

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.285 of 2025

Arising Out of PS. Case No.-379 Year-2022 Thana- BODHGAYA District- Gaya

Vijay Kumar, S/o Ram Charitra Chaudhary, Resident of village- Kendui, P.S-
Magadh Medical, District- Gaya, Bihar

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

with
CRIMINAL APPEAL (DB) No. 291 of 2025

Arising Out of PS. Case No.-379 Year-2022 Thana- BODHGAYA District- Gaya

Dharmendra Kumar, S/o Jatan Chaudhary, Resident of Kendui, P.S- Magadh
Medical, District- Gaya, Bihar

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

with
CRIMINAL APPEAL (DB) No. 657 of 2025

Arising Out of PS. Case No.-379 Year-2022 Thana- BODHGAYA District- Gaya

Ravindra Kumar, son of Pun Choudhary, resident of village - Chanhua Durjan
Khap, P.S- Mohanpur, District- Gaya

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

Appearance :

(In CRIMINAL APPEAL (DB) No. 285 of 2025)

For the Appellant/s : Mr.Ritwaj Raman, Advocate
Ms. Shashi Priya, Advocate
Ms. Pankhuri, Advocate

For the Respondent/s : Ms. Shashi Bala Verma, APP

(In CRIMINAL APPEAL (DB) No. 291 of 2025)

For the Appellant/s : Mr.Ritwaj Raman, Advocate
Ms. Shashi Priya, Advocate
Ms. Pankhuri, Advocate

For the Respondent/s : Ms. Shashi Bala Verma, APP

(In CRIMINAL APPEAL (DB) No. 657 of 2025)

For the Appellant/s : Mr. Ajay Kumar Thakur, Advocate
For the Respondent/s : Ms. Shashi Bala Verma, APP

CORAM: HONOURABLE MR. JUSTICE MOHIT KUMAR SHAH
and
HONOURABLE MR. JUSTICE ARUN KUMAR JHA



ORAL ORDER

(Per: HONOURABLE MR. JUSTICE ARUN KUMAR JHA)

16 09-04-2026 The records of the aforesaid three appeals have been put up under the heading 'For Orders' on the point of suspension of sentence and grant of bail to the appellants, who have been convicted under Section 21(c) of Narcotic Drugs and Psychotropic Substance Act, 1985 (hereinafter referred to as 'NDPS Act') by the learned court of Additional Sessions Judge-II-cum-Special Judge, NDPS Act, Gaya in NDPS Case No. 39/2022, arising out of Bodh Gaya P.S. Case No. 379/2022 vide judgment of conviction dated 07.01.2025 and have been sentenced to undergo rigorous imprisonment for 15 years with fine of Rs.1,50,000/- and in default of payment of the fine, they have been further directed to undergo simple imprisonment for a term of one month for each fraction of fine of Rs.10,000/- vide order of sentence dated 08.01.2025. Aggrieved by the judgment of conviction and order of sentence, the appellants have approached this Court by filing these appeals.

2. Brief facts of the case, as culled out from the records, are that on 26.06.2022, while the informant had been on patrolling duty with other police personnel, he received a message from the SHO of Bodh Gaya Police Station regarding three persons riding two motorcycles going to a hotel on NH 83



for making delivery of consignment of Heroin. The informant was told about appointment of one Kamal Nayan Kashyap, Circle Officer, Bodh Gaya, as a Magistrate and also about deployment of Panther constables to the spot. The informant reached the spot in front of the named hotel where the Magistrate and Panther constables also came and checking of vehicles was started. At around 6:45 P.M., the informant found three riders coming on two motorcycles, who were signaled to stop, but on seeing the police party they tried to take a U-turn and escape. Nonetheless, they were chased and the police party caught them. The appellants Dharmendra Kumar and Ravindra Kumar were found riding a Glamour Motorcycle bearing Registration No.BR-02AN-1073 keeping a bag in between them whereas the appellant Vijay Kumar had been riding a Pulsar Motorcycle bearing Registration No.BR-02BC-2885 and he was found having a white plastic bag hanging from the handle of the motorcycle. The appellants were served with notice under Section 50 of the NDPS Act. The appellants had asked for their search before the Magistrate and as no person from public was willing to become witness to the search, two police constables were made witness of the search of the appellants. From the motorcycle driven by the appellants Dharmendra Kumar and Ravindra Kumar, recovery of 1.006 Kg of heroin like substance



was made, whereas from the motorcycle driven by appellant Vijay Kumar, recovery of 1.012 Kg of heroin like substance was made. On testing the seized articles by DD Kit, *prima facie* evidence of contraband containing heroin was found. Apart from the contraband, mobile phones and motorcycles were also seized. On interrogation, the apprehended persons named co-accused Ram Chaudhary, who provided the appellants with contraband. The seizure memo was prepared and the appellants were brought to the police station with the seized articles.

