffarpur and informant of the case, deposed that on 29.12.2007 he along with the customs officials conducted preventive checking near Kanti Thermal Power Station situated on N.H.-28. During checking, *Shit-Basant* Bus coming from Dhaka was intercepted and searched wherein the accused persons were found sitting together from whose possession *charas* was recovered. He has proved the seizure list, panchnama, voluntary statements and other relevant documents. In his cross-examination, he admitted that he had not entered into the bus during the search and had not personally witnessed the *charas* tied around the waists of accused Rambani Khatun and Rozidan Khatun. He further admitted that the bag alleged to contain *charas* was not recovered in his direct presence from the person of accused Birja Prasad.



(ii) P.W.2 Laldeo Razak, a member of the raiding party, supported the prosecution case regarding interception of the bus, search and recovery of charas from the accused persons. He deposed that accused Birja Prasad was carrying a bag containing charas and that the female accused were concealing charas around their waists. He further stated that the accused persons were travelling together and the seized articles were properly sealed and seized. In cross-examination, he stated that the bag was kept under the seat of the bus and admitted certain contradictions regarding the manner of search and seizure.

(iii) P.W.3 Vinod Prasad Singh, another customs official and member of the raiding party, corroborated the prosecution version regarding the checking operation and seizure of charas from the accused persons. He stated that the raiding party started its work at about 8/9 A.M. and the search of the bus was conducted at about 9/10 P.M. He proved his signature on the seizure related documents. In cross-examination, he admitted that he had not entered into the bus during the search and also admitted that in his previous statement he had stated regarding receipt of secret information by the customs officials.

(iv) P.W.4 Meena Devi, a lady customs official and



member of the raiding team, supported the prosecution case and specifically stated that Superintendent Dinesh Kumar himself searched the bus. She deposed that the raiding party arrived at Kanti Railway Station at about 6/7 P.M., hired a Bolero vehicle and thereafter proceeded to the place of occurrence. She further stated that the search of the bus was conducted at about 9.45 P.M. and the female accused were found concealing charas around their waists. In cross-examination, she admitted that the customs officials had received secret information regarding transportation of contraband but could not disclose the exact details of such information.

(v) P.W.5 Shanker Prasad Rai, another official witness and member of the raiding party, deposed regarding preventive checking, interception of the bus and seizure of charas from the accused persons. He stated that the bus was searched during the night hours. In cross-examination, he admitted that he had not witnessed actual recovery of charas from the female accused and had only seen the bag alleged to be in possession of accused Birja Prasad. He further admitted that he had not entered into the bus during the course of search.

(vi) P.W.6 - Sahadeo Choudhary, also a customs official and member of the raiding party, supported the



prosecution case regarding seizure of contraband from the accused persons. However, he stated that the place of occurrence was near Motipur and not Kanti Thermal Power Station. He further deposed that after search, Laldeo Razak came out of the bus along with the accused persons and informed them that charas had been recovered from their possession. In cross-examination, he admitted that he himself had not entered into the bus during search and had not personally witnessed the actual recovery.

(vii) P.W.7 - Umesh Singh, khalasi of the bus, was examined as an independent witness. He admitted his signature on the seizure list but stated that his signature had been obtained under duress and that he had not witnessed the actual seizure or recovery. Though he did not fully support the prosecution case, he admitted that he was the *khalasi* of the bus in question, which according to the prosecution corroborated the fact that the bus had been intercepted and searched by the customs officials.

16. On the basis of materials surfaced during the trial, the appellants/accused was examined under Section 313 of the Cr.PC by putting incriminating circumstances/evidences surfaced against them, which they denied and shows their complete innocence.



The question which arises for consideration is whether the conviction of the appellant under Section 20(b)(ii) (c) of the NDPS Act is sustainable in the circumstances that the bag containing the Narcotics was lying under the seat of the appellant and on the statement attributed to the co-accused that the appellant had engaged them for transportation of the contraband and these circumstances are sufficient to establish conscious possession of the contraband by the appellant?

