

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.76 of 2006

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Babu Saheb Chaudhary, Son of late Dona Chaudhary, resident of village-
Mallah Toli (Mohania) Police Station-Mohania, District- Kaimur at Bhabua.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

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Appearance:

For the Appellant/s : Mrs. Muskan Singh, Advocate

For the Respondent/s : Mr. A.M.P Mehta, APP.

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CORAM: HONOURABLE MR. JUSTICE RAMESH CHAND MALVIYA
ORAL JUDGMENT

Date: 17-03-2025

Heard Mrs. Muskan Singh, learned *Amicus*
Curiae for the appellant and Mr. A.M.P. Mehta, learned APP for
the State.

2. The present appeal has been filed under
Section 374 (2) of Code of Criminal Procedure, 1973
(hereinafter referred as 'Cr.P.C') challenging the judgment of
conviction and order of sentence dated 12.12.2005 passed in
Sessions Trial No. 167 of 1997 in connection with Mohania P.S.
Case No. 116 of 1997 passed by the learned Additional Sessions
Judge-I, Kaimur at Bhabua, whereby and whereunder the
appellant has been convicted under Section 21 of the Narcotic
Drugs and Psychotropic Substances Act, 1995 (hereinafter
referred to as the 'Act') and has been sentenced to undergo
rigorous imprisonment for 10 years and fine of Rs. 1,00,000/-



and in default of payment of fine further imprisonment for six months.

3. The case of the prosecution in brief, is that on 08.07.1997 at about 13.00 hours, the informant namely Sumari Pd. Mandal, S.I. of Police posted at Mohania P.S. was on duty in the police station and he got confidential information that some persons were dealing in heroin near the Ramrati Dharamshala in Mohania. On the basis of this information, the Informant made an entry in the station diary and proceeded to raid with a raiding party. The informant stated that Chandrika Paswan A.S.I., Nand Kishore Sharma (constable H.G.No.10414), Gulab Prasad (constable H.G.No.10344), Shanker Singh (constable H.G.No.8289), Akhileshwar Kumar Rai, Dafadar and chaukidars namely, Babulal Paswan, Parshuram Paswan, Bachulal Paswan and Jangali Musahar were the members of the raiding party. When the informant and the raiding party reached near the said Dharamshala, the persons assembled there, began to run away but during the course of chasing, the raiding party caught hold of two persons. The informant sent chaukidar Babulal Paswan to the S.D.O. Mohania and he requested the said authority to come at the place of occurrence. After some time, Shri Sheo Bhushan Thakur, Executive Magistrate,



Mohania reached the place of occurrence and in his presence as well as in the presence of one local witness, the persons of the accused were searched and from the possession of co-accused Reyasat Ali Ansari total 75 gm of heroin kept in 15 packets along with cash of Rs. 125/- was recovered and from the possession of accused-appellant Babu Saheb Chaudhary, 1 gm of heroin kept in two *puriya* along with *machis* was recovered in presence of the witnesses. The informant prepared a seizure list at the spot and copy of the same was handed over to the accused persons after taking signatures of the witnesses. After that the informant gave a written report before the officer-in-charge, Mohania and on the basis of that report, Mohania P.S. Case No. 116 of 1997 under Sections 8, 17 and 21 of the N.D.P.S. Act was registered and then police started investigating the matter.

4. During investigation of the case, the I.O. sent the recovered heroin for chemical examination before the Director, F.S.L. Bihar, Patna which was received. The FSL report showed that the article which was recovered from the co-accused Reyasat was not heroin but the 1 gram of heroin-like substance which was recovered from the accused/appellant was confirmed to be heroin by the laboratory result. After completing investigation, I. O. submitted the charge-sheet and



cognizance of the offence was taken by the learned Sessions Judge, Kaimur at Bhabua and then the case record was transferred to the learned Additional Sessions Judge-III, Bhabua. The charges were framed under Sections 8, 17 and 21 of the NDPS Act and explained to the accused and read over to them in Hindi to which they pleaded not guilty and claimed to be tried.

