IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.338 of 2016

Arising Out of PS. Case No.-92 Year-2012 Thana- RAXAUL District- East Champaran

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Lakshaman Mahto S/o Late Bhanu Mahto resident of Village - Inerwa, Ward No. 19, P.S. - Birganj, Distt. - Parsa, Nepal.

... ... Appellant

Versus

The State Of Bihar Through Lans Nayak G.d. Devid Sonewal,13th B.n. Ssb, D Coy

... ... Respondent

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Appearance :

For the Appellant/s : Mr. Shri Prakash Tiwari, Advocate

For the Respondent/s : Mr.Ajay Mishra, APP

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CORAM: HONOURABLE MR. JUSTICE ASHWANI KUMAR SINGH
and
HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD

ORAL JUDGMENT
(Per: HONOURABLE MR. JUSTICE ASHWANI KUMAR SINGH)

Date: 11-02-2022

Heard Mr. Shri Prakash Tiwari, learned counsel for the appellant and Mr. Ajay Mishra, learned Additional Public Prosecutor for the State through video conferencing.

2. This appeal is directed against the judgment of conviction and order of sentence dated 27.02.2016 and 29.02.2016 respectively passed by the learned 1st Additional Sessions Judge, East Champaran, Motihari in N.D.P.S. Case No. 48 of 2012 arising out of Raxaul P.S. Case No. 92 of 2012 whereby and whereunder the appellant has been convicted under Section 20(b)(ii)(C) of the Narcotics Drugs and Psychotropic Substances Act, 1985 (for short 'N.D.P.S. Act') and sentenced to undergo rigorous imprisonment

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for a term of 11 years and to pay a fine of Rs.1,10,000/- and on default of payment of fine to further undergo rigorous imprisonment for one year. He has further been held guilty for the offence under Section 23(c) of the N.D.P.S. Act and sentenced to undergo rigorous imprisonment for a term of 10 years and to pay a fine of Rs. 1,00,000/- and in default of payment of fine to further undergo rigorous imprisonment for one year. Both the sentences have been ordered to run concurrently.

3. The prosecution case in short is that on 24.04.2012, at about 01:00 P.M., when the informant Lans Nayak, GD, 13th, B.N, SSB, "D" Coy David Sonowal was on patrolling duty along with other SSB personnel near border, he received a secret information regarding movement of certain contraband material from Nepal which information was passed on by him to his Company Commander, Inspector Shailesh Kumar and after seeking permission, the team headed by the informant started surveillance in the border area. At about 04:30 P.M., one person was seen coming from Birganj to Ahirwa Tola. He was directed to stop but having seen SSB officials, he started fleeing away. He was caught by the members of the team. On the queries made by the officials, he disclosed his name and identity as Lakshaman Mahto of Birganj Nepal. Thereafter in presence of two independent witnesses,

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namely, Nandu Yadav and Ram Balak Paswan, a search was made of the person detained and from his possession, 5 yellow coloured packets tied on his right thigh were recovered. On inquiry, he disclosed that the recovered packets contained charas. He disclosed that he is the owner of the contraband charas and he sells it after going to Raxaul. The recovered contraband was tested by drug detection kit and was found to be charas.

4. The informant has alleged that a seizure list was prepared at the place of occurrence and the person from whom the contraband charas was recovered was apprehended. He was produced before the S.H.O., Raxaul along with the seized charas weighing 2.5 kgs.

5. On the basis of the aforestated information given to the Police, Raxaul P.S. Case No. 92 of 2012 was registered under Sections 20, 22, 23 and 24 of the N.D.P.S. Act against the appellant and investigation was taken up. On completion of investigation, charge sheet was submitted before the trial court pursuant to which cognizance was taken. After complying with the mandatory requirements of Section 207 of the Code of Criminal Procedure charges were framed against the appellant for the offences punishable under Sections 20(b)(ii)(C) and 23(c) of the

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N.D.P.S. Act. The appellant denied the charges. Accordingly, the trial commenced.

6. During trial altogether 7 witnesses namely Lans Nayak David Sonowal (PW1), Gagan Gurang (PW2), Jaiparakash Sah (PW3), Baswant Kambale (PW4), Benkenta Rasna Baiyena (PW5), Dhana Jee Bhimrao (PW 6) and Md. Satar (PW7) were examined in support of the charges.