17. Conviction is under Sections 20(b)(ii) (C) of the NDPS Act. For the sake of convenience and better appreciation of the facts, the above provision *inter alia* reproduced as under:-

“20. Punishment for contravention in relation to cannabis plant and cannabis.—

Whoever, in contravention of any provisions of this Act or any rule or order made or condition of licence granted thereunder;--

(a) cultivates any cannabis plant; or

(b) produces, manufactures, possesses, sells, purchases, transports, imports inter-State, exports inter-State or uses cannabis, shall be punishable--

(i) where such contravention relates to clause

(a) with rigorous imprisonment for a term which may extend to ten years and shall also be liable to fine which may extend to one lakh rupees;

(ii) where such contravention relates to sub-clause (b),—

(A) and involves small quantity, with rigorous imprisonment for a term which may extend to one year, or with fine, which may extend to ten thousand rupees, or with both;

(B) and involves quantity lesser than commercial quantity but greater than small quantity, with rigorous



imprisonment for a term which may extend to ten years and with fine which may extend to one lakh rupees;

(C) and involves commercial quantity, with rigorous imprisonment for a term which shall not be less than ten years but which may extend to twenty years and shall also be liable to fine which shall not be less than one lakh rupees but which may extend to two lakh rupees:

Provided that the court may, for reasons to be recorded in the judgment, impose a fine exceeding two lakh rupees.

18. The provision of Section 4(2) of the Code of Criminal Procedure, 1973, mandates that offences under special statutes are to be investigated and tried in accordance with the procedure prescribed under the Cr.P.C., unless there is a specific contrary provision in the special law.

19. The search and seizure, therefore, rests predominantly on the testimony of official witnesses and same cannot be discarded solely on that ground, however, it requires careful scrutiny and corroboration in view of their official capacity and involvement in the investigation.

20. The Hon'ble Supreme Court in case of **Anil @ Andya Sadashiv Nandoskar vs. State of Maharashtra, (1996) 2 SCC 589**, has held that police personnel are competent witnesses and their testimony cannot be rejected merely because of their official status; however, as a rule of prudence, such



evidence must be examined with greater caution, particularly where independent corroboration is lacking. In the facts of the present case, in the absence of reliable independent witnesses and in view of the inconsistencies emerging in the prosecution evidence, the procedural safeguards under Section 100 Cr.P.C. The obvious reason behind this provision is to inject fair-play in the process of investigation.

21. Section 43 of the Narcotic Drugs and Psychotropic Substances Act, 1985 empowers the officers of the departments specified under Section 42 of the Act to conduct search, seizure and arrest in public places or while the contraband is in transit. The provision authorizes such officer, upon having reason to believe that an offence punishable under the Act has been committed, to seize any narcotic drug, psychotropic substance or controlled substance found in a public place. The power of seizure also extends to any animal, conveyance, article, document or other material which may be liable to confiscation or which may furnish evidence regarding the commission of an offence under the Act, including evidence relating to illegally acquired property liable for seizure, freezing or forfeiture under Chapter V-A of the Act.

22. Further, clause (b) of Section 43 empowers the



authorized officer to detain and search any person in a public place whom he has reason to believe has committed an offence under the Act. If, upon such search, any narcotic drug, psychotropic substance or controlled substance is found in the possession of such person and the possession appears to be unlawful, the officer is authorized to arrest such person, as well as, any other person accompanying him. The expression “reason to believe” signifies that the officer's action must be founded upon objective and reasonable grounds and not on mere suspicion or conjecture.

23. The Explanation appended to Section 43 gives an expansive meaning to the term “public place” by including within its ambit public conveyances, hotels, shops and any other place intended for use by, or accessible to, the general public. Thus, where recovery is effected from a public place, the search and seizure are governed by Section 43 rather than Section 42 of the Act. Unlike Section 42, which deals with search of buildings, conveyances or enclosed places and requires compliance with certain procedural safeguards relating to recording and communication of information, Section 43 applies to searches conducted in public places and does not attract those additional requirements. Consequently, if the recovery of



contraband is made from a place accessible to the public, the legality of the search and seizure is to be examined in the light of Section 43 of the NDPS Act and to this extent, I find force in the argument of the defendant.

