

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Appeal (SJ) No.78 of 2016

Arising Out of PS. Case No.-126 Year-2012 Thana- RAMGARHWA District- East
Champanan

=====

Munna Mohammad Son of Late Makbul Hawari, Resident of village-
Raghunathpur, P.S.- Ramgarhwa, Dist. East Champanan

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

with

Criminal Appeal (SJ) No. 141 of 2016

Arising Out of PS. Case No.-126 Year-2012 Thana- RAMGARHWA District- East
Champanan

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SIZIRA KHATOON, wife of Majbullah Ansari, resident of Chapkahiyan,
Ward No. 2, Birganj (Nepal).

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

with

Criminal Appeal (SJ) No. 143 of 2016

Arising Out of PS. Case No.-126 Year-2012 Thana- RAMGARHWA District- East
Champanan

- =====
1. Sita Devi Wife of Daroga Patel
 2. Daroga Patel Son of Banshi Patel Both resident of village -
Chaukiya Bairiya, P.S. Pokhariya, District - Parsa (Nepal)

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

=====

Appearance :

(In Criminal Appeal (SJ) No. 78 of 2016)

For the Appellant : Mr. Alok Kumar Chaudhary, Advocate.
Mr. Klanand Jha, Advocate.

For the Respondent : Mr. Sujeet Kumar Singh (APP)

(In Criminal Appeal (SJ) No. 141 of 2016)

For the Appellant : Ms. Rashmi Jha, Advocate.

For the Respondent : Mr. Sujit Kumar Singh(APP)



(In Criminal Appeal (SJ) No. 143 of 2016)
For the Appellant : Ms. Rashmi Jha, Advocate.
For the Respondent : Mr. Bipin Kumar(APP)

CORAM: HONOURABLE MR. JUSTICE ASHUTOSH KUMAR
ORAL JUDGMENT

Date : 16-03-2018

All the three appeals have been heard together and are being disposed of by this common judgment.

2. The appellants have been convicted under Sections 20(b)ii(c) and 23(c) of the Narcotic Drugs and Psychotropic Substances Act and appellant Munna Mohammad (Cr. App (SJ) No. 78 of 2016) has been additionally convicted under Section 25 of the N.D.P.S. Act apart from the aforesaid Sections. By judgment dated 21.12.2015 passed by the learned 1st Addition District and Sessions Judge, Motihari, East Champaran in N.D.P.S. Case No. 121 of 2012 and by order dated 23.12.2015, they have been sentenced to undergo R.I. for 10 years for each of the offences, to pay a fine of Rs. 1 lakh each and in default of payment of fine to further suffer R.I. for six months.



3. The appellants were found to be in possession of Charas, weighing about 12 Kilograms. All the appellants were found to be in possession of a number of packets containing Charas which they were carrying on their persons.

4. Chandeshwar Paswan (P.W. 7) who at the relevant time was the S.H.O. of Ramgarhwa Police Station lodged a self-statement on 10.10.2012 alleging that on 09.10.2012 at about 11 o'clock in the night, he received information that some unknown men and women are approaching the house of the appellant/Munna Mohammad in village Raghunathpur and their movement and conduct was suspicious. This information was recorded by him in the police diary and thereafter he along with SAP constables proceeded towards village Raghunathpur on a private vehicle. The house of the appellant/Munna Mohammad was raided. From his possession, three packets containing Charas was found. Similarly, from the possession of appellant/Daroga Patel (in Cr. App (SJ) No. 143 of 2016)



three packets were recovered. From the possession of Sita Devi and Sizra Khatoon (in Cr. App (SJ) No. 141 of 2016) six packets each from beneath their wearing apparel was also found. A total of 18 packets containing 12 Kgs. of Charas was recovered. The appellants accepted the recovered items as narcotics which was to be sent to Kanpur. The appellants also disclosed that one Udit Kumar who was present in another room, was the owner of the aforesaid narcotics. Udit Kumar, who was arrested, disclosed that the narcotics was brought from Nepal and had to be sent to Uttar Pradesh stealthily. A seizure list was prepared in presence of Sanjiv Kumar and Rakesh Dixit who have been examined as P.Ws. 4 and 5 at the trial. On the basis of the aforesaid self-statement, a case vide Ramgarhwa P.S. Case No. 126 of 2012 dated 10.10.2012 under Sections 15, 18, 20, 22, 23, 24 and 25 of the Narcotic Drugs and Psychotropic Substances Act was registered for investigation.



