

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.3793 of 2023**

Arising Out of PS. Case No.-633 Year-2020 Thana- HAJIPUR SADAR District- Vaishali

Ravi Kumar, S/o Sri Shyam Narayan Choudhary, R/o Village-Daulatpur, P.S.-
Hajipur Sadar, Dist. -Vaishali

... .. Appellant

Versus

The State of Bihar

... .. Respondent

Appearance :

For the Appellant	:	Mr. Ajay Kumar Thakur, Advocate Mrs. Vaishnavi Singh, Advocate Mr. Ritwik Thakur, Advocate Ms. Kiran Kumari, Advocate Mr. Purushottam Kumar, Advocate
For the Respondent-State:		Mrs. Anita Kumari Singh, APP

**CORAM: HONOURABLE MR. JUSTICE CHANDRA SHEKHAR JHA
ORAL JUDGMENT**

Date : 02-09-2024

This appeal has been preferred by the appellant/convict under Section 374(2) of the Code of Criminal Procedure (hereinafter referred to as 'the Code') challenging the impugned judgment of conviction dated 28.06.2023 and order of sentence dated 03.07.2023 respectively passed by learned Additional Sessions Judge-I-cum-Special Judge NDPS, Vaishali at Hajipur in NDPS No. 91 of 2020 arising out of Hajipur Sadar P.S. Case No.633 of 2020, whereby the concerned Trial Court has convicted the appellant/convict for the offences punishable under Section 20(b)(ii)(c) of the Narcotic Drugs and Psychotropic



Substances Act (for short 'NDPS Act') and sentenced to undergo rigorous imprisonment for ten years with fine of Rs.1,00,000/- and in default of payment of fine, to further undergo rigorous imprisonment for two years under Section 20(b)(ii)(c) of the NDPS Act.

2. The case of prosecution is based on written report of informant, namely, Sanjeev Kumar (PW-1), Sub-Inspector of Police, Sadar Police Station, Hajipur, which was addressed to the Inspector of Police-cum-Officer-in-Charge of Sadar Police Station in which it is alleged that on 13.10.2020, he along with armed forces, Homeguard, Pramod Jha, Homeguard Baleshwar Pandey and Homeguard Jai Prakash Chaudhary was engaged in patrolling duty. At 10.45 A.M. he received a secret information that two persons are carrying *ganja* in a plastic bag on a scooter and are going towards Daulatpur. The informant further alleged that he gave information to this effect to his superior officer and proceeded for verification of the secret information on Hajipur-Muzaffarpur road near Dharamkanta. The informant noticed that one scooty upon which two persons were



carrying a yellow colour plastic bag. On seeing the police, the pillion rider jumped from the scooter and fled away. The person, who was driving the scooty, was caught by the police, who disclosed his name as Ravi Kumar (appellant), S/o Shyam Narayan Chaudhary, village-Daulatpur, P.S.-Hajipur Sadar, District-Vaishali. The appellant disclosed the name of the absconder as Prince @ Babul Chaudhary, S/o Arvind Chaudhary of village-Daulatpur, P.S.-Hajipur Sadar, District-Vaishali. The informant further alleged that he was told that as per information, there is narcotic substance in the bag and they have to search. As no independent witness was ready to be witness, the Homeguard, Pramod Jha and Homeguard Baleshwar Pandey were made seizure list witnesses. The accused/appellant was informed that he has right to be searched before a Magistrate or a gazetted officer but, the accused persons have given consent to be searched by the informant. After being searched, *ganja* was recovered from the bag, which was being carried on the scooty. On weighment, 20.100 kgs *ganja* was found in the bag. On query, the accused disclosed that his father is engaged in the



business of selling *ganja* and he was carrying the same as per his direction. The contraband and scooty were seized upon which, the seizure list witnesses and the accused persons put their signatures. Thereafter, the appellant was arrested.

3. On the basis of aforesaid written report, a formal FIR, being Hajipur Sadar P.S. Case No.633 of 2020 was registered under Sections 8, 20(b)(ii)(c), 25 and 29 of the NDPS Act, whereafter investigation of this case was handed over to A.S.I., Ranjan Kumar Jaiswal by the S.H.O.

4. After completion of investigation and on the basis of materials collected during investigation, the Investigating Officer of this case has submitted charge-sheet No.1131 of 2020 dated 31.12.2020 against the appellant and other accused person, namely, Shyam Narayan Chaudhary under Sections 8, 20(b)(ii)(c), 25 and 29 of the NDPS Act. Upon which, the learned District and Sessions Judge-cum-Special Judge, NDPS took cognizance of the offence on 04.06.2021 under Sections 8, 20(b)(ii)(c), 25 and 29 of the NDPS Act. The learned trial court after



supplying the police papers under Section 207 of the Code framed charges under Sections 8(c), 20(b)(ii)(c) read with 29 and Section 25 read with Section 29 of the NDPS Act against the appellant and other accused persons on 04.10.2021, which were explained to the appellant/convict to which, he pleaded not guilty and claimed to be tried.

