

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.1114 of 2018**

Arising Out of PS. Case No.-72 Year-2017 Thana- NAUGACHIA District- Bhagalpur

Saurav Kumar @ Saurabh Kumar, Son of Ajay Kumar Jha, Resident of
Village – Tulsipur, Police Station- Kharik, District- Bhagalpur.

... .. Appellant/s

Versus

The State of Bihar.

... .. Respondent/s

Appearance :

For the Appellant	:	Mr. Ajay Kumar Thakur, Advocate Mr. Imteyez Ahmed, Advocate Mr. Shashi Shekhar, Advocate Mr. Ritwaj Raman, Advocate Ms. Somali Almarya, Advocate Mr. Purushottam Kumar, Advocate
For the Respondent-State:		Mr. Abhimanyu Sharma, APP

**CORAM: HONOURABLE MR. JUSTICE BIBEK CHAUDHURI
and
HONOURABLE MR. JUSTICE CHANDRA SHEKHAR JHA
ORAL JUDGMENT
(Per: HONOURABLE MR. JUSTICE BIBEK CHAUDHURI)**

Date : 20-04-2026

This is an appeal under Section 374(2) of the Cr.P.C. assailing judgment of conviction and order of sentence passed by the learned Additional District and Sessions Judge Ist, Court of Bhagalpur in NDPS Case No. 1391 of 2017 on 24.07.2018, convicting the appellant for committing offence under Sections 20B (ii)(C) and 22 of the NDPS Act and sentencing him to suffer rigorous imprisonment for 20 years for the offence punishable under Section 20B (ii)(c) with a fine of Rs. 1 lakh and in default of payment of fine, further sentenced him for a period of six months of simple



imprisonment. The learned Trial Judge was of the view that since the appellant was sentenced for the offence under Section 20B(ii)(C) no separate sentence is required to be passed for the offence punishable under Section 22 of the NDPS Act.

2. The aforesaid judgment passed by the learned trial court is under challenge before us.

3. Factual aspect leading to the filing of the instant appeal is as follows:-

4. Naugachhia P.S. Case No. 72 of 2017 dated 25th April, 2017 was registered against the appellant on the basis of a *suo moto* complaint filed by one Sajany Kumar Sudhanshu, Inspector of Police cum SHO of the P.S. Naugachhia, stating *inter alia* that on 25th April, 2017 at about 6:00 PM he was performing mobile patrolling duty with arms constable, namely, Raju Kumar, Motichandra Ratna and Ashutosh Kumar. At about 8:00 PM, when they reached village Srighur, Simra, they found two persons riding on a motorcycle, were crossing Ajani Simra More at a high speed. On suspicion, the police party tried to apprehend them and when the said motorcycles were chased, the pillion rider fell down on the ground, where a polybag was found in



possession. The police party apprehended him. The motorcycle rider fled away from the spot. The informant asked the name of the said apprehended person, who disclosed his name as Saurabh Kumar. On search, police recovered two packets of *cannabis* from the possession of the said apprehended person. One packet of *cannabis* weighted about 25 kgs and the other was about 22 kgs. The Inspector of Police seized the said *cannabis* under proper seizure list in presence of the witnesses at the spot. The accused put his LTI on the seizure list and the copy of the same was handed over to him. The witnesses also signed on the seizure list, thereafter the accused was formally arrested and he was brought to Naugachia police station.

5. The said complaint was treated as FIR and Naugachhia P.S. Case No. 72/2017 was dated 25th April 2017 was registered against the appellant. Thereafter, one Md. Mehtab Khan, a police officer, directed to investigate the said case. On completion of investigation, police submitted charge-sheet against the accused under Section 20 B(ii)(C)/22 of the Arms Act. Since, the offence under the NDPS Act is triable by the learned Special Judge in the rank of Additional Sessions Judge, the case was transferred to the 1st Court of the learned



Additional Sessions Judge for trial and disposal.

6. In the Trial Court, prosecution examined as many as eight witnesses, amongst them PW-1 is the informant. PW-2 is a Constable of Police, who was discharging mobile duty on 24th April, 2017. PW-3, Raju Kumar Singh is also a Constable of Police discharging mobile duty on the date and time of the occurrence. PW-4, Motilal Ratan is another member of the raiding party. PW-5, Md. Mehtab Khan is the Investigating Officer of this case. PW-6, Brahamdev Sharma and PW-7, Md. Rakesh are the witnesses to seizure of narcotics substance. PW-8, Ganesh Prasad Yadav was posted as Malkhana Officer at Naugachia Police Station, he produced Malkhana Register to show that seized 47 kgs of *Cannabis* were kept in the Malkhana of Naugachia Police Station.

7. We have carefully perused and considered the evidence of the witnesses adduced in Trial Court. We have also considered the exhibited documents.