5. The police after investigation submitted charge sheet whereupon cognizance was taken and the trial court after examining eight witnesses on behalf of the prosecution convicted and sentenced the appellants as aforesaid.

6. The learned advocates appearing for the appellants have challenged the impugned judgment and order of conviction as being bad in the eyes of law, primarily on the ground that the mandatory provisions of Sections 42 (ii), 50, 52A and 55 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter called the 'Act') have not been complied with, rendering the conviction of the appellants absolutely unjustified. It has been submitted that the entire recovery was from the personal possession of the appellants, who at the time of search and seizure were not made known that they had the option of getting themselves searched before a Gazetted Officer. While they were searched, the members



of the police party also did not offer themselves for any search by the appellants.

7. Learned counsels appearing for the appellants have further argued that the secret information which was received by P.W. 7 was not reduced in writing and sent to the superior police officer as mandated under Section 42 (ii) of the Act.

8. The samples were never drawn from the recovered items, which is again in teeth of the mandatory provisions of the Act.

9. Apart from all this, it has been harped upon by the learned advocates that for no apparent reason, there was an unusual delay in sending the sample for forensic examination and even in the report of the forensic laboratory, there is no mention of the mode in which the packets were received for forensic examination.

10. Chandeshwar Paswan, the informant (P.W. 7) though, has supported the self-statement lodged by him but in his cross-examination has admitted that before



searching the persons of the appellants, the police party did not offer themselves for search. No search memo of the police party was prepared. He has further admitted in his cross-examination that the packets which were recovered from the possession of the appellants were not weighed separately. Some of the packets were not even opened. On none of the packets, any identification mark was put so as to identify that particular packets were recovered from particular accused persons/appellants. That apart, P.W. 7 has further admitted that the seizure list was prepared on 09.10.2012 at about 19:45 hours. After the preparation of the seizure list, the case was lodged on the next day i.e. on 10.10.2012 at about 7 o' clock in the morning. He did not inform the investigating officer that he had got himself searched before searching the appellants. However, he has stated that the secret information which he had received, pursuant to which raid was conducted, was informed to the S.D.P.O. Raxaul. The recovered articles were, according to P.W. 7 kept in



Malkhana on 10.10.2012. All the packets which were recovered from the appellants were put into one packet. In paragraph 19 of his cross-examination, P.W. 7 clearly and categorically stated that he did not let the appellants know that they had the option of getting themselves searched before a Gazetted Officer. In the same paragraph, he has further admitted that samples were not prepared at the spot for sending them to the forensic laboratory for ascertaining whether the recovered items were narcotics. While searching the women accused/appellants, there were no female constables.

11. Alakh Narayan Singh (P.W. 6) is the investigating officer of this case who has, in his cross-examination stated that he did not file any application for getting the 164 statement of the appellants recorded. The packets of narcotics which he had received from P.W. 7 were not marked. He had not visited the place of occurrence along with the informant. However, he has stated that the seized packets were kept in the Malkhana but he never



mentioned about it in the case diary. He did not record the statement of the neighbours of the appellants. Though, he had recorded the statement of the appellants but did not make any inventory of the seized articles which were received by him from P.W. 7. He has admitted of seeing appellant/Munna Mohammad in an injured condition who was treated for his injuries.

12. From the FIR and the deposition of the aforesaid two witnesses viz. P.W. 6 and 7 the following facts stand established:

I. Before the search of the appellants, the police party did not offer themselves for their search,

II. The appellants were never informed of their rights of being searched in presence of any Gazetted Officer,

III. The secret information which was received by P.W. 7 was not reduced in writing and sent to the superior police officer,

IV. Some of the packets which were recovered were not even opened.



V. None of the packets were marked for their identification.

VI. There is no statement by the aforesaid witnesses about the narcotics having been weighed or any sample having been taken from the aforesaid recovered items for being sent for chemical as well as forensic examination.

13. Section 42 (ii) of the Act reads as follows:

42. Power of entry, search, seizure and arrest without warrant or authorisation.- (1) Any such officer (being an officer superior in rank to a peon, sepoy or constable) of the departments of central excise, narcotics, customs, revenue intelligence or any other department of the Central Government including para-military forces or armed forces as is empowered in this behalf by general or special order by the Central Government, or any such officer (being an officer superior in rank to a peon, sepoy or constable) of the revenue, drugs control, excise, police or any other department of a State Government as is empowered in this behalf by general or special order of the State Government, if he has reason to believe from persons knowledge or information given by any person and taken down in writing that any narcotic drug, or psychotropic substance, or controlled substance in respect of which an offence punishable under this Act has been committed or any document or other article which may furnish evidence of the commission of such offence or any illegally acquired property or any document or other



article which may furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act is kept or concealed in any building, conveyance or enclosed place, may between sunrise and sunset, -

(a) enter into and search any such building, conveyance or place;

(b) in case of resistance, break open any door and remove any obstacle to such entry;

(c) seize such drug or substance and all materials used in the manufacture thereof and any other article and any animal or conveyance which he has reason to believe to be liable to confiscation under this Act and any document or other article which he has reason to believe may furnish evidence of the commission of any offence punishable under this Act or furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act; and

(d) detain and search, and, if he thinks proper, arrest any person whom he has reason to believe to have committed any offence punishable under this Act:

(2) Where an officer takes down any information in writing under sub-section (1) or records grounds for his belief under the proviso thereto, he shall within seventy-two hours send a copy thereof to his immediate official superior.

This is a mandatory provision of law and non-compliance of the same renders the entire investigation and consequent trial and conviction faulty.



14. In case of Abdul Rashid Ibrahim Mansuri Vs. State of Gujarat 2002 (2) SCC 513, the Supreme Court has held that compliance of Section 42 of the Act is mandatory and non-compliance of the same would prejudice the accused. However later, in case of Sajan Abraham vs. State of Kerala 2001 (6) SCC 692, it was held that the provisions of Section 42 of the Act would be deemed to have been followed even when there would be a substantial compliance of the same. In view of the different stand over the issue, the matter was referred to the Constitution Bench of the Supreme Court in case of Karnail Singh Vs. State of Haryana 2009 (8) SCC 539. In the aforesaid case it was held that total non-compliance of the requirements under Section 42 of the N.D.P.S. Act would be impermissible but delayed compliance with satisfactory explanation may be accepted.

15. There is nothing on record to indicate that the secret information received by P.W. 7 was either reduced in writing or sent to superior police officer. Merely by



making a statement by P.W. 7 that he had entered in the police diary about such information having been received and having orally informed the S.D.P.O., a superior police officer, the requirements under Section 42 (ii) of the Act cannot be said to have been complied with.

16. Section 50 of the Act reads as follows:

50. Conditions under which search of persons shall be conducted.- (1) When any officer duly authorised under section 42 is about to search any person under the provisions of section 41, section 42 or section 43, he shall, if such person so requires, take such person without unnecessary delay to the nearest Gazetted Officer of any of the departments mentioned in section 42 or to the nearest Magistrate.

(2) If such requisition is made, the officer may detain the person until he can bring him before the Gazetted Officer or the Magistrate referred to in sub-section (1).

(3) The Gazetted Officer or the Magistrate before whom any such person is brought shall, if he sees no reasonable ground for search, forthwith discharge the person but otherwise shall direct that search be made.

(4) No female shall be searched by anyone excepting a female. [(5) When an officer duly authorised under section 42 has reason to believe that it is not possible to take the person to be searched to the nearest Gazetted Officer or Magistrate without the possibility of the person to be searched parting with possession of any narcotic drug or psychotropic substance, or controlled substance or



article or document, he may, instead of taking such person to the nearest Gazetted Officer or Magistrate, proceed to search the person as provided under section 100 of the Code of Criminal Procedure, 1973.

(6) After a search is conducted under sub-section (5), the officer shall record the reasons for such belief which necessitated such search and within seventy-two hours send a copy thereof to his immediate official superior.]

17. Section 50 of the Act mandates that in case of the personal search of the accused, he has to be given the option of being searched before a Gazetted Officer of his choice. Admittedly, this option was not given to the appellants. On the contrary, appellant/Munna Mohammad was injured at the time of his being handed over to P.W. 6, the investigating officer of the case.

