

**(2016) 04 PAT CK 0190**

**In the Patna High Court**

**Case No :** Criminal Appeal (SJ) No.53 of 2015. (Arising Out of PS. Case No. -139 Year-2011 Thana-Chapra Muffasil District-Saran Against the judgment of conviction dated 03.09.2014 and order of sentence dated 09.09.2014 passed in NDPS Case No. 07 of 2011 arising out

**Chandrawati Devi, W/o Raj Mohan Ram alias Raj Mohan Singh, Resident of Village Hakama, Police Station Garakha, District Saran - Appellant @HASH The State of Bihar**

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**Date of Decision :** 08-04-2016

**Acts Referred:**

Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 20 (b)(ii)(c), Section 22(c), Section 52A, Section 57

**Citation :** (2017) 2 AICLR 203 : (2017) 1 CriCC 494 : (2016) CriLJ 4710 : (2017) 1 Crimes 362 : (2017) 3 RCR Criminal 38

**Hon'ble Judges :** Gopal Prasad, J.

**Bench :** Single Bench

**Advocate :** Mr. Rajesh Roy, Mr. Raghwendra Kumar, Advocates, for the Appellants; Mrs. Abha Singh, A.P.P, for the Respondents

**Final Decision :** Allowed

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**Judgement**

Mr. Gopal Prasad, J. - These appeals have been heard and disposed of by the common order as both arise out of the same judgment and order dated 3rd of September, 2014 passed by Sri Balram Singh, 1st Additional Sessions Judge, Saran at Chapra in connection with NDPS Case No. 07 of 2011 arising out of Chapra Mufassil P.S. Case No. 139 of 2011, G.R. No. 2688 of 2011 by which he has convicted the appellants for the offences under Section 20b (ii)(c) as well as under Section 22(c) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the "NDPS Act") and sentenced them to undergo rigorous imprisonment for ten years and a fine of Rs. 1,00,000/- and in case of default of payment of fine they have further been directed to undergo rigorous imprisonment for three years. However, it has been ordered that both the sentences shall run concurrently.

2. The prosecution case, as alleged, is that on 15.07.2011, at about 08:05 A.M.

the Station House Officer, Muffasil Police Station, Mr. Subodh Kumar Mishra received a secret information at the Police Station that at Mohalla Hemnagar, in the house of Hare Ram Rai, two persons, living as a tenant, are indulging in the business of Ganja and have concealed the Ganja in the said house for the purpose of smuggling. Thereafter, the informant recorded a Sanha in the Muffasil Police Station and proceeded to the place of occurrence along with Police party comprising Anand Kumar (P.W.4), Niraj Kumar (P.W.3), Anil Kumar (P.W.1) and Nilmani Ranjan (P.W.2) and reached Hemnagar at about 8.15 A.M. with two local independent witnesses Hare Ram Rai (seizure-list witness) and Santosh Mistri (not examined) and raided the house of Hare Ram Rai, which was given in tenancy. The further case is that on seeing the Police party, one person tried to flee away from the room but was apprehended and disclosed his name as Rakesh Singh and in his presence, on search of the room one moving bag of Coralight Company containing three bags of Ganja, each containing of 5 Kgs. of ganja and two packets of Ganja kept in a plastic bag, each containing about 5 Kgs. weight and so in all about 25 Kgs. Ganja were recovered. The person, who was apprehended, disclosed that he has brought the Ganja from Chakiya Motihari for smuggling and the said Ganja was planned to send to Jharkhand. He further disclosed that in his business, Chandrawati Devi, who is his Bhabhi resides in the same house, is also involved with him. On search of the bed from beneath the pillow, Rs. 39,000/- was also recovered and on being enquired about money Rakesh Singh disclosed that the said money is the fruit of the Ganja sold earlier. A seizure list was prepared in presence of both the independent witnesses and both of them put their signature over the same. A copy of the said seizure list was also handed over to Rakesh Singh and said Chandrawati Devi and they also put their signature over the seizure-list. Said Rakesh Singh was arrested at the spot itself, whereas to arrest Chandrawati Devi, a phone call was sent to the Police Station to send a lady Chowkidar and after arrival of a lady Chowkidar Soni Kumari, said Chandrawati was also arrested. It is claimed in the First Information Report that said Rakesh Singh and Chandrawati Devi are indulged in smuggling of Ganja and have kept a huge quantity of Ganja in their rented house and while doing so, they have been caught red handed, which is a cognisable offence under Section 20/22 of the NDPS Act.