7. PW1 Lans Nayak David Sonowal, who is the informant of the case, has corroborated his initial version as narrated in the FIR in his examination-in-chief. In cross-examination, he proved the notice for search under Section 50 of the N.D.P.S. Act which was marked as Exhibit-1, his own signature on the proforma of intercepted goods which was marked as Exhibit-2, signature of Inspector Shailesh Kumar on the proforma of intercepted goods which was marked as Exhibit 2/A, signature of Nandu Yadav on the proforma of apprehension of the appellant which was marked as Exhibit-3, signature of Ram Balak Paswan on the proforma of apprehension which was marked as Exhibit 3/A, his own signature on the proforma of apprehension of the appellant which was marked as Exhibit 3/B and signature of Shailesh Kumar, Inspector of SSB on the proforma of apprehension which was marked as Exhibit 3/C, the confession

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made by the appellant which was marked as Exhibit 4 and the written report submitted by him to the S.H.O. of Raxaul police station which was marked as Exhibit-5. He identified the appellant in the dock in cross-examination. He admitted that all the proformas which were proved by him during trial were downloaded to computer and printed at the Company Headquarter whereafter his signature, signature of the witnesses, Signature of the Company Commander as also the signature of the accused was taken on those proformas. He admitted that he is not aware that under the N.D.P.S. Act, before searching a person, he has to be apprised his right to be searched before a Gazetted Officer. He further admitted that when the appellant was apprehended, 4-5 local persons were present there. He had inquired from them their identity and name but did not record it on any paper. He denied that the packets recovered from the possession of the appellant were weighed at the Company Headquarter. He, however, admitted that the contraband was recovered from the field.

8. Gagan Gurang (PW2) is consistent with the statement of PW 1 in his examination-in-chief. In cross-examination, he admitted that neither he received the confidential information nor he was made aware of any such information. He admitted that he himself did not recover any contraband. He admitted that whatever

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he was told by his Company Commander, he has stated before the court. He admitted that if a team recovers contraband, it is rewarded. However, he denied that out of greed, the team has falsely implicated the appellant.

9. PW2 and PW4 are also consistent with the evidence of PW1 in their examination-in-chief. However, in cross-examination, they also admitted that they did not recover any contraband themselves. PW4 admitted that for the first time, he saw the contraband in the left hand of the Company Commander.

10. PW5 is also consistent with the evidence of PW1 in his examination-in-chief except that he stated that the seizure list witnesses, namely, Nandu Yadav and Ram Balak Paswan had searched the person of the appellant and they had recovered 5 packets of contraband from his possession.

In reply to the court question, PW5 stated that he does not know as to from which thigh of the appellant the contraband charas was recovered.

11. In cross-examination, PW5 admitted that the appellant was not searched by any officer or jawan of SSB.

12. Like PW2 to PW4, PW6 is also consistent with the evidence of PW1 in his examination-in-chief. In cross-examination, he also admitted that all the documents were

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prepared in the Company Headquarter. He further admitted that the packets recovered from the possession of the appellant were opened at the Company Headquarters. He stated that he cannot say whether those packets were sealed or not after opening them.

13. Md. Satar (PW7), who is the Investigating Officer of the case, stated in his evidence that he recorded the statement of the witnesses who all supported the prosecution case. He stated that he filed an application in the court of Special Judge for getting the contraband tested at the Forensic Science Laboratory, Patna and Kolkata. He stated that the seized contraband was ordered to be sealed in presence of Sri. R.K. Bharti, Judicial Magistrate, 1st Class and in his presence the contraband was sealed whereafter the sample of the seized substance was sent to Forensic Science Laboratory, Patna and Kolkata and awaiting the test report from the Forensic Science Laboratory, Patna, he filed chargesheet before the court.

14. In his cross-examination, he admitted that the seized contraband was handed over to him in a polyethene which was kept in the almirah of the police station. He clarified that the same was not sent to the malkhana because the malkhana Incharge was on leave. He had not given the charge of the malkhana to anyone and the malkhana was locked. He admitted that the key of the

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almirah was with the S.H.O. of the police station. He admitted that there is no mention of putting any mark on the seized substance in the case diary. He further admitted that the order dated 27.04.2012 passed by the court was received by him on 05.05.2012 and he produced the seized contraband before Sri. R.K. Bharti, learned Judicial Magistrate, 1st Class on 05.07.2012. He stated that from the seized substance, 30 gms was drawn as sample and the same was sealed. He admitted that the substance was sent only to the Forensic Science Laboratory, Patna. He further admitted that there is no mention in the case diary that the sample of the seized substance was also sent to Kolkata. He admitted that he did not make any inquiry about the independent witnesses and in his presence, they had not put any signature on any documents. He also admitted that the seizure list witnesses are not witnesses to the charge sheet.