5. To substantiate its case, the prosecution has examined altogether seven witnesses. They are:- **(i) PW-1 Sanjeev Kumar (informant); (ii) PW-2 Pramod Jha; (iii) PW-3 Baleshwar Pandey; (iv) PW-4 Ranjan Kumar Jaiswal**, who is Investigating Officer of this case; **(v) PW-5 Amit Kumar Choudhary; (vi) PW-6 Jai Prakash Choudhary; and (vii) PW-7 Shambhu Paswan.**

6. Apart from the oral evidence, the prosecution has also relied upon following exhibits/documentary evidences, which are:-

Sl.No.	Exhibit Nos.	Documents exhibited
1.	Exhibit-1	Seizure List
2.	Exhibit-2	Notice u/s 50 of NDPS Act
3.	Exhibit-3	<i>Fardbeyan</i>
4.	Exhibit-4	Reg. of FIR
5.	Exhibit-5	Signature of Pramod Jha on Notice u/s 50 of NDPS Act



6.	Exhibit-5/1	Signature of Pramod Jha on seizure list
7.	Exhibit-5/2	Signature of Pramod Jha on arresting memo of accused Ravi Kumar
8.	Exhibit-5/3	Signature of Pramod Jha on arresting memo of Shyam Choudhary
9.	Exhibit-6	Signature of Baleshwar Jha on Seizure List.
10.	Exhibit-7	Signature of Baleshwar Pandey on notice under section 50 of NDPS Act
11.	Exhibit-8	Signature of Ravi Kumar on Notice.
12.	Exhibit-9	Signature of Baleshwar Pandey on arresting memo
13.	Exhibit-10	Formal FIR
14.	Exhibit-11	Signature of Ranjan Kumar Jaiswal on arresting memo.
15.	Exhibit-11/1	Signature of Ranjan Kr. Jaiswal on arresting memo.
16.	Exhibit-12	Charge-sheet
17.	Exhibit-13	FSL Report
18.	Exhibit-14	Letter of FSL Report
19.	Exhibit-15	Malkhana Register
20.	Exhibit-M/1	Material
21.	Exhibit-M/2	Material.

7. On the basis of evidences/circumstances as surfaced during the trial, the learned trial court has examined the appellant/accused under Section 313 of the Code, where he completely denied all the evidences surfaced



during the trial and claimed his complete innocence and false implication.

8. The defence in order to prove his innocence exhibited following documents, which are as under:-

Sl. No.	Exhibit nos.	Documents exhibited
1.	Exhibit-A	Certified copy of FIR of Sadar P.S. Case No.594 of 2020
2.	Exhibit-B	<i>Fardbeyan</i> of Sadar Hajipur 594 of 2020
3.	Exhibit-C	Medical Report of Ravi Kumar
4.	Exhibit-D	Prescription of Ravi Kumar.

9. The appellant/convict in order to prove his innocence examined one defence witness, who is DW-1 namely, Juli Kumari.

10. Taking note of the evidences as surfaced during the trial and after considering the arguments as advanced by both the parties, the learned Trial Court has convicted the appellant/convict/accused for the offences under Section 20(b)(ii)(c) of the NDPS Act and sentenced him in the manner indicated above.

11. Being aggrieved with the aforesaid judgment



of conviction and order of sentence, the appellant/convict has preferred the present appeal.

12. Hence, the present appeal.

Argument on behalf of the appellant/convict:

13. It is submitted by Mr. Ajay Kumar Thakur, learned counsel appearing on behalf of appellant/convict that it is evident from the deposition of the prosecution witnesses, particularly PW-1, who is informant of this case, that sampling, sealing and seizure of contraband as alleged to be recovered from possession of appellant was not made as prescribed under the law and, therefore, on this score alone, the conviction as recorded by learned trial court is fit to be set aside. It is submitted that instead of sending seized contraband to *malkhana* after drawing the sample, it was taken to the house of the appellant along with appellant to arrest co-accused, Shyam Narayan Chaudhary, who is father of the appellant. It is also pointed out that no rule regarding personal search or search of vehicle appears to be followed in present case. It is also pointed by Mr. Thakur that seizure list is not appears to be supported by independent witnesses



despite of their presence. Even no attempt was made to persuade them to join investigation as an independent witness. It is also pointed by learned counsel that upon weighing contraband/*ganja*, it was found 20 kg. 100 gms, which includes the weight of wrappers/bag also. It is submitted that recovered contraband was shown "commercial quantity", which is apparent from its weight, just to aggravate the allegation and to cover this case under provision of Section 37 of the NDPS Act.

13.1. Mr. Ajay Kumar Thakur further submitted that the representative samples of contraband was not prepared during the course of investigation. He further submitted that not even a preliminary test through test detection kit was made at spot to ascertain *prima facie* that the seized contraband was *ganja* and merely upon the basis of disclosure and upon the basis of the experience, it was presumed that the material, which was recovered from the appellant was *ganja* and, thereafter, it was sealed. It is pointed out that the non-compliance of preliminary detection of *ganja* on spot is fatal to the case of prosecution and on



this score alone, the conviction as recorded by the learned trial court is fit to be quashed/set aside. While concluding argument, learned counsel submitted that the compliance of Section 52-A of the NDPS Act also not appears to be followed. It appears from case of the prosecution that another co-accused, namely, Prince Kumar was also present with the appellant. Therefore, the prosecution is bound to establish the culpable mental state of appellant in view of Section 35 of the NDPS Act, as it is a case of recovery from the joint possession.

