

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.1415 of 2017**

Arising Out of PS. Case No.-169 Year-2014 Thana- SONEPUR District- Saran

1. Sabujdeo Das, Son of Ravidas, Resident of Village- Netadipara, Police Station- Dhupkuri, District- Jalpaiguri.
2. Totan Das, Son of Bhavesh Chandra Das, Resident of Village- Payagarh, Police Station- Mathabhanga, District- Kuchbihar.
3. Devashish Verman, Son of Sitanath Verman, Resident of Village- Payagarh, Police Station- Mathabhanga, District- Kuchbihar.

... .. Appellant/s

Versus

The State Of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s	:	Mr. Dhanesh Shankar Vidyarthi, Advocate Mr. Daya Shankar Prasad Sinha, Advocate
For the Respondent/s	:	Ms. Anita Kumari Singh, APP

**CORAM: HONOURABLE MR. JUSTICE SHAILENDRA SINGH
ORAL JUDGMENT**

Date : 29-08-2023

1. Heard the parties.
2. This appeal has been filed against the judgment of conviction dated 25.02.2017 and order of sentence dated 02.03.2017 passed by the learned 1st Additional Sessions Judge, Saran at Chapra in connection with N.D.P.S. Case No. 11 of 2014 (CIS Registration No. 101 of 2014) arising out of Sonepur P.S. Case No. 169 of 2014, whereby and whereunder the appellants have been convicted for the offences punishable under Sections 20(b) (ii) (c) and 22 (c) of the N.D.P.S. Act and sentenced to undergo rigorous imprisonment for 10 years and to



pay a fine of Rs. 1,00,000/- each (Rupees One Lakh only) for the said offences, in default of payment of fine, to further undergo simple imprisonment for a period of 3 years and both the sentences have been directed to run concurrently.

3. The appellants and co-accused persons, namely, Rakesh Singh and Chandan Singh were tried together and were jointly charged for the offences punishable under Sections 20(b)(ii)(c) and 22(c) of Narcotic Drugs and Psychotropic Substances Act (hereinafter referred to as “NDPS Act”) and the appellants were also charged for the offence punishable under Section 414 of the IPC. The appellants were convicted for the offences punishable under Sections 20(b)(ii)(c) and 22(c) of NDPS Act and sentenced as mentioned above but they were acquitted of the offence punishable under Section 414 of IPC. The co-accused Rakesh Singh and Chandan Singh were acquitted of the offences charged upon them.

4. The substance of the prosecution’s case is that on 09.05.2014 at about 5:45 p.m., the informant, Police Sub-Inspector of Sonapur P.S., when he was on patrolling duty, received a wireless information and direction from the officer-in-charge of Sonapur P.S. to rush to Anand Vihar Hotel situated near N.H.-19 where a team of Special Task Force (in short



S.T.F.), Patna had apprehended smugglers of *Ganja*. Thereafter, he reached in front of said hotel and saw that S.T.F. team was standing near a red colour Alto Car bearing Registration No. WB-74W-9977 and three persons were sitting inside the car who disclosed their names as Sabujdeo Das, Totan Das and Devashish Verman (appellants). Further case of the prosecution is that from aforesaid car, 65 kg narcotic contraband suspected to be *Ganja*, wrapped in 23 green polythene packets, was seized and the apprehended persons did not show any paper of the said Alto Car, after that one packet was opened and narcotic contraband *Ganja* was found in it and the same was found to be wrapped in news Paper. From the possession of the appellants, mobile phones and Rs. 3000/- were also recovered and on interrogation they disclosed that they were carrying the alleged contraband from Mathabhanga to deliver it at Shitalpur to Rakesh Singh (now acquitted) and they were in contact with said Rakesh Singh through mobile phones. Further case of the prosecution is that due to non-availability of independent witnesses, 23 recovered packets with Alto car, mobile phones and Rs. 3000/- were seized in the presence of P.S.I., Dharmendra Kumar and Junior Commando Jitendra Paswan and the seizure list was prepared accordingly.



