

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.395 of 2016**

Arising Out of PS. Case No.-121 Year-2014 Thana- SATHI District- West Champaran

Parma Sah Son of late Yamuna Sah Resident of Village- Belbaniya, PS
Shikarpur, District West Champaran.

... .. Appellant/s

Versus

The State Of Bihar

... .. Respondent/s

Appearance :

For the Appellant : Mr. Bimlesh Kumar Pandey, Advocate
For the State : Ms. Anita Kumari Singh, APP

**CORAM: HONOURABLE MR. JUSTICE PRABHAT KUMAR SINGH
ORAL ORDER**

12 25-03-2026 Heard learned counsel for the appellant and learned
A.P.P. for the State.

2. This appeal has been filed challenging the judgment of conviction dated 28.04.2016 and order of sentence dated 30.04.2016 passed in Trial No. 39 of 2014 corresponding to N.D.P.S. Case No. 12 of 2014 arising out of Sathi P.S. Case No. 121 of 2014 whereby and whereunder the sole appellant has been convicted under Sections 20(b)(ii)(B), 22(b) and 23(b) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred as the N.D.P.S. Act) and has been sentenced to undergo rigorous imprisonment for 10 years and pay a fine of Rs. 1,00,000/- for each of the offence and in case of default of payment of fine, to further undergo imprisonment for one year for each default.



3. The prosecution case, in brief, is that on 07.07.2014 at about 16:00 hours, informant, namely Dhirendra Nath Verma, received secret information that two persons are going to Sathi Railway Station on a motorcycle with *Ganja*. Upon receiving the information, a raiding team was prepared and the same reached near Sathi Bazar Railway Station and at about 18:15 hours, two persons were seen coming from Sathi Bazar to Railway Station and on suspicion, they were asked to stop, however, they started fleeing but were caught eventually. Upon enquiry, they disclosed their names as Parama Sah (appellant) and Arvind Kumar Sharma and on search, some substance was found in a polythene kept in a gunny bag and this appellant disclosed that the said article was *Ganja* and was brought from Nepal. Accordingly, seizure was made in presence of two witnesses, namely Suresh Thakur and Hari Sah and along with the contraband, one mobile phone and a SIM card were seized from possession of this appellant and one mobile phone, a SIM card, 40 rupees cash and motorcycle were seized from possession of co-accused Arvind Kumar Sharma.

4. The seized articles were produced with the accused persons to Sathi Police Station and accordingly, Sathi P.S. Case No. 121 of 2014 was registered. In this case, charge-



sheet was submitted on 11.10.2014 under Sections 20, 22, 23, 24, 27 and 29 of the N.D.P.S. Act and thereafter, cognizance was taken and charges were framed on 22.05.2015 under Sections 20(b)(ii)B, 22(b) and 23(b) of the N.D.P.S. Act.

5. In this case, in order to bring home guilt of the accused person, the prosecution has examined altogether seven witnesses. P.W. 3, namely Dhirendra Nath Verma is informant of this case and member of the raiding team. P.W. 1, namely Nagendra Sahani; P.W. 2, namey Rahul Kumar; P.W. 4, namely Anil Sharma and P.W. 5, namely Vivekanand Singh, are members of the raiding team. P.W. 6, namely Rajesh Kumar Jha, is the Investigating Officer of the case. P.W. 7, namely Awadhesh Kumar, is incharge of the *Malkhana*. On the other hand, the defence has not produced any oral or documentary evidence.

6 After hearing the parties, the learned trial court convicted the appellant and sentenced him as indicated in the opening paragraph of this order.

7. Learned counsel appearing for the appellant assails the order of conviction and sentence on various grounds. He contends that in this case, there has been total violation of Sections 42, 52A and 55 of the N.D.P.S. Act. He contends that in



this case, the police officer did not record the information at all and did not inform the the officer superior to him at all thus, is a clear violation of Section 42 of the Act. The prosecution could not prove drawing of the so called samples in presence of the Magistrate and also in presence of the appellant. The seized articles were neither sealed at the spot nor it was sealed while keeping the same in *Malkhana* and as such, production of the material exhibit does not prove that it was the same article which was alleged to have been seized in the alleged occurrence and from the possession of this appellant. Thus, the prosecution also failed to prove the preparation of inventory in view of Sections 52A and 55 of the N.D.P.S. Act. He further contends that the Magistrate before whom the so called sample was drawn has also not been examined. Nor the expert who prepared the F.S.L. report has been examined or the two seizure list witnesses, namely Suresh Thakur and Hari Sah, were examined. Two members of the raiding team were also not examined. He, therefore, contends that there is total violation of Sections 42, 52A and 55 of the N.D.P.S. Act and hence, on that score alone, the appellant is entitle to the relief of acquittal.