13.2. It is also submitted that clauses 1.4, 1.5, 1.6 and 1.9 of the Standing Instruction as available through Standing Instruction No."1 of 1988" dated 15.03.1998 not appears to be followed in the present case. It is also pointed out by learned counsel that the compliance of Section 42 of the NDPS Act was also not appears to be followed.

13.3. It is submitted by Mr. Thakur that having all such non-compliance of the mandatory provisions make the conviction of appellant questionable, as recorded by the learned trial court and, therefore, the same is fit to be



quashed and set aside. In support of his aforesaid submission, learned counsel has relied upon the legal reports of Hon'ble Supreme Court as available through **Union of India vs. Mohanlal and Another [(2016) 3 SCC 379; Gorakh Nath Prasad vs. State of Bihar [(2018) 2 SCC 305]** and **Noor Aga vs. State of Punjab and Another [(2008) 16 SCC 417]**.

14. *Per contra*, learned APP while appearing on behalf of the State submitted that the appellant was arrested while he was driving the alleged scooter from which contraband/*ganja* was recovered, which upon weighing, found 20 kg. 100 gms. It is submitted that the recovered contraband was produced before the court and same found *ganja* also on forensic examination and, therefore, it can not be viewed with doubt whether recovered material was ganja or not. It is further submitted that the recovery in present case is not related with personal search and, therefore, compliance of Section 50 of the NDPS Act is not appearing mandatory. It is also pointed out that this is not a case where compliance of Section 42 of the NDPS Act is to be



followed rather it is a case where appellant was intercepted at public place. In support of his submission, learned APP relied upon the legal report of Hon'ble Supreme Court as available through **Sk. Raju @ Abdul Haque @ Jagga vs. State of West Bengal [AIR 2018 SC 4255]**.

15. I have perused the trial court records carefully and gone through the evidences available on record and also considered the rival submissions as canvassed by learned counsel appearing on behalf of the parties.

16. As to re-appreciate the evidences, while disposing the present appeal, it would be apposite to discuss the evidences as available on record, which are as under:-

(i) **PW-1 is Sanjeev Kumar**, who is the informant of this case. It appears from his testimony as available through his examination-in-chief itself that he received a secret information at about 10:35 P.M. on 13.10.2020, while he was on patrol pump that one scooty is coming with one pillion rider carrying *ganja*. To verify the said information, they came along with members of patrolling team near to weigh-bridge situated near to Daulatpur Gumti



and found that one scooter is coming from Hajipur side. It was stopped but, one person fled away and one person was apprehended by them, who disclosed his name as Ravi Kumar (appellant) and also disclosed the name of the person, who fled away as Prince Kumar. People were gathered over there, who were asked to join investigation as an independent witness but, they refused. It was disclosed by the apprehended accused/appellant that the jute bag (bora) is containing *ganja*. When it was opened, two packets were found, which upon weighing on electronic weighing machine, found 20 kg 100 gms. The number of scooty was BR-31-AB1825. It was disclosed by apprehended appellant that his father Shyam Narayan Choudhary is involving in selling of *ganja* and he supplied it to him. Thereafter, the sampling of seized *ganja* was done and seizure list of the scooty and seized *ganja* was prepared, which was signed by the witness, namely, Pramod Jha and Baleshwar Pandey. A copy of the seizure list was supplied to the appellant also. He identified said search-cum-seizure list, bearing his signature, which upon his identification, was exhibited as **Exhibit No.1**.



Thereafter, he went to arrest Shyam Narayan Choudhary, father of the appellant to village-Daulatpur, where he was arrested. Bablu Choudhary was also searched but, he was not found on home. A notice was also given to appellant regarding his search, which bears his signature and also the signature of appellant. It was identified by him during the trial and upon his identification, it was exhibited as **Exhibit No.2**. He typed his written information at place of recovery itself addressing police Inspector-cum-S.H.O., which bears his signature, which upon his identification, was exhibited as **Exhibit-3**. He also identified the signature and hand-writing of the then S.H.O. Ravi Kumar, which upon his identification was exhibited as **Exhibit No.4**, which was in connection with endorsement of lodging of present FIR on written/typed information. Thereafter, he came to police station along with both arrested person and seized materials, whereafter the seized material was sent to *malkhana* and scooty was kept within the premises of police station. He identified appellant through video conferencing.