3. After the recovery of Ganja and preparing the seizure list, the seized articles were sealed at the place of occurrence itself and before putting seal on each packet of the Ganja, 100 gms. Ganja were taken out as a sample. The seized articles were brought to the Police Station and kept in Malkhana. Thereafter, the investigation proceeded after lodging the First Information Report.

4. During investigation, further statement of the informant was recorded. The Investigating Officer inspected the place of occurrence and recorded the statement of the independent seizure list witnesses and sent the sample to the Forensic Science Laboratory on 21.07.2011 for chemical examination. A draft receipt of the Forensic Science Laboratory has been submitted with the charge sheet. After submission of the charge-sheet, cognisance was taken and after

framing of charge, the trial proceeded. During trial, seven witnesses were examined by the prosecution.

5. P.W.1 is Anil Kumar, a Probationer Assistant Sub-Inspector of Police, P.W. 2 is Nilmani Ranjan Sinha, the Sergeant, who was member of the raiding party, P.W. 3 is Niraj Kumar, Assistant Sub-Inspector of Police and also a member of the raiding party, P.W.4 is Anand Kumar, Assistant Sub-Inspector of Police who was also the member of the raiding party, P.W. 5 is Subodh Kumar Mishra, the informant, P.W.6 is Sujit Das, the Investigating Officer of the case and P.W.7 is Hareram Rai who is a seizure list witness.

6. The defence has also adduced two witnesses, who are D.W.1, Baban Bari and D.W.2, Brijmohan Singh. D.W. 1 has deposed that nothing has been recovered from the house of Rakesh Singh and on 15.07.2011 itself he came at Chapra with Chandrawati Devi and he had stayed at the room of Rakesh Singh. He further stated that he along with Rakesh Singh went at the clinic of Dr. Ram Ekbal Prasad where he booked his number and found the number as 50 and returned back at about 7:30 A.M. and that the Police apprehended Rakesh Singh at the shop of Krishna Prasad.

7. D.W. 2 Braj Mohan Singh has stated before the court that he is a tenant at the house of Hare Ram Rai. He further admitted that at about 7:30 A.M. police surrounded the house of Hare Ram and searched the house of Hare Ram Rai but nothing was recovered. Only an old man and lady were present who came for medical treatment and staying at the room of Rakesh Singh. The witness further admitted that Rakesh Singh was not apprehended at his house nor anything was seized from his room.

8. The Trial Court after taking into consideration the evidence of the witnesses, convicted and sentenced the appellants. The defence of the accused persons is that neither any occurrence occurred nor any recovery has been made and the accused persons have falsely been implicated in this case only on suspicion.

9. The learned counsel for the appellants, however, challenged the order of conviction and sentence recorded by the Trial Court on the ground that there is non-compliance of the mandatory provision contained in Section 42(1)(2) of the NDPS Act. The information received has neither been recorded nor the same was transmitted to superior officer. It has further been contended that the articles seized were not produced before the learned Magistrate and the sample of the seized article has also not been taken in the presence of the learned Magistrate nor it has been sealed with the seal of the Officer-in-Charge of the Police Station and there is violation of Sections 52-A, 55 and 57 of the NDPS Act. Hence, the said provision under that Act has not been complied. It has further been contended that non-compliance of the NDPS Act has serious consequence and hence, since the safeguard provided under the Act is not complied with. It casts a serious doubt about the investigation and the appellant is entitled to benefit of doubt to set aside the conviction and is fit to be acquitted.

10. Learned counsel for the State, however, contends that on a secret information, the Police proceeded and conducted the raid in the house of Hare Ram Rai and the articles were seized from the room in which the appellant was a tenant and the articles seized were sealed after taking out the sample, which was also duly sealed and kept in Malkhana and, hence, no prejudice has been caused to the accused for non-compliance of the provisions of the Act and, hence, the order of conviction and sentence be sustained.

11. After taking into consideration the materials on record and the respective submissions of the parties, the question for consideration is as to whether the prosecution has been able to prove the charges beyond all reasonable doubts.

12. However, coming to the allegation made in the written statement on the basis of which the First Information Report lodged, it has been specifically alleged that on 15.07.2011 at about 8.05 hours in the morning he received a secret information that two persons, who were the tenants in the house of Hare Ram Rai of Mohalla Hemnagar, run the business of smuggling of Ganja and have kept concealed the Ganja in the room which they have taken on rent. It has further been alleged that he recorded his Sanha entry in the diary of the Police Station and then proceeded along with the Police party who were the witnesses and reached Hemnagar and raided the house of Hare Ram Rai along with two independent witnesses Hare Ram Rai and Santosh Mistry and on seeing the Police, one person started fleeing away and on apprehended disclosed his name as Rakesh Singh and from the room the Ganja was recovered. The three packets in a moving bag of Oralight Company and two bags from plastic gunny bag, each bag contained 5 Kgs. of the Ganja and from the room of Chandrawati said to be the Bhabhi of said Rakesh Singh and the seizure list was prepared.

