

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.532 of 2022**

Arising Out of PS. Case No.-7 Year-2015 Thana- GOVERNMENT OFFICIAL COMP.
District- East Champaran

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Md. Abdul Kais @ Abdul Kais, Son of Late Sheikh Khalil, Resident of Village- Khairwa Tola, P.S.- Chhauradano, District- East Champaran

... .. Appellant/s

Versus

The Union of India through Sri Ashok Kumar Rai, Intelligence Officer, Narcotics Control Bureau Patna Zonal Unit, New Delhi

... .. Respondent/s

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Appearance :

For the Appellant/s	:	Mr. Nafisuzzoha, Advocate Mr. Manjeet Kumar Mishra, Advocate
For the Union of India	:	Mr. Uma Shankar Verma, Advocate Ms. Shail Kumari, C.G.C.

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CORAM: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH

and

HONOURABLE MR. JUSTICE NAWNEET KUMAR

PANDEY

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH)

Date : 31-07-2023

This appeal has been preferred by the appellant under Section 374(2) of the Code of Criminal Procedure, putting to challenge a judgment of conviction dated 17.06.2021 and an order of sentence dated 24.06.2021, passed by learned 3rd Additional Sessions Judge, East Champaran, Motihari in N.D.P.S. Case No. 66 of 2015, CIS No. 13/16, whereby the appellant has been convicted and sentenced as under:-



Appellant	Conviction under Section	Sentence		
		Imprisonment	Fine (Rs.)	In default of fine
Md. Abdul Kais @ Abdul Kais	21(c) of the NDPS Act	R.I. for 14 years	1,00,000/-	R.I. for six months

2. It is the case of the prosecution that based on a secret information received by M. Dilip Singh, SI/GD, Coy Commander, Mahuawa, Bihar (PW 2) received on 07.12.2015 to the effect two persons were carrying huge quantity of heroin on a Hero Honda motorcycle and were about to cross *Chhauradano* to *Katgenwa* between 6:30 am to 7:30 am on 08.12.2015. A team of SSB (Sashastra Seema Bal), Mahuawa was formed to act upon the said information. The team comprised SI M. Dilip Singh (PW-2), Bhupender Singh SI/GD, Amit Choudhary Hawaldar/GD, Sonu Kumar Constable/GD, Jaypal Yadav Constable/GD, Saugat Ray Constable/GD, Jyotish Oraon Constable/GD. Based on the said information, the team reached the place of indication on 08.12.2015. They contacted two persons namely, Umesh Yadav (not examined) and Devendra Kumar (not examined) with a request to remain present as independent witnesses during the likely search, to which they agreed. At 07:00 am two persons were seen coming from *Katgenwa* to *Chhauradano* in a black Hero Honda Splendor motorcycle



who were intercepted in the presence of two independent witnesses. The persons who were intercepted disclosed their names as Md. Abdul Kais (the appellant) and Rakesh Mahto a co-accused, who is said to have been declared a juvenile.

3. It is further case of the prosecution that the persons so apprehended were given the option as contemplated under Section 50 of the Narcotic Drugs and Psychotropic Substances Act (NDPS Act in short) to be examined in presence of Magistrate or a gazetted officer. They, however, gave in writing their option to be searched by the members of the team. Nothing incriminating was recovered from there personal possession. The appellant was carrying a bag which was searched and from which a packet of transparent plastic, which was wrapped with a brown colour tape, was recovered. On the opening of the packet, brown colour powder was found, small quantity of which was tested with Drug Detection Kit which responded to the test of heroin. Thereafter, for necessary action and interrogation by the team both the witnesses, the intercepted persons namely, the appellant and Rakesh Mahto and the SSB team moved to 13 Battalion SSB, *Pipra Kothi*, District East Champaran, Bihar where they reached at 10:00 pm. In the meanwhile, an information was



transmitted to Bikash Kumar (PW-5), Superintendent, Narcotics Control Bureau (NCB), Patna. As directed by PW-5, a team of NCB, Patna was constituted comprising Anil Kumar Prasad, the Investigating Officer (PW-3), Ashok Kumar Rai (PW-4), Bikash Kumar himself and Nitin Srivastava Sepoy (not examined). They reached SSB *Pipra kothi* at 03:00 pm on 08.12.2015, whereafter they were briefed by M. Dilip Singh (PW-2) about the recovery. The recovered substance was again tested by the IO Anil Kumar Prasad (PW-3) in the presence of both the independent witnesses with the use of Drug Detection Kit which responded positive to the test of heroin. Thereafter, the recovered substance was weighed and its weight was found to be about 620 grams and thereafter, the recovered materials were seized.

4. It is noteworthy, at this juncture, that no evidence has been adduced at the trial by the prosecution as to which tool was used for weighing the substance said to have been seized from the possession of the appellant.

5. Further, two samples, 5 gm each, were taken out from the seized material and kept in transparent plastic bags separately which was hot sealed and kept in yellow colour envelopes and sealed with the departmental seal NCB-01 and



marked as S1 and S2. Rest of the recovered material was weighed again and was found to be 610 grams which was wrapped in a markin cloth and sealed with departmental seal and marked as 'A'. The said black colour bag was also wrapped in a markin cloth and sealed with departmental seal and marked as 'B'. The signatures of the IO Anil Kumar Prasad (PW-3), the appellant, co-accused Rakesh Mahto and both the independent witnesses were obtained on all the sealed packets. The said Hero Honda Splendor motorcycle was also seized. The search-cum-seizure list, test memo in triplicate were prepared on the spot in the presence of both the independent witnesses. The accused persons and the team of NCB, Patna and SSB, *Pipra Kothi* and all the members of the said team including the seizing officer put their signatures on the search-cum- seizure list. The procedure for search and seizure had began on 08.12.2015 at about 07:00 am and ended at 7:00 pm. The copies of the said search-cum-seizure list were given to both the accused persons. It is further case of the prosecution that voluntary statement of both the independent witnesses were recorded under Section 67 of the NDPS Act wherein, they confessed their involvement in trafficking of heroin. They confessed that they had taken the alleged



consignment of heroin from Bhuwail which was handed over to him by Md. Taimul. Based on recovery of the articles and confessional statement of the accused persons, they were arrested at 09:00 pm and 11:15 pm respectively as the NCB officials had reason to believe that they had violated Section 8 of the NDPS Act and committed offence punishable under Section 21 of the NDPS Act. The accused persons were produced before the learned Sessions Judge-cum-Special Judge, NDPS Act, Motihari on 09.12.2015 whereafter they were remanded to judicial custody. The NCB officials were granted permission to keep the remaining seized contraband marked as 'A', packet 'B', the duplicate sample S2 and the said motorcycle with its key under the custody of NCB *Malkhana* and were further granted permission for sending of the samples to Central Forensic Science Laboratory, Kolkata for chemical examination and result thereof. The report of search, seizure and arrest of the accused persons was furnished to the higher official superior in accordance with Section 57 of the NDPS Act.

6. A complaint petition was filed before the court of learned District and Sessions Judge-cum-Special Judge, NDPS Act, East Champaran, Motihari on 26.05.2016 giving rise to



NDPS Case No. 66 of 2015. It is noteworthy that according to the prosecution's case, the sample of the seized articles was sent to Central Forensic Science Laboratory, Kolkata for chemical examination but before the report of the chemical examination could be obtained, the complaint petition was filed on 26.05.2016, after completion of investigation.

7. Subsequent to filing of the complaint case, the result of the forensic examination conducted by the Central Forensic Science Laboratory, Kolkata was made available which read as under:

“REPORT: Received one(01) sample packet in sealed and intact condition marked as “Original sample-S-1” and the sample packet was found sealed with seven (07) red lac seals. Impression of seal affixed on the sample packet tallied with facsimile of seal as given in the test memo.

On opening the sample packet, the sample was found kept in a heat sealed transparent auto pressed plastic pouch marked as “S-1”. The sample is in the form of light brown powder. On the basis of chemical tests and chromatographic examination it is concluded that the sample u/r answers positive tests for the presence of Heroin, Morphine and Codeine.

For determination of percentage of Heroin, Morphine and Codeine, the sample u/r may be forwarded to Central Forensic Science Laboratory, Kolkata.

Gross weight of the sample received with test heat sealed transparent auto pressed plastic pouch marked as “S-1”=5.7 gram.

Gross weight of remnant sample returned with transparent auto pressed plastic pouch marked as “S-1”=4.6 gram.

Facsimile of seal “CHEMICAL



EXAMINER CAL CUS House NO. 1” on sealed remnant.”

8. After taking of cognizance, the charge was subsequently framed against this appellant and co-accused Rakesh Mahto on 26.07.2016 for commission of the offence punishable under Section 21(c) of the NDPS Act for contravention of Section 8(c) of the NDPS Act. The appellant denied the charge and claimed to be tried.

9. At the trial, the prosecution examined six witnesses namely, Bhupender Singh Verma (PW-1), M. Dilip Singh (PW-2), Anil Kumar Prasad IO(PW-3), Ashok Kumar Rai an NCB Official (PW-4), Bikash Kumar an NCB official(PW-5) and Manoj Kumar Yadav, an NCB official (PW-6). The seizure list witnesses were not examined. In addition to the oral evidence of the witnesses as noted above, the prosecution brought on record following evidence at the trial by way of exhibits: -

Sl. No.	Document	By whom	Exhibit No.
1	Signature of PW-1 Bhupendra Singh Verma on search-cum-seizure list.	Prosecution	1 to 1/6
2	Signature of PW-4, Ashok Kumar Rai on search-cum-seizure list	Prosecution	1/7 to 1/13
3	Notice for search u/s 50 of NDPS Act to accused Rakesh Mahto (not facing trial in this case record)	Prosecution	2
4	Notice for search u/s 50 of NDPS	Prosecution	2/1



	Act to accused Abdul kais		
5	Seizure Report	Prosecution	3
6	Personal search memo of Rakesh Mahto	Prosecution	4
7	Personal search memo of Abdul Kais	Prosecution	4/1
8	Details of apprehended persons	Prosecution	5
9	Deposit of seized goods	Prosecution	6
10	Details of raiding party (SSB Pesonnel)	Prosecution	7
11	Signature of PW-2 M. Dilip Singh on search-cum-seizure list	Prosecution	8 to 8/6
12	Search-cum-seizure list	Prosecution	9
13	Notice issued u/s 67 of NDPS Act	Prosecution	10 and 10/1
14	Voluntary Statement of accused Abdul Kais	Prosecution	11
15	Signature of PW-4 Ashok Kumar Rai on all seven pages of voluntary statement of accused Abdul Kais	Prosecution	11/1 to 11/7
16	Voluntary statement of accused Rakesh Mahto (not facing trial in this case record)	Prosecution	12
17	Notice issued to witness Sri Devendra Kumar	Prosecution	12/1
18	Notice issued to witness Sri Umesh Yadav	Prosecution	12/2
19	Signature of PW-4 Ashok Kumar Rai on voluntary statement of accused Rakesh Mahto(not facing trial in this case record)	Prosecution	12/3 to 12/8
20	Signature of PW-3 A.K. Prasad on page no. 4 of statements of independent witnesses Umesh Yadav and Devendra Kumar	Prosecution	13
21	Signature of PW-4 Ashok Kumar Rai on statement of independent witnesses Umesh Yadav and Devendra Yadav	Prosecution	13/1 to 13/4
22	Arrest memo of accused Md. Abdul Kais	Prosecution	14
23	Arrest memo of accused Rakesh Mahto (not facing trial in this case record)	Prosecution	14/1



24	Jama Talashi of accused Rakesh Mahto(not facing trial in this case record)	Prosecution	15
25	Jama Talashi of accused Md. Abdul Kais	Prosecution	15/1
26	Test Memo	Prosecution	16
27	Test report of Chemical Laboratory, Seema Shulk Sadan, Kolkata on the back leaf of forwarding	Prosecution	16/1
28	Report u/s 57 of NDPS Act forwarded to Zonal Director NCB, Patna	Prosecution	17
29	Application to the District and Sessions Judge-cum-Special Judge, NDPS Act 1985, Motihari for permission for sending the sample marked as S1 to CRCL, Kolkata and keep the sample marked as S2 and rest seized material/articles in the custody of NCB, Malkhana, Patna	Prosecution	18
30	Official Complaint petition	Prosecution	19
31	Signature of witness PW-5 Bikash Kumar on all the pages of search-cum-seizure list	Prosecution	20 to 20/6
32	Inventory	Prosecution	21
33	Certificate paper	Prosecution	22
34	Photograph	Prosecution	23
35	Certificate of Destruction (with objection)	Prosecution	24

10. After closure of the evidence of the prosecution's witnesses, the appellant was questioned under Section 313 of the CrPC so as to give him an opportunity to explain the circumstances which emerged against him based on the evidence adduced at the trial. The appellant answered the questions in negative.



11. The trial court after having appreciated the evidence adduced at the trial has held the appellant guilty of the offence punishable under Section 21(c) of the NDPS Act and has sentenced him to imprisonment and fine as noted above.

12. It has been argued on behalf of the appellant, assailing the impugned judgment and order of the trial court, that apparently, the sample of the recovered article soon after the seizure was not prepared in the presence of a Magistrate rather two samples, according to the prosecution's case, were prepared by the NCB officials themselves, one of which was sent to the Forensic Science Laboratory. He submits that act of drawing of the sample soon after the seizure of the substance, said to be heroin, was in clear breach of the mandatory safeguard provided under Section 52A(2)(b) of the Act. He has further submitted that though, according to the prosecution's case, the seized substance from the possession of the appellant, has been destroyed, the prosecution failed to bring on record the duplicate sample (S2) as material exhibit at the trial. He further submits that failure on the part of the prosecution to ensure examination of seizure list witnesses vitiates the finding of conviction.



13. Learned counsel for the Union of India, defending the impugned judgment, has submitted that in the present case huge quantity of heroin (620 grams) was recovered from the appellant's possession after due compliance of Section 50 of the NDPS Act. The appellant and the co-accused confessed their involvement in illicit trade of heroin in their statements made before the NCB officials under Section 67 of the NDPS Act. He submits that as the prosecution was able to prove these aspects at the trial, by operation of Section 54 of the NDPS Act, the burden shifted to the appellant and he was required to account satisfactorily the possession of the substance. He having failed to do so, the trial court after duly appreciating the evidence on record, taking note of the provisions under Sections 67 and 54 of the NDPS Act, has rightly held the appellant guilty of the offence punishable under Section 21(c) of the NDPS Act.

14. We have perused the impugned judgment and order of the trial court and we have carefully scrutinized the evidence adduced at the trial. It is apparent from the records that the seizure list witnesses were not examined and all the witnesses who deposed at the trial were either officials of SSB or the officials of NCB. It is evident that soon after the seizure



was effected of the substance consequent upon recovery from the appellant's possession, samples were not drawn in the presence of a Magistrate which is one of the safeguards laid down under Section 52A(2)(b) of the NDPS Act. The Supreme Court in case of *Union of India vs. Mohanlal* reported in *(2016) 3 SCC 379* has laid down the law in paragraphs 15 and 16 as under:-

“15. It is manifest from Section 52-A(2)(c) (supra) that upon seizure of the contraband the same has to be forwarded either to the officer-in-charge of the nearest police station or to the officer empowered under Section 53 who shall prepare an inventory as stipulated in the said provision and make an application to the Magistrate for purposes of (a) certifying the correctness of the inventory, (b) certifying photographs of such drugs or substances taken before the Magistrate as true, and (c) to draw representative samples in the presence of the Magistrate and certifying the correctness of the list of samples so drawn.

16. Sub-section (3) of Section 52-A requires that the Magistrate shall as soon as may be allow the application. This implies that no sooner the seizure is effected and the contraband forwarded to the officer-in-charge of the police station or the officer empowered, the officer concerned is in law duty-bound to approach the Magistrate for the purposes mentioned above including grant of permission to draw representative samples in his presence, which samples will then be enlisted and the correctness of the list of samples so drawn certified by the Magistrate. In other words, the process of



drawing of samples has to be in the presence and under the supervision of the Magistrate and the entire exercise has to be certified by him to be correct.”

15. The empowered officers under Section 53 of the NDPS Act are under obligation to ensure that the samples are drawn in the presence of a Magistrate to satisfy the requirement of Section 52A(2)(b) of the NDPS Act. Secondly, according to the prosecution's case, whereas one sample was sent to Central Forensic Science Laboratory, Kolkata for chemical examination, the other sample was kept with the permission of the court in the NCB godown. The Second sample or duplicate sample was not produced as material exhibit at the trial.

16. There are two main reasons why we are inclined to interfere with the impugned finding recorded by the trial court. Firstly, the samples were not drawn in the presence of a Magistrate as contemplated under Section 52A(2)(b) of the NDPS Act and secondly, the duplicate sample was not produced before the court at the trial as material exhibit. These facts, coupled with the fact that the independent witnesses could not be examined at the trial to prove the seizure and all the prosecution's witnesses are official witnesses, we do not consider it safe to uphold the finding of conviction recorded by



the trial court by its impugned judgment.

17. Accordingly, the impugned judgment of conviction and order of sentence dated 17.06.2021/ 24.06.2021 passed by the learned 3rd Additional Sessions Judge, East Champaran, Motihari in connection with NDPS Case No. 66 of 2015, CIS No. 13/16 are set aside. The appellant stands acquitted of the charge of offence punishable under Section 21(c) of the NDPS Act, giving him benefit of doubt.

18. This appeal is allowed accordingly.

19. The appellant is in jail custody. Let him be released forthwith, if he is not required in any other case.

(Chakradhari Sharan Singh, J)

(Nawneet Kumar Pandey, J)

Rajesh/Suraj/-

AFR/NAFR	NAFR
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