(i)(a) Upon cross-examination, it was stated by him



that he never obtained permission for search from any gazetted officer. It was stated by him that he informed to his senior officers regarding the secret information what he received, whereas this fact is not mentioned in his written information. He did not mention the name of any person, who gathered during recovery. It was said by him that about 14-15 persons were present there but, he did not obtained the signature of any person on seizure list. It was said by him also that weighing was done at place of recovery itself and for that purpose, the electronic weighing machine was brought at place of recovery from a nearby shop. It was stated that seizure list was signed by police personnel. He did not recorded any confessional statement of appellant Ravi Kumar. He did not even recorded the statement of Ravi Kumar under Section 164 of the Code. It was stated by him that during investigation, whether said *ganja* was tested or not, is not in his knowledge. He did not find any shop at the house of appellant. He did not search the house of appellant. He did not find any evidence regarding selling of *ganja* at the house of appellant. An attention was drawn, which was



denied by him in want of knowledge that the informant of Sadar P.S. Case No.519 of 2020 dated 28.09.2020 was lodged by Asha Devi, mother of appellant against one Bablu Choudhary and others, where scooty was also damaged. He denied that the said scooty is present in the premises of police station. He denied that the appellant was implicated falsely by him on the instance of the persons, who are in inimical terms with Ravi Kumar (appellant).

(ii) **PW-2 Pramod Jha**, who is Home-guard personnel and was posted at Hajipur Sadar Police Station on 13.10.2020 and was also member of the patrolling team. He almost stated the occurrence on the same line and also the recovery, sampling and search, as it was deposed by PW-1/informant. He identified the signature on notice, which was given to the appellant prior to search, which upon his identification was exhibited as **Exhibit No.5**. He also identified his signature on search-cum-seizure, which upon his identification exhibited as **Exhibit No.5/1**, it was said to be signed by Baleshwar Pandey (PW-3) also. He also identified his signature on arrest memo of appellant, which



on identification, exhibited as **Exhibit No. 5/2**. He also supported the fact that after arresting the appellant, he along with other police personnel went to the house of Shyam Narayan Choudhary i.e. father of the appellant and arrested him. He also identified his signature on arrest memo, which upon his identification, exhibited as **Exhibit No. 6**. This arrest memo was said to be signed by Baleshwar Pandey (PW-3) also. After arresting Shyam Narayan Choudhary, they came along with apprehending accused persons and seized materials at police station from where, it was sent to *malkhana*. He said to be examined by Investigating Officer of this case, during investigation.

(ii)(a) Upon cross-examination, he stated that appellant disclosed that contraband belongs to one Shyam Narayan Choudhary. He was on patrolling duty since early morning under PW-1/informant. It was categorically stated by him that no secret information was received rather they apprehended appellant on the basis of suspicion. No information was given to any gazetted officer. It was stated that at the time of recovery 35-40 persons were gathered



over there. It was stated that nothing incriminating including contraband was recovered from the house of Shyam Choudhary. He denied the suggestion that at the instance of Prince Kumar, he implicated falsely Shyam Choudhary and his son Ravi Kumar.

(iii) **PW-3 Baleshwar Pandey**, who exactly deposed on the line of PW-2, being the seizure list witness. He is also Home-guard personnel and was part of patrolling team on the date and time of occurrence.

(iii)(a) Upon cross-examination, it was stated by him that 10-20 persons were gathered at the place of occurrence, who upon request, refused to be an independent witness of the occurrence. It was stated that he cannot say about the facts, which is mentioned in seizure list, where he signed. He also stated that nothing was recovered from Ravi Kumar (appellant).

(iv) **PW-4 Ranjan Kumar Jaiswal**, who is A.S.I. and was given the charge of investigation of this case by S.H.O. Mohan Kumar. He said to recorded the statement of prosecution witness, who supported the case of prosecution.



He said to visit the place of occurrence but, nothing appears from his examination-in-chief that he visited the second place from where the father of appellant was arrested and the place from where appellant was brought immediately after the arrest by informant/PW-1 before taking him to police station. He produced seized materials before District and Session Judge, Vaishali. Sample was drawn, whereafter material exhibit and sample was sealed and it was sent to FSL, Muzaffarpur for forensic examination. After completion of investigation, he submitted charge-sheet bearing No.1131 of 2020 on 31.12.2020 against appellant along with co-accused Shyam Narayan Choudhary. He identified his handwriting on aforesaid charge-sheet, which upon his identification was exhibited as **Exhibit No.12**. It was stated by him that he did not record the statement of any independent witness. Seizure list was also not prepared by him. He sent the seized materials for forensic examination on 24.12.2020. He denied the suggestion that at the instance of Prince @ Babloo Choudhary, the present false case was lodged against the appellant.



(v) **PW-5 Amit Kumar Choudhary**, who was posted as Assistant Director, FSL, Muzaffarpur. He said to receive a parcel on 24.12.2020 in connection with Sadar P.S. Case No.633 of 2020 dated 13.10.2020 under Sections 8/20B(ii)(c)/25/29 of the NDPS Act. After obtaining the parcel, he found two box wrapped in a cloth bearing Mark No. '1' and '2', which was sealed and was found correct with sample seal. Both boxes upon opening found containing flowering and fruiting vegetable like substances, which upon examination, found with main ingredients as "Tetra Hydro Cannabinol' (THC) and, thereafter, it was confirmed that the said material was *ganja*. The FSL report was prepared by one typist, Madhurendra Kumar Kunwar as per his direction and instruction, bearing his signature and also the signature of Incharge Director Majid Khan, which upon his identification, was exhibited as **Exhibit No.13**. It was deposed that a letter of said report was sent to District Judge, Vaishali, Hajipur through special messenger vide Letter No. 592-FSL 970-2020 dated 07.04.2022. It was stated by him that on visual basis, the material, which was



kept in box cannot be ascertained as *ganja*.

