

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.110 of 2019**

Arising Out of PS. Case No.-74 Year-2016 Thana- GAUNAHA District- West Champaran

1. Khatoon Nesha Wife of Zamdin @Zamadin Miya
 2. Zamdin @ Zamdin Mian Son of Nek Mohd. Dewan
Both are residents of Village - Bhitiharwa, P.S.- Gaunaha, District - West Champaran
- Appellant/s
- Versus
- The State Of Bihar Respondent/s
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Appearance :

For the Appellant/s : Mr. Brij Kishor Mishra, Adv.
For the Respondent/s : Mr. Zeyaul Hoda, APP

**CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
ORAL JUDGMENT**

Date : 28-08-2019

1. Appellants, Khatoon Nesha, Zamdin @ Zamdin Mian have been found guilty for an offence punishable under Section 20(b)(iii)(c) of the NDPS Act and each one has been sentenced to undergo R.I. for ten years as well as to pay fine appertaining to rupees one lac in default thereof, to undergo S.I. for one year, additionally, under Section 22(c) of the NDPS Act and sentenced to undergo R.I. for ten years as well as to pay fine appertaining to rupees one lac in default thereof to undergo S.I. for one year, additionally, by the Additional Sessions Judge, Vth-cum-Special Judge, NDPS, West Champaran at Bettiah in Trial No.28 of 2016 / 25 of 2017 arising out of Gaunaha P.S. Case No.74/2016 vide judgment of conviction and order of sentence dated 30.11.2018 with a further direction to run the sentences concurrently, with a



further direction that the sentence will be effective from the date of arrest..

2. Anjay Kumar Rajak (PW.6) a Dy, Superintendent, SSB filed written report disclosing therein that after having been confidentially informed by his spy with regard to storage as well as sale of narcotic substance (ganja) by Zamdin @ Zamdin Mian of village Bhitiharwa, after informing the concerned officials, constituted a raiding party, and then, thereafter, conducted raid at the place of Zamdin @ Zamdin Mian. At that very time his wife Khatoon Nesha was present and in whose presence as well as in presence of co-villagers Bitu Kumar (PW.4) and Mukesh Kumar (PW.3) his house was searched and during course thereof, from a plastic bag 20Kg of ganja was seized, from a jhola, half Kg of ganja was seized and from another jhola certain sachets were recovered weighing 25 Gms of ganja, totalling 20.525 Kg and for that, seizure list was prepared. Because of the fact that Khatoon Nesha failed to produce any document regarding legality of possession on account thereof, she was also taken into custody for that arrest memo was prepared. Therefore, written report, the material exhibit along with apprehended accused have been produced before the concerned police station.



3. After registration of Gaunaha P.S. Case No.74/2016 investigation commenced and concluded by way of submission of charge sheet, facilitating the trial, meeting with the ultimate result, subject matter of instant appeal.

4. Defence case as is evident from mode of cross-examination as well as statement recorded under Section 313 of the Cr.P.C. is that of complete denial. However, nothing has been adduced in defence.

5. As is evident from the lower court record, six prosecution witnesses have been examined in order to substantiate its case who are, PW.1-Priyanka Kumar, PW.2-Alok Kumar Pandey, PW.3-Mukesh Kumar, PW.4-Bittu Kumar, PW.5-Nagendra Singh, PW.6-Anjay Kumar Rajak. Side by side the following exhibits have also been at the end of the prosecution. The Signature of seizure witnesses on the seizure list of contraband goods stands proved and marked as Ext.1, and Ext.2, and Signature of informant on seizure list stands marked as Ext.1/a, the Formal FIR stands marked as Ext.3, and that on the charge sheet as Ext.5, and suppl. C.S. of Zamdin Miyan as Ext.5/a, the endorsement made by SHO on FIR stands marked as Ext.4, the FIR stands proved and marked as Ext.6 with Signature of informant marked as Ext.6/a, the signature of the Officer-in-



charge on the Formal FIR stands marked as Ext.8, the arrest memo as Ext.7, and the FSL report stands marked as Ext.9. As stated above nothing has been adduced in defence.

