

**IN THE HIGH COURT OF JUDICATURE AT PATNA**

**Dharmendra Kumar Singh @ Dharmendra Singh**

**vs.**

**The State of Bihar**

Criminal Appeal (DB) No. 1241 of 2017

23-06-2023

**(Hon'ble Mr. Justice Ashutosh Kumar)**

**and**

**(Hon'ble Mr. Justice Shailendra Singh)**

**Issue for Consideration**

Whether the conviction of the appellant under Section 20(b)(ii)(c) read with Section 29 of the N.D.P.S. Act, 1985 was sustainable when mandatory provisions relating to search, seizure, sampling, storage, and production of narcotics were not duly followed.

**Headnotes**

Section 42 of the N.D.P.S. Act. has not been complied with. No sampling was done at the place of raid. There is no entry in the malkhana register. After the narcotics was kept in the malkhana for about two months, a requisition was made by Sub-Inspector of Police to the District Judge of the concerned district for deputing a Magistrate for drawing the samples. There is no evidence that such samples were drawn before the Magistrate so deputed as the Magistrate has not been examined nor any statement has been made that such sampling was done before him. There was no photography of the sampling process. Samples were sent to the laboratory for testing through a special messenger who has not been examined at the trial but those were received in the laboratory after 23 days. Even the sampling was done after undue delay. Assuming that the samples corresponded to Charas would be of no avail to the State for prosecuting the appellant. (Para 12, 13)

The two witnesses to the seizure have not supported the prosecution case and have also not identified the appellant. (Para 14)

Appeal is allowed. (Para 21)

Case Law Cited

Vijay Jain v. State of Madhya Pradesh; (2013) 14 SCC 527; Jitendra v. State of M.P.; (2004) 10 SCC 562; Khet Singh v. Union of India; AIR 2002 SC 1450; Noor Aga v. State of Punjab; (2008) 16 SCC 417; Union of India v. Balmukund and others; (2012) 9 SCC 161

List of Acts

Narcotic Drugs and Psychotropic Substances Act, 1985

List of Keywords

Narcotics seizure; NDPS Act compliance; Procedural lapses; Sampling and storage; FSL delay; Non-production of material exhibit; Independent witnesses; Standing instructions; Acquittal

Case Arising From

Palanwa P.S. Case No. 86/2012, District East Champaran

Appearances for Parties

For the Appellant : Mr. S.P. Tiwary, Advocate; Ms. Surya Nilambri, Amicus

For the Respondent : Mr. Dilip Kumar Sinha

Headnotes Prepared by Reporter: Amit Kumar Mallick, Adv.

Judgment/Order of the Hon’ble Patna High Court

**IN THE HIGH COURT OF JUDICATURE AT PATNA  
CRIMINAL APPEAL (DB) No.1241 of 2017**

Arising Out of PS. Case No.-86 Year-2012 Thana- PALANWA District- East Champaran

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Dharmendra Kumar Singh @ Dharmendra Singh S/o Harendra Singh, R/o  
Village- Amar Chhatauni, P.S.- Village- Amar Chhatauni, P.S.- Motihari  
Muffasil, District- East Champaran.

... .. Appellant/s

Versus

The State Of Bihar

... .. Respondent/s

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**Appearance :**

For the Appellant/s : Mr. S.P. Tiwary, Adv.  
Ms. Surya Nilambri, Amicus  
For the Respondent/s : Mr.Sri Dilip Kumar Sinha

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

**Date : 23-06-2023**

1. Heard Ms. Surya Nilambri, the learned counsel  
  
for the appellant and Mr. Dilip Kumar Sinha, the  
  
learned APP for the State.
2. We have been very ably assisted by Ms. Surya  
  
Nilambri, the learned Amicus.
3. The sole appellant stands convicted under  
  
Section 20(b)(ii)(c) read with Section 29 of the  
  
N.D.P.S Act, 1985 and has been sentenced to undergo  
  
R.I. for 14 years, to pay fine of Rs. One Lakh and in  
  
default of payment of fine to further undergo



imprisonment for six months.

