IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.474 of 2006

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Vijay Mahto @ Bijay Mahto, son of Munshi Mahto, resident of Mohalla: Asha Nagar, P.S.: Biharsarif, District: Nalanda (Bihar).

... ... Appellant/s

Versus

State of Bihar

... ... Respondent/s

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Appearance :

For the Appellant/s : Mr.Yogendra Kumar Singh, Advocate.
Mr. Ajit Kumar, Advocate.
Mr. Manoj Kumar, Advocate.

For the Respondent/s : Mr. Anand Mohan Prasad Mehta, APP

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CORAM: HONOURABLE MR. JUSTICE SUNIL DUTTA MISHRA
C.A.V. JUDGMENT

Date : 12.08.2025

Heard learned counsel for the appellant and the learned APP for the State.

2. The present Criminal Appeal has been filed under Sections 374 (2) of the Code of Criminal Procedure, 1973 (hereinafter referred to as 'Cr.P.C.') against the judgment dated 24.05.2006 and sentence dated 26.05.2006 in Sessions Trial No.243 of 1990 passed by the Additional Sessions Judge, Fast Track Court No.5, Biharsarif, Nalanda (hereinafter referred to as the "Trial Court"), wherein the appellant has been convicted under Section 18 of the Narcotic Drugs and Psychotropic Substances Act (hereinafter referred to as "N.D.P.S. Act") and sentenced to undergo rigorous imprisonment for 10 years and

was also imposed with fine of Rs. 1,00,000/- and in default of which the appellant has to further undergo rigorous imprisonment for 3 years.

3. The brief facts of the case as per the prosecution is that on 25.03.1987, Dinesh Chandra Gupta (P.W.5), Sub-Inspector of Excise, along with Sri S.S. Srivastava, Executive Magistrate, on secret information, visited and recovered 1800 opium plants from the alleged field of appellant at Asha Nagar, Biharsarif and also from nearby two plots 500 and 2000 opium plants respectively were recovered. The informant prepared seizure lists in presence of three witnesses detailing the recovery of opium plants from all three fields. Thereafter, the samples of the opium plants were taken and sealed in packets. A complaint to the learned C.J.M., Biharsarif was presented with seizure lists, application to destroy the opium plants and also the permission to send the sample for chemical examination was sought. The learned C.J.M., Biharsarif at Nalanda ordered to register the complaint and allowed the said applications for destruction of seized opium plants and chemical examination of the said sample. Upon completion of the investigation, it was found that 1800 opium plants recovered on 25.03.1987 from *Khata* No. 222, Plot No. 375, Area 21 decimals, belonged to

Vijay Mahto-appellant herein. Subsequently, a prosecution report was submitted before the learned C.J.M. 17.07.1987 under Section 18 of the N.D.P.S. Act against the appellant/accused.

4. On the basis of material on record, including chemical examination report, the learned C.J.M., Nalanda took cognizance under Section 18 of the N.D.P.S. Act on 17.07.1987. Thereafter, the case was committed to the Court of Sessions on 24.04.1990 and charge was framed against the appellant/accused on 05.02.1999 under Section 18 of N.D.P.S. Act, wherein he pleaded not guilty and claimed to be tried.

5. During the course of trial, the prosecution has examined total five witnesses to bring home the charges against the appellant/accused.

P.Ws.	**Name**
P.W.1	Santosh Kumar (Seizure list witness)
P.W.2	Dr. Chhatrapati Shivaji (Seizure list witness)
P.W.3	Vijay Kumar (Formal witness)
P.W.4	Navin Kumar Mishra (Member of raiding party)
P.W.5	Dinesh Chandra Gupta (Complainant-cum-Investigating Officer)

Moreover, two court witnesses, namely, Md. Khabir, Circle Officer of Biharsarif Circle as C.W.1 and Vijay Kumar Srivastava, Revenue Clerk as C.W.2 were examined and altogether fifteen documents were exhibited as under:

Exhibit	Documents
Ext. 1	Signature of Santosh Kumar (P.W.1) on seizure list
Ext. 1/A	Signature of Dr. Chhatrapati Shivaji (P.W.2) on seizure list.
Ext. 2	Complaint dated 25.03.1987 to C.J.M., Biharsarif, Nalanda.
Ext. 3	Petition dated 25.03.1987 to destroy the seized opium plants.
Ext. 3/A	The Carbon Copy of order dated 25.03.1987 on the petition to destroy the seized opium plants.
Ext. 3/B	Carbon Copy of petition and forwarding order of Court on the same for chemical examination of sample of opium plants.
Ext. 4	Seizure list of 2000 opium plants
Ext. 4/A	Seizure list of 1800 opium plants
Ext. 4/B	Seizure list of 500 opium plants
Ext. 5	Prosecution Report to C.J.M., Nalanda
Ext. 6	Certificate of Chemical Examiner
Ext. 7	Seizure list
Ext. 8	Carbon Copy of Certificate issued by the Circle Officer
Ext. 9 and 9/A	Photocopy of Register II *Raiyati Khata* (old and new) of Munshi Mahto showing *Khata* no. 222 and other *Khata* in his name

6. On behalf of the accused/appellant to show that he has no concern with *Khata* no.222, plot no.375 and he is separated form his father and brother, and his name being mutated in the revenue record separately and rent receipts have been issued, one witness was examined in favour of his case,

namely, Indrajeet Prasad Sinha as D.W.1. Also, four documents were exhibited in support thereto. *Abhidhari Khata Pustika* issued by Revenue and Land Reforms department, Bihar Government prepared and certified by Circle Officer showing different *Khata* and polts nos. owned and possesed by accused/appellant is marked as Ext. A and three rent receipts of *khata* no. 207 & 2015 in the name of Vijay Kumar, son of Munshi Mahto for the year 1986-87, 1988-89, and 1989-90 are marked as Ext. B, Ext. B/1 and Ext. B/2 respectively.

7. The learned Trial Court on considering the entire oral and documentary evidence on record and submission of learned counsel for the parties given finding that P.W.4 and P.W.5 are employee in the excise department and posted at Patna at the time of occurrence. There was no enmity among the accused/appellant, P.W.4 and P.W.5, and it is not expected from them to implicate an innocent person on the instance of any other person. The opium plants were recovered from plot no. 375, *khata* no.222 and the then Circle Officer had no reason to issue a wrong certificate that the land of plot no.375 belonged to accused Vijay Mahto. From the evidence of C.W.1 and C.W.2 along with Ext.8, the prosecution has been able to substantiate the fact that plot no.375, *khata* no.222, Area 21 decimal from

which 1800 opium plants were recovered, belonged to Munshi Mahto who is father of accused. The plea of accused that he is separated from his brother and father was taken at belated stage after conclusion of prosecution evidence, therefore, this defence has no force. This case was not initiated on the report made to police, rather the Excise Department raided and recovered the illegal opium plants from the field and thereafter, on completion of enquiry they submitted prosecution report. Therefore, in the circumstances it is not correct to say that P.W.5 is informant as well as I.O. Moreover, name of the owners of two other plots were disclosed but prosecution against those two owners were not made by the complainant in the case is not acceptable ground for entitlement of accused for acquittal.

8. The learned Trial Court on the basis of aforesaid findings came to the conclusion that offence under Section 18 of N.D.P.S. Act has been substantiated against the accused Vijay Mahto who is guilty and accordingly, convicted the appellant for the offence under Section 18 of the N.D.P.S. Act and sentenced the appellant to undergo rigorous imprisonment for 10 years and also imposed fine of Rs. 1,00,000/- and in default of which the appellant has to further undergo rigorous imprisonment for 3 years.

9. Learned Counsel appearing on behalf of the appellant has submitted that the prosecution has failed to prove the charge against the appellant beyond reasonable doubt and, therefore, the judgment and order of conviction passed by the learned Trial Court is not sustainable either in fact or in law. It is submitted that P.Ws. 1 and 2, who were present as seizure witnesses, have specifically denied the seizure of opium in their presence and have deposed that their signatures were obtained on plain paper. No independent witness has supported the alleged recovery of the opium plant from the field of the appellant, and P.W.3 Vijay Kumar, being a formal witness, was not present at the time of recovery. It is further submitted that P.Ws. 4 and 5, namely Navin Kishore Mishra and Dinesh Chandra Gupta respectively, who were part of the raiding party, are interested witnesses, and hence their evidence ought to have been scrutinized with caution. The learned counsel has also argued that the land in question, recorded under *Khata* No. 222, Plot No. 375, area 21 decimals, stands in the name of his father Munshi Mahto, son of Ugri Mahto, as evident from the Register-II marked as Ext.9 and Ext.9/A. The said Munshi Mahto has three sons viz., Vijay Mahto (accused/appellant), Kishore Kumar, and Ajay Kumar, who have been living separately after

partition for a considerable period. The appellant has no concern with the land of *khata* no.222, plot no.375. Therefore, the prosecution's contention that the land from which the opium plant was allegedly recovered belongs to the appellant is incorrect and baseless and also against its own specific finding that the same belongs to the father appellant viz., Munshi Mahto. Learned counsel further submits that the Trial Court failed to consider properly the report of the Circle Officer (Ext.8) and the entries in Register-II (Ext.9/A), which are inconsistent with the prosecution case. It is also urged that crucial witnesses such as the Chemical Examiner, Executive Magistrate, and *Malkhana* in-charge were not examined by the prosecution, and the sample of opium allegedly seized and sent for chemical examination was neither produced before the Court nor exhibited during trial. Moreover, attention is also drawn to the cross-examination of P.W.5 Dinesh Chandra Gupta, wherein he admitted in paragraph 5 that the sealed sample of the opium plant was sent through department after a delay of 3 to 4 days from the date of seizure. It is evident that the samples were not sent by the Court but by the department which vitiates the prosecution case. It is further submitted that the complainant (P.W.5) has himself conducted the entire investigation and

submitted the prosecution report which is unfair investigation and is against the principle of administration of criminal justice. The reasons given by the learned Trial Court for discarding the evidence of defence are not correct in view of the specific defence that the appellant has no concerned with the land in question. On the strength of the above submissions, it is urged that the findings recorded by the learned Trial Court are perverse and unsustainable, and the impugned judgment and order are liable to be set aside.

10. Per contra, learned A.P.P. on behalf of the State submitted that the learned Trial Court has not committed any error while passing the impugned judgment and, therefore, this Court may not interfere with the same. The learned APP has referred to Section 35 of N.D.P.S. Act and submitted that there is presumption of culpable mental state against the appellant from whose land (*khata* no.222, plot no.375) 1800 opium plants were found. He further submitted that the seizure list witnesses turning hostile is not very significant as the other circumstances prove that the appellant was involved in the illegal cultivation of opium plants. Moreover, it is submitted that non-joining of independent witnesses is not fatal to the prosecution case. He further submitted that there is no bar against conducting

investigation by the informant/complainant himself and the accused/appellant has not been able to establish any bias or unfair investigation by P.W.5.

11. This Court has reconsidered the submissions canvassed by the learned counsels for the parties and after going through the evidence led by the parties before the learned Trial Court and also re-appreciated the same. It is well settle that this Court has power to re-appreciate and reconsider the evidence in appeal.

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

13. P.W.1- Santosh Kumar (seizure list witness) in his deposition stated that he does not know Dinesh Chandra Gupta, the informant of the present case and admitted that the signature appearing on the seizure list was indeed his signature (Ext.1). He turned hostile and denied to have any knowledge about the occurrence. In his cross-examination, he has further stated that his signature had been obtained on a plain paper and he had not given any statement either to the police, the complainant or the investigating officer.

14. P.W.2- Dr. Chhatrapati Shivaji (seizure list

witness) in his deposition has also denied to have any knowledge regarding the case and further deposed that his signature, marked as Ext.1/A, was taken on a plain paper. During his cross-examination, he has stated that no recovery of 1800 poppy plants was made in his presence, nor was any seizure-list prepared in his presence. He reiterated that his signature had been obtained on a plain paper.