6. Heard learned counsel for the appellants as well as learned APP. Gone through the lower court record.

7. After perusal of the lower court record, it is evident that since the time of conducting raid, recovery, it is apparent that the mandatory provision of the NDPS Act has blatantly been flouted and on account thereof, the judgment impugned would not survive. The first and foremost happens to be, from the evidence of PW.6, informant it is apparent that neither the seized ganja was sealed at the spot nor sample was prepared. Sampling was done contrary to it. From the evidence of PW.5 the I.O., paragraph 17 he has stated that the seized article was not sealed at the spot at para-18 he said that even after taking it to police station, it was not sealed. In para-19, 20 he has stated that seized articles were sealed in presence of District and Sessions Judge but, he is unable to disclose the exact date. In para-22 he has further stated that sample was prepared at the court. In para-24 he has stated that seized article as well as the sample were kept at Malkhana. In para-23 he has stated that the sample was sent to the FSL by chowkidar on 04.09.2016. The aforesaid theme happens to be very



much confusing after going through Ext.9, the FSL report which discloses that the article was sent to vide memo no.Nil dated 30.08.2016/through Ch.05/13 Gajadhar Ram and the same was received in the office of 05.09.2016 had there been pious conduct of the prosecution, then in that circumstance, the aforesaid chowkidar Gajadhar Ram ought to have been examined to explain or/ in likewise manner the command would have been made an exhibit to show that chowkidar was authorized to carry the sample on 04.09.2016. Apart from this, from the evidence it is apparent that ganja was recovered from the three different places kept in three distinct sachet/bags but, during course of evidence there happens to be no disclosure in what manner sample was prepared. Apart from this, there happens to be no positive evidence to justify the evidence of PW.5 that seized article was kept in Malkhana. There happens to be no discloser why seized article was not sealed at the spot why not sample was prepared.

8. In Union of India v. Mohanlal and another reported in **(2016) 3 SCC 379**, it has been held:-

“12. Section 52-A(1) of the NDPS Act, 1985 empowers the Central Government to prescribe by a notification the procedure to be followed for seizure, storage and disposal of drugs and psychotropic substances. The Central Government have in exercise of that power issued Standing Order No. 1/89 which prescribes the procedure to be followed while conducting seizure of the contraband. Two



subsequent standing orders one dated 10.05.2007 and the other dated 16.01.2015 deal with disposal and destruction of seized contraband and do not alter or add to the earlier standing order that prescribes the procedure for conducting seizures. Para 2.2 of the Standing Order 1/89 states that samples must be taken from the seized contrabands on the spot at the time of recovery itself. It reads:

“2.2. All the packages/containers shall be serially numbered and kept in lots for sampling. Samples from the narcotic drugs and psychotropic substances seized, shall be drawn on the spot of recovery, in duplicate, in the presence of search witnesses (Panchas) and the person from whose possession the drug is recovered, and a mention to this effect should invariably be made in the panchnama drawn on the spot.”

13. Most of the States, however, claim that no samples are drawn at the time of seizure. Directorate of Revenue Intelligence is by far the only agency which claims that samples are drawn at the time of seizure, while Narcotics Control Bureau asserts that it does not do so. There is thus no uniform practice or procedure being followed by the States or the Central agencies in the matter of drawing of samples. This is, therefore, an area that needs to be suitably addressed in the light of the statutory provisions which ought to be strictly observed given the seriousness of the offences under the Act and the punishment prescribed by law in case the same are proved. We propose to deal with the issue no matter briefly in an attempt to remove the confusion that prevails regarding the true position as regards drawing of samples.

14. Section 52A as amended by Act 16 of 2014, deals with disposal of seized drugs and psychotropic substances. It reads:

“52A : Disposal of seized narcotic drugs and psychotropic substances.-(1) The Central Government may, having regard to the hazardous nature of any narcotic drugs or psychotropic substances, their vulnerability to theft, substitution, constraints of proper storage space or any other relevant considerations, by



notification published in the Official Gazette, specify such narcotic drugs or psychotropic substances or class of narcotic drugs or class of psychotropic substances which shall, as soon as may be after their seizure, be disposed of by such officer and in such manner as that Government may from time to time, determine after following the procedure hereinafter specified.

(2) Where any narcotic drug or psychotropic substance has been seized and forwarded to the officer-in-charge of the nearest police station or to the officer empowered under section 53, the officer referred to in sub-section (1) shall prepare an inventory of such narcotic drugs or psychotropic substances containing such details relating to their description, quality, quantity, mode of packing, marks, numbers or such other identifying particulars of the narcotic drugs or psychotropic substances or the packing in which they are packed, country of origin and other particulars as the officer referred to in sub-section (1) may consider relevant to the identity of the narcotic drugs or psychotropic substances in any proceedings under this Act and make an application, to any Magistrate for the purpose of-

(a) certifying the correctness of the inventory so prepared; or

(b) taking, in the presence of such Magistrate, photographs of such drugs or substances and certifying such photographs as true; or

(c) allowing to draw representative samples of such drugs or substances, in the presence of such Magistrate and certifying the correctness of any list of samples so drawn.