4. The appellant stood charged under Section 20(b) (c)(ii)/29 and 23C with the aid of Section 29 of the N.D.P.S. Act, 1985. However, at the trial, he was not convicted for the offence under Section 20(c) of the N.D.P.S. Act. For Section 29 of the N.D.P.S. Act, 1985, no punishment has been awarded to him.
5. On the self statement of PW5 /Amitesh Kumar, who at the relevant time was S.H.O. Palanwa police station in the district of East Champaran, a case vide Palanwa P.S. Case No. 86/12 dated 29.07.2012 was registered for the offences under Sections 20(b), 22, 23 and 24 of the N.D.P.S. Act. In his self statement, PW5 has alleged that on 29.07.2012, he secretly learnt at about 9.30 A.M. that some persons are coming from Nepal with contraband. This information was entered in the Station Diary and a raiding team was constituted and a picket was posted at the relevant place. At about 10 'O' Clock in the day, a Pulsar motorcycle was spotted and the riders, seeing the police party, tried to



flee away. The pillion rider, who was carrying a bag containing the narcotics threw the bag and also tried to flee away but was nabbed by the police party. The person driving the motorcycle, namely, the appellant was also arrested. In front of two villagers available, namely, Sagir Miyan (PW6) and Hriday Sharma (PW7), search was conducted on the person of the appellant and the co-accused. The bag which was thrown by the pillion rider by the name of Rajiv Ranjan, who later was sent to Juvenile Justice Board for determination of his guilt, was found to be containing 49 packets of 500 grams each of *Charas*. The total weight of the seized narcotics was 24.5 Kgs. On a plain assessment of the narcotics, it was found to be *Charas*. Mobile telephones in possession of the accused persons, were also seized. No paper with respect to the ownership of the motorcycle which was being driven by the appellant could be produced before the raiding team. Both the arrested accused persons disclosed before PW5 that they in the past also had brought narcotics from Nepal



and had taken it to Delhi for being sold in the market.

This time also, they were carrying the narcotics for it to be taken to Delhi for sale.

6. After investigation, chargesheet was submitted and the appellant was put on trial.
7. The Trial Court, after having examined seven witnesses on behalf of the prosecution and none on behalf of the defence, convicted and sentenced the appellant as aforesaid.
8. Mr. S.P. Tiwary and Ms. Surya Nilambri have submitted that the evidence against the appellant in this case is absolutely weak. In support of the aforesaid contention, it has been urged that mandatory provisions under the N.D.P.S. Act, 1985, namely, Sections 42A, 50, 52, 52A and 54 read with 55 have not been followed. The standing instruction numbers 1/88 and 1/89 have been completely flouted and the sampling has not been done in accordance with the mandate. In fact, the sampling has not at all been done at the place of raid. The seized narcotic was



straightaway taken to police *malkhana* where it was kept without any inventory having been made or any entry made in the *malkhana* register for about two months. It was only thereafter that a requisition was made before the learned District Judge for deputing a Magistrate for drawing the sample in the *malkhana*. The samples so drawn thereafter was dispatched to the Forensic Science Laboratory (FSL) at Patna on 06.09.2012 through a constable/special messenger who has not been examined at the trial. But the samples were received in the laboratory after about 23 days on 26.09.2012.

- 9.** It has thus been urged that in the absence of any procedure having been followed in drawing and sending the sample to the FSL, Patna, it cannot be presumed that it was the sample from the same stock which was seized from the possession of the appellant.
- 10.** The further refrain of the appellant is that even during the trial, the material exhibit was never produced and no explanation also has been offered for



its non- production. The narcotics so seized were never destroyed as there is no evidence or certification regarding its disposal. In that case, it ought to have been produced before the Court during the trial. The material exhibit not being produced at the trial definitely renders the prosecution case doubtful.

**11.** As opposed to the afore-noted contention, Mr. Dilip Kumar Sinha, the learned counsel for the State submitted that there has been a substantial compliance of the provisions of the N.D.P.S. Act, 1985 in as much as samples were drawn from all the packets, numbered, kept in *malkhana* and dispatched to the laboratory. The samples were prepared in presence of a Magistrate who was deputed by the District Judge on the asking of the police. Only because the process of sampling was not photographed and that the sampling was not done at the place of raid would not justify any inference of the case tottering at the seams. He has further submitted that 24.5 Kgs of *Charas* is too heavy a consignment to be treated lightly. The appellant in





the past also had carried narcotics from Nepal to Delhi for its sale in the market. No interference, Mr. Sinha contends, should be made with the trial Court judgment of conviction and sentence of the appellant.