24. The present appeal raises a question which lies at the intersection of the statutory presumptions contained in Sections 35 and 54 of the NDPS Act and the foundational requirement that the prosecution must first establish conscious possession beyond reasonable doubt. For better appreciation of the case, Sections 35 and 54 of the NDPS Act are reproduced hereinafter:

“Section 35. Presumption of culpable mental state.—*(1) In any prosecution for an offence under this Act which requires a culpable mental state of the accused, the court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.*

Explanation.—In this section “culpable mental state” includes intention motive, knowledge of a fact and belief in, or reason to believe, a fact.

(2) For the purpose of this section , a fact is said to be proved only when the court believes it to exist beyond a reasonable doubt and not merely when its existence is established by a preponderance of probability.

Section 54. Presumption from possession of illicit articles.—*In trials under this Act, it may be presumed, unless and until the contrary is proved, that the accused has committed an offence under this Act in respect of—*

(a) any narcotic drug or psychotropic substance or controlled substance;

(b) any opium poppy, cannabis plant or coca plant growing on any land which he has cultivated;

(c) any apparatus specially designed or any group of utensils specially adopted for the manufacture of any narcotic drug or psychotropic substance or controlled substance; or



(d) any materials which have undergone any process towards the manufacture of a narcotic drug or psychotropic substance or controlled substance, or any residue left of the materials from which any narcotic drug or psychotropic substance or controlled substance has been manufactured, for the possession of which he fails to account satisfactorily].”

25. In case of **Rakesh Kumar Raghuvanshi vs The State Of Madhya Pradesh** reported in **2025 INSC 96**, the Apex has held in respect of permission of Section 35 that the provision mandates that, in any prosecution under the Act, the Court shall presume the existence of the requisite mental state on the part of the accused, including intention, knowledge, motive, belief, or reason to believe, in relation to the acts constituting the offence. However, the said presumption is rebuttable, and it is open to the accused to establish, by leading cogent evidence, that such mental state did not exist. Thus, once the foundational facts necessary to attract the offence are proved by the prosecution, the burden shifts upon the accused to rebut the statutory presumption by demonstrating the absence of knowledge, intention, or conscious involvement in the alleged possession or contravention under the Act.

26. Further, the Apex Court held that Section 54 of the NDPS Act incorporates a rule of evidentiary presumption in relation to possession of illicit articles. The provision enables



the Court to presume, unless and until the contrary is proved, that the accused has committed an offence under the Act if he is found in possession of any narcotic drug, psychotropic substance, controlled substance, prohibited plants, apparatus or materials connected with the manufacture of such substances, and fails to account for such possession satisfactorily. The presumption contemplated under Section 54 is, however, not automatic and becomes operative only after the prosecution establishes the foundational facts necessary to invoke it, particularly that the contraband was recovered from the conscious and exclusive possession of the accused. Once the prosecution successfully proves conscious possession, the burden shifts upon the accused to rebut the statutory presumption by furnishing a lawful and satisfactory explanation for such possession. In the absence of any acceptable explanation, the Court may draw the presumption that the accused has committed the offence punishable under the NDPS Act.

27. The standard required for sustaining a conviction under the NDPS Act is far higher. Where two views are possible on the evidence, the view favourable to the accused must prevail.



28. The evidence of the prosecution witnesses though does not present a consistent account regarding the manner of search, seizure and recovery of the alleged contraband. While P.W.4 categorically stated that the informant himself conducted the search inside the bus, P.W.1 admitted that he had not entered the bus and had not personally witnessed the alleged recovery from the female accused. Similarly, P.Ws. 3, 5 and 6 also admitted that they had not entered the bus and had not witnessed the actual recovery. The testimony of P.W.2 that the bag allegedly containing *charas* was lying beneath the seat of the bus further creates doubt regarding the conscious and exclusive possession of accused/appellant Birja Prasad. The prosecution evidence is also not uniform with respect to the place of occurrence, as P.W.6 stated that the recovery was made near Motipur whereas the prosecution case mentions Kanti Thermal Power Station. Significantly, P.W.7, the sole independent witness, did not support the prosecution case regarding the actual seizure and asserted that his signature on the seizure list had been obtained under duress. In such circumstances, where the foundational facts relating to search, seizure and recovery are themselves shrouded in doubt and are sought to be established primarily through official witnesses whose



testimonies are not wholly consistent, the Court is required to scrutinize the prosecution case with greater caution. It is well settled that in cases under the N.D.P.S. Act, which prescribe stringent punishments and reverse burdens of proof, the prosecution must first establish the foundational facts through cogent, reliable and unimpeachable evidence before any statutory presumption can be invoked against the accused. The importance of maintaining the sanctity of the seized contraband and establishing an unbroken link between the alleged recovery and the material produced before the Court has also been repeatedly emphasized by the Hon'ble Supreme Court.