8. In support of his contentions, learned counsel for the appellant has placed reliance upon Paragraph No. 17 of



judgment of the Hon'ble Apex Court passed in the case of ***Karnail Singh versus State of Haryana*** reported in (2009) 8 SCC 539, which reads as follows:-

“17. It is clear from Sajan Abraham [(2001) 6 SCC 692 : 2001 SCC (Cri) 1217] that to enforce the law under the NDPS Act stringently against the persons involved in illicit drug trafficking and drug abuse, the legislature has made some of its provisions obligatory for the prosecution to comply with, which the courts have interpreted to be mandatory. It is further clear that this is in order to balance the stringency for an accused by casting an obligation on the prosecution for its strict compliance. The Court however while construing such provisions strictly should not interpret them literally so as to render their compliance impossible. It concluded that if in a case, the strict following of a mandate results in delay in trapping an accused, which may lead the accused to escape, then the prosecution case should not be thrown out. It is also clear that when substantial compliance has been made it would not vitiate the prosecution case.”

9. Learned counsel for the appellant further placed reliance upon judgment of the Hon'ble Apex Court passed in the case of ***State of Rajasthan versus Jagraj Singh @ Hanja*** reported in (2016) 11 SCC 687, Paragraph Nos. 9, 24 and 25 of which reads as follows:-

“9. Whether the High Court committed error in acquitting the accused is the issue which needs to be considered in this appeal. Whether there was sufficient material to support the findings of the High Court regarding non-compliance with Section 42(1) and Section 42(2) and whether Section 43 was applicable in the present case are the other issues which need to be answered. Whether recovery as claimed by the



prosecution is supported from the evidence on record and material and samples were properly sealed are other related issues.

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24. After referring to a large number of cases, this Court in Balbir Singh case [State of Punjab v. Balbir Singh, (1994) 3 SCC 299 : 1994 SCC (Cri) 634] recorded the conclusion in para 25 which is to the following effect : (SCC pp. 320-22)

“25. The question considered above arise frequently before the trial courts. Therefore we find it necessary to set out our conclusions which are as follows:

(1) If a police officer without any prior information as contemplated under the provisions of the NDPS Act makes a search or arrests a person in the normal course of investigation into an offence or suspected offences as provided under the provisions of CrPC and when such search is completed at that stage Section 50 of the NDPS Act would not be attracted and the question of complying with the requirements thereunder would not arise. If during such search or arrest there is a chance recovery of any narcotic drug or psychotropic substance then the police officer, who is not empowered, should inform the empowered officer who should thereafter proceed in accordance with the provisions of the NDPS Act. If he happens to be an empowered officer also, then from that stage onwards, he should carry out the investigation in accordance with the other provisions of the NDPS Act.

(2-A) Under Section 41(1) only an empowered Magistrate can issue warrant for the arrest or for the search in respect of offences punishable under Chapter IV of the Act, etc. when he has reason to believe that such offences have been committed or such substances are kept or concealed in any building, conveyance or place. When such warrant for arrest or for search is issued by a Magistrate who is not empowered, then such search or arrest if carried out would be illegal. Likewise only empowered officers or duly authorised officers as enumerated in Sections 41(2) and 42(1) can act under the provisions of the NDPS Act. If such arrest or search is made under the provisions of the NDPS Act by anyone other than such officers, the same would be illegal.

(2-B) Under Section 41(2) only the empowered officer can give the authorisation to his subordinate officer to carry out the arrest of a person or search as mentioned therein. If there is a contravention, that would affect the prosecution case and vitiate the conviction.

(2-C) Under Section 42(1) the empowered officer if has a prior information given by any person, that should necessarily be taken down in writing. But if he has reason to believe from personal knowledge that offences



under Chapter IV have been committed or materials which may furnish evidence of commission of such offences are concealed in any building, etc. he may carry out the arrest or search without a warrant between sunrise and sunset and this provision does not mandate that he should record his reasons of belief. But under the proviso to Section 42(1) if such officer has to carry out such search between sunset and sunrise, he must record the grounds of his belief.

To this extent these provisions are mandatory and contravention of the same would affect the prosecution case and vitiate the trial.

(3) Under Section 42(2) such empowered officer who takes down any information in writing or records the grounds under proviso to Section 42(1) should forthwith send a copy thereof to his immediate official superior. If there is total non-compliance with this provision the same affects the prosecution case. To that extent it is mandatory. But if there is delay whether it was undue or whether the same has been explained or not, will be a question of fact in each case.