18. Sections 52 (a) and 55 of the Act reads as follows:

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 substances, controlled substances or conveyances] 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, controlled substances or conveyances] 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, controlled substances or conveyances] 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, controlled substances or conveyances] 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, substances or conveyances] 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) Where 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 or 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].

55. Police to take charge of articles seized and delivered. - An officer-in-charge of a police station shall take charge of and keep in safe custody, pending the orders of the Magistrate, all articles seized under this Act within the local area of that police station and which may be delivered to him, and shall allow any officer who may accompany such articles to the police station or who may be deputed for the purpose, to affix his seal to such articles or to take samples of and from them and all samples so taken shall also be sealed with a seal of the officer-in-charge of the police station.

19. From the perusal of the records, it appears that the mandatory provisions of both the aforequoted Sections have been completely ignored.

20. P.W. 6 and 7 have clearly admitted that the samples were not taken at the place of search and seizure. In fact, P.W. 6 has not spoken about having drawn



sample even later. The guidelines by the Narcotic Control Bureau in this regard have been totally flouted. In *Noor Aga vs. State of Punjab* 2008 (16) 417, the Supreme Court has opined that guidelines issued by the NCB should not only be substantially complied with but also in a case involving penal proceedings vis-à-vis a departmental proceeding, rigors of such guidelines must be insisted upon. It is the standing order in the guidelines that the samples ought to be drawn from the seized articles at the time of seizure.

21. Now in this context, the evidence of Rakesh Dixit and Sanjiv Kumar Singh, P.Ws. 4 and 5 respectively assume relevance. They are said to be the witnesses to the search and seizure. Both of them have supported the prosecution version and have stated that they has signed on a blank sheet of paper, at the instance of the officer-in-charge of the police station.

22. Though, P.W. 6 and 7 both as seen above have in their cross-examination stated that the seized articles



were kept in the Malkhana but the records did not reveal the same. The investigating officer (P.W. 6) has not entered it in the case diary that he had kept the seized packets in the Malkhana on the same day when it was handed over to him. That apart, even if it is believed that the packets were kept in the Malkhana, there were no identification mark for them to be linked with the recovery made from the person of the appellants.

23. What is even more surprising is that the seizure was effected on 09.10.2012/10.10.2012 but it was sent for forensic examination on 02.02.2013 i.e. after about three months. Where were the seized packets in the interregnum and how were those handled is not known. The report of the forensic science laboratory (Ext. 5) does not at all disclose as to the mode in which the parcel was found to be packed on receipt. There is also no statement about the description of seal over such packet. The samples, though were dispatched to the FSL on 02.02.2013 but was received on 18.02.2013. This also



makes the contents of the report (Ext. 5) suspect. The report however inter alia reads that the dark greenish brown substances contained in the five small tin containers as described was found to be charas.

Charas is also known as hashish in the resinous exudates of the flowering and fruiting tops of the female part of Cannabis Sativa containing Tetra Hydro Cannabinol (T.H.C.) as their chief intoxicating ingredient.

24. Which narcotic substance was put to test and whether that substance was the one which was recovered from the possession of the appellant is not known. The evidence with regard to the same, as has been noticed earlier, is absolutely blurred and uncertain.

25. Thus, this Court finds that the prosecution has miserably failed to bring home and establish charges against the appellants beyond reasonable doubts. The provisions of the Narcotic Drugs and Psychotropic Substances Act are very stringent with corresponding severe sentences. In such a circumstance, the law brooks



of no departure from the mandatory provisions and in case there is non-compliance of the mandatory provisions, the benefit has to go to the accused.

26. For the aforesaid reasons, this Court is of the view that the conviction and sentence of the appellants is absolutely unjustified.

27. The judgment and order of conviction dated 21.12.2015 and order of sentence dated 23.12.2015 is set aside. The appellants are acquitted of the charges.

28. The appellants are in custody. They be released forthwith from jail, if not required in any other case.

29. A copy of the judgment be transmitted to the superintendent of the concerned jail for information, compliance and record.

(Ashutosh Kumar, J)

krishna/-

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