(vi) **PW-6 Jai Prakash Choudhary**, who was also the part of patrolling team and narrated the version of interception, recovery, sampling and seizure in the manner as it was deposed by PW-2 and 3.

(vi)(a) Upon cross-examination, it was stated by him that he was not the seizure list witness. He failed to disclose the name of shopkeeper from whom weighing machine was brought. It was stated that several persons were gathered at place of occurrence but, statement of none was recorded. He denied the suggestion that under collusion of Prince @ Babloo Choudhary, he lodged false case against the appellant along with his father Shyam Narayan Choudhary.

(vii) **PW-7 Shambhu Paswan**, who was the *malkhana* Incharge of Sadar Police Station, Hajipur. It was deposed by him that under instruction of SHO, he brought *malkhana* register and sample in connection with present case. The *malkhana* register is bearing No. MR 77/2020, which mentioning that one scooter bearing Registration No.



BR-31AB-1825 and one yellow colour plastic bag in which material like *ganja* total weighing 20 kg 100 gms., S.D. No. of said material was 458 dated 13.10.2020, which was sent to Central *Malkhana*, which is in Town Police Station, bearing his signature, which upon his identification, exhibited as **Exhibit No.15**. He was directed to brought sample of seized material. It was opened before the court and was found with *ganja*. The box before opening was sealed and was bearing the signature of Assistant Director, bearing No.970/2020 and also the case No.633/2020 and also the MR No.77/2020. It was deposed that the said scooty was in very bad condition and, therefore, it was not produced.

(vii)(a) Upon cross-examination, it was stated that he was not a member of raiding team/patrolling party and only produced seized materials before the court under instruction of S.H.O. The said material exhibits was exhibited as M1 and M2.

17. It would be apposite to reproduce in this connection paragraph 6, 8 and 13 of the judgment of Hon'ble Supreme Court in the case of **Gorakh Nath Prasad**



(supra) which are as under :-

6. The NDPS Act provides for a reverse burden of proof upon the accused, contrary to the normal rule of criminal jurisprudence for presumption of innocence unless proved guilty. This shall not dispense with the requirement of the prosecution to having first establish a prima facie case, only whereafter the burden will shift to the accused. The mere registration of a case under the Act will not ipso facto shift the burden on to the accused from the very inception. Compliance with statutory requirements and procedures shall have to be strict and the scrutiny stringent. If there is any iota of doubt the benefit shall have to be given to the accused.

7. xxx xxx xxx

8. The remaining prosecution witnesses being police officers only, it will not be safe to rely upon their testimony alone, which in any event cannot be sufficient evidence by itself either with regard to recovery or the seized material being ganja. No explanation has also been furnished by the prosecution for non-production of the ganja as an exhibit in the trial. The benefit of doubt will, therefore, have to be given to the appellant and in support of which learned Senior Counsel Shri Rai has relied upon *Jitendra v. State of M.P.* (2004) 10 SCC 562 and reiterated in *Ashok alias Danga Jaiswal v. State of Madhya Pradesh* (2011) 5 SCC 123 as follows:



"**12.** Last but not the least, the alleged narcotic powder seized from the possession of the accused, including the appellant was never produced before the trial court as a material exhibit and once again there is no explanation for its non-production. There is, thus, no evidence to connect the forensic report with the substance that was seized from the possession of the appellant or the other accused.

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| 9. | xxx | xxx | xxx |
| 10. | xxx | xxx | xxx |
| 11. | xxx | xxx | xxx |
| 12. | xxx | xxx | xxx |

13. It may be noted here that in *Jitendra v. State of M.P.*, (2004) 10 SCC 562, on similar facts this Court held that the material placed on record by the prosecution did not bring home the charge against the accused beyond reasonable doubt and it would be unsafe to maintain their conviction on that basis. In *Jitendra (supra)*, the Court observed and held as under:-

'5. The evidence to prove that charas and ganja were recovered from the possession of the accused consisted of the evidence of the police officers and the panch witnesses. The panch witnesses turned hostile. Thus, we find that apart from the testimony of Rajendra Pathak (PW 7), Angad Singh (PW 8) and Sub-Inspector



D.J. Rai (PW 6), there is no independent witness as to the recovery of the drugs from the possession of the accused. The charas and ganja alleged to have been seized from the possession of the accused were not even produced before the trial court, so as to connect them with the samples sent to the forensic science laboratory. There is no material produced in the trial, apart from the interested testimony of the police officers, to show that the charas and ganja were seized from the possession of the accused or that the samples sent to the forensic science laboratory were taken from the drugs seized from the possession of the accused. ...