(4-A) If a police officer, even if he happens to be an “empowered” officer while effecting an arrest or search during normal investigation into offences purely under the provisions of CrPC fails to strictly comply with the provisions of Sections 100 and 165 CrPC including the requirement to record reasons, such failure would only amount to an irregularity.

(4-B) If an empowered officer or an authorised officer under Section 41(2) of the Act carries out a search, he would be doing so under the provisions of CrPC, namely, Sections 100 and 165 CrPC and if there is no strict compliance with the provisions of CrPC then such search would not per se be illegal and would not vitiate the trial.

The effect of such failure has to be borne in mind by the courts while appreciating the evidence in the facts and circumstances of each case.

(5) On prior information the empowered officer or authorised officer while acting under Sections 41(2) or 42 should comply with the provisions of Section 50 before the search of the person is made and such person should be informed that if he so requires, he shall be produced before a gazetted officer or a Magistrate as provided thereunder. It is obligatory on the part of such officer to inform the person to be searched. Failure to inform the person to be searched and if such person so requires, failure to take him to the gazetted officer or the Magistrate, would amount to non-compliance with Section 50 which is mandatory and thus it would affect the prosecution case and vitiate the trial. After being so informed whether such person opted for such a course or not would be a question of fact.

(6) The provisions of Sections 52 and 57 which deal with



the steps to be taken by the officers after making arrest or seizure under Sections 41 to 44 are by themselves not mandatory. If there is non-compliance or if there are lapses like delay, etc. then the same has to be examined to see whether any prejudice has been caused to the accused and such failure will have a bearing on the appreciation of evidence regarding arrest or seizure as well as on merits of the case.”

25. A three-Judge Bench in Saiyad Mohd. Saiyad Umar Saiyad v. State of Gujarat [Saiyad Mohd. Saiyad Umar Saiyad v. State of Gujarat, (1995) 3 SCC 610 : 1995 SCC (Cri) 564] after elaborate consideration of the provisions of the NDPS Act including Section 50 had endorsed the judgment of this Court in Balbir Singh case [State of Punjab v. Balbir Singh, (1994) 3 SCC 299 : 1994 SCC (Cri) 634] .”

10. Learned counsel for the appellant also places reliance upon another judgment of the Hon’ble Apex Court passed in the case of **Boota Singh and Others versus State of Haryana** reported in **(2021) 19 SCC 606**, Paragraph Nos. 12, 13, 14 and 15 of which reads as follows:-

“13. In Jagraj Singh [State of Rajasthan v. Jagraj Singh, (2016) 11 SCC 687 : (2017) 1 SCC (Cri) 348] , the facts were more or less identical. In that case, the vehicle (as observed in para 5.3 of the decision) was not a public transport vehicle. After considering the relevant provisions and some of the decisions of this Court including the decision in Karnail Singh [Karnail Singh v. State of Haryana, (2009) 8 SCC 539 : (2009) 3 SCC (Cri) 887] , it was observed : (Jagraj Singh case [State of Rajasthan v. Jagraj Singh, (2016) 11 SCC 687 : (2017) 1 SCC (Cri) 348] , SCC pp. 694-95 & 702, paras 14, 16 & 29)

“14. What Section 42(2) requires is that where an officer takes down an information in writing under sub-section (1) he shall send a copy thereof to his immediate officer senior. The communication Ext. P-15 which was sent to the Circle Officer, Nohar was not as per the information recorded in Ext. P-14 and Ext. P-21. Thus, no error was committed by the High Court in coming to the conclusion



that there was breach of Section 42(2).

16. In this context, it is relevant to note that before the Special Judge also the breach of Sections 42(1) and 42(2) was contended on behalf of the defence. In para 12 of the judgment the Special Judge noted the above arguments of defence. However, the arguments based on non-compliance with Section 42(2) were brushed aside by observing that discrepancy in Ext. P-14 and Ext. P-15 is totally due to clerical mistake and there was compliance with Section 42(2). The Special Judge coming to compliance with the proviso to Section 42(1) held that the vehicle searched was being used to transport passengers as has been clearly stated by its owner Vira Ram, hence, as per the Explanation to Section 43 of the Act, the vehicle was a public transport vehicle and there was no need of any warrant or authority to search such a vehicle. The High Court has reversed the above findings of the Special Judge. We thus, proceed to examine as to whether Section 43 was attracted in the present case which obviated the requirement of Section 42(1) proviso.