5. During trial, the prosecution examined altogether eight witnesses P.W. 1 to P.W. 8 and relied upon the following documents which were marked as Exhibits :-

- (i) Ex.1: Signature of only namely, Bijendra Singh on seizure list.
- (ii) Ex. 1/1: Signature of one namely, Nirmal Kumar Singh on seizure list.
- (iii) Ex. 2: Seizure list.
- (iv) Ex. 3: Self-written application of one namely, Sri Ram Ram.
- (v) Ex. 4: An endorsement on self-written application.
- (vi) Ex. 5, 6 , 7 & 8: Signature of one namely, Chandra Bhushan Mishra on confessional statements of Devashish Verman, and Rakesh Singh and on seizure list, and FIR.
- (x) Ex. 9: Carbon copy of forwarding letter regarding examination of F.S.L.
- (xi) Ex. 10: Signature of Jitendra Paswan on seizure list.
- (xii) Ex. 11: F.S.L. Report No. 1752/14 dated 16.09.2014 of F.S.L. Patna.

6. During trial, 13 packets out of the 23 seized packets were produced as material objects and the same were



marked as material Exhibits No. I to XIII.

7. After the completion of the evidence of the prosecution, the statements of the appellants/accused were recorded and they denied the main circumstances appearing against them from the prosecution evidences and claimed themselves as to be innocent.

8. The appellants did not produce any evidence in their defence.

9. It has been argued by the learned counsel for the appellants that there is serious contradiction among the statements of prosecution witnesses regarding the position and presence of the appellants when the alleged contrabands were seized from the alleged car, the prosecution failed to prove that the information, which is stated to have been given by the police officer who first got the knowledge of the occurrence was given to superior officer as per the provision of Section 42 (2) of N.D.P.S. Act and the seizure memo of the alleged contrabands was not prepared in presence of the Executive Magistrate. It has further been argued that the process of sampling from the seized contrabands and sealing of the same was not done as per law and neither inventory of the seized materials nor photography of the same was done when process of sampling



and sealing of the seized articles was being done. Further contentions are that it is an admitted position that the samples from the seized narcotic contrabands were not taken in presence of Executive Magistrate or any Gazetted Officer and there was considerable unexplained delay in between the point of time of getting the samples by the police official concerned and the time when the same was handed over to the F.S.L. Department and the said delay was not explained by the prosecution.

10. In support of the above contentions, the learned counsel for the appellants has placed reliance upon the judgment of Hon'ble Division Bench of this Court passed in the case of *Dharmendra Kumar Singh vs. State of Bihar (Cr.Appeal (DB) No. 1214 of 2017)* reported in *PLJR 2023 (3) page 539*.

11. Learned APP has vehemently opposed the appeal and submitted that the instant matter relates to the recovery of huge quantity of 65 kg *Ganja* kept in 23 packets which were recovered from a car and the same were found in specific possession of the appellants and the prosecution succeeded in proving that the seizure of the seized articles was prepared at the spot, the information which was initially got by the concerned police officer regarding the commission of the



alleged occurrence was given to the superior police officer and the sample taken from seized contraband was examined and tested by the F.S.L. department and the same was opined as *Ganja*. It has been further argued that during trial 13 packets out of the total seized 23 packets were produced before the trial court that were marked as material Exhibits - I to XIII and the rest packets could not be produced by the investigating officer on account of destruction of the said remaining packets which was explained by the S.H.O. when the show cause notice was issued to him by the trial court. It has been further argued that relevant entry was made in Malkhana register regarding depositing the seized materials and the prosecution succeeded to prove the offences charged against the appellants who have been rightly convicted and sentenced for the offences charged upon them and there is no force in the instant appeal and the same is liable to be dismissed.

12. I have heard both the sides and perused the evidences available on the record. The main points for consideration are :

- (i) Whether the prosecution succeeded to prove the recovery of 65 kg of narcotic material namely, *Ganja* kept in 23 packets in a car?



(ii) Whether the prosecution succeeded to prove the compliance of mandatory provisions of N.D.P.S. Act as well as principles laid down by the Hon'ble Apex Court regarding sampling, seizing, photography of the seized contrabands, preparation of inventory and production of the seized contraband before the trial court etc. ?