15. After the closure of the prosecution case, the statement of the appellant was recorded under Section 313 of the Code of Criminal Procedure.

16. The defence did not adduce any evidence in order to prove his innocence.

17. After the closure of the prosecution and the defence case, arguments advanced on behalf of the parties were heard and

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vide impugned judgment dated 27.02.2016, the appellant was held guilty for the offences punishable under Sections 20(b)(ii)(C) and 23(c) of the N.D.P.S. Act. Consequently, he was sentenced vide impugned order dated 29.02.2016.

18. Mr. Shri Prakash Tiwari, learned counsel for the appellant assailing the impugned judgment of conviction and order of sentence submitted that the trial court failed to appreciate the credibility of the search and seizure. It passed the impugned judgment overlooking all the procedures established under the law. He submitted that the trial court failed to appreciate that the prosecution had failed to prove the case beyond all reasonable doubts against the appellant. He contended that the mandatory provisions as laid down under Section 50, 52-A and 55 of the N.D.P.S. Act was given a complete go-bye by the prosecution.

19. He further contended that the credibility of the prosecution version becomes doubtful also on account of non-sealing of the goods at the place of seizure and putting any mark over it. He argued that the trial court ought to have recorded the judgment of acquittal in view of the fact that the seized substance was not produced before the court during trial. According to him, non-production of the material object before the court is not a mere procedural irregularity rather the same has the potential to

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vitiate the entire trial. In this regard, he has placed his reliance on the judgment of the Hon'ble Supreme Court in the matter of **Vijay Jain versus State of Madhya Pradesh** since reported in (**2013) 14 SCC 527** and **Jitendra and Another versus State of M.P.** reported in **(2004) 10 SCC 562.**

20. He contended that the seizure list witnesses, namely, Nandu Yadav and Ram Balak Paswan were also not examined and rest of the witnesses are official witnesses whose version is not credible in absence of corroboration by the statement of the seizure list witnesses.

21. Lastly, he contended that the prosecution case is full of vital contradictions and absurdities on material points ignoring which the court below passed the impugned judgment of conviction.

22. On the other hand, Mr. Ajay Mishra, learned Additional Public Prosecutor for the State contended that the witnesses examined during trial are consistent. He contended that the informant has fully corroborated the prosecution case as narrated in the FIR during trial. According to him, the contraband seized from the possession of the appellant was tested at the place of occurrence itself by the drug testing kit and was found to be charas. He submitted that the contraband charas was sent to

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Forensic Science Laboratory, Patna and the report dated 31.08.2012 suggests that the dark greenish colour solid substance contained in small tin box was found to be charas. Referring to the Forensic Science Laboratory report, he submitted that the seized substance was sent through Chaukidar Shashi Bhushan Kumar and was received in the Office of the Director, Forensic Science Laboratory, Bihar, Patna on 13th July, 2012. He contended that since the seizure of the five packets containing charas is not disputed, non-examination of the independent witnesses would not vitiate the trial. He contended that the minor contradiction in the evidence of the witnesses are bound to happen and on this score, it cannot be said that the trial got vitiated.

23. In reply, Mr. Tiwary, learned counsel for the appellant submitted that the Forensic Science Laboratory report was taken into evidence even without being proved formally by any witness. He submitted that a copy of the report was never served to the appellant in compliance with Section 207 of the Code of Criminal Procedure. He further contended that even the Chaukidar who is said to have taken the sample of the contraband to the Office of the Director, Forensic Science Laboratory, Patna was not examined during trial. He submitted that there is no evidence that the sample was taken from the seized contraband. He

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further contended that from the evidence adduced during trial it would be evident that the seized contraband was never kept in the malkhana rather it was kept in the almirah of the Officer Incharge. He urged that the trial court ought not to have given any credence to the Forensic Science Laboratory report under the facts and circumstances of the case.

24. We have heard learned counsel for the respective parties and carefully perused the records.

25. On appreciation of evidence, we find force in the contentions advanced on behalf of the appellant. The informant who allegedly seized the contraband charas from the possession of the appellant has admitted in his deposition that he was not aware of the provisions of Section 50 of the N.D.P.S. Act. He admitted that all the proformas including the notice for search under Section 50 of the N.D.P.S. Act were downloaded on computer and printed at the Company Headquarter and signatures of the appellant and witnesses were made over it. Thus, it would be evident from the evidence of PW 1 that the appellant was not apprised of his right to be searched by a Gazetted Officer or a Magistrate.