13. P.W.5, Subodh Kumar Mishra is the informant and has deposed that he received the secret information at the Police Station while posted as the Officer-in-Charge of the Muffasil Chapra Police Station and recorded the Sanha Entry in the diary of the Police Station. However, the said information has not been proved. He has also deposed that the Ganja was recovered in the presence of the independent witnesses and also the recovery of Rs. 39,000/- under the pillow of the bed. He has further stated that he sealed the seized articles at the place of occurrence. He has further stated that he had taken out 100 gms. of Ganja from the seized articles from each packet as sample. He has also deposed that he proved the said five packets of the Ganja, which were sealed and marked as Exhibits I, II and III, which contains the seized bag, plastic gunny bag and money and has stated that the seized articles were kept in Malkhana of the Police Station. He has further stated in his cross-examination that he did not inform to any Magistrate and he handed over the investigation to the Investigating Officer, Sujit Das (P.W.6) and so he inspected the place of occurrence.

14. P.W.6, Sujit Das has deposed that during investigation, he perused the First Information Report, seizure list and recorded the further statement of the informant and inspected the place of occurrence the house of Hare Ram Rai

situated at Moohalla Hemnagar Colony. Thereafter, he recorded the statement of seizure list witnesses, namely, Hare Ram Rai and Santosh Mishra. He has further stated that on 21.07.2011 he after taking permission from the District and Sessions Judge, sent the sample for chemical examination to the Forensic Science Laboratory and the report of the F.S.L. has been marked as Exhibit-4. Hence, from his evidence, there is no specific mention that the sample taken was sealed and the said seal bear the signature of the Officer-in-charge of the Police Station. However, Anil Kumar, P.W.1, who is the Probationer Assistant Sub-Inspector of Police was also a member of the raiding party and supported the prosecution case regarding the raid conducted in the house of Hare Ram Rai and recovery of the articles which were weighed and found that each packets contained 5 Kgs. of Ganja in each packet and total 25 Kgs. Ganja was found. This witness further stated that 100 gms. Ganja was taken out for sample for chemical examination and rest recovered Ganja was sealed and sample was also sealed in a Tin box on which both the independent seizure list witnesses put their signatures.

15. P.W. 2 Nilmani Ranjan, Sergeant, was also a member of the raiding party and also supported the prosecution case. He has also stated that the Ganja was sealed after taking 100 gms. for sample and the sample was also sealed thereafter, the seized Ganja along with the accused persons were brought to the Police Station.

16. P.W.3 Niraj Kumar, who is the Sub Inspector of Police and also a member of the raiding party. He has also supported the prosecution case about the seizure and has also stated that the seized articles were sealed as well as sample was also sealed.

17. P.W.4 Anand Kumar, who is a Probationer Sub-Inspector of Police and also a member of the raiding party and supported the prosecution case and has stated that the Ganja was weighed there.

18. The criticism drawn by the learned counsel for the appellants that though the witnesses P.Ws. 2, 3 and 4 have supported the prosecution case that Ganja was seized and sealed at the place of occurrence after taking out the sample, but the informant in his statement has stated that the weight was not specifically mentioned and it was only the weight was taken on approximate. The further evidence of the informant is that the Ganja and the accused persons were brought to the Police Station and were kept at the Police Station. The articles were kept in Malkhana and he has produced the seized articles. However, it has been stated that Malkhana Register has not been brought on record, but the evidence of the Enquiry Officer that the articles seized was sealed as well as the sample taken at the spot about 100 gms. and were brought and kept at the Malkhana and the same was produced from the Malkhana in a sealed cover before the Police. However, it is also accepted that the articles seized were not produced before the Magistrate as provided under Section 52-A of the NDPS Act and the submission is that there is violation of Section 52-A of the NDPS Act that

the certification of the articles seized not produced nor the destruction and nor the Malkhana Register has been produced. However, having regard to the fact that there is violation of Sections 52-A and 57 of the NDPS Act are concerned it is useful that Sections 52-A and 57 of the NDPS Act are not mandatory and are only directory and the question for consideration whether there is noncompliance of Sections 52-A and 57 of the NDPS Act prejudiced the accused.