The other discrepancies noticed by this Court in the judgment of the Trial Court while recording the conviction of the appellant?"

29. Section 52-A of the NDPS Act provides a complete statutory mechanism for disposal of seized narcotic drugs and psychotropic substances and mandates that, upon seizure, an inventory of the contraband containing full particulars such as description, quantity, mode of packing and identifying marks is required to be prepared. It further requires that the empowered officer shall make an application before the Magistrate for the purposes of certifying the correctness of such



inventory, or for taking photographs of the seized articles and certifying the same, or for drawing representative samples in the presence of the Magistrate with due certification. The provision is intended to ensure transparency and to maintain the integrity of the seized contraband by providing judicial supervision at the crucial stage of sampling and documentation. Sub-section (4) further gives statutory recognition to such inventory, photographs and samples certified by the Magistrate as primary evidence. In the present case, however, the prosecution has not been able to establish compliance of the mandatory safeguards under Section 52A of the Act, particularly with regard to drawing of samples under the supervision of the Magistrate and proper certification thereof, thereby casting a serious doubt on the sanctity of the alleged seizure and subsequent forensic examination.

30. From the material available on record and the evidence of witnesses in course of trial, it is admitted that no narcotic substance was recovered from the person of the appellant. No article of personal identification belonging to the appellant was recovered from the bag. The prosecution does not assert that the appellant was carrying the bag in his hand or on his person. The conviction is founded substantially on the



circumstance that the bag was lying beneath the seat of the appellant and on the statement attributed to the co-accused that the appellant had engaged them for transportation of the contraband.

31. In the present case, on careful scrutiny of the evidence available on record, serious doubts arise regarding due compliance of the mandatory safeguards prescribed under Section 52A of the NDPS Act. Further, the procedure relating to preparation of inventory, drawing of samples in the presence of Magistrate, and proper chain of custody also appears to be doubtful. The absence of independent witnesses in support of seizure and the failure to properly establish conscious possession of the contraband further weaken the prosecution case. In view of these infirmities, the prosecution has not been able to prove its case beyond reasonable doubt against the appellants under the NDPS Act.

32. The other circumstance which has weighed with this Court is that after the alleged seizure, the contraband was stated to have been sealed and handed over to PW-1 Dinesh Kumar, Superintendent, Customs, Muzaffarpur, who was also part of the raiding team. However, from the materials on record, it does not appear that the seized articles were deposited in any



designated *Malkhana* meant for safe custody of narcotics. The evidence rather indicates that the seized contraband remained in the custody of the customs officials, without any clear and satisfactory proof regarding its proper deposit and preservation in accordance with the prescribed procedure. More significantly, there is no convincing evidence to show that samples were drawn from the seized contraband in the presence of the Magistrate as mandated under Section 52A of the NDPS Act and the relevant Standing Instructions applicable at the relevant time. The chain of custody, therefore, remains seriously doubtful. In addition, although the chemical examination report indicates that the sample tested positive for *charas*, the prosecution has failed to establish an unbroken link between the seized substance and the sample sent to the FSL, thereby creating a serious doubt regarding the sanctity of the alleged recovery and its subsequent examination.

33. In the present case, as noticed hereinabove, serious doubts arise with regard to compliance of the mandatory safeguards under Section 52A of the NDPS Act, particularly as to whether the samples were in fact drawn in the presence of the Magistrate as required under law. Though PW-7, was stated to be part of the raiding team and has also deposed before the Trial



Court, his evidence does not inspire confidence so far as the essential aspects of weighment, sealing and custody of the seized contraband are concerned. His participation in the raid, by itself, does not satisfy the statutory requirement, as he was merely a member/signatory to the seizure process and not the authority competent to certify the inventory or the sampling procedure. The law mandates that such certification must be done by the designated Judicial Magistrate, First Class, which is conspicuously absent in the present case. Moreover, the material exhibits relating to the seized contraband were not produced before the learned Trial Court, thereby further weakening the prosecution case and casting a serious doubt on the authenticity and integrity of the alleged recovery and sampling process.