5. On behalf of the prosecution, total six witnesses were examined to substantiate the charges leveled against the accused/appellant, out of them, PW-1 Sumari Pd. Mandal (informant), PW-2 Anwar Khalifa, PW-3 Babulal Paswan, PW-4 Sheo Bhushan Thakur, PW-5 Chandrika Paswan-I.O. and PW- 6 Bholu Prasad.

6. PW-1 Sumari Prasad Mandal is the informant of this case. He stated that on 08.07.1997 he was posted as S.I. in the Mohania police station and on that day at about 01.00 PM he got confidential information that some persons were dealing in heroin near Ratiram Tola in Mohania. On the basis of this information, the informant made an entry in the station diary and proceeded for conducting raid along with a raiding party in which Chandrika Paswan, A.S.I., armed forces, dafadar and chaukidar accompanied him. He further stated that when they



reached near Ratiram field, the persons assembled there, began to run away from there but after chasing them, they caught two persons namely Babu Saheb Chaudhary and Reyasat Ali Ansari. The persons of these two accused persons were searched in the presence of a Magistrate and one independent witness namely Anwar Khalifa. From the possession of co-accused Reyasat Ali Ansari, 75 gm of heroin kept in 15 packets along with cash of Rs 125/- was recovered and from the possession of accused/appellant Babu Saheb Chaudhary, 1 Gm of heroin kept in two *puriya* along with *machis* were recovered in presence of witnesses. The informant then prepared a seizure list on the spot on which the independent witness and the Magistrate put their signatures and the copy of the same was handed over to the accused persons. PW-1 proved the seizure list marked as ext. 1 and then both the accused persons were brought to the police station where PW-1 gave his written report to the officer-in-charge, Mohania on the basis of which a case was lodged. PW-1 proved his written report marked Ext. 2 and the formal F.I.R. marked Ext. 3. PW-1 handed over the investigation of the case to PW-5 i.e, Chandika Paswan.

6.i. In Para 6 of his cross-examination he stated that in the police station he got the confidential information



before the officer-in-charge and on the direction of the officer-in-charge, he raided the premises and caught the accused persons but no Magistrate was with them at that time. In Para-8 of the cross-examination, he stated that when he left the police station, he was carrying blank sheets and a weighing scale and nothing else. However, in Para-9 of the cross-examination, he has stated that he was carrying a seal stamp with him.

7. PW-2 Anwar Khalifa is a seizure list witness and has been declared hostile by the prosecution. In his cross-examination, PW-2 stated that he was made to put his signature on a blank sheet and that when he put his signature, Magistrate was not present.

8. PW-3 Babulal Paswan was posted as chaukidar in the Mohania police station. He stated in his examination-in-chief that on the date of occurrence he along with others i.e., the raiding party went to the house of Reyasat Ansari and from there *daroga jee* sent him to call the Magistrate. He further stated that seizure list was prepared in his presence. During cross examination this witness only stated that he gave his statement before *Daroga ji*.

9. PW-4 Shiv Bhushan Thakur is the Magistrate who was posted at Mohania and in whose presence the alleged



heroin was recovered. He stated in his examination-in-chief that in his presence the persons of the accused were searched. He further alleged that from the possession of accused Reyasat Ali Ansari 15 *puriya* of heroin and a cash amount of Rs 125/- was recovered and from the possession of accused/appellant Babu Saheb Chaudhary two *puriya* of heroin which he had kept in his *gamchha* was recovered, and the same was searched by the police and the seizure list was prepared at the spot. PW-4 proved his signature on the seizure list marked as Ext.4/1.

9.i. In Para-2 of his cross examination, PW-4 stated that when he was informed about the incident, at that time he was in his office. In Para-3 of the cross examination PW-4 stated that the allegedly seized heroin was not sealed in his presence and that he did not remember if he had put his signature on the seizure list or not. When he reached the place of occurrence i.e., the field, many persons were assembled there. He further stated that when he reached the place of occurrence many people were present there. In Para-4, he further stated that police recorded his statement and only bodies of two persons were searched in his presence.

10. PW-5 Chandrika Paswan is the I.O. in the present case. He stated in his examination-in-chief that on



08.07.1997 he was posted at Mohania police station as A.S.I. and investigation of Mohania P.S. Case No. 116 of 1997 was handed over to him. He stated that he recorded the statements of the witnesses and also visited the place of occurrence. He also narrated the boundary of the place of occurrence, i.e., field which was north of Ratiram Dharamshala. He stated that he recorded the statement of the independent witness Anwar Khalifa who stated that recovery was done before that witness and the Magistrate and from the possession of accused Reyasat Ali Ansari, 15 *puriya* of heroin and a cash amount of Rs 125/- and from the possession of accused Babu Chaudhary 2 *puriya* of heroin were recovered.

10.i. In Para-5 of his cross-examination, PW-5 stated that he recorded the statements of the witnesses of this case but later stated that he did not record the statements of any of the witnesses. He also stated that no reason was recorded in the case diary for not recording the statements of the witnesses. He further stated that when he started investigation the allegedly recovered heroin was sealed and the same was opened in the office of the D.I.G. for which he had taken permission from the special Judge. In para-6 of his cross-examination he stated that report of the F.S.L was not received before filing the charge-



sheet.

11. PW-6 Gulab Prasad was a home guard constable and was a member of the raiding party. He stated in his examination-in-chief that on the date and time of occurrence he was with the informant when the two persons were caught and from the possession of both accused persons, namely Reyasat Ansari and Babu Saheb Chaudhary heroin was recovered. PW-6 had identified the accused persons who were present in the Court.

11.i. In Para-2 of his cross examination, he stated that many people were present when the police was conducting the raid at the place of occurrence. In Para-3 of his cross-examination, he further stated that all the documents related to the seizure was prepared at the police station itself and the seized heroin was not sealed in his presence.

12. The Learned *Amicus Curiae* has submitted that there are material discrepancies in the statements of the witnesses. PW-3 has stated that he went to the place of occurrence which was the house of Reyasat Ali Ansari along with the raiding party to search his place whereas the I.O. has stated that the place of occurrence was the field which was situated north of Ratiram Dharamshala. She further submitted



that there are no independent witness in the present case and the only independent witness who was also the seizure list witness was declared hostile by the prosecution. She further submitted that the I.O. did not examine any other person who were present at the place of occurrence. She further submitted that in Para-3 of the cross examination PW-4, who was the Magistrate in front of whom the accused persons were searched stated that the allegedly seized heroin was not sealed in his presence. She further pointed out that as per the statement of the I.O. in Para-6 of his cross-examination, the charges were framed before the FSL report was obtained by the police. She further submitted that the prosecution case is doubtful because the substance recovered from co-accused Reyasat Ali Ansari was confirmed to be some powdery substance and not heroine as alleged by the informant but the 1 gram of substance recovered from the accused/appellant was found to be heroin. The case is suspicious because both the accused were apprehended from the same place and based on the same confidential information received by the informant. She further submitted that the FSL report submitted before the Court was not examined and neither was the Examiner examined with respect to the report. She further submitted that the accused/appellant was not examined properly



by the trial Court under Section 313 of Cr.P.C as he was not put any questions regarding the findings of the FSL report. She relied on the decision of Rajasthan High Court in the case of ***Kabu v. State of Rajasthan, 1990 SCC OnLine Raj 466 : (1990) 2 RLW 139 (2) : 1992 Cri LJ 1491*** where it was held as follows:

“The opinion of the chemical examiner is an important circumstance in cases of this type and such circumstances not being proved and not being put to the accused, the court taking help of the report without putting a question to the accused in that regard and affording him opportunity to explain, is a vital infirmity. It is pertinent to note that if it finds place on the record, if not proved or exhibited, in just like any other waste paper and the Court should not have taken into consideration, especially so when no question in that regard was put to the accused.”

12.i. Learned Amicus Curiae further submitted that this appeal is of the year 2006 and the occurrence is of the year 1997, whereas, the appellant have suffered and undergone persistent agony on the account of the same and are struggling for the defence since last 20-21 years. So, the appellant should have been acquitted from the conviction as sentenced against him.

13. On the other hand, learned Additional Public



Prosecutor has vehemently opposed this appeal and submits that there was recovery of heroin from the person of the accused-appellant and thus in view of the aforesaid statements and the evidence on record, learned trial Court had rightly convicted the appellant and the present appeal should not be entertained.