26. A bare reading of Section 50 of the N.D.P.S. Act would show that it applies in case of physical search of a person. It is the case of the prosecution that the recovery of 5 packets of

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contraband charas was made from the person of the appellant. Hence, compliance with the requirements under Section 50 of the N.D.P.S. Act was mandatory.

27. In the matter of **State of Punjab versus Baldev Singh** since reported in **(1999) 6 SCC 172,** the Hon'ble Supreme Court held "… *We have no hesitation in holding that in so far as the obligation of the authorised officer under Sub-Section (1) of Section 50 of the N.D.P.S. Act is concerned, it is mandatory and requires a strict compliance. Failure to comply with the provision would render the recovery of the illicit article illegal and vitiate the conviction if the same is recorded only on the basis of the recovery of illicit article from the person of the accused during such search. Thereafter, the suspect may or may not to chose the law provided to him under the said provision."*

28. The aforesaid view of the Hon'ble Supreme Court was reinforced by the Hon'ble Supreme Court in a Five Judge Constitution Bench Judgment in the matter of **Vijaysinh Chandubha Jadeja versus State of Gujarat** since reported in **(2011) 1 SCC 609** wherein it was observed: *"... We also feel that though Section 50 gives an option to the empowered officer to take such person (suspect) either before the nearest gazetted officer or the Magistrate but in order to impart authenticity, transparency*

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and creditworthiness to the entire proceedings, in the first instance, an endeavour should be made to produce the suspect before the nearest Magistrate, who enjoys more confidence of the common man compared to any other officer. It would not only add legitimacy to the search proceedings, it may verily strengthen the prosecution as well."

29. It would be explicit from the evidence adduced during trial that the appellant was not apprised of his right under Section 50 of the N.D.P.S. Act to be searched before a gazetted officer or a Magistrate. Thus, on this score alone, the appellant would succeed. However, since arguments have been made on other points also we would like to deal with them.

30. Admittedly, the two seizure list witnesses namely Nandu Yadav and Ram Balak Paswan have not been examined during trial. They have not even been made seizure list witnesses. Though it is not an uncommon phenomenon in criminal trials particularly relating to N.D.P.S. Act that the seizure witnesses are not examined, it is surprising as to why they have not been included even in the list of witnesses in the charge sheet.

31. In the absence of examination of the seizure list witnesses and in the absence of inclusion of their name in the list of witnesses in the chars sheet, the case of the prosecution that the

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seizure of the contraband charas was made in presence of independent witnesses becomes doubtful.

32. Coming to the next submission made on behalf of the appellant regarding the illegality of the sampling of the seized contraband, it is manifest from the evidence that the representative samples were not drawn from the seized substance and sent to the expert in the designated laboratory for chemical analysis and report in accordance with law. It would also be evident from the evidence that the seized substance and the samples were not handled properly in the prescribed manner.

33. Standing Instruction No. 1 of 1988 dated 15.03.1988 of Narcotics Control Bureau, Government of India issued under Section 52 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*

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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*

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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."

34. It has come in evidence of the witnesses that the entire formalities of search and seizure except the preparation of seizure list was done in the Company Headquarter and not at the place of occurrence. There is nothing to suggest that the seizing officer sealed the seized article at the place of seizure or any time thereafter in terms of Clause 1.4 of the Standing Instruction No. 1 of 1988. There is also no evidence to suggest that any sample from the seized packets was drawn on the spot of recovery in the presence of the appellant in terms of Clause 1.5 of the Standing Instruction. Non-sealing of the seized packets and not collecting the samples at the initial stage of seizure were the defects which could not have been cured later on.

We have seen in the evidence of the Investigating Officer, Md. Satar (PW 7) that an application for sampling and sealing the seized packets was filed in the court of Special Judge and one R.K. Bharti, Judicial Magistrate 1st Class was authorized for the said purpose. PW 7 admitted that the order passed by the learned Special Judge on 27.04.2012 was received by him on 05.05.2012 and the seized contraband was produced before Sri R. K. Bharti,

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Judicial Magistrate 1st Class on 05.07.2012 when a sample weighing 30 gms was taken out and it was sealed. It is surprising that when the order passed on 27.04.2012 was received by the PW 7 on 05.05.2012 as to why the seized substance was produced before the learned Magistrate after two months on 05.07.2012.