8. It is submitted by Mr. Ajay Kumar Thakur, learned counsel on behalf of the appellant and ably assisted by Mr. Ritwaj Raman that the Seizing Officer, i.e. PW-1 failed to conduct search and seizure of the person of the accused, as per the statutory directions and provisions contemplated in the



N.D.P.S. Act. It is also submitted by Mr. Thakur that according to PW-1, he seized two bags of *Cannabis* containing 25 kgs and 22 kgs respectively. However, no sample seizure list, sealing and levelling were made at the spot by the Seizing Officer.

9. Secondly, in the F.I.R., he did not say anything about the sample seizure list but in his evidence, PW-1 stated that he prepared samples of seized *Cannabis* in two brown coloured packets of 25 grams each. Thus, there is specific contradiction between the evidence of the informant and the statement made by him in the F.I.R. Neither the sample seizure list nor the sample goods were produced during investigation before the learned Magistrate for preparation of samples from the sample seized goods in order to send the same to the Forensic Science Laboratory (FSL). Therefore, Mr. Thakur has raised a pertinent question as to whether the sample seizure list was at all produced before the learned Magistrate or not and secondly, if the samples allegedly prepared by PW-1 were produced before the learned Magistrate to prepare sample of contraband articles from samples of seized goods for sending the same to the FSL for chemical examination. Secondly, it is submitted by Mr.



Thakur that no sample seizure list was exhibited during trial of the case. There is also no evidence on behalf of the prosecution that the said samples of contraband articles were sealed and levelled. Thirdly, the learned counsel on behalf of the appellant submits that in the instant case only the police personnel had supported the prosecution case. Surprisingly enough, though the independent seizure witnesses identified their signature and Left Thumb Impression (LTI) on the seizure list. No question was put by the prosecution in order to corroborate the incident. They being the independent witnesses could have the best witnesses regarding apprehension of the accused/recovery of contraband articles and seizure of the same. In the absence of such evidence, the learned Trial Judge ought to have held that the prosecution failed to prove the charge against the accused persons.

10. The procedure, for search, seizure and arrest without warrant or authorization have been described in Section 42 and 43 of the NDPS Act. The provisions read as hereunder:-

“[42. Power of entry, search, seizure and arrest without warrant or authorisation.-- (1) Any such officer (being an officer superior in rank to a peon, sepoy or constable) of the departments of central excise, narcotics, customs, revenue



intelligence or any other department of the Central Government including para-military forces or armed forces as is empowered in this behalf by general or special order by the Central Government, or any such officer (being an officer superior in rank to a peon, sepoy or constable) of the revenue, drugs control, excise, police or any other department of a State Government as is empowered in this behalf by general or special order of the State Government, if he has reason to believe from personal knowledge or information given by any person and taken down in writing that any narcotic drug, or psychotropic substance, or controlled substance in respect of which an offence punishable under this Act has been committed or any document or other article which may furnish evidence of the commission of such offence or any illegally acquired property or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act is kept or concealed in any building, conveyance or enclosed place, may between sunrise and sunset,-

- (a) enter into and search any such building, conveyance or place;*
- (b) in case of resistance, break open any door and remove any obstacle to such entry;*
- (c) seize such drug or substance and all materials used in the manufacture thereof and any other article and any animal or conveyance which he has reason to believe to be liable to confiscation under this Act and any document or other article which he*



has reason to believe may furnish evidence of the commission of any offence punishable under this Act or furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act; and

(d) detain and search, and, if he thinks proper, arrest any person whom he has reason to believe to have committed any offence punishable under this Act:

Provided that in respect of holder of a licence for manufacture of manufactured drugs or psychotropic substances or controlled substances granted under this Act or any rule or order made thereunder, such power shall be exercised by an officer not below the rank of sub-inspector:

Provided further that] if such officer has reason to believe that a search warrant or authorisation cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place at any time between sunset and sunrise after recording the grounds of his belief.

(2) Where an officer takes down any information in writing under sub-section (1) or records grounds for his belief under the proviso thereto, he shall within seventy-two hours send a copy thereof to his immediate official superior.]”

“43. Power of seizure and arrest in public place.—Any officer of any of the departments mentioned

in section 42 may—

(a) seize in any public place or in transit,



any narcotic drug or psychotropic substance or controlled substance in respect of which he has reason to believe an offence punishable under this Act has been committed, and, along with such drug or substance, any animal or conveyance or article liable to confiscation under this Act, any document or other article which he has reason to believe may furnish evidence of the commission of an offence punishable under this Act or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act;

(b) detain and search any person whom he has reason to believe to have committed an offence punishable under this Act, and if such person has any narcotic drug or psychotropic substance or controlled substance in his possession and such possession appears to him to be unlawful, arrest him

and any other person in his company.