Whether non production of seized contraband can prejudice the accused?

34. In case of *Jitendra and Another v. State of M. P.* reported in **2004 (10) SCC 562**, the Apex Court has observed that the *Charas* and *Ganja* alleged to have been seized from the possession of the accused were not produced before the trial court to connect them with the sample sent to the forensic science laboratory (FSL). The High Court noticed the lacuna but brushed it aside by observing that non-production of those



articles before the court is not fatal to the prosecution when the defense had not insisted during trial that those be produced. While observing so, the High Court relied on Section 465 CrPC to hold that non-production of the material object was a mere procedural irregularity and did not cause prejudice to the accused. Rejecting the aforesaid reasoning, the Apex Court held:

“6. In our view, the view taken by the High Court is unsustainable. 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 when 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 offense is punishable with a stringent sentence as under the NDPS Act. ...”

35. The aforesaid view was followed by the Apex Court in case of ***Ashok v. State of M.P. (Criminal Appeal Nos. 946-947 OF 2019)***, wherein the Apex Court, *inter alia*, emphasized upon the necessity of maintaining proper custody of the seized contraband from the date of its seizure till obtaining of FSL report including production in Court because for the prosecution to succeed it is imperative that there must be evidence to connect the forensic report with the substance that was seized from the possession of the accused.



36. In case of *Noor Aga v. State of Punjab* reported in **2010 (3) SCC (CRI) 748**, the accused, an Afghan national, was apprehended with 1.4 kg heroin concealed in layered wall of a carton carrying grapes. The contraband articles were produced before the Magistrate. Evidence, however, was not clear regarding the purpose of such production and there was no evidence that order was passed in respect of its destruction. Moreover, no application for destruction was filed. During trial, the seized contraband was not produced. Submission, on behalf of accused, *inter alia*, was that prosecution having not produced the physical evidence of the seizure before the court, particularly the sample of the purported contraband material, no conviction could have been based thereupon. On behalf of the prosecution, submission was that the contraband was destroyed under orders of the Magistrate. The Apex Court found that there was no cogent evidence that guidelines in respect of destruction of contraband articles were followed. Relevant observations are extracted below:

“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.” 25.1. After observing as above, this Court proceeded to notice several discrepancies in the evidence produced and held:



“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 endeavor to prove the fact of possession of contraband by the appellant.”

37. Following the decision in case of **Noor Aga** (*supra*), the Apex Court, in case of **Union of India v. Jaroopram, (Criminal Appeal Nos. 741-742 OF 2011)** laid emphasis on the production of the bulk quantity of seized contraband in absence of there being evidence of its disposal. The relevant paragraphs are as under:

“10. Omission on the part of the prosecution to produce the bulk quantity of seized opium would create a doubt in the mind of the court on the genuineness of the samples drawn and marked as A, B, C, D, E, F from the allegedly seized contraband. However, the simple argument that the same had been destroyed, cannot be accepted as it is not clear that on what authority it was done. Law requires that such an authority must flow from an order passed by the Magistrate. On a bare perusal of the record, it is apparent that at no point of time any prayer had been made by the prosecution for destruction of the said opium or disposal thereof otherwise. The only course of action the prosecution should have resorted to is for its disposal is to obtain an order from the competent court of Magistrate as envisaged under section 52A of the Act. It is explicitly made under the Act that as and when such an application is made, the Magistrate may, as soon as may be, allow the application.

11. There is no denial of the fact that the prosecution has not filed any such application for disposal /destruction of the allegedly seized bulk quantity of contraband material nor was any such



order passed by the Magistrate. Even no notice has been given to the accused before such alleged destruction /disposal. It is also pertinent here to mention that the trial court appears to have believed the prosecution's story in a haste and awarded conviction to the respondent without warranting the production of bulk quantity of contraband. But, the High Court committed no error in dealing with this aspect of the case and disbelieving the prosecution story by arriving at the conclusion that at the trial, the bulk quantities of contraband were not exhibited to the witnesses at the time of adducing evidence.”