35. It is also an admitted fact that the seized substance was not kept in the malkhana and was not under the proper custody as required in law. It was kept in a polythene in the almirah of the Police Station. Under such circumstance, the seized property could have been changed anytime and no authenticity to the sample taken out from such property can be given. It is not known as to what was seized from the possession of the appellant and what was kept in the almirah of the police station, the key of which was in the custody of S.H.O. and what was produced before the Magistrate for sampling.

36. The question as to whether or not 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 versus. Union of India** since reported in **AIR 2002 SCC 1450**, **Noor Aga versus. State of Punjab** since reported in **(2008) 16 SCC 417** and **Union of India versus. Balmukund and others** since reported in **2012 (9) SCC 161.**

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37. 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……."*

38. 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 therefor, 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*

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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."

39. In **Union of India versus Balmukund (supra)**, the Hon'ble Supreme Court observed in para 36 as under:

"36. There is another aspect of the matter which cannot also be lost sight of. Standing Instruction 1/88 which has been issued under the Act, lays down the procedure of taking samples. The High Court has noticed that P.W.7 had taken samples of 25 gm each from all the five bags and then mixed them and then sent to the laboratory. There is nothing to show that adequate quantity from each bag had been taken. It was a requirement of law."

40. There is no evidence that the packets of charas found from the possession of the appellant were assigned a serial number. There is no evidence that the alleged charas found in each

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of the packets was separately weighed. There is an admission by the Investigating Officer that he did not seize the contraband at the place of seizure. There is also an admission by the Investigating Officer of the case that he received the seized packets kept in a polyethene which was kept in almirah, the key of which was in the custody of the Officer In charge of the Police Station. There is no evidence that the contents of the five packets were well-mixed to make it homogeneous and representative before the sample was drawn. The sample was not sealed in presence of the appellant and the seizure list witnesses. The official seal of the Investigating Officer before whom the seized contraband was produced was not produced before the court. There is also no evidence to show that the sample sent to the Forensic Science Laboratory, Patna was drawn from the contraband said to have been seized from the possession of the appellant.

41. Apparently, there has been non-compliance of the guidelines issued by Standing Instruction No. 1 of 1988. The Court would, thus, draw an adverse inference against the prosecution in view of the judgments of the Hon'ble Supreme Court cited above that had there been substantial compliance, the evidence would have gone against it.

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42. We further notice that the Chaukidar who took the sample to the Forensic Science Laboratory was not examined during trial. The FSL report (Exhibit 6) was taken into evidence behind the back of the appellant. A copy of the same was neither supplied to him in compliance with Section 207 of the Code of Criminal Procedure nor it was given to him at any stage of the trial. None of the witnesses examined during trial has whispered a word about the report of the Forensic Science Laboratory. Under such circumstance, no credence can be given to the FSL report which corroborates the case of the prosecution that the dark greenish solid content in the small tin box was found to be charas.

43. So far as the material exhibit charas is concerned, it was the duty of the S.H.O. to have kept it in safe custody. He ought to have put his seal on the seized packets. There is no evidence that the packets were sealed by the S.H.O. of Raxaul Police Station.

44. One of the most important provision i.e. Section 52-A of the N.D.P.S. Act has been made for the disposal of the seized Narcotic Drugs and Psychotropic Substances. The said provision requires preparation of an inventory of the seized property in presence of the Magistrate after taking photographs and certifying such photographs to be true and allowing to draw

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representative samples of such drugs and substances in the presence of such Magistrate and certifying the correctness of any list of sample so drawn. In case the aforesaid procedure is followed notwithstanding anything contained in the Code of Criminal Procedure, every court trying an offence under the N.D.P.S. Act is required to treat the inventory, the photographs of Narcotic Drugs or Psychotropic Substances and any list of samples drawn and certified by the Magistrate as primary evidence in respect of such offence.

45. In the instant case, it has rightly been pointed out by Mr. Shri Prakash Tiwary, learned counsel for the appellant that the procedure prescribed under Section 52-A of the N.D.P.S. Act has not been followed.

46. In absence of the proof regarding disposal of the contraband in accordance with law, the prosecution was required to produce the contraband before the court. However, the seized contraband was never produced before the court during trial. In absence of any evidence relating to disposal of the seized property and the production of the seized property in the court, it cannot be held that any seizure of contraband was made from the possession of the appellant.