14. At this stage, I would like to appreciate the relevant extract of entire evidence led by the prosecution and defence before the Trial Court.

15. Having deeply studied and scrutinized the facts of the case and the materials available on record, it is pertinent to first mention the provisions of Section 21 of the NDPS Act as applicable on the date of occurrence. It states as follows:

21. Punishment for contravention in relation to manufactured drugs and preparations.— Whoever, in contravention of any provision of this Act or any rule or order made or condition of licence granted thereunder, manufactures, possesses, sells, purchases, transports, imports inter-State, exports inter-State or uses any manufactured drug or any preparation containing any manufactured drug shall be punishable with rigorous imprisonment for a term which may extend to ten years, but which may extend to twenty years and shall also be liable to fine which shall not be less than one lakh rupees but which may extend to two lakh rupees.



Provided that the Court may, for reasons to be recorded in the judgment, impose a fine exceeding two lakh rupees.

16. The accused/appellant in the present case has been convicted under the provisions of Section 21 of the Act but it is observed that there are material discrepancies in the statements of the prosecution witnesses to support the conviction. PW-3 who was a member of the raiding party stated that he went to the house of Reyasat Ali Ansari which was the place of occurrence to conduct the raid while PW-5, who is the I.O. has stated that the place of occurrence was the field which is situated north of Ratiram Dharamshala from where the accused were apprehended. Further, magistrate in whose presence the apprehended articles were recovered also state that the place of occurrence was the field which is situated north of Ratiram Dharamshala from where the accused were apprehended. Thus the place of occurrence is doubtful. It is further observed that PW-4, Shiv Bhushan Thakur and PW-6, Gulab Prasad stated in their statements before the Court that there were many people present when the police conducted raid of the accused persons. However, the prosecution has not presented any of the persons as witness and neither did the police record the statement of any persons. The police recorded the statement of one independent witness, PW-2 but the witness



turned hostile and stated that the police made him put his signature on a blank page. Apart from this witness, no other person's statement was recorded by the police. The trial Court stated that the FSL report was the most important document but the same was not proved by the Chemical Examiner. Further, as per the submission of the learned *Amicus Curiae* the learned trial Judge did not put any questions to the accused/appellant under Section 313 Cr.P.C. regarding the chemical report because of which the accused appellant was not able to express the circumstances against him and it caused prejudice to his case and the same is correct in the opinion of this Court. The chemical examiner who prepared the FSL report has also not been examined by the trial Court. In light of the same, the veracity of the FSL report is doubtful.

17. The prosecution case is also doubtful because the sole independent witness, i.e. the Magistrate in whose presence the seizure was made has stated in Para 3 of his cross-examination that the seized articles were not sealed in his presence. It is further observed that as per the FSL report the seized substance was received in the Forensic Science Laboratory on 16.07.1998. This raises significant doubt whether the seized substance was kept in safe custody as required under



Section 55 of the Act. Further since the chemical examiner has not been examined there is no evidence as to whether the seals were intact or not.

18. Hence, keeping in view all the materials on record, it is observed that in light of the material discrepancies in the statement of witnesses and the doubtfulness over the truth of the FSL report, the case against the accused/appellant is not proved beyond shadow of all reasonable doubt. The statements of the I.O. and the Magistrate in whose presence the seizure was made does not fully establish the guilt of the accused. The Magistrate has stated that the seized articles were not sealed in front of him. Thus, in light of the facts of the case, the appellant is given the benefit of doubt. The conviction of the appellant is hereby set aside and the appellant is acquitted from the charges leveled against him.

19. Before parting with this appeal, Secretary, Patna High Court Legal Services Committee is directed to pay Rs. 5,000/- (five thousand) to the learned Amicus Curiae, namely, Mrs. Mushkan Singh towards honorarium for assisting this Court in the present appeal.

20. Let a copy of first and last page of this judgment be handed over to the advocate Mrs. Mushkan Singh,



learned Amicus Curiae and Office is directed to proceed further in granting honorarium to her which is to be paid by Patna High Court Legal Services Committee.

21. Accordingly, this appeal stands partly allowed.

(Ramesh Chand Malviya, J)

SunnyKr/-

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