13. At first, I would like to discuss the evidences of the prosecution witnesses which are relevant in respect of the above-mentioned points.

14. P.W.2. Sri Ram Ram, who is the informant of this case, deposed in the cross-examination that the information, which he had received, was not reduced by him in writing and the same was also not forwarded to superior officer. He further deposed in paragraph no. 11 of the cross-examination that the accused persons were not informed of their right to be searched before the gazetted officer or Magistrate, he further stated that he prepared seizure memo at the spot but the same was signed by the Executive Magistrate at the police station. He further deposed in paragraph no.13 of the cross-examination that the seized 23 packets were kept in a sack which was sealed but he did not remember the details or name of the seal which was used



in the process of sealing and he did not send the copy of seal to the court. He deposed in paragraph no. 20 of the cross-examination that he deposited the seized materials in the Malkhana but could not state the serial number of the Malkhana register where the seized and deposited articles were entered. He further stated in paragraph nos. 22 and 23 of the cross-examination that the Magistrate never came before him and he did not know whether the seized materials had been destructed or not ?

15. P.W.3 Chandrabhusan Mishra, who was S.H.O. of Sonapur police station, deposed in the examination-in-chief that he got the information that some S.T.F. officials had seized a car with narcotic contraband *Ganja* near Anand Vihar Hotel on National Highway, then he asked the evening patrolling police party to reach at the said hotel and directed the patrolling police officer namely, Sri Ram Ram to make the necessary proceeding and also requested the Sub-Divisional Officer to depute a Magistrate. He further deposed that he directed the patrolling officer namely, Sri Ram Ram on wireless to bring the seized materials and apprehended accused persons to police station and then they were brought at the police station and in the meantime an Executive Magistrate Satendra Kumar Singh also



reached at the police station who inspected the seized materials and signed over the seizure list. He further deposed in paragraph no. 4 of the examination-in-chief that the incident of the recovery of the contraband was informed to the Superintendent of Police. He deposed in paragraph no. 7 of the examination-in-chief that the seized material was kept in the Malkhana of Sonapur police station. He stated in para 13 of the cross-examination that the police officer namely, Sri Ram Ram brought the seized contraband in unsealed condition. He further stated in paragraph no.16 of the cross-examination that the Magistrate signed on the seizure list at the police station. He stated in paragraph no. 21 of the cross-examination that the sampling from the contraband was conducted at 7 p.m. at Sonapur police station and perhaps samples were taken from 10 to 15 packets and thereafter the materials were sealed by P.W.6 Jamshed Alam.

16. P.W. 5 Manoj Kumar Singh (A.S.I.) is the person who produced the seized materials before the trial court. He deposed in the examination-in-chief that he produced only 13 packets before the court. The said packets were marked as material Exhibits No. I to XIII. He stated in the cross-examination that the seized materials were kept in two sacks



after bringing out from the box and the sacks were fastened with a rope. That box was in sealed condition which was broken by S.H.O. but at that time no document was prepared and the opening mouth of the sacks was not sealed after putting the material objects in them. He further deposed that all 13 packets were not bearing any type of seal.

17. P.W.7 Kanhaiya Jee Mishra is the person who took the samples to F.S.L., Patna for chemical examination. He stated in the examination-in-chief that he got the permission from the court concerned for taking and depositing the sample to F.S.L., Patna and deposited the same on 21.07.2014 at F.S.L., Patna. He stated in the cross-examination that he got the sample packets on 08.07.2014.

18. From the above discussion of the evidence of the prosecution witnesses, it is clearly evident that though the seizure list of the recovered contrabands was prepared at the spot but the same was signed at the police station by the Executive Magistrate and the prosecution failed to prove that the samples from the seized packets were taken in the presence of the Executive Magistrate or any other gazetted officer and moreover there is sufficient evidence to show that the samples were not taken on the spot at the time of recovery which is a



clear violation of the Standing Order no.1 of 1989 of the Central Government.