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47. In this regard, the appellant has rightly placed his reliance on the judgment of the Hon'ble Supreme Court in **Jitendra and Another versus State of M.P.** reported in **(2004) 10 SCC 562.** In the said case, in paragraph '6', the Hon'ble Supreme Court held as under:-

> *"6. In our view, the view taken by the High Court is unsustainable. In the trial it was necessary for the prosecution to establish by cogent evidence that the alleged quantities of charas and ganja were seized from the possession of the accused. 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. The suggestion made by the defence in the cross-examination is worthy of notice. It was suggested to the prosecution witnesses that the landlady of the house in collusion with the police had lodged a false case only for evicting the accused from the house in which they were living. Finally, we notice that the investigating officer was also not examined. Against this background, to say that, despite the panch witnesses having turned hostile, the non-*

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examination of the investigating officer and non-production of the seized drugs, the conviction under the NDPS Act can still be sustained, is far-fetched."

48. Similarly in **Vijay Jain (supra),** the Hon'ble Supreme Court in para '12' held as under:-

"12. We are thus of the view that as the prosecution has not produced the brown sugar before the Court and has also not offered any explanation for non-production of the brown sugar alleged to have been seized from the appellants and as the evidence of the witnesses (PW 2 and PW 3) to the seizure of the materials does not establish the seizure of the brown sugar from the possession of the appellants, the judgment of the trial court convicting the appellants and the judgment of the High court maintaining the conviction are not sustainable."

49. Before we conclude, we must record our displeasure regarding the manner in which the trial court recorded the statement of the appellant under Section 313 of the Code of Criminal Procedure. The only question asked from the appellant was as under:-

"There is evidence against you that on 24th of April, 2012 at about 4.30 P.M. five packets of Charas which were tied on your right thigh weighing 2.5 Kgs were

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recovered near Ahirwa Tola, Police Station, Raxaul which were brought by you from Raxaul, Nepal in India.

50. It is well settled that the object of Section 313 of Code of Criminal Procedure is to enable the accused to explain the circumstances against him in evidence so that he may submit his explanation to those circumstances personally as also his stand with regard the circumstances in evidence which have been collected against him and has come on record during trial. If the questions on incriminating circumstances have been ignored by the trial court then it is an illegality which amounts to an abuse of the process of the court. The question under Section 313 of the Code of Criminal Procedure should not be treated as an empty formality as it is an important facet of the trial.

51. In the present case, the appellant was never informed the following incriminating circumstances by the trial court: (a) that a seizure memo of the contraband recovered was prepared; (b) that the seized packets were produced before the Police Station at Raxaul; (c) that the articles recovered were kept in the almirah of the Police Station; (d) that a sample of contraband was drawn; (e) that the sample was sealed; (f) that the sample was sent to the FSL for test; and, (g) that the FSL report shows that the substance sent to the FSL was found to be Charas.

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52. Thus, it would be evident that the appellant was never informed of the circumstances appearing against him during trial. He did not have any chance to explain them.

53. We are of the considered view that these circumstances which were not put to the appellant during trial could not have been used against him for conviction and sentence.

54. Based on the aforesaid analysis of the evidence and law, we are of the view that the entire investigation of the case was perfunctory. The defects in investigation are substantial and go to the root of the identity of the alleged contraband charas alleged to be recovered from the possession of the appellant. The glaring lapses on the part of the prosecution during investigation would certainly affect the credibility of the prosecution case. The case of the prosecution is based only on the oral testimony of official witnesses with the arrest of the appellant. The evidence adduced during trial does not inspire confidence as P.W.1, Lans Nayak David Sonowal who is the informant of this case and who had seized the contraband himself admitted in paragraph '19' in his cross-examination that the seized article was found from the field as also P.W. 5 admitted in cross-examination that the appellant was not searched by any jawan or officer of SSB. The evidence on behalf of the prosecution does not inspire confidence also because

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of the several discrepancies highlighted hereinabove in our discussion.

55. All these factors lead us to believe that the prosecution had failed to prove its case beyond all reasonable doubts against the appellant.

56. Accordingly, the appeal is allowed.

57. The impugned judgment of conviction dated 27.02.2016 and the consequent order of sentence dated 29.02.2016 passed by the learned 1st Additional Sessions Judge-cum- Special Judge, East Champaran, Motihari in NDPS Case No. 48 of 2012 arising out of Raxaul P.S. Case No. 92 of 2012 are set aside. The appellant is acquitted of the charges levelled against him. He is directed to be set at liberty forthwith unless his detention is required in any other case.

(Ashwani Kumar Singh, J)

(Rajeev Ranjan Prasad, J)

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