

IN THE HIGH COURT OF JUDICATURE AT PATNA

CRIMINAL APPEAL (SJ) No.2983 of 2022

Arising Out of PS. Case No.-23 Year-2018 Thana- GOVERNMENT OFFICIAL COMP.

District- West Champaran

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Lakshaman Sharma, Son of Hira Sharma R/V- Shitalpur, P.S- Raxaul, Dist- East Champaran

... ... Appellant/s

Versus

The Union of India through Zonal Director, Narcotic Control Bureau, Patna, Bihar Bihar

... ... Respondent/s

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Narcotic Drugs and Psychotropic Substance- Sec.20(b)(ii)(c) and 29- Recovery of 4.500 kg of charas from possession of co-accused- appellant apprehended on the basis of confessionalstatement of co-accused. (Para-11)

Evidence Act- Sec.25, NDPS Act- Sec.67- confessional statement made to police and cannot be taken into account to convict accused under NDPS Act- statement recorded u/s 67 cannot be used as confessional statement in trial under NDPS Act. Tofan Singh Vs State of Tamil Nadu: (2021) 4 SCC 1- relied on. (Para-13)

Statement u/s 67 completely inadmissible- NCB official not succeeded to gather further evidence- trial court wrongly placed reliance upon the statement while convicting the appellant- Hence, conviction of appellant completely illegal and not sustainable- judgement and order of conviction set aside- Appeal allowed. (Para-18)

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Bihar Bihar

... .. Respondent/s

Appearance :

For the Appellant/s : Mrs. Bela Singh, Adv.
For the UOI (NCB) : Mr. Awadhesh Kr. Pandey, Sr. CGC.
Mr. Ram Anurag Singh, CGC.

CORAM: HONOURABLE MR. JUSTICE SHAILENDRA SINGH
ORAL JUDGMENT

Date : 08-02-2024

1. Heard learned counsel for the appellant and learned
APP appearing for UOI through NCB.

2. The instant appeal has been filed against the judgment
of conviction dated 06.06.2022 and order of sentence dated
16.06.2022 passed by the learned District and Sessions Judge,
West Champaran, Bettiah, in connection with N.D.P.S. Case No.
63/2021 arising out of N.C.B. Case No. 23/2018 (Special Case No.
18/2018), whereby and whereunder the appellant has been
convicted for the offences punishable under Sections 20(b)(ii)(c)
and 29 of the Narcotic Drugs and Psychotropic Substance Act
(hereinafter referred to as NDPS Act) and sentenced to undergo
rigorous imprisonment for ten years for the offence punishable



under Section 20(b)(ii)(c) of NDPS Act with a fine of Rs. 1,00,000/- and in case of default of payment of fine, additional rigorous imprisonment for one year has been awarded upon him and he has also been sentenced to undergo rigorous imprisonment for ten years for the offence punishable under Section 29 of NDPS Act with a fine of Rs. 1,00,000/- and in case of default of payment of fine, additional rigorous imprisonment for one year has been awarded upon him and both the sentences of imprisonment have been directed to run concurrently by the convicting trial court.

3. The substance of prosecution's allegation is that on 02.05.2018, Mr. Sunil Dubey, Assitant Director of Narcotics Control Bureau (in short NCB), Patna got the information that one person had been apprehended with 4.500 kg of *charas* by SSB officials, then a team consisting of the officials of NCB was constituted with intelligence officials A. K. Prasad, Ashok Kumar Rai and one constable Manoj Kumar Yadav who were part of the team and on the same day at about 5 P.M. the team with relevant materials such as drug detection kit, etc. started their journey and reached at Enerva where the 47th SSB Battalion was deputed and thereafter, the NCB team met Sr. Raj Kumar Kumawat, Assistant Commandant of SSB and recovered the prohibited seized material and the assistant commandant gave all the information of search