19. The next question for violation of Section 42 of the NDPS Act however, from the evidence, it is apparent that the informant received the information at the Police Station and the informant P.W.5 has stated that he recorded the said statement in the case diary as Sanha Entry. However, he has neither given the number of the Sanha Entry nor the Sanha entry has been proved and further there is no evidence that he sent the same to his Superior Officer. However, coming to Section 42 of the NDPS Act which provides that the Officer who is authorised on receiving the information from any person has to record it in writing in the concerned register and shall send a copy thereof to his immediate Superior Official as enshrined in Section 42(1) and 42(2) of the NDPS Act. Section 42(1) specifically provides that any officer authorised on receipt of information about possession of article has reason to believe from personal knowledge or information given by any person shall take down any information in writing and Section 42(2) of the NDPS Act provides that such Enquiry Officer who takes down any information in writing under Sub section (1) or records grounds for his belief, he forthwith within 72 hours send a copy of it to his immediate official superior.

20. Having regard to the fact and circumstances that the information received the informant proceeded on the said information believing it true and conducted raid in the house of the accused hence, it was incumbent on him to comply the provision of Section 42-(1) and (2) i.e. to record the information in writing and sending the same to superior officer in compliance of the mandatory provisions under Section 42(1) and (2) respectively. Hence, there is apparently a violation of Section 42 (1) and (2) of the NDPS Act and hence, apparently and admittedly compliance of Section 42(2) of the NDPS Act has not been done and there is complete violation of Section 42(2) of the NDPS Act. There is nothing on record to suggest what prevented the informant or the Enquiry Officer in not sending a copy of the statement recorded within the time stipulated under the provisions of Section 42(2) of the NDPS Act. It is well settled that the provision contained in Section 42(2) of the NDPS Act is mandatory in nature and non-compliance of the provision contained in Section 42(2) of the NDPS Act vitiates the entire trial including the conviction and sentence recorded by the Trial Court. It is well settled that the Enquiry Officer who takes down the information in writing under Section 42(1) of the NDPS Act should forthwith send a copy thereof to his immediate Official Superior and if there is non-compliance of this provision, the same affects the prosecution case and to that extent to his belief. Sub section (1) of Section 42 of the NDPS Act gives amended to the Enquiry Officer before proceeding to make a search to take down an information in writing and Sub

section (2) of Section 42 of the NDPS Act provides that the information so recorded must be sent to the superior official within the time stipulated and if these mandatory provisions are not complied with then the trial stand vitiated. This provision has been made only as a safeguard taking into consideration the deterrent effect or sentence contemplated under the Act. The provision contained in Section 42(1)(2) of the NDPS Act must be required to be necessarily complied with. However, this is a case of recovery in the house and not a case of chance recovery rather this is a case where there is a specific case of the prosecution that the informant received the information at the Police Station and he proceeded and conducted the search in the closure in a building, which is alleged to be a room rented to the appellants and hence, noncompliance of Section 42(1) and 42(2) of the NDPS Act, specifically Section 42(2) of the NDPS Act vitiates the trial. However, the evidence of P.W.5, the informant that he recorded the statement and made the Sanha Entry but the same has neither been produced nor the Sanha Entry has been mentioned nor there is any evidence that the said written report was sent to the Officers Superior. Hence, in view of these facts, it is apparent that there is non-compliance or violation of Section 42(2) of the NDPS Act, which is mandatory in nature even Section 42(1) of the NDPS Act has not been established that whatever recorded has not been placed or brought.

21. Hence, I find that the order of conviction and sentence recorded by the Trial Court is not sustainable as the entire trial was vitiated for non-compliance of the provisions contained in Section 42(1) and 42 (2) of the NDPS Act, hence, I find and hold that the prosecution has not been able to prove the charges levelled against the appellants beyond all reasonable doubts and the judgment of conviction dated 03.09.2014 and order of sentence dated 09.09.2014 passed by Shri Balram Singh, learned 1st Additional Sessions Judge, Saran at Chapra in connection with N.D.P.S. Case No. 07 of 2011 arising out of Chapra Mufassil P.S. Case No. 139 of 2011, G.R. No. 2688 of 2011, are hereby, set aside and both the appeals are allowed. Appellant, namely, Rakesh Singh alias Rakesh Kumar Singh of Cr. Appeal (SJ) No. 565 of 2014, who is in custody, be released forthwith if not wanted in any other case.