6. ... The best evidence would have been the seized materials which ought to have been produced during the trial and marked as material objects. There is no explanation for this failure to produce them. Mere oral evidence as to their features and production of panchnama does not discharge the heavy burden which lies on the prosecution, particularly where the offence is punishable with a stringent sentence as under the NDPS Act. In this case, we notice that panchas have turned hostile so the panchnama is nothing but a



document written by the police officer concerned.' "

18. It is further apposite to reproduce the paragraph Nos. 27, 28, 29, 30, 31, 32, 55, 56, 57 & 58 of the judgment of Hon'ble Supreme Court in the case of **Noor Aga** (supra) as to understand the implication of Section 35 and 54 of the Act, which are as under:-

"**27.** Section 43, however, empowers an officer of any department mentioned in Section 42 to detain and search any person who he has reason to believe has committed an offence punishable under the Act in a public place. Section 50 provides for the conditions under which search of persons is to be conducted. Section 51 provides for application of the Code of Criminal Procedure, 1973 insofar as they are not inconsistent with the provisions of the Act. Section 52 provides for disposal of persons arrested and articles seized.

28. Section 52-A provides for disposal of seized narcotic drugs and psychotropic substances; sub-section (2) thereof reads as under:

"52-A.(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.”

29. Indisputably, the proper officers of the 1962 Act are authorised to take action under the Act as regards seizure of goods, documents and things.

30. We may notice Section 110 of the 1962 Act, sub-section (1) whereof reads as under:

“110. *Seizure of goods, documents and things.*—(1) If the proper officer has reason to believe that any goods are liable to



confiscation under this Act, he may seize such goods:

Provided that where it is not practicable to seize any such goods, the proper officer may serve on the owner of the goods an order that he shall not remove, part with, or otherwise deal with the goods except with the previous permission of such officer.

(1-A) The Central Government may, having regard to the perishable or hazardous nature of any goods, depreciation in the value of the goods with the passage of time, constraints of storage space for the goods or any other relevant consideration, by notification in the Official Gazette, specify the goods or class of goods which shall, as soon as may be after its seizure under sub-section (1), be disposed of by the proper officer in such manner as the Central Government may, from time to time, determine after following the procedure hereinafter specified.

(1-B) Where any goods, being goods specified under sub-section (1-A), have been seized by a proper officer under sub-section (1), he shall prepare an inventory of such goods containing such details relating to their description, quality, quantity, mark, numbers, country of origin and other particulars as the proper officer may consider relevant to the identity of the goods in



any proceeding under this Act and shall make an application to a Magistrate for the purpose of—

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

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

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

(1-C) Where an application is made under subsection (1-B), the Magistrate shall, as soon as may be, allow the application.”

31. Indisputably, the Central Government has issued guidelines in this behalf being Standing Order 1 of 1989 dated 13-6-1989 which is in the following terms:

“WHEREAS the Central Government considers it necessary and expedient to determine the manner in which the narcotic drugs and psychotropic substances, as specified in Notification No. 4/89 dated 29-5-1989 [F. No. 664/23/89-Opium, published as S.O. 381(E)], which shall, as soon as may be, after their seizure, be disposed of, having regard to their hazardous nature, vulnerability to theft, substitution and constraints of proper storage space;



Now, therefore, in exercise of the powers conferred by sub-section (1) of Section 52-A of the Narcotic Drugs and Psychotropic Substances Act, 1985 (61 of 1985) (hereinafter referred to as 'the Act'), the Central Government hereby determines that the drugs specified in the aforesaid notification shall be disposed of in the following manner...."

These guidelines under the Standing Order have been made under the statute, and heroin is one of the items as substances listed for disposal under Section I of the Standing Order.

32. Paras 3.1 and 6.1 of the Standing Order read as under:

"Preparation of inventory

3.1. After sampling, detailed inventory of such packages/containers shall be prepared for being enclosed to the panchnama. Original wrappers shall also be preserved for evidentiary purposes.

Certificate of destruction

6.1. A certificate of destruction (in triplicate) (Annexure III) containing all the relevant data like godown entry no., file no., gross and net weight of the drugs seized, etc. shall be prepared and duly endorsed by the signature of the Chairman as well as members of the Committee. This could also serve the purpose of panchnama.



The original copy shall be posted in the godown register after making necessary entries to this effect, the duplicate to be retained in the seizure case file and the triplicate copy will be kept by the Disposal Committee.”

55. The provisions of Section 35 of the Act as also Section 54 thereof, in view of the decisions of this Court, therefore, cannot be said to be ex facie unconstitutional. We would, however, keeping in view the principles noticed hereinbefore, examine the effect thereof vis-à-vis the question as to whether the prosecution has been able to discharge its burden hereinafter.

Burden of proof

56. The provisions of the Act and the punishment prescribed therein being indisputably stringent flowing from elements such as a heightened standard for bail, absence of any provision for remissions, specific provisions for grant of minimum sentence, enabling provisions granting power to the court to impose fine of more than maximum punishment of Rs 2,00,000 as also the presumption of guilt emerging from possession of narcotic drugs and psychotropic substances, the extent of burden to prove the foundational facts on the prosecution i.e. “proof beyond all reasonable doubt” would be more onerous. A heightened scrutiny test would be necessary to be invoked. It is so because whereas, on the one



hand, the court must strive towards giving effect to the parliamentary object and intent in the light of the international conventions, but, on the other, it is also necessary to uphold the individual human rights and dignity as provided for under the UN Declaration of Human Rights by insisting upon scrupulous compliance with the provisions of the Act for the purpose of upholding the democratic values. It is necessary for giving effect to the concept of "wider civilisation". The court must always remind itself that it is a well-settled principle of criminal jurisprudence that more serious the offence, the stricter is the degree of proof. A higher degree of assurance, thus, would be necessary to convict an accused. In *State of Punjab v. Baldev Singh* [(1999) 6 SCC 172 : 1999 SCC (Cri) 1080] it was stated:-

"28. ... It must be borne in mind that severer the punishment, greater has to be the care taken to see that all the safeguards provided in a statute are scrupulously followed."

57. It is also necessary to bear in mind that superficially a case may have an ugly look and thereby, prima facie, shaking the conscience of any court but it is well settled that suspicion, however high it may be, can under no circumstances, be held to be a substitute for legal evidence.



58. Sections 35 and 54 of the Act, no doubt, raise presumptions with regard to the culpable mental state on the part of the accused as also place the burden of proof in this behalf on the accused; but a bare perusal of the said provision would clearly show that presumption would operate in the trial of the accused only in the event the circumstances contained therein are fully satisfied. An initial burden exists upon the prosecution and only when it stands satisfied, would the legal burden shift. Even then, the standard of proof required for the accused to prove his innocence is not as high as that of the prosecution. Whereas the standard of proof required to prove the guilt of the accused on the prosecution is "beyond all reasonable doubt" but it is "preponderance of probability" on the accused. If the prosecution fails to prove the foundational facts so as to attract the rigours of Section 35 of the Act, the actus reus which is possession of contraband by the accused cannot be said to have been established."

19. Standing Instruction No. "1 of 1988" dated 15.03.1988 of Narcotics Control Bureau, Government of India issued under Section 52-A of the N.D.P.S. Act prescribes the detailed procedure for sampling, sealing and



despatching the seized sample to the laboratory for test.

Clauses 1.4, 1.5, 1.6 and 1.9 of the Standing Instruction

No. 1 of 1988 dated 15.03.1998 read as under:-

1.4 If the drugs seized are found in packages/containers, the same should be serially numbered for purposes of identification. In case the drugs are found in loose form, the same should be arranged to be packed in unit containers of uniform size and serial numbers should be assigned to each package/ container. Besides the serial numbers, the gross and net weight, particular of the drug and the date of seizure should invariably be indicated on the packages. In case sufficient space is not available for recording the above information on the package, a Card Board label, should be affixed with a seal of the seizing officer and on this Card Board label, the above details should be recorded.

1.5 Place and time of drawal of sample
Samples from the Narcotic Drugs and Psychotropic Substances seized must be drawn on the spot of recovery, in duplicate, in the presence of search (Panch) witnesses and the person from whose possession the drug has been recovered, and mention to this effect should invariably be made in the panch nama drawn on the spot.

1.6 Quantity of different drugs required in the sample
The Quantity to be drawn in each sample for chemical test should be 5 grams in respect of all narcotic drugs and psychotropic substances except in the cases of Opium, Ganja and Charas/Hashish where



a quantity of 24 grams in each case is required for chemical test. The same quantities should be taken for the duplicate sample also. The seized drugs in the packages/containers should be well mixed to make it homogeneous and representative before the sample in duplicate is drawn.

1.9 It needs no emphasis that all samples must be drawn and sealed; in the presence of the accused, Panchnama witnesses and seizing officer and all of them shall be required to put their signatures on each sample. The official seal of the seizing officer should also be affixed. If the person, from whose custody the drugs have been recovered, wants to put his own seal on the sample, the same may be allowed on both the original and the duplicate of each of the samples.”

20. The question as to whether the compliance of the guidelines issued by Standing Instruction No. 1 of 1988 would vitiate the trial was considered by the Hon'ble Supreme Court in **Khet Singh Vs. Union of India** since reported in **AIR 2002 SCC 1450, Noor Aga vs. State of Punjab** since reported in **(2008) 16 SCC 417** and **Union of India vs. Balmukund and others** since reported in **2012 (9) SCC 161**.

21. In **Khet Singh** (supra) after examining the said issue, the Hon'ble Supreme Court held in para 10 as



under:-

“**10.** The instructions issued by the Narcotics Control Bureau, New Delhi are to be followed by the officer in-charge of the investigation of the crimes coming within the purview of the NDPS Act, even though these instructions do not have the force of law. They are intended to guide the officers and to see that a fair procedure is adopted by the officer in-charge of the investigation.....”

22. In **Noor Aga (supra)** after giving thoughtful consideration to the guidelines issued under the N.D.P.S. Act in the Standing Order, the Hon’ble Supreme Court observed in paras 89 to 91 as under:-

“**89.** Guidelines issued should not only be substantially complied, but also in a case involving penal proceedings, vis-à-vis a departmental proceeding, rigours of such guidelines may be insisted upon. Another important factor which must be borne in mind is as to whether such directions have been issued in terms of the provisions of the statute or not. When directions are issued by an authority having the legal sanction granted therefore, it becomes obligatory on the part of the subordinate authorities to comply therewith.