15. P.W.3- Vijay Kumar, who is a formal witness, in his deposition has formally identified the different writings and signatures of I.O. Dinesh Chandra Gupta appearing in Ext.2, Ext.3, Ext.3/A, and Ext.3/B. He has further proved the prosecution report laid by Dinesh Chandra Gupta as well as the seizure list and Chemical Examination Report (Ext.6). In his cross-examination, he admitted that he has no personal knowledge of the case, nor any document was written before him and further stated that in the year 1987 he was posted at District Nawada and never got any opportunity to work with Dinesh Chandra Gupta.

16. P.W.4, Navin Kumar Mishra, who was the Special Superintendent of the Excise Intelligence Bureau, Patna, deposed that he was part of the raiding team along with P.W.5 Dinesh Chandra Gupta and 12 constables of the Excise

Department. He stated that after coordinating with the District Administration at Biharsarif, a team led by Executive Magistrate Shri S.S. Srivastava proceeded to the place of occurrence around 12:15 P.M. According to him, 1800 opium poppy plants were allegedly found standing on the land of Vijay Mahto and were seized in the presence of the Magistrate and police personnel. Further, opium poppy plants numbering 500 and 2000 respectively were also seized from two adjoining plots. However, in his cross-examination, P.W.4 admitted that he was unaware of the specific *khata* or plot numbers of the lands from which the seizure was made and could not describe the boundaries of the alleged land. He further stated that he was not acquainted with the seizure list witnesses and had not seen the accused on the spot during the raid. He also could not confirm who had informed them that the land belonged to Vijay Mahto and had no knowledge regarding the ownership of the other two plots. Significantly, he admitted that prior information regarding the raid was not given to either Sohsarai P.S. or Biharsarif P.S. and that there is no record of the application or intimation allegedly submitted to the District Magistrate. He further conceded having no personal knowledge of the ownership or cultivation of poppy on the land in question.

17. P.W. 5, Dinesh Chandra Gupta who is the complainant-cum-Investigating Officer of this case deposed that on 25.03.1987, he received information that the cultivation of opium poppy plant was going on at Asha Nagar. So on that very day a raid was organized, and along with force constituted of Special Superintendent Navin Kumar Mishra (P.W.4), arranged for Executive Magistrate and went to P.O. and raided it, where 1700 to 1800 opium plants were found in the field of Vijay Mahto (appellant). Besides, in other two plots also opium poppy plants were found which were seized and were sent to chemical examiner after informing the C.J.M., Biharsarif, Nalanda and the C.J.M. ordered for the same. The same day an application to destroy the opium poppy plants was also filed before C.J.M. and the order was passed. After receiving the chemical report, he completed investigation and submitted charge sheet. In his cross-examination, he admitted that he did not inform the concerned police station about the raid rather he informed his department. He further admitted that the help of the local police was taken but he can not say the name of the police station as the organizer can only say about it. He was neither known to Asha Nagar earlier nor was he acquainted with it and he was taken to the place of occurrence by local people. He stated that

he was not acquainted with any of the owners of the three fields from where poppy plants were recovered. Also, he cannot give the details of the *khata*, plots etc. of the same as he does not remember, he can say it after looking into the records. He further stated that the field where the poppy was being cultivated belonged to Vijay Yadav and the same was informed by Vijay Yadav himself during the course of investigation. The statement of Vijay Yadav was not recorded. He stated that he did not search the house of the accused. The poppy plants were sent for chemical examination with a delay of around 3-4 days from the date of recovery of poppy.

