

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No. 360 of 1996

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Sheo Narain Chowdhari son of late Ganesh Chowdhari, resident of Dandwa
Mallah Tola, Mohania, Police Station Mohania, District Kaimur, Bhabua
(Bihar).

... .. Appellant/s

Versus

The State of Bihar

The Union of India through Narcotics Control Bureau.

... .. Respondent/s

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Appearance :

For the Appellant	:	Mr. Prabhat Ranjan (Amicus Curiae)
For the NCB/UOI	:	Dr. K.N. Singh, Additional Solicitor General
		Mr. Anshuman Singh, C.G.C./U.O.I.

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CORAM: HONOURABLE MR. JUSTICE SUDHIR SINGH
and
HONOURABLE MR. JUSTICE CHANDRA PRAKASH
SINGH
ORAL JUDGMENT
(Per: HONOURABLE MR. JUSTICE SUDHIR SINGH)

Date : 19-10-2022

The present appeal has been preferred 26 years ago,
against the judgment of conviction dated 07.08.1996 and order of
sentence dated 09.08.1996 passed by the Sessions Judge, Rohtas at
Sasaram in N.C.B. case No.3 of 1993, whereby and whereunder
the appellant has been convicted under Sections 21 read with
Section 8 of the Narcotics Drugs and Psychotropic Substance Act,
1985 (hereinafter referred to as the 'N.D.P.S. Act') and 27(A) of
the N.D.P.S. Act and has been sentenced to undergo R.I. for 13



years besides payment of fine of Rs.1,20,000/- under Section 21 of the N.D.P.S. Act and in default thereof to undergo further R.I. of one year. Same and similar sentence has been awarded to the appellant for the offence under Section 27(A) of the N.D.P.S. Act also. Both the sentences of the appellants have been directed to run concurrently. The sentences in default of payment of fine however shall run separately and consecutively.

2. Prosecution report-cum-complaint petition (Ext-7) was lodged by Rajendra Singh Pathak (P.W.1), Intelligence Officer, Narcotics Control Bureau, Varanasi on 22.06.1993. The complainant is an Intelligence Officer in Narcotics Control Bureau, Varanasi and has filed the complaint as public servant. The prosecution case, in short, is that on receipt of a prior secret information that the accused was indulging in illicit trafficking of Narcotic Drugs (heroin) and was possessing and keeping heroin in huge quantity at his residence in village Dandwa Mallah Tola Mohania. The complainant had transmitted this information to the Deputy Director, Narcotics Control Bureau, Varanasi and had organised a raiding party of officers of Narcotic Control Bureau, Central Excise and Customs and D.R.I. They reached the residence of the appellant at 7:00 A.M. on 29.03.1993. They called two independent witnesses of the locality, namely, Shri Lal Bahadur



Prasad (P.W.3) and Jai Shri Chaudhary (D.W.1), who were available near the house of the appellant. They all knocked the door of house of the appellant. The appellant had himself opened the door. After giving their own introduction the aforesaid officers disclosed to the appellant their purpose regarding search of his house. The officers were willing to give their own search prior to their entrance into the dwelling house of the appellant, but as the accused denied the offer, the officers went into the house without giving their own search. The dwelling house of the appellant was lawfully searched in presence of the appellant and two independent witnesses named above on 29.03.1993 at 7:05 a.m. On search, one country made pistol loaded with one live cartridge was recovered from the room, which was exclusively occupied by the appellant. The arm and ammunition were kept on the bed which was concealed by bed sheet of the appellant. Besides that, four more live cartridges of .315 bore kept in a packet were also recovered from an almirah affixed in the wall. On opening the electric switch Board affixed in the wall of the said room a polythene packet containing grey colour powder was also recovered in presence of the witnesses and the appellant. The appellant himself disclosed that the recovered powder was heroin. The officers also tested the powder with the aid of text kit



possessed by them at spot and found it to be heroin. Further on removing the bricks of a cavity in one of the walls of the room, it was found that there was a *Jhola* containing a big polythene packet containing currency notes of different denominations amounting to Rs.33,798/-. On weight the recovered heroin measured 65 grams. Out of it, two samples of 5 grams each were drawn at spot packed, sealed and signed by the appellant, witnesses and the officers. The rest of the recovered heroin, country made pistol along with the live cartridges were also packed and sealed separately. The currency notes were also wrapped and sealed properly in the same polythene packet and in the *Jhola* and the packet was signed by the accused, witnesses and the officers at the spot. About the unlicensed pistol and cartridges the appellant disclosed that he had been possessing the same for threatening the people, who tried to put hindrance in his heroin trade. A recovery memo of the currency notes was also prepared at spot, which was also signed by the appellant, witnesses and the officers after supplying a copy of the same to the accused. After completion of search and seizure, the witnesses as well as the accused gave their statements voluntarily in writing. The investigation further proceeded and it was revealed that the appellant had deposited a huge amount as earnings out of his dealings in heroin. The appellant in his statement has further



revealed that he had deposited a sum of Rs.62,501.70/- in Bhojpur Rohtas Gramin Bank, Branch Darwan, Punjab National Bank, Akodhi Branch, Mohania and Ratwar Bhabhua. Subsequently these amounts deposited in the name of the appellant and his family members were seized and deposited in the concerned Banks. Charge sheet was submitted against the appellant. The learned court below took cognizance and charges were framed against the appellant. He denied all the charges and claimed to be tried.

3. During trial, the prosecution examined altogether three witnesses. Out of whom, P.W.1 is Rajendra Singh Pathak, Intelligence Officer, Narcotics Control Bureau, Varanasi (complainant). P.W.2 is Lallan Tiwary. P.W.3 is Lal Bahadur Prasad (seizure witness). The prosecution has also brought on record the F.S.L. report of the samples, which has been marked as Ext-1. The defence has examined only one witness, namely, Jai Shree Mallah (D.W.1).

4. By order dated 29.11.2021 passed by a Co-ordinate Bench of this Court, Mr. Prabhat Ranjan, learned advocate, was appointed as Amicus Curiae to represent the appellant at the cost of the State, as none had appeared on that date on behalf of the appellant.



5. Learned Amicus Curiae, Mr. Prabhat Ranjan, appearing for the appellant submits that the judgment of conviction and order of sentence under challenge is bad in the eye of law. It suffers from several legal infirmities. The learned trial court has failed to appreciate the lacunas on the case of the prosecution. He submitted that out of two seizure witnesses, one has not been produced by the prosecution; rather he has been examined during the trial as D.W. In his deposition, he has denied the seizure of contraband. On the other hand, he has deposed that the police compelled him and took his signature on blank documents by force. Thus, it has been argued that the entire case of the prosecution that contraband substance has been recovered from the house of the appellant itself becomes doubtful. Further, it has been submitted that the prosecution has committed several procedural irregularities in the search and seizure of the present case. Further, it has been submitted that the only evidence, which could have been used against the appellant in the present case, was the confessional statement of the appellant recorded under Section 67 of the N.D.P.S. Act. However, after the three-Judges Bench judgment of the Hon'ble Supreme Court in the case of *Tofan Singh vs. State of Tamil Nadu* reported in (2021) 4 SCC 1 the same has become an inadmissible piece of evidence. Therefore, it has been urged that



the judgment of learned trial court be set aside and the appellants be acquitted from the charges framed against him.

6. Per contra, Dr. K.N. Singh, learned Additional Solicitor General, assisted by Mr. Anshuman Singh, learned advocate, appearing for the Narcotics Control Bureau submitted that the judgment of conviction and order of sentence passed by the learned trial court requires no interference. The prosecution has been able to prove its case beyond all reasonable doubts. There has been no procedural irregularity so far the search and seizure are concerned. All the mandatory provisions laid down under the N.D.P.S. Act has been duly complied with. Lastly, it has been argued that *sans* the confessional statement of the appellant recorded under Section 67 of the NDPS Act, there is enough evidence available on record, on the basis of which the conviction of the appellant can sustain.

7. Adverting to the contentions raised by both the sides and after perusal of the material available on record, following issues are required to be addressed: -

(I) Whether the prosecution has been able to prove the recovery was made from the house of the appellant beyond all reasonable doubt?



(II) Whether the prosecution has been able to prove that the substance recovered from the house of the appellant was heroin?

(III) Whether there has been any procedural irregularity in respect to search and seizure conducted, due to which prejudice has been caused to the appellant?

(IV) Whether the conviction of the appellant can sustain *sans* his confessional statement recorded under Section 67 of the N.D.P.S. Act?

(V) Whether the appellant has discharged his burden casted upon him under Section 54 of the N.D.P.S. Act?

8. In order to deal with the first issue, from perusal of record it appears that when raid was conducted and seizure was made from the house of the appellant, apart from the officials, two independent witnesses were also present. At the very outset, we note that the official witnesses have fully supported the fact that recovery was made from the house of the appellant. Now, the first independent witness, namely, Lal Bahadur Prasad has been examined by the prosecution as P.W.3. From perusal of his deposition, it is evident that he has fully supported the factum of



recovery from the house of appellant. We have given our anxious consideration to his deposition and we find that the defence in its entire cross-examination has not been able to shake his truthfulness and there is nothing on record, which makes his deposition doubtful. However, the second independent witness, namely, Jai Shree Mallah has not been produced by the prosecution, but during trial he has been examined as D.W.1. Being examined as D.W.1, Jai Shree Mallah has denied the factum of recovery from the house of appellant and has deposed that his signatures were obtained by the police under duress. The settled principle of law as far as proof is concerned is that the evidence is not to be counted but to be weighed. The Indian Evidence Act does not specify any number of witnesses, which is required to prove a certain fact. The evidence adduced should be qualitative and not quantitative. If the evidence is of sterling nature, the Court is not handicapped on relying upon the deposition of a solitary witness with regard to believing of a certain fact. As far as the deposition of D.W.1 is concerned, we would like to rely upon the judgment of the Hon'ble Supreme Court rendered in the case of ***Rizwan Khan vs. The State of Chhattisgarh*** reported in (2020) 9 SCC 627, wherein it has been held as follows: -

“8.2...It is settled law that the testimony of the official witnesses cannot be rejected on the ground of



non-corroboration by independent witness. As observed and held by this Court in catena of decisions, examination of independent witnesses is not an indispensable requirement and such non-examination is not necessarily fatal to the prosecution case, [see Pardeep Kumar (supra)].

In the recent decision in the case of Surinder Kumar v. State of Punjab, (2020) 2 SCC 563, while considering somewhat similar submission of non-examination of independent witnesses, while dealing with the offence under the NDPS Act, in paragraphs 15 and 16, this Court observed and held as under:

15. The judgment in Jarnail Singh v. State of Punjab (2011) 3 SCC 521, relied on by the counsel for the Respondent State also supports the case of the prosecution. In the aforesaid judgment, this Court has held that merely because prosecution did not examine any independent witness, would not necessarily lead to conclusion that the Accused was falsely implicated. The evidence of official witnesses cannot be distrusted and disbelieved, merely on account of their official status.

16. In State (NCT of Delhi) v. Sunil, (2011) 1 SCC 652, it was held as under: (SCC p. 655)

It is an archaic notion that actions of the police officer should be approached with initial distrust. It is time now to start placing at least initial trust on the actions and the documents made by the police. At any rate, the court cannot start with the presumption that the police records are untrustworthy. As a



proposition of law, the presumption should be the other way round. That official acts of the police have been regularly performed is a wise principle of presumption and recognised even by the legislature. Applying the law laid down by this Court on the evidence of police officials/police witnesses to the facts of the case in hand, referred to hereinabove, we are of the opinion as the police witnesses are found to be reliable and trustworthy, no error has been committed by both the courts below in convicting the Accused relying upon the deposition of the police officials.

Therefore, applying the aforesaid proposition of law in the facts of the given case, where the factum of recovery is not only supported by the evidence of official witnesses, but also by the P.W.3, who is an independent witness, we have no hesitation in reaching to the conclusion that the prosecution has been able to prove that recovery has been made from the house of the appellant.

9. So far the second issue is concerned, it needs not much deliberation, as from the prosecution report as also evidence of P.W.1, it is evident that the substance which was recovered from the house of the appellant was first tested by testing-kit used by the raiding team, in which they found that the substance was heroin. Further, the prosecution has brought on record Ext.1, which is the Forensic Science Laboratory report, which also confirms that the



sample, which was seized from the house of the appellant, was heroin. Therefore, it leaves no room for doubt that the seized substance recovered from the house of the appellant was heroin.

10. Now, adverting ourselves to the third issue that whether there has been any procedural irregularity committed in the present case, which has caused prejudice to the case of the appellant. P.W.1 in paragraph 15 of his deposition (cross-examination) has stated that he investigated the case in accordance with Section 53 and Section 67 of the Narcotic Drugs and Psychotropic Substances, Act, 1985 (hereinafter referred as N.D.P.S. Act, 1985). Section 53 of the N.D.P.S. Act, 1985 states about conferring the power of the officer-in-charge of police station by central government or state government to any officer of the department of central excise, narcotics, customs, revenue intelligence or any class of such officers with the powers of an officer-in-charge of a police station for the purpose of carrying out investigation of the offences under the N.D.P.S. Act, 1985. Further Section 67 vests the power to officer, who is authorised under Section 42 to make enquiry in connection with the contravention of any provision of the Act. Further, Section 42 of the N.D.P.S. Act, 1985 confers the power of entry, search, seizure and arrest without warrant or authorisation to any officer of the departments of central excise, narcotics, customs,



revenue intelligence or any other department of the Central Government, if he has reason to believe from personal 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. Section 42(2) of N.D.P.S. Act, 1985 states that where an officer takes down any information in writing under subsection (1) or records grounds for his belief under the proviso, he shall within seventy-two hours send a copy to his immediate official superior and the same act was performed by him, which is evident from Paragraph 1 of his deposition (Examination-in-chief) that after he got the information of the involvement of the appellant in selling of heroin after writing down the said information, he sent it to Deputy Director, Narcotics Control Bureau, Varanasi. Further, an argument has been raised by the learned counsel for defence with respect to compliance of Section 57 of the N.D.P.S. Act, 1985 which states that a full report of the particulars of the arrest and seizure shall be given by him to his immediate superior official within 48 hours. In this regard, we shall refer to the Constitutional Bench Judgment of Hon'ble Supreme Court in ***Baldev Singh v State of Punjab***, reported in ***AIR 1999 SC 2378***, in paragraph 18 of its judgement observed as follows:-



“18....(6) The provisions of Sections 52 and 57 which deal with the steps to be taken by the officers after making arrest or seizure under Sections 41 to 44 are by themselves not mandatory. If there is non-compliance or if there are lapses like delay etc. then the same has to be examined to see whether any prejudice has been caused to the accused and such failure will have a bearing on the appreciation of evidence regarding arrest or seizure as well as on merits of the case.”

It is evident from the appreciation of the deposition of P.W.1 and P.W.2 that the heroin was seized from the house of the appellant and thereby from the constructive possession of the appellant and the above testimony of prosecution witnesses stands further corroborated from the deposition of P.W.3, who is an independent search list witness examined on behalf of prosecution and has supported the case of prosecution in relation to the search and seizure made by the officer in the house of the accused from where such substance was found. Therefore, applying the proposition of law as adumbrated in **Baldev Singh (supra)** in the facts of the given case, we are of the considered opinion that no prejudice has been caused to the appellant from the non-compliance of Section 57 of NDPS Act, 1985 and thus there has been no procedural irregularity insofar as the present case is concerned.



11. Now, coming to the fourth issue, that whether the conviction of the appellant can sustain *sans* his confessional statement recorded under Section 67 of the NDPS Act. In this regard, P.W.1 in paragraph 2 of his deposition (examination-in-chief) stated that during search he found one country made pistol located with one live cartridge which was found from the room exclusively occupied by the appellant. The arms and ammunition were kept in a concealed manner i.e. beneath the bed on the cot. The witness in the aforesaid paragraph further stated that on opening the electric switch board, affixed in the wall of the room, a packet containing grey colour powder was recovered. The officer further stated that he tested the powder with the aid of kit on that place and it was found to be heroin. Further, a sample of 5 gram of heroin was taken, and one of the samples was sent to the General Manager, Opium and Alkaloid Works, Ghazipur and the chemical examiner vide his report (Ext.1) confirmed that the said substance was heroin. The finding of such substance from the house of the appellant has been totally corroborated by P.W.2 and P.W.3, an independent search list witness, which is evident from their depositions. P.W.1 further stated in paragraph 11 of his deposition (examination-in-chief) that on the basis of the confessional statement of the appellant before the police officer, wherein he has stated that the money saved in



different bank accounts was received by him as a result of his business proceeds of heroin. The said money was discovered in consequence of the disclosure made by the appellant through his confessional statement in course of investigation. This again corroborates the allegation. Thus, apart from the confessional statement, which has become inadmissible in light of the judgment of Hon'ble Supreme Court in *Toofan Singh (supra)*, there are deposition of trustworthy and reliable witnesses P.W.2 and P.W.3, there are material exhibits, namely, Material Exhibit II, Material Exhibit III, there is report of the chemical examiner marked as Exhibit 1, which confirms the substance as heroin. Therefore, we safely hold that the learned trial court has rightly held the appellant guilty and the conviction of the appellant sustains *sans* his confessional statement recorded under Section 67 of the N.D.P.S. Act.

12. In order to deal with the last issue, this Court takes note of the fact that N.D.P.S. Act is a stringent law and, therefore, special provisions under Sections 35 and 54 of the N.D.P.S. Act have been introduced by the legislature. Section 35 of the N.D.P.S. Act deals with the presumption of culpable mental state and as per Section 54 of the N.D.P.S. Act, if the recovery under the N.D.P.S. Act is from the presumption of a person, unless the contrary is proved, it shall be



presumed that the appellant has committed an offence under N.D.P.S. Act. From perusal of the record, it is evident that the prosecution has been able to establish and prove its case by adducing satisfactory evidence. However, the appellant has not discharged its burden and has failed to rebut the presumption, which has been created against him as per Section 54 of the N.D.P.S. Act as no substantive evidence has been adduced by the appellant for discharge of his burden under Section 54 of the N.D.P.S. Act.

13. Therefore, in view of the findings arrived at on the issues formulated above, we are of the opinion that the learned trial court has rightly convicted the appellant. Hence, the present appeal stands dismissed and the judgment of conviction dated 07.08.1996 and order of sentence dated 09.08.1996 passed by the Sessions Judge, Rohtas at Sasaram in N.C.B. case No.3 of 1993 are, hereby, upheld and affirmed. Since the appellant is on bail, his bail bonds are hereby cancelled. He is directed to be taken into custody forthwith for serving the remaining part of his sentence.

14. Before parting away with this appeal, we record our appreciation for Mr. Prabhat Ranjan, learned Amicus Curiae, who has rendered his able assistance in this matter. We direct the Patna High Court Legal Services Committee to pay a sum of Rs.5000/- to Mr. Prabhat Ranjan, learned advocate, appointed as Amicus Curiae



by order dated 29.11.2021 passed by a Co-ordinate Bench of this Court.

(Sudhir Singh, J)

(Chandra Prakash Singh, J)

Narendra/-

AFR/NAFR	NAFR
CAV DATE	
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