90. Recently, this Court in State of Kerala & Ors. v. Kurian Abraham (P) Ltd. & Anr. [(2008) 3 SCC 582], following the earlier decision of this Court in Union of India v. Azadi Bachao Andolan [(2004) 10 SCC 1] held that statutory instructions



are mandatory in nature.

91. The logical corollary of these discussions is that the guidelines such as those present in the Standing Order cannot be blatantly flouted and substantial compliance therewith must be insisted upon for so that sanctity of physical evidence in such cases remains intact. Clearly, there has been no substantial compliance of these guidelines by the investigating authority which leads to drawing of an adverse inference against them to the effect that had such evidence been produced, the same would have gone against the prosecution.”

23. There is another glaring flaw in the prosecution’s case as samples were admittedly not drawn in the presence of a Magistrate, as contemplated under Section 52-A(2)(b) of the Act, which is mandatory requirement, as it has been held in the matter of **Union of India vs. Mohanlal** (supra).

CONCLUSION:

24. With aforesaid settled legal proposition in hand, now coming to the fact of this case, it is apparent that source of information regarding carrying of contraband, which is the genesis of occurrence/recovery is appearing doubtful, as PW-1/informant said that he received secret



information that appellant is coming from Hajipur side along with another person as a pillion rider having *ganja* on their scooty but, PW-3 who is also the party of same patrolling team and also seizure list witness stated categorically that no secret information was received regarding present recovery and arrest was made on the basis of suspicion. This fact also appears to be supported by PW-3, who is another seizure list witness.

25. Further, it is an admitted position that no information to senior officers was given *qua* any secret information or recovery as stated above to appoint gazetted officer. From cursory examination of testimony of PW-1/informant, it appears that the sample, which was alleged to be drawn at place of occurrence itself was not weighed and not marked. Even the box, which alleged to be recovered from the possession of appellant was not marked. It is also apparent from the deposition of PW-1 that he along with his entire team and seized contraband instead of depositing it into police station, taken first to the house of appellant to arrest his father, where they found nothing



incriminating. After visit of the house of appellant with seized contraband, same was subsequently deposited with the *malkhana* of Sadar Police Station. No descriptions regarding marking and sampling was deposed by PW-1/informant *qua* seized material. There is nothing on record, which may suggest that any gazetted officer was requested to join investigation. No representative sample was said to be drawn from the seized contraband.

26. One vital flaws which appears to be surfaced from deposition of PW-1 that the seized material was presumed to be contraband as "*ganja*" without even preliminary testing by any detection kit and believing that material was *ganja*, it was sealed.

27. All these facts are sufficient to construed that search, sealing and sampling of *Ganja* were done in very mechanical manner without following any mandatory provisions of law as available under the NDPS Act.

28. From the deposition of Investigating Officer i.e. PW-4, it appears that the sample drawn was sent to FSL, Muzaffarpur on 24.12.2020. It appears highly doubtful that



when the alleged contraband was recovered on 13.10.2020, why a sample was sent for forensic examination on 24.12.2020. The report regarding contraband was made available from Forensic Science Laboratory, Muzaffarpur through Letter No.592 dated 07.04.2022, whereas charge-sheet was submitted on 31.12.2020. It can be gathered safely that before submission of the charge-sheet, prosecution has nothing to say in its support that seized material was *ganja*. In absence of any mark of seal, as it nothing appears from deposition of PW-1 and PW-4, it is suspicious that the material produced before the court or the material, which was sent for examination to Forensic Science Laboratory, Muzaffarpur was the same contraband, which was recovered from the possession of the appellant. Moreover, the deposition of PW-3, categorically revealed that nothing was recovered from the possession of appellant Ravi Kumar. All these facts are sufficient to suggest recovery of contraband doubtful from the possession of appellant/convict. Interestingly, PW-7, who brought seized material/*ganja* from *Malkhana* stated that it was deposited



by mentioning its weight as 20 kg. 100 gm., which again creates a doubt whether any sample was drawn from it. Even PW-1 is silent about the weight of sample which was taken from recovered *ganja*.

29. In view of aforesaid discussions, it can be said safely that prosecution has failed to established its case beyond reasonable doubt during trial *qua* appellant for recovery of contraband/*ganja*.

30. Hence, the present appeal stands allowed.

31. Accordingly, the impugned judgment of conviction dated 28.06.2023 and order of sentence dated 03.07.2023 respectively passed by learned Additional Sessions Judge-I-cum-Special Judge NDPS, Vaishali at Hajipur in NDPS No. 91 of 2020 arising out of Hajipur Sadar P.S. Case No.633 of 2020 is quashed and set aside. Resultantly, the appellant, namely, Ravi Kumar is acquitted from the charges levelled against him by the Trial Court.

32. Since appellant is in custody in connection with aforesaid case, he is directed to be released forthwith, if not required in any other case. Fine, if any, deposited be



returned to the appellant forthwith.

33. Office is directed to send back the Trial Court Records (TCRs) along with a copy of this judgment to the learned trial court, without delay.

(Chandra Shekhar Jha, J.)

Sanjeet/-

AFR/NAFR	AFR
CAV DATE	NA
Uploading Date	11-09-2024
Transmission Date	11-09-2024