38. In case of ***Baldev Singh v. State of Haryana*** reported in ***2015 (17) SCC 554***, a three- Judge Bench of the Apex Court, following the decisions in ***Jitendra (supra)***, ***Ashok (supra)*** and ***Noor Aga (supra)***, allowed the appeal of a convict on the ground that the seized contraband was not produced and there was no satisfactory evidence regarding proper custody of the contraband.

39. In case of ***Vijay Pandey v. State of U.P.*** reported in ***AIR 2019 Supreme Court 3569***, the Apex Court laid emphasis on the existence of evidence to correlate the seized sample with the one that was tested. The relevant observations are reproduced *inter alia* hereinafter:

“8. The failure of the prosecution in the present case to relate the seized sample with that seized from the appellant makes the case no different from failure to produce the seized sample itself. In the circumstances the mere production of a laboratory report that the sample tested was narcotics cannot be conclusive proof by itself. The sample seized and that tested have to be correlated.”



*Whether the circumstances are sufficient to establish
conscious possession of the contraband by the appellant.*

40. Possession under the NDPS Act is not a purely physical concept. In ***Madan Lal v. State of Himachal Pradesh*** reported in **(2003) 7 SCC 465**, the Supreme Court explained that possession in the context of the NDPS Act denotes conscious possession, namely knowledge coupled with dominion and control. Equally, in ***Dharampal Singh v. State of Punjab*** reported in **(2010) 9 SCC 608**, it was held that before the statutory presumptions under Sections 35 and 54 can operate, the prosecution must first establish the foundational fact of possession.

41. The burden cast upon an accused under the NDPS Act is undoubtedly stringent. Yet, the law does not permit the Court to invert the burden of proof at the threshold. The prosecution cannot derive assistance from the statutory presumptions unless it first demonstrates by cogent evidence that the contraband was in the possession of the accused.

42. Tested on this standard, the evidence on record falls short of establishing possession of the appellant. No independent witness has deposed that the bag belonged to him. Significantly, the bag contained a *saree* admittedly belonging to



the co-accused.

43. The presence of the *saree* assumes evidentiary significance. It constitutes an objective circumstance connecting the bag with the co-accused.

44. In case of *Surinder Kumar Khanna v. Intelligence Officer, DRI* reported in *(2018) 8 SCC 271*, the Hon'ble Supreme Court held that conviction cannot rest solely on the statement of a co-accused in the absence of independent incriminating material. The Constitution Bench of the Apex Court in case of *Tofan Singh (supra)*, reiterated the limitations on the evidentiary use of statements recorded by officers under the NDPS Act.

45. The Hon'ble Supreme Court in case of *Mohan Lal v. State of Rajasthan*, reported in *(2015) 6 SCC 222*, explained that possession under the NDPS Act is not confined to physical custody. It includes both actual possession and constructive possession. Constructive possession means that a person may not have the contraband physically on his person, but he knows about its existence, has the power or ability to exercise control over it, and has the intention (animus) to exercise such control, which is reproduced hereinafter:

14. Dr Harris, in his essay titled "The Concept



of Possession in English Law” [Published in Oxford Essays in Jurisprudence (Edited by A.G. Guest, First Series, Clarendon Press, Oxford, 1968).] while discussing the various rules relating to possession has stated that “possession” is a functional and relative concept, which gives the Judges some discretion in applying abstract rule to a concrete set of facts. The learned author has suggested certain factors which have been held to be relevant to conclude whether a person has acquired possession for the purposes of a particular rule of law. Some of the factors enlisted by him are : (a) degree of physical control exercised by person over a thing, (b) knowledge of the person claiming possessory rights over a thing, about the attributes and qualities of the thing, (c) the person's intention in regard to the thing, that is, “animus possessionis” and “animus domini”, (d) possession of land on which the thing is claimed is lying, also the relevant intention of the occupier of a premises on which the thing is lying thereon to exclude others from enjoying the land and anything which happens to be lying there; and Judges' concept of the social purpose of the particular rule relied upon by the plaintiff.