**12.** From the records and the deposition of the witnesses, we find that PW-5 on receiving such information that accused persons are attempting to smuggle narcotics from Nepal, though recorded an entry in the station diary and constituted a raiding team, but did not actually comply with the provisions contained in Section 42 of the N.D.P.S. Act. PW-5 in his deposition has not spoken about giving such information to superior police officer within 72 hours of receipt of such information and consequent raid. There is nothing on record either to ascertain that this provision under the Act was complied with. We have further found that no sampling was done at the place of raid. The statement of PW-5 that weighing instrument was procured from the neighbourhood does not appear to be genuine. The raid was conducted on



a highway near Indo-Nepal Border which does not have any residential habitation. Thus, the assessment of PW-5 and his raiding team that the consignment weighed 24.5 kgs is also rendered doubtful. As noted above, no sampling was done at the place of raid and according to PW-5, as also the other members of the raiding team who have been examined in the trial, the consignment was straightaway brought to *malkhana*. Surprisingly, there is no entry in the *malkhana* register which has been produced during trial. There is no evidence of any officer in-charge of *malkhana* regarding the deposit of such narcotics. The mandatory instructions are that the samples have to be drawn up at the place of raid which has to be specifically numbered, marked and sealed in presence of two independent witnesses. This is for the safety of any false implication and exaggerated version in the First Information Report/prosecution report. The process of sampling is also required to be photographed for the reason that the law enjoins that such huge quantity of



narcotics seized in a case be destroyed under a certification which would serve as necessary evidence during the trial for prosecuting the accused persons.

**13.** In the case in hand, we find that nothing of that kind was done and after the narcotics was kept in the *malkhana* for about two months, a requisition was made by Ashok Kumar, PW-4 / Sub-Inspector of Police to the District Judge of the concerned district for deputing a Magistrate for drawing the samples. There is no evidence on record that such samples were drawn before the Magistrate so deputed as the Magistrate has not been examined nor any statement has been made that such sampling was done before him. There was no photography of the sampling process. Most shockingly, the samples were sent to the laboratory for testing on 06.09.2012 through a special messenger who has not been examined at the trial but those were received in the laboratory after 23 days on 26.09.2012. Where exactly were the samples kept in the meanwhile is not known. Thus, we hold that it was



unsafe to depend upon the report of the FSL regarding the sample, which remained in transit for 23 days without any explanation. As mentioned earlier, even the sampling was done after undue delay. The entire process of storage and sampling remains in obscurity as there is no evidence to that effect nor any photographs are available on record. In that event, assuming that the samples corresponded to *Charas* would be of no avail to the State for prosecuting the appellant.

**14.** The two witnesses to the seizure viz., PWs-6 and 7 have not supported the prosecution case and have also not identified the appellant in the dock. This further confounds the whole situation.

**15.** In **Vijay Jain Vs. State of Madhya Pradesh; 2013 14 SCC 527** and **Jitendra and another Vs. State of M.P. 2004 10 SCC 562**, it has been held by the Supreme Court that non-production of the material object before the Court is not only a procedural irregularity but it has the potential to vitiate the entire



trial. It is not without any purpose that the standing instructions of 1988 and 1989 have been issued. A detailed procedure has been provided; none of which have been followed.

**16.** The Supreme Court in **Khet Singh Vs. Union of India; AIR 2002 SCC 1450, Noor Aga Vs. State of Punjab; (2008) 16 SCC 417** and **Union of India vs. Balmukund and others (2012) 9 SCC 161** has categorically held that breach of the standing instructions makes the case doubtful and also vitiates the trial. Those instructions are intended to guide the officers so that a fair procedure is adopted during the investigation. The Supreme Court has even gone on to explain that a substantial compliance of the guidelines is not sufficient; rather there should be a total compliance of such guidelines as the provisions contained in the Act are too stringent. The Supreme Court quelled the argument that the standing instructions are not issued under the provisions of the Statute. The Supreme Court was of the view that such



directions have been issued by the authority having legal sanction and, therefore, it is obligatory on the part of the investigating agency to comply with the terms of such guidelines.

**17.** The manner in which the narcotics have been seized and have not been destroyed has created a situation which would be perilous for the whole society. As far as the accusation against the appellant is concerned, with such a major breach of the provisions of law in the standing instructions, we do entertain a lingering doubt in our minds whether the prosecution has come with true version and whether the trial Court was justified in convicting the appellant without the case having been proved to the hilt by the prosecution.

**18.** For the afore-noted reasons, we are not persuaded to affirm the judgment and order of conviction of the appellant.

**19.** Perforce, we set aside the judgment and order of the conviction.

**20.** We have been informed that the appellant is in



custody since the date of his arrest. He is directed to be released forthwith from jail if not required or detained in any other case.

21. The appeal stands allowed.
22. Let a copy of the judgment be dispatched to the Superintendent of the concerned jail for record and compliance.
23. The records of this case be returned to the Trial Court.
24. Before parting, we direct the Patna High Court, Legal Services Committee to pay an amount of Rs. 5500/- to Ms. Surya Nilambri, learned *Amicus* as a consolidated fee for the services rendered by her. We again acknowledge her able assistance in this case.

(Ashutosh Kumar, J)

( Shailendra Singh, J)

Sunil/ Sangam/-

AFR/NAFR	AFR
CAV DATE	N/A
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