19. It is important to mention that from the evidence of prosecution, it is clearly evident that inventory of the seized materials as well as photography of the process of sampling before the Executive Magistrate or gazetted officer was not made/conducted in the present matter which is a clear violation of the provisions of Section 52 of the N.D.P.S Act. Though, as per the prosecution the Executive Magistrate Satyendra Kumar Singh signed on the seizure list and inspected the seized contrabands but the said officer was not produced and examined as a witness before the trial court by the prosecution so in this regard the statement made by P.W.3 does not appear reliable.

20. In the instant matter, all the seized packets, containing the alleged contraband, were not produced before the trial court and out of 23 seized packets, only 13 packets were produced. Though the prosecution took the plea that the rest packets could not be produced on account of their destruction in natural course. The said statement does not appear to be reliable and does not exonerate the prosecution to comply with its duty to keep the seized packets in proper custody/condition in Malkhana as well as to produce the same in



the trial court and the said negligence committed on the part of the prosecution goes in favour of the accused persons (appellants) and Hon'ble the Apex Court in the case of *Jitendra and Anr. vs. State of Madhya Pradesh* reported in 2004 (10) SCC 562 observed that “ *the best evidence would have been the seized materials which ought to have been produced during the trial as marked material objects, mere oral evidence as to their features and production of Panchnama does not discharge the heavy burden which lies on the prosecution, particularly when where the offence is punishable with a stringent sentence as under N.D.P.S. Act.*” and it was further observed that non-production of seized drugs was not a mere procedural irregularity and the same caused prejudice to the accused hence it will be fatal to the prosecution's case.

21. In the light of the said principle laid down by the Hon'ble Apex Court, the non-production of 10 packets, which were allegedly seized from the possession of the accused persons, before the trial court goes against the prosecution and makes its case doubtful.

22. From the above discussed evidence, it comes into light that the seized materials were deposited in Malkhana of police station concerned and necessary entries were made in the



Malkhana register but in this regard neither the said register nor any documentary evidence was produced by the prosecution and the said fact also goes against the prosecution.

23. From the evidence of P.W.7, it appears that he got the sample on 08.07.2014 and thereafter got the order of the court concerned for depositing the same to FSL, Patna on 11.07.2014 but he kept the sample in his possession for several days and deposited the same on 21.07.2014 at FSL, Patna and regarding the said delay taken place on his part in depositing the said sample at F.S.L., Patna, no any explanation was given by him as well as the prosecution and the said fact creates a serious doubt in the prosecution's allegation. Though, from the evidence of the prosecution, it appears that the seized packets were sealed and the seal was having the name of Jamshed Alam but the concerned police official did not make any memo of the sample of seal and prosecution failed to prove it by producing the memo of sample of seal.

24. In the instant matter, admittedly the investigating officer did not prepare an inventory of the seized narcotic materials with adequate particulars in presence of the Magistrate nor the photography of the process of sealing and taking of samples from the seized packets was made so the said



negligence on the part of the investigating officer raises a question regarding fair play in the process of investigation and in this regard the principles laid down by Hon'ble Apex Court in the case of *Mangi Lal vs. State of Madhya Pradesh* passed in *Cr. Appeal No. 1651 of 2023* are important and relevant.

25. In the instant matter, admittedly 10 packets, out of 23 packets which were seized from the possession of the appellants, were not produced before the trial court and the prosecution took the plea that the said 10 packets destroyed in natural course. As per Standing Order No.1 of 1989 of Central Government, it is mandatory for the official concerned to store such contraband in safes and vaults provided with double-locking system but in the present matter the police remained careless in keeping and storing the seized packets in safe manner and the negligence on the part of the police makes the prosecution's case weak.

26. For the aforementioned reasons, I am not persuaded to affirm the judgment convicting the appellants and order of sentencing them, hence the judgment and order impugned are hereby set aside. The appeal stands allowed. The appellants are in custody, hence they are directed to be released forthwith from jail, if their custody is not required in any other case.



27. Let the judgment’s copy be sent to the concerned court and Jail Superintendent for immediate compliance of this judgment.
28. Let the L.C.R. be sent back to the trial court.

(Shailendra Singh, J)

Rajiv/-

AFR/NAFR	
CAV DATE	
Uploading Date	
Transmission Date	

