

**Phalli Sah Vs. the State of Bihar**

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**SooperKanoon Citation :** [sooperkanoon.com/120729](http://sooperkanoon.com/120729)

**Court :** Patna

**Decided On :** Aug-31-2007

**Judge :** Ghanshyam Prasad, J.

**Acts :** Narcotic Drugs and Psychotropic Substances Act - Sections 20, 54 and 55

**Appeal No. :** Criminal Appeal No. 233 of 2006

**Appellant :** Phalli Sah

**Respondent :** The State of Bihar

**Advocate for Def. :** Gopesh Kumar, A.P.P

**Advocate for Pet/Ap. :** Suraj Narayan Pd. Sinha, Mukesh Kumar and Meera Kumari, Advs.

**Disposition :** Appeal allowed

**Prior history :** Ghanshyam Prasad, J. 1. The sole appellant has preferred this appeal against the judgment of conviction dated 16.2.2006 and its order of sentence dated 18.2.2006 passed by 1st Additional Sessions Judge, Bettiah in Trial No. 25 of 2003. The sole appellant has been convicted under Section 20 of N.D.P.S. Act and has been sentenced to undergo R.I. for seven years with fine of Rs. 50,000/- in default S.I. for six months. 2. On 26.1.2003, S.I. of Belthia P.S. received a confidential information rega

## **Judgement :**

**Ghanshyam Prasad, J.**

1. The sole appellant has preferred this appeal against the judgment of conviction dated 16.2.2006 and its order of sentence dated 18.2.2006 passed by 1st Additional Sessions Judge, Bettiah in Trial No. 25 of 2003. The sole appellant has been convicted under Section 20 of N.D.P.S. Act and has been sentenced to undergo R.I. for seven years with fine of Rs. 50,000/- in default S.I. for six months.
2. On 26.1.2003, S.I. of Beltha P.S. received a confidential information regarding carrying of ganja by a eye list in attache near Balthar village. The S.I. alongwith other police personnel proceeded in a jeep towards Balthar village. When they come near Beltha village, they saw a person on cycle with attache. He was asked to stop upon which he attempted to flee away. However, he was caught by the police alongwith cycle and attache. In presence of two independent witnesses, the attache was opened and 9 kgms. of ganja was recovered wrapped in polythin. Seizure list was prepared in presence of appellant and independent witnesses.
3. In course of the trial, altogether 11 witnesses have been examined in this case. P.W.1, Kanhajya Pandey and P.W.4, Binay Kumar Mishra are the seizure list witnesses. P.Ws. 5 to 10 are police personnels.
4. Defence is a complete denial of the prosecution case and plea of innocence.
5. In course of the argument, the learned lawyer for the appellant challenged the judgment in question both in law as well as on facts. However, the main submission is that serious irregularities and illegalities was committed in seizure and sampling of the alleged ganja. Sampling of ganja was not done at the place of occurrence in presence of the appellant. After six months of the seizure, sample was sent to the Director, Forensic Science Laboratory for analysis. It is further submitted that there is no material on the record to show as to when sample was taken and from where it was taken. Therefore, conviction on the basis of a report based of such sample is illegal and bad in law. For that, the learned Counsel for the appellant has relied upon two decisions reported in : 2002 CriLJ1832 (Khet

Singh v. Union of India) and 2002 (4) PLJR 93 (Lal Babu Sah v. The State of Bihar).

6. On perusal of the record, it appears that the alleged ganja was seized on 26.1.2003. However, there is no material on the record to show that sample of the alleged ganja was taken on that very day in presence of accused-appellant for sending to the Chemical Analysis. Chargesheet was also submitted on 19.9.2003 without analyst report. Thereafter, the report (Ext.2) was submitted on 17.5.2004, Ext. 2 would also go to show that sample was sent to the Director of Forensic Science Laboratory on 18.7.2003 i.e. after six months of the seizure. P.W.2, Dineshwar Prasad is the main witness who is informant as well as I.O. of the case. He has not uttered even a single word in his evidence as to when and in whose presence sample was taken. He has not uttered even a single word as to whether the seized substance had been kept. Therefore, it cannot be said with certainty that the sample sent to the chemical analyst was actually the sample of the substance seized from the appellant.