Explanation.—For the purposes of this section, the expression “public place” includes any public conveyance, hotel, shop, or other place intended for use by, or accessible to, the public.”

11. Section 50 of the NDPS Act lays down the conditions under which search of persons shall be conducted.

Section 50 of the NDPS Act runs thus:-

“50. Conditions under which search of persons shall be conducted.—(1) When any officer duly authorised under



section 42 is about to search any person under the provisions of section 41, section 42 or section 43, he shall, if such person so requires, take such person without unnecessary delay to nearest Gazetted Officer of any of the departments mentioned in section 42 or to the nearest Magistrate.

(2) If such requisition is made, the officer may detain the person until he can bring him before the Gazetted Officer or the Magistrate referred to in sub-section (1).

(3) The Gazetted Officer or the Magistrate before whom any such person is brought shall, if he sees no reasonable ground for search, forthwith discharge the person but otherwise shall direct that search be made.

(4) No female shall be searched by anyone excepting a female.

(5) When an officer duly authorised under section 42 has reason to believe that it is not possible to take the person to be searched to the nearest Gazetted Officer or Magistrate without the possibility of the person to be searched parting with possession of any narcotic drug or psychotropic substance, or controlled substance or article or document, he may, instead of taking such person to the nearest Gazetted Officer or Magistrate, proceed to search the person as provided under section 100 of the Code of Criminal Procedure, 1973.

(6) After a search is conducted under sub-section (5), the officer shall record the reasons for such belief which necessitated such search and within seventy-two hours send a copy thereof to his immediate official superior.”



12. It is needless to say that F.I.R. is the foundation of a criminal case. In the F.I.R., the informant did not state as to whether the accused was offered to be searched in presence of a Gazetted Officer of any of the Departments mentioned in Section 42 of the NDPS Act or before the nearest Magistrate. Of course, sub-Section 5 of Section 50 empowers a Police Officer to conduct search in the absence of any Gazetted Officer or the Magistrate, if they are not available at the time of search but such fact is required to be proved by the prosecution.

13. In a case under the NDPS Act certain aspects are required to be proved without reasonable doubt by the prosecution, examining the Investigating Officer. The Investigating Officer ensure to follow the following guidelines and the following facts must be recorded in the case dairy:-

i) Raiding parties constitution, departure with/without vehicle, arms and remuneration, route taken, the name of the driver as well as accompanying of the informer.

ii) Number of independent public witnesses requested, their place, their background i.e. whether they were passersby, rickshaw pullers, residents etc., and reasons for not joining.



iii) Time must be noted for important aspects like time of making general diary entry at the time of departure by raiding party and also the time of return with the accused and contraband articles.

iv) Time of actual search and seizure and

v) Time of apprehending of suspects.

14. Immediately after seizure, it is the duty of the Arresting Officer to prepare the sample seizure list. This sample becomes the part of the case property, especially when the contraband articles are huge in quantity. So, the case prepared must be properly sealed with standard seal and the seal used must be handed over to any of the witnesses. While taking the case property in his charge, the Station House Officer (SHO) should counter seal it with his own seal, every addition in the FSL/CFSL etc., must be duly signed by the SHO.

15. In the instant case, Malkhana Officer was examined by the prosecution as PW-8, he produced the Malkhana Register. The relevant entry in the Malkhana Register has been marked as **Exhibit-11**. On perusal of the said exhibit, it is found that the Malkhana Officer received total seized 47 kgs of *Cannabis* in two packets. Therefore, the



claim of PW-1 that sample seizures were made has not been proved. If the entire 47 kgs of *Cannabis* are kept in P.S. Malkhana, then how the sample was taken for sending the same to FSL.

16. Therefore, we are not in a position to relate the FSL Report with the *Cannabis* allegedly seized from the appellant.

17. The learned counsel on behalf of the prosecution submits that the appellant is a habitual offender and other cases are also pending against him.

18. This aspect cannot be taken into consideration by us. In view of the fact that in criminal trial past bad conduct of an accused is not relevant.

19. Considering such aspect of the matter, we are of the view that the Trial Court passed an order of conviction and sentence of the appellant without considering the essential requirements contained in Section 42, 43 and 50 of the NDPS Act. Therefore, the order of Conviction and sentence cannot be sustained.

20. Accordingly, the instant appeal is allowed on contest.

21. The accused/appellant be acquitted of the



charges and released at once, if he is in custody.

22. The Office is directed to issue release order at once. Fine amount, if any, which has been deposited by the appellant be returned to him.

(Bibek Chaudhuri, J)

Chandra Shekhar Jha, J:- I agree

(Chandra Shekhar Jha, J)

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