(3) When an application is made under sub-section (2), the Magistrate shall, as soon as may be, allow the application.

(4) Notwithstanding anything contained in the Indian Evidence Act, 1872 (1 of 1872) or the Code of Criminal Procedure, 1973 (2 of 1974), every court trying an offence under this



Act, shall treat the inventory, the photographs of [narcotic drugs, psychotropic substances, controlled substances or conveyances] and any list of samples drawn under sub-section (2) and certified by the Magistrate, as primary evidence in respect of such offence.”

15. It is manifest from Section 52A (2)(c) (supra) that upon seizure of the contraband the same has to be forwarded either to the officer in-charge of the nearest police station or to the officer empowered under Section 53 who shall prepare an inventory as stipulated in the said provision and make an application to the Magistrate for purposes of (a) certifying the correctness of the inventory (b) certifying photographs of such drugs or substances taken before the Magistrate as true and (c) to draw representative samples in the presence of the Magistrate and certifying the correctness of the list of samples so drawn.

16. Sub-section (3) of Section 52- A requires that the Magistrate shall as soon as may be allow the application. This implies that no sooner the seizure is effected and the contraband forwarded to the officer in charge of the Police Station or the officer empowered, the officer concerned is in law duty bound to approach the Magistrate for the purposes mentioned above including grant of permission to draw representative samples in his presence, which samples will then be enlisted and the correctness of the list of samples so drawn certified by the Magistrate. In other words, the process of drawing of samples has to be in the presence and under the supervision of the Magistrate and the entire exercise has to be certified by him to be correct.

17. The question of drawing of samples at the time of seizure which, more often than not, takes place in the absence of the Magistrate does not in the above scheme of things arise. This is so especially when according to Section 52-A(4) of the Act, samples drawn and certified by the Magistrate in compliance with sub-section (2) and (3) of Section 52-A above constitute primary evidence for the purpose of the trial. Suffice it to say that there is no provision in the Act that mandates taking of samples at the time of



seizure. That is perhaps why none of the States claim to be taking samples at the time of seizure.”

9. Furthermore, it is evident that there there happens to be no disclosure at the end of the prosecution that superior officials were ever informed even after recovery either in compliance of Section 42(2) of the NDPS Act or under Section 57 of the NDPS Act. Not only this, it is also evident from the evidence available on the record that neither the prosecution has been able to produce the material exhibit in the court during course of trial nor, there happens to be destruction report in accordance with Section 52(A) of the NDPS Act followed with exhibit of representative sample and that being so, it happens to be a severe jolt to the prosecution case as has been observed by the Apex Court in *Mohinder Singh v. State of Punjab* reported in *AIR 2018 SC 3798*, it has been held:

“12. For proving the offence under the NDPS Act, it is necessary for the prosecution to establish that the quantity of the contraband goods allegedly seized from the possession of the accused and the best evidence would be the court records as to the production of the contraband before the Magistrate and deposit of the same before the Malkhana or the document showing destruction of the contraband.

13. In *Vijay Jain v. State of Madhya Pradesh* (2013) 14 SCC 527, this Court reiterated the necessity of production of contraband substances seized from the accused before the trial court to establish that the contraband substances seized from the accused tallied with the samples sent to the FSL. It was held that mere oral evidence to establish seizure of contraband



substances from the accused is not sufficient. It was held as under:-

"10. On the other hand, on a reading of this Court's judgment in *Jitendra v. State of M.P.* (2004) 10 SCC 562, we find that this Court has taken a view that in the trial for an offence under the NDPS Act, it was necessary for the prosecution to establish by cogent evidence that the alleged quantities of the contraband goods were seized from the possession of the accused and the best evidence to prove this fact is to produce during the trial, the seized materials as material objects and where the contraband materials alleged to have been seized are not produced and there is no explanation for the failure to produce the contraband materials by the prosecution, mere oral evidence that the materials were seized from the accused would not be sufficient to make out an offence under the NDPS Act particularly when the panch witnesses have turned hostile. Again, in *Ashok v. State of M.P.* (2011) 5 SCC 123, this Court found that the alleged narcotic powder seized from the possession of the accused was not produced before the trial court as material exhibit and there was no explanation for its nonproduction and this Court held that there was therefore no evidence to connect the forensic report with the substance that was seized from the possession of the appellant."

10. Consequent thereupon, judgment impugned recorded by the learned lower court is set aside. Appeal is allowed. Both the appellants are under custody, hence are directed to be released forthwith, if not wanted in any other case.

(Aditya Kumar Trivedi, J.)

Prakash Narayan

AFR/NAFR	AFR
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