18. The learned Trial Court on perusal of record found that certified copy regarding land in question issued by Circle Officer as mentioned in prosecution report which was very important document for decision of this case has not been proved by the prosecution, the Court examined two witnesses. C.W.1 Mohd. Khabir, the then Circle Officer, deposed on 05.05.2006 as court witness and has proved the certificate dated 13.07.1987 issued by then Circle Officer Sri Rabindra Nath Tiwari as Ext.8 which was issued on the basis of revenue *karamchari* inspection and report. He further deposed that *khata* no.222 *khesra* no.375, area 21 decimal is recorded in the name

of Vijay Prasad. In his cross-examination, he has admitted that he has not seen the report on the basis whereof the Ext.8 was issued. He also admitted that *Kisan Bahi* contains the seal of Circle Officer which would be legal but without verifying the concerned issue record, it cannot be said that the same was issued complying all the formalities.

19. C.W.2 Vijay Kumar Srivastava, revenue clerk, in his deposition stated that in Register II, *khata* no.222 is recorded in the name of Munsi Mahto son of Ugri Mahto. He proved Ext.9 and Ext.9/A which are old Register II and new Register II. He proved *Kisan Bahi (Abhidhari Khata Pustika)* of Vijay Mahto marked as Ext.A. He has admitted in his cross-examination that on Ext.A contains printed signature of Circle Officer and there is small signature of revenue clerk, namely, Subodh Kumar Sinha on it.

20. The appellant examined Indrajeet Prasad Sinha as (D.W.1) who is resident of village Asha Nagar who deposed that father of accused (Munshi Mahto) is alive and the accused has two more brothers and all the three brothers have been seperated since 25 years whose living, cultivation and kitchen all are seperate.

21. First, I shall deal with the core issue "*whether*

the prosecution has successfully established beyond reasonable doubt that cultivation of opium plants was done by the accused and whether the accused had ownership and possession of the land from which the alleged opium plants were recovered?"

22. For holding a person liable for illegal cultivation of opium poppy, it must be proved that the cultivation was done by the accused or under his control. The mere presence of plants on land is not enough unless it is established that the accused was in possession or had dominion over the land.

23. Section 35 of the N.D.P.S. Act raises a presumption as to existence of culpable mental state from the possession of illicit articles and culpable mental state includes the knowledge of facts also. As per explanation (2) of Section 35 of the N.D.P.S. Act, a fact is said to be proved only when the court believes it to exist beyond reasonable doubt and not merely when its existence is established by a preponderance of probability.

24. In the case of ***Dharampal Singh v. State of Punjab*** reported in **(2010) 9 SCC 608** the Hon'ble Supreme Court referred to the expression "possession" in the context of Section 18 of the N.D.P.S. Act. In the said case, opium was

found in the dickey of the car when the appellant therein was driving himself and the contention was canvassed that the said act would not establish conscious possession. In support of the said submission, reliance was placed on ***Avtar Singh* v. *State of Punjab*** reported in **(2002) 7 SCC 419** and ***Sorabkhan Gandhkhan Pathan* v. *State of Gujarat*** reported in **(2004) 13 SCC 608**. The Hon'ble Supreme Court observed in para 12, 13, 15 and 16 as under:

> ***"12.*** *We do not find any substance in this submission of the learned counsel. The appellant Dharampal Singh was found driving the car whereas appellant Major Singh was travelling with him and from the dickey of the car 65 kg of opium was recovered. The vehicle driven by the appellant Dharampal Singh and occupied by the appellant Major Singh is not a public transport vehicle. It is trite that to bring the offence within the mischief of Section 18 of the Act possession has to be conscious possession. The initial burden of proof of possession lies on the prosecution and once it is discharged legal burden would shift on the accused. Standard of proof expected from the prosecution is to prove possession beyond all reasonable doubt but what is required to prove innocence by the accused would be preponderance of probability. Once the plea of the accused is found probable, discharge of initial burden by the prosecution will not nail him with offence. Offences under the Act being more serious in nature higher degree of proof is required to convict an accused.*
>
> ***13.*** *It needs no emphasis that the expression*

'possession' is not capable of precise and completely logical definition of universal application in the context of all the statutes. 'Possession' is a polymorphous word and cannot be uniformly applied, it assumes different colour in different context. In the context of Section 18 of the Act once possession is established, the accused who claims that it was not a conscious possession has to establish it because it is within his special knowledge.

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15. *From a plain reading of the aforesaid it is evident that it creates a legal fiction and presumes the person in possession of illicit articles to have committed the offence in case he fails to account for the possession satisfactorily. Possession is a mental state and Section 35 of the Act gives statutory recognition to culpable mental state. It includes knowledge of fact. The possession, therefore, has to be understood in the context thereof and when tested on this anvil, we find that the appellants have not been able to satisfactorily account for the possession of opium.*

16. *Once possession is established the court can presume that the accused had culpable mental state and have committed the offence…."*

25. The Hon'ble Supreme Court in **Rakesh Kumar Raghuvanshi v. the State of Madya Pradesh** reported in 2025 **SCC OnLine SC 122** held in para 14, 15, 16, 20 and 21 as under:

"14. *Thus, before the Court holds the accused guilty of the offence under the NDPS Act, possession is something that the*

prosecution needs to establish with cogent evidence. If the accused is found to be in possession of any contraband which is a narcotic drug, it is for the accused to account for such possession satisfactorily, if not, the presumption under Section 54 comes into place.

15. *Section 54 of the NDPS Act being relevant in the context on hand is extracted hereunder for convenient reference: "54. Presumption from possession of illicit articles. —In trials under this Act, it may be presumed, unless and until the contrary is proved, that the accused has committed an offence under this Act in respect of — (a) any narcotic drug or psychotropic substance or controlled substance; (b) any opium poppy, cannabis plant or coca plant growing on any land which he has cultivated; (c) any apparatus specially designed or any group of utensils specially adopted for the manufacture of any narcotic drug or psychotropic substance or controlled substance; or (d) any materials which have undergone any process towards the manufacture of a narcotic drug or psychotropic substance or controlled substance, or any residue left of the materials from which any narcotic drug or psychotropic substance or controlled substance has been manufactured, for the possession of which he fails to account satisfactorily."*

16. *Therefore, as envisaged by the provision itself, unless and until the contrary is proved in trials of cases involving offences coming within the purview of the NDPS Act, it may be presumed that the accused has committed an offence under the Act in respect of any articles prohibited to be possessed by him and for the possession of which, he failed to account satisfactorily. Therefore, it is the*

> *burden of the prosecution to establish that the contraband was seized from the conscious possession of the accused. Only when that aspect has been successfully proved by the prosecution, the onus will shift to the accused to account for the possession legally and satisfactorily.*
>
> ***xxxxxx***
>
> ***20.*** *Section 35 of the NDPS Act deals with the presumption of culpable mental state. It states that in any prosecution under the NDPS Act, the court shall presume that the accused had the requisite mental state, including intention, knowledge, and motive, unless the accused can prove otherwise. This shifts the burden of proof onto the accused to demonstrate that they lacked knowledge or intent regarding the possession of the drugs.*
>
> ***21.*** *Conscious possession refers to a scenario where an individual not only physically possesses a narcotic drug or psychotropic substance but is also aware of its presence and nature. In other words, it requires both physical control and mental awareness. This concept has evolved primarily through judicial interpretation since the term "conscious possession" is not explicitly defined in the NDPS Act. This Court through various of its decisions has repeatedly underscored that possession under the NDPS Act should not only be physical but also conscious. Conscious possession implies that the person knew that he had the illicit drug or psychotropic substance in his control and had the intent or knowledge of its illegal nature.***"**

26. Considering the statutory provision and the settled law declared by the Hon'ble Supreme Court discussed herein above, the following essentials emerge with respect to proving culpability under the N.D.P.S. Act:

> ***(i)*** *Existence of culpable mental state which includes intention, motive, knowledge of a fact, and belief in, or reason to believe, a fact.*
> ***(ii)*** *Conscious and exclusive possession of the contraband or material in question as prohibited under the N.D.P.S. Act.*
> ***(iii)*** *For prosecution, a fact is proved only when the Court believes it exists beyond reasonable doubt and not based on preponderance of probabilities.*

27. It is apparent that the initial burden to proof that the accused had conscious possession or ownership of a particular property/land where from there has been alleged recovery of substances prohibited under the N.D.P.S. Act lies on the prosecution.

28. In the present case, on perusal of the deposition of P.W.4, the Special Superintendent of Excise Intelligence Bureau, it appears that he admitted in his cross-examination that he was unaware of the whereabouts of that land they conducted raid on, also, he could not describe the boundaries of the alleged land from which recovery of the poppy plants was made. Furthermore, P.W.5, the complainant-cum- Investigation Officer of this case, has deposed in his cross-examination that he was taken to the alleged land by the local people as he was not acquainted with the lands where the poppy plants were recovered and the owners thereof. In the same breath he deposed

that the appellant/accused himself told him that the appellant/accused was the owner of the aforesaid land during the course of investigating but his statement were not recorded. C.W.1, the Circle Officer of Biharsarif, deposed that the land of *khata* no. 222 belongs to Vijay Mahto-appellant, son of Munshi Mahto. On the other hand, C.W.2, Vijay Kumar Srivastava who is revenue clerk, has brought Register II (new and old) in the learned Trial Court and deposed that the land of *khata* no. 222 is in the name of Munshi Mahto, son of Ugri Mahto. The statements of the Court Witnesses contradict each other, therefore, the prosecution has failed to establish, beyond reasonable doubt, the ownership and possession of the land in question by the accused.

29. The land from which the alleged recovery of poppy plants was made is recorded in the name of one Munshi Mahto, as evident from the entries in Register-II (Ext.9 and Ext.9/A). Moreover, no credible evidence has been brought on record to prove that the accused had any direct ownership or possession over the said land. Furthermore, P.W.4, the Special Superintendent of Excise, in his cross-examination, has candidly admitted that he had no personal knowledge of the ownership of the land and had not seen the accused at the place of occurrence.

30. So far the submission that P.W.5 was the complainant he should not have been made the investigation officer in concerned I may make reference to the decision of Hon'ble Supreme Court in **State v. V. Jayapaul** reported in **(2004) 5 SCC 223** wherein it was held as under:

> ***"6. …….****We find no principle or binding authority to hold that the moment the competent police officer, on the basis of information received, makes out an FIR incorporating his name as the informant, he forfeits his right to investigate. If at all, such investigation could only be assailed on the ground of bias or real likelihood of bias on the part of the investigating officer. The question of bias would depend on the facts and circumstances of each case and it is not proper to lay down a broad and unqualified proposition, in the manner in which it has been done by the High Court, that whenever a police officer proceeds to investigate after registering the FIR on his own, the investigation would necessarily be unfair or biased…….***"**

31. Sections 154, 156 and 157 of Cr.P.C. permit the Officer-In-Charge of Police Station to reduce the information/complaint or otherwise (may be from other sources like secret information, from hospital or telephonic message) of a cognizable offence in writing, rush to the spot and further investigate the matter. Investigation includes even search and seizure. Section 53 of the N.D.P.S. Act authorizes the Central

Government or the State Government, as the case may be, invest any officer of the department of drugs control, revenue or excise or any other department or any class of such officers with powers of an officer-in-charge of a police station for investigation of offence under the N.D.P.S. Act.

32. The Constitution Bench of Hon'ble Supreme Court in **Mukesh Singh v. State (Narcotic Branch of Delhi)** reported in **2020 SCC OnLine SC 700** observed that merely because the complainant conducted the investigation that would not be sufficient to cast doubt on the entire prosecution version. There is no specific bar against conducting investigation by the informant/complainant himself. Only in a case where the accused has been able to establish and prove the bias and or/unfair investigation by the informant-cum-investigator and the case of prosecution is merely based upon the deposition of the informant-cum-investigator, meaning thereby prosecution does not rely upon other witnesses, more particularly the independent witnesses in the case, where the complainant himself has conducted the investigation, such aspect of the matter can certainly be given due weightage while assessing the evidence on record

33. In the present case, on secret information, P.W.5

made the recovery of the opium plants and seized the same and investigated the same to find out who was involved in the cultivation of opium plants. The seizure list witnesses have not supported the prosecution case. No independent witnesses have supported the prosecution case.

34. The Hon'ble Supreme Court in the case of **Jitendra v. State of M.P.** reported in **(2004) 10 SCC 562** has held, with respect to seizure witness turning hostile, role of independent witnesses and procedural lapses in matters under N.D.P.S. Act, in para 5 and 6 as under:

> ***"5.*** *……. The High Court relied on Section 465 CrPC to hold that non-production of the material object was a mere procedural irregularity and did not cause prejudice to the accused.*
>
> ***6.*** *In our view, the view taken by the High Court is unsustainable. In the trial it was necessary for the prosecution to establish by cogent evidence that the alleged quantities of charas and ganja were seized from the possession of the accused. The best evidence would have been the seized materials which ought to have been produced during the trial and marked as material objects. There is no explanation for this failure to produce them. Mere oral evidence as to their features and production of panchnama does not discharge the heavy burden which lies on the prosecution, particularly where the offence is punishable with a stringent sentence as under the NDPS Act. In this case, we notice that panchas have turned hostile so the panchnama is nothing but a document*

> *written by the police officer concerned. The suggestion made by the defence in the cross-examination is worthy of notice. It was suggested to the prosecution witnesses that the landlady of the house in collusion with the police had lodged a false case only for evicting the accused from the house in which they were living. Finally, we notice that the investigating officer was also not examined. Against this background, to say that, despite the panch witnesses having turned hostile, the non-examination of the investigating officer and non-production of the seized drugs, the conviction under the NDPS Act can still be sustained, is far-fetched."*

35. On point of seizure witnesses turning hostile, the Hon'ble Supreme Court in **Ashok v. State of M.P.** reported in **(2011) 5 SCC 123**, has held in para 9 that:

> ***"9.*** *The seizure witnesses turning hostile may not be very significant, as it is not an uncommon phenomenon in criminal trials, particularly in cases relating to NDPS but there are some other circumstances which, when taken together, make it very unsafe to uphold the appellant's conviction."*

36. Having considered the entire materials available on record, including the oral and documentary evidence, as well as the submissions advanced on behalf of both parties, this Court finds serious infirmities and inconsistencies in the prosecution case which go to the root of the matter.

37. It is also pertinent to note that the seizure list witnesses (P.Ws. 1 and 2) have not supported the prosecution

version and have categorically denied witnessing any seizure of opium plants. Their signatures, as per their deposition, were obtained on plain papers without their knowledge of the contents. Also, no independent public witness was examined to corroborate the seizure, which casts serious doubt on the authenticity of the recovery proceedings. Additionally, crucial witnesses such as the Executive Magistrate, the Chemical Examiner, and the *Malkhana* in-charge have not been examined. Bhanu Prasad who was also a seizure list witness has not been examined. The non-production and non-exhibition of the seized samples in the Court is a significant lapse. It further appears from the cross-examination of P.W.5, the Investigating Officer in the present case, that the sample of the seized opium was sent to the Chemical Examiner after a delay of 3 to 4 days, with no explanation for the delay or evidence of proper custody, raising concerns about the integrity of the sample.

38. In a criminal trial, the burden lies heavily on the prosecution to prove its case beyond reasonable doubt. The evidence on record falls short of this standard. The prosecution case is riddled with material contradictions, procedural irregularities, and lack of substantive evidence linking the accused directly with the alleged offence.

39. In view of the above, this Court is of the considered opinion that the prosecution has failed to bring home the charge against the accused. The benefit of doubt must, therefore, go to the accused.

40. Accordingly, the judgment/order of conviction and sentence passed by the learned Trial Court is set aside. The accused, Vijay Mahto is hereby acquitted of the charge. He is on bail and his bail bonds, if any, shall stand discharged.

41. The appeal is allowed accordingly.

(Sunil Dutta Mishra, J)

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AFR/NAFR	AFR
CAV DATE	04.08.2025
Uploading Date	12.08.2025
Transmission Date	12.08.2025