and seizure of the seized contraband through his letter dated 03.05.2018 which had been sent to NCB. As per his letter, the office of SSB got the information that one person was coming from Nepal country and would enter into the territory of India with narcotic material *charas* and then a *Quick Response Team* (QRT) was constituted by SSB officials which was led by Sr. Raj Kumar Kumawat and the said team saw two persons coming from Nepal side near *border pillar* no. 413 then the SSB officials asked them to stop but they started fleeing and then one of them was apprehended on chase, who disclosed his name as Sanjay Mahto Kewat and the other person managed to escape and thereafter, a notice under section 50 of NDPS Act was given to Sanjay Mahto Kewat and on that, he gave his consent to be searched before the SSB officials and thereafter, in the presence of two independent persons namely Prem Kumar Yadav and Sushil Yadav a bag, he was carrying at the time of arrest, was searched from which 4.500 kg *charas* like material was recovered and thereafter, the seized contraband along with the apprehended accused Sanjay Mahto Kewat was handed over to NCB officials. It was further alleged that nine (9) packets wrapped with brown colour tape kept in a plastic bag were recovered from the possession of the apprehended accused and thereafter, some small quantity was taken as a sample



from each packet that was examined by the help of detection kit and then the seized material was confirmed as *charas* and the total weight of the seized contraband was measured as 4.500 kg. After that, the packets and samples were kept in different packets which were sealed in the presence of two independent witnesses Prem Kumar Yadav and Sushil Yadav and all these proceedings were completed on 03.05.2018 at the spot. It was further revealed that the statements of the independent witnesses along with the statement of apprehended co-accused were recorded under section 67 of NDPS Act by the NCB officials and after completion of necessary formalities, it came into light that the seized narcotic contraband was to be delivered to the present appellant. It was further revealed that the appellant was arrested on 18.09.2021 and thereafter, his statement **was also recorded under section 67 of NDPS Act.**

4. With the above allegations, a complaint was filed by the NCB against the appellant and co-accused Sanjay Mahto Kewat by an intelligence official of NCB. The appellant was tried separately from the co-accused as he was arrested about three years after the recovery of the alleged contraband.

5. The appellant stood charged for the offences punishable under sections 20(b)(ii)(C), 23 and 29 of NDPS Act.



6. During trial, altogether seven witnesses were produced and examined by the prosecution and several documents were produced and proved and they were marked as exhibits which are as under :

Ext. 1 – Search-cum-Seizure memo made by NCB.

Ext. 2 – Notice to accused Sanjay Mahto Kewat under section 67 of NDPS Act.

Ext. 2/1 & 2/2 – Notices to witnesses Prem Kumar Yadav and Sushil Yadav under section 67 of NDPS Act.

Ext. 2/3 & 2/4 – Notice to Lakshman Sharma (appellant) under section 67 of NDPS Act.

Ext. 3 – Statement of accused Sanjay Mahto Kewat under section 67 of NDPS Act.

Ext. 3/1 – Signature of one A.K. Rai on entire statement.

Ext. 4 – Jama Talasi of accused Sanjay Mahto Kewat.

Ext. 5 – Arrest memo of accused Sanjay Mahto Kewat.

Ext. 6 – Receipt of Malkhana.

Ext. 7 – Forwarding of samples for chemical examination.

Ext. 8 – Test memo.

Ext. 9 – Report of C.R.C.L. Kolkata.

Ext. 10 – Compliance under section 57 of NDPS Act.



Ext. 11 – Complaint petition.

Ext. 12 – Notice issued for search under section 50 of NDPS Act to the accused.

Ext. 13 – Personal search memo.

Ext. 14 – Performa of seizure.

Ext. 15 – Performa of intercepted goods.

Ext. 16 – Interception memo.

Ext. 17 – List of persons involved in seizure procedure.

Ext. 18 – Written petition to Director of NCB, Patna.

Ext. 19 – Medical report of accused.

Ext. 20 – Signature of witness Prem Kumar Yadav on personal-cum-search memo.

Ext. 20/1 – Signature of witness Prem Kumar Yadav on notice for search.

Ext. 20/2 – Signature of witness Prem Kumar Yadav on interception memo.

Ext. 20/3 – Signature of witness Prem Kumar Yadav on notice under section 50 of NDPS Act.

Ext. 20/4 – Signature of witness Prem Kumar Yadav on search-cum-seizure list.

Ext. 20/5 – Signature of witness Prem Kumar Yadav on notice under section 67 of NDPS Act.



Ext. 20/6 – Signature of witness Prem Kumar Yadav on statements of witnesses.

Ext. 20/7 – Signature of witness on arrest memo.

Ext. 20/8 – Signature of witness Prem Kumar Yadav on Jama Talashi.

Ext. 20/9 – Signature of witness Sushil Yadav on personal search memo.

Ext. 20/10 – Signature of witness Sushil Yadav on notice for search.

Ext. 20/11 – Signature of witness Sushil Yadav on interception memo.

Ext. 20/12 – Signature of witness Sushil Yadav on notice under section 50 of NDPS Act.

Ext. 20/13 – Signature of witness Sushil Yadav on search-cum-seizure list.

Ext. 20/14 – Signature of witness Sushil Yadav on notice under section 67 of NDPS Act.

Ext. 20/15 – Signature of witness Sushil Yadav on statement.

Ext. 20/16 – Signature of witness Sushil Yadav on arrest memo.



Ext. 20/17 – Signature of witness Sushil Yadav on Jama Talashi.

Ext. 20/18 – Signature of witness A.K. Rai on search-cum-seizure list.

Ext. 20/19 – Signature of witness A.K. Rai on the statement of accused Sanjay Mahto Kewat.

Ext. 21 – Malkhana register of NCB, Patna.

Ext. 22 – Certification and photographs of seized materials.

Ext. 23 – Statement of appellant Lakshaman Sharma.

7. After the completion of the prosecution's evidence, the statement of the convict was recorded under section 313 of Cr.P.C. in which he denied all the main circumstances appearing against him from the prosecution's evidences and he mainly took the defence that he was an innocent person.

8. The appellant did not give any evidence in his defence.

9. After hearing both the sides and taking into account the various exhibits, the learned trial court held the appellant guilty of the offences punishable under sections 20(b)(ii)C and 29 of NDPS Act and sentenced him in the manner mentioned above.



10. Mrs. Bela Singh, learned counsel appearing for the appellant submits that the conviction of the appellant is completely bad in the eye of law as the appellant was not apprehended with the alleged contraband and he was made accused mainly on the basis of confessional statement of apprehended co-accused Sanjay Mahto Kewat who recorded his statement under section 67 of NDPS Act and the learned trial court placed reliance upon the said statement ignoring the principle laid down by the Hon'ble Apex Court in the judgment of Tofan Singh vs. State of Tamil Nadu reported in (2021) 4 SCC 1. Further submission is that there is no legal evidence to justify the conviction of the appellant.

11. On the contrary, Mr. Awadhesh Kumar Pandey, learned counsel appearing for UOI through NCB has vehemently opposed the appeal and submitted that the appellant indulged in smuggling of narcotic material from Nepal country into Indian territory and the seized contraband which comes in the purview of commercial quantity was to be delivered to the appellant as per the statement made by the apprehended co-accused Sanjay Mahto Kewat and the appellant remained abscond for more than three years after the recovery of alleged contraband but anyhow he was arrested on 18.09.2021 and thereafter, his trial was started and he himself accepted his involvement in the alleged crime before the



NCB officials and in this regard, recorded his statement which was proved before the trial court and while convicting the appellant, the learned trial court placed reliance upon the judgment of the Hon'ble Apex Court passed in the case of Ram Singh vs. Central Bureau of Narcotics reported in (2011) 11 SCC 347.

12. Heard both the sides, perused the judgment impugned and evidences available on the case record of the trial court and also gone through the statement of the accused. The instant appeal relates to the recovery of 4.500 kg of *charas* which was recovered from the possession of co-accused Sanjay Mahto Kewat. The recovery was made by SSB officials but admittedly, the appellant was not apprehended with the co-accused Sanjay Mahto Kewat and he was apprehended more than three years after the arresting of co-accused Sanjay Mahto Kewat with the alleged contraband. In respect of the appellant's involvement in the alleged crime of smuggling of narcotic material from Nepal country into the territory of India, the prosecution initially relied upon the statement of apprehended co-accused Sanjay Mahto Kewat who recorded his statement before NCB officials and his statement was recorded under section 67 of NDPS Act and thereafter, the appellant was apprehended and his statement was **also recorded under section 67 of NDPS Act** by NCB officials. The said



statements were mainly taken into consideration by NCB while filing complaint against the appellant and co-accused Sanjay Mahto Kewat. Learned trial court also mainly placed reliance upon the statements of the appellant and the co-accused recorded under section 67 of NDPS Act while convicting the appellant for the charged offences.

13. Here it is important to mention that in the light of the facts revealed by the appellant and co-accused in their statements, the NCB officials did not succeed to get the disclosure of any relevant fact or evidence to show the appellant's involvement in the alleged crime of smuggling of narcotic material. The Hon'ble Apex Court in its *landmark* judgment passed in the case of **Tofan Singh** (supra) tested the legality and admissibility of the statement recorded under section 67 of NDPS Act. In this judgment, it has been ruled by the Hon'ble Apex Court that the officer who is invested with powers under section 53 of NDPS Act are that “*police officers*” within the meaning of section 25 of the Evidence Act as a result of which any confessional statement made to them would be barred under the provisions of section 25 of the Evidence Act and cannot be taken into account in order to convict an accused under the NDPS Act. ***It has been further ruled that a statement recorded under section 67 of the NDPS Act cannot be***



used as a confessional statement in the trial of an offence under the NDPS Act.

14. In the latest judgment of the Hon'ble Apex Court passed in the case of **Balwinder Singh (Binda) vs. Narcotics Control Bureau** reported in **2023 SCC Online SC 1213**, the principle laid down in **Tofan Singh** (supra) case has been followed and it has been observed that any confessional statement made by an accused to an officer invested with the powers under section 53 of NDPS Act, is barred for the reason that such officers are "police Officers" within the meaning of section 25 of the Evidence Act, a statement made by an accused and recorded under section 67 of the NDPS Act cannot be used as a confessional statement in the trial of an offence under the NDPS Act.

15. During the course of argument, it has been accepted by learned counsel appearing for NCB that the NCB officials, who recorded the statement of the accused, made the seizure memo and did other proceedings, were invested with the powers under section 53 of NDPS Act, so in view of the said position, Anil Kumar Prasad, intelligence officer of NCB and junior intelligence officer **Prann Kumar** of NCB, who recorded the statements of accused Sanjay Mahto Kewat and of the appellant, were acting as police officers within the meaning of section 25 of the Evidence



Act. As such, the statements of the appellant and co-accused recorded by them is **hit** by the provisions of section 25 of the Evidence Act and the same cannot be taken into account in order to convict the appellant.

16. Accordingly, the statements of this appellant and co-accused Sanjay Mahto Kewat recorded under section 67 of NDPS Act by NCB officials are completely inadmissible in the eye of law and the learned trial court wrongly placed reliance upon the judgment of the Hon'ble Apex Court passed in the case of **Ram Singh vs. Central Bureau of Narcotics reported in (2011) 11 SCC 347** as the judgment of the Hon'ble Apex Court passed in the cases of **Kanhaiyalal vs. Union of India [(2008) 4 SCC 668]** and **Raj Kumar Karwal vs. Union of India [(1990) 2 SCC 409]** which were followed and relied in the said judgment have been over-ruled by the Hon'ble Apex Court in the judgment passed in the case of Tofan Singh (supra).

17. Here it is important to mention that recovery of the alleged contraband was made before two persons namely Prem Kumar Yadav and Sushil Yadav who were made the witnesses of the seizure memo and they are said to be independent persons. Both the persons were examined as P.W. 3 and P.W. 4 but in the cross-examination, they deposed that any material related to the



case was not recovered before them. Though both the witnesses accepted their signatures upon arrest memo, search memo and other relevant documents prepared by NCB but they stated that all these documents had been prepared much earlier and they only signed over them and they did not have any knowledge of the contents of these documents. Accordingly, the evidence of both the important witnesses goes against the prosecution and it also makes the prosecution's case weak.

18. After above discussion of the evidences and material available, this Court forms the opinion that the learned trial court wrongly placed reliance upon the statement of the appellant and co-accused recorded under section 67 of NDPS Act by intelligence officers of NCB while convicting the appellant as the said statements are completely inadmissible and hit by the provisions of section 25 of the Evidence Act and the NCB officials who investigated the present matter did not succeed to gather any further evidence on the basis of said statements showing the appellant's involvement in the alleged crime of smuggling. Hence the conviction of the appellant for the offences charged is completely illegal and not sustainable in the eye of law as such the judgment and order impugned convicting and sentencing the



appellant for the offences charged are hereby set aside and the present appeal stands allowed.

19. The appellant/ Lakshaman Sharma is in judicial custody. He is directed to be released forthwith in the present matter, if his custody is not required in any other case.

20. Let the judgment's copy be sent to the trial court as well as the jail authority concerned forthwith for needful compliance and information.

21. Let the LCR be sent back to the trial court concerned forthwith.

(Shailendra Singh, J)

annu/-

AFR/NAFR	AFR
CAV DATE	NA
Uploading Date	16.02.2024
Transmission Date	16.02.2024