29. After referring to the earlier judgments, the Constitution Bench came to the conclusion that non-compliance with requirement of Sections 42 and 50 is impermissible whereas delayed compliance with satisfactory explanation will be acceptable compliance with Section 42. The Constitution Bench noted the effect of the aforesaid two decisions in para 5. The present is not a case where insofar as compliance with Section 42(1) proviso even an argument based on substantial compliance is raised there is total non-compliance with Section 42(1) proviso. As observed above, Section 43 being not attracted, search was to be conducted after complying with the provisions of Section 42. We thus, conclude that the High Court has rightly held that non-compliance with Section 42(1) and Section 42(2) were proved on the record and the High Court has not committed any error in setting aside the conviction order.”

13. In Jagraj Singh [State of Rajasthan v. Jagraj Singh, (2016) 11 SCC 687 : (2017) 1 SCC (Cri) 348] , the facts were more or less identical. In that case, the vehicle (as observed in para 5.3 of the decision) was not a public transport vehicle. After considering the relevant provisions and some of the decisions of this Court including the decision in Karnail Singh [Karnail Singh v. State of Haryana, (2009) 8 SCC 539 : (2009) 3 SCC (Cri) 887] , it was observed : (Jagraj Singh case [State of Rajasthan v. Jagraj Singh, (2016) 11 SCC 687



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14. The evidence in the present case clearly shows that the vehicle was not a public conveyance but was a



vehicle belonging to accused Gurdeep Singh. The registration certificate of the vehicle, which has been placed on record also does not indicate it to be a public transport vehicle. The Explanation to Section 43 shows that a private vehicle would not come within the expression "public place" as explained in Section 43 of the NDPS Act. On the strength of the decision of this Court in Jagraj Singh [State of Rajasthan v. Jagraj Singh, (2016) 11 SCC 687 : (2017) 1 SCC (Cri) 348] , the relevant provision would not be Section 43 of the NDPS Act but the case would come under Section 42 of the NDPS Act.

15. It is an admitted position that there was total non-compliance of the requirements of Section 42 of the NDPS Act."and also upon judgments of this Hon'ble Court passed in the case of Vinod Das versus State of Bihar reported in 2024 (6) BLJ 360 and Pintu Bhagat versus State of Bihar reported in 2016 (1) PLJR 771."

11. Lastly, learned counsel for the appellant has placed reliance upon judgments of this Hon'ble Court passed in the case of ***Vinod Das versus State of Bihar*** reported in ***2024 (6) BLJ 360*** and ***Pintu Bhagat versus State of Bihar*** reported in ***2016 (1) PLJR 771***.

12. On the other hand, learned A.P.P. for the State has submitted that there is no need of any interference in this appeal since the prosecution witnesses have supported the corroborated the prosecution story and there is no reason to differ with the findings of the learned trial court and the judgment of conviction and order of sentence are justified and legal.



13. From going through the rival submissions, evidences and upon perusal of the records, this Court finds that it is a case of total non-compliance of the requirements of Section 42 of the N.D.P.S. Act, which is impermissible. In this case, the police officials did not record the information in writing before taking action. Nor did he inform the officer superior to him at all and thus, it is a clear violation of Section 42 of the N.D.P.S. Act. Neither the two seizure list witnesses nor the Magistrate in whose presence the samples were drawn of the expert who prepared the F.S.L. report were examined and there is no plausible explanation as to why they were not examined. Moreover, the samples were not drawn before the appellant. That apart, the samples were drawn and kept in the *Malkhana* but there is nothing on record to suggest that the samples were sealed at the spot or appropriately preserved in the dedicated *Malkhana* and thus, the prosecution has failed to prove that the inventory was prepared in accordance with law and there is violation of Sections 52A and 55 of the N.D.P.S. Act. Moreover, all the prosecution witnesses are police officials and there is no independent witness.

14. These discrepancies in carrying out the investigation makes the prosecution case highly tainted.



15. For the aforementioned discrepancy and infirmity, I find that the impugned judgment of conviction dated 28.04.2016 and order of sentence dated 30.04.2016 are difficult to sustain.

16. In that view of the matter, the judgment of conviction dated 28.04.2016 and order of sentence dated 30.04.2016 passed by the learned Additional District and Sessions Judge-IIIrd, Bettiah, West Champaran in Trial No. 39 of 2014 corresponding to N.D.P.S. Case No. 12 of 2014 arising out of Sathi P.S. Case No. 121 of 2014 are hereby set aside.

17. Appellant is acquitted of all the charges and is discharged from the liability of the bail bond in connection with this case.

18. Accordingly, this appeal stands allowed.

19. Interlocutory application/s, if any, also stands disposed off.

(Prabhat Kumar Singh, J)

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