7. Offences of N.D.P.S. Act are serious offences for which severe punishment have been provided. Therefore, in order to prevent false implication and fabrication of false evidence several checks and balances are provided under the Act. The Narcotic Control Bureau has also issued instruction in form of direction for compliance by the concerned authorities. Clause (1.5) of Standing Instruction 1 of 88 laid down manner for seizure and sampling of the illicit substance. It runs as follows:

Place and time for 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 is recovered, and a mention to this effect should invariably be made in the panchnama drawn on the spot.

8. In decision reported in 2002 SCC vide paragraph-10, the necessity to follow the instruction has been discussed, which is as follows:

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 preview 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.

9. Apparently, the above instructions have not been followed in this case which has seriously Prejudiced the appellant.

10. The above decision has been followed in Lal Babu's case reported in 2002 PLJR. In paragraph-6 of the judgment it has been held as follows:

6. In the facts and circumstances of the case, the submissions of the counsel for the appellant appear to be well founded. Section 55 of the NDPS Act contemplates that after the article is produced at the Police station it should be kept in safe custody by the Officer Incharge pending orders of the Magistrate if any. In the instant case, though the article was supposedly kept in the malkhana of the Police Station, there is nothing to show that seal was put on the packets or that the packets bore or were given identification marks. Sample was thus taken from some unidentified and unsealed packet(s). In fact the I.O. (PW 7), who took the samples does not claim that the samples were taken from the same packet(s) which had been seized by Amar Nath Tiwari, understandably because the packets were not identified by Amar Nath Tiwari, who rather admitted that he did not see the packets after depositing them in the Malkhana. In the absence of any positive evidence to suggest that the samples were taken from the some packets which were seized from the appellant's possession. I have no manner of doubt that the appellant has suffered prejudice vitiating his conviction. Where the prosecution rests on the report of the Forensic Laboratory on the basis of sample which cannot be conclusively linked with the articles seized from the accused's custody it is un-understandable as to how he can be convicted on the basis of such report. The onus to prove that the accused was in possession of narcotic etc. is on the prosecution. Only then presumption under Section 54 of the NDPS Act can be drawn and onus shifts to the accused. Considering the gravity of the offence, minimum sentences prescribed under the Act, the prosecution is required to

conclusively prove possession of narcotic etc. with the accused. In the case of Khet Singh (supra) the Supreme Court observed that guidelines of the Bureau of Narcotics should be followed, and thus the sample should be taken in the same transaction. In the instant case sample was taken after 40 days. The articles seized from the appellant's possession not having been kept in 'safe custody' as envisaged under Section 55 of the NDPS Act, and in the absence of any evidence that the sample was taken from the same packets I have no doubt in my mind that the conviction cannot be sustained. In Gurubux Singh v. State of Haryana (2001) 3 SCC 28, the Supreme Court held that the provisions of Section 55 are directory and violation thereof ipso facto does not vitiate trial or conviction, but has a bearing on the appreciation of evidence regarding seizure of the article. On facts of the case which were more or less similar to the present case, the conviction was set aside.

11. In present case, there is no evidence which conclusively links the sample with the articles seized from the appellant. Apart from it, there is no evidence to show that the seized article was kept in safe custody by the Investigating Officer. The sample was also taken after six months without having any explanation. Therefore, in view of the above decisions, the conviction of the appellant based on report of Forensic Science Laboratory (Ext. 2) which was conducted on the basis of doubtful sample of the article is apparently bad and illegal and is fit on be set aside.

12. In the result, this appeal is allowed. The impugned judgment of conviction and order of sentence is hereby set aside. The appellant is directed to be released at once, if not wanted in any other case.