46. The Apex Court laid down the above principle by applying the principle of dominion and control to uphold the conviction under Section 18 of the NDPS Act in the fact of the said case, establishing a critical legal precedent for cases where contraband is not physically found in possession of the accused in the said case at the time of arrest of the accused in respect of the opium, which was hidden in a remote pit underneath a bridge, it was not in his immediate physical possession. The Apex Court Court rejected this defense by legally deconstructing possession into two components:

- i. *Corpus* (Physical Control): Direct or indirect access to the item.
- ii. *Animus* (Intent): The intent to exercise control over



the item to the exclusion of others.

47. Based on the above governing principle of law can the evidence on record and the oral evidence suggest acquired possession to the knowledge of the appellant exercising dominion and control as a result of concealment?

48. As laid down by the Hon'ble Supreme Court in the *Mohan Lal (Supra)* in which, it is explicitly ruled that "exercise of dominion and control as a result of concealment" constitutes valid possession under the law, even though the narcotic substance was not within Mohan Lal's hands or physical vicinity at the moment of his arrest.

49. In the present case, the disclosure made by the co-accused persons, who voluntarily gave statement that they were carrying the contraband having engaged as a carrier by the appellant, which would be evident from the evidence of the seizure witnesses, namely P.W.1 Dinesh Kumar and P.W.2 Laldeo Razak, unequivocally proves the search and recovery of *Charas* from the possession of the accused persons, and nothing substantial has emerged in their cross-examination to discredit their testimony. The seizure is further corroborated by the voluntary statements of the accused (Exts. 1/4 to 1/6) and their interrogatory statements (Exts. 1 to 1/2), wherein they admitted



possession of the contraband. The defence has failed to establish that such statements were obtained by any inducement, threat or promise by retracting the statement. The evidence further discloses that accused Birja Prasad was carrying all the bags from which 10 kilograms of *Charas* was recovered, while accused Rambani Khatun and Rozidan Khatun were found travelling together with him and each of them were found in possession of 5 kilograms of *Charas* each. Significantly, *sarees* belonging to Rambani Khatun and Rozidan Khatun were recovered from the bag beneath the seat of Birja Prasad, thereby, establishing the close association of the three accused persons and joint involvement in the transportation of the contraband cannot be ruled out. The unique relationship of the accused, particularly, the appellant with the contraband establishes that nobody else knew about the *Charas* in the bag beneath the seat, which establishes beyond reasonable doubt that the appellant maintained constructive possession and absolute ownership contrary over the hidden *Charas* until seizure. The presumption of culpable mental state under Section 35 of the NDPS Act, which includes deliberate and conscious intention over the purpose to commit the illegal act, motive or objective behind the action, knowledge of an act or consciousness that substance in



question is prohibited narcotic and lastly the act and information would lead any reasonable person to assume and have reason to believe that he was in constructive possession of the contraband with a guilty mind "fulfilling the statutory explanation of Section 35 of the NDPS Act". The positive evidence on record establishes the appellant ownership and control over the bag. The chemical examination report confirms that the seized substance was *Charas*. In these circumstances, the prosecution has proved beyond reasonable doubt that the accused/appellant, who with a conscious mental state was in continuous conscious control of the recovered contraband. Consequently, the statutory presumption under Section 54 of the NDPS Act stands attracted, and in the absence of any satisfactory explanation from the accused, the Court has no hesitation in holding that the appellant was knowingly and consciously possessing and transporting commercial quantity of *Charas*, thereby rendering him liable for conviction under the provisions of the NDPS Act.

50. The principles governing "*constructive conscious possession*" have been satisfied, as there is clear proof of dominion, control, and knowledge of the seized article, this Court is of the considered opinion that the impugned judgment of conviction dated 28.05.2012 and order of sentence dated



30.05.2012 passed by the learned 6th Additional Sessions Judge, Muzzafarpur, in NDPS Case No. 132/07-08, S.T. 3/08, whereby and whereunder, the appellant has been convicted for the offence punishable under Sections 20 (b) (ii) C of the NDPS Act and have been sentenced to undergo Rigorous Imprisonment for 10 years and fine of Rs. 1 lakh. don't require any interference, accordingly, the appeal is dismissed.

51. Since the appellant is on bail, he is directed to be taken into custody forthwith.

52. Office is directed to send back the lower court records along with a copy of the judgment to the learned District Court forthwith.

(Purnendu Singh, J)

Niraj/-

AFR/NAFR	
CAV DATE	14.05.2026
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