3. On the basis of written information of the informant, Bodh Gaya P.S. Case No. 379 of 2022 was registered under Sections 8, 21(c), 25 and 29 of the NDPS Act. After investigation, police submitted charge sheet against the accused persons for offences under Sections 8, 21(c), 25 and 29 of the NDPS Act and the learned Sessions Judge, Gaya vide order dated 12.10.2022 took cognizance for the offences under Section 8, 21(c), 25 and 29 of the NDPS Act. On 04.07.2024, charges for the offences under Sections 21(c), 25 and 29 of NDPS Act were framed against the accused persons. It further transpires that after considering the evidence brought on record, the learned trial court convicted the accused persons, who are appellants before this Court and sentenced them as already detailed hereinbefore.



4. Mr. Ajay Kumar Thakur, learned counsel for the appellants while assailing the impugned judgment of conviction and order of sentence on a number of grounds has submitted that the judgment of conviction and order of sentence are completely erroneous as no offence under any of the provisions of the NDPS Act is made out against the appellants. At the outset, Mr. Thakur drew our attention to the FSL report dated 28.03.2023 (Exhibit 15) and has submitted that the result of the report of contraband seized from the appellants shows that the seized substance is “Phenothiazine along with Promethazine”. Mr. Thakur has further submitted that these substances namely “Phenothiazine” and “Promethazine” are neither narcotic drugs nor psychotropic substance under the NDPS Act. Mr. Thakur has next submitted that these substances are not covered under the Schedule appended with the NDPS Act wherein list of psychotropic substance have been provided. Mr. Thakur has also submitted that these two compounds have not been notified as narcotic drug and psychotropic substance by any government notification, rather they are compounds which are covered by Drugs and Cosmetics Act, 1940 and are having antihistamine and antipsychotic properties and are used in medicines.

5. Mr. Thakur has contended that the substances ‘Phenothiazine’ and ‘Promethazine’ are specified under



Schedule H and Schedule G, respectively of the Drugs Rules, 1945. The substance Phenothiazine has been mentioned as item no.397 in Schedule H. Similarly, the substance Promethazine is covered under Schedule G of Drugs Rules, 1945. Schedule G relates to Rule 97 of the Drugs Rules which pertains to the labelling of medicines, whereas Schedule H derives its authority from both Rule 97 and Rule 65 of the Drugs Rules. Similarly Promethazine is covered under Schedule G of Drugs Rules, 1945 which is said to be an antihistamine substance. Mr. Thakur has also submitted that if supply of any drugs under Schedule H is made, the particulars are to be entered in the register and Rule 65(3)(1)(f) of Drugs Rules, 1945 further prescribes mentioning the name of manufacturer of drugs and its batch number and the date of expiry of potency. In case of violation of these conditions, the same would be punishable under Section 27 of the Drugs and Cosmetics Act, 1940. Mr. Thakur has contended that for argument sake if it is supposed that any violation of the provisions of the Drugs and Cosmetics Act, 1940 and the Drugs Rules, 1945 are made, the same would be punishable under the Drugs and Cosmetics Act, 1940 and not under the NDPS Act. Mr. Thakur has further submitted that the power granted to Central Government under Section 3 of NDPS Act to add or omit from the list of psychotropic substances has



not been exercised to include Phenothiazine and Promethazine in the said list and, therefore, these two substances do not find mention in the gazette notification no. S.O. 1055(E) dated 19.10.2001 or any other gazette notification which has been published till date by the Central Government for adding the names of substances in the list of psychotropic substances. Thus, Mr. Thakur has submitted that Phenothiazine and Promethazine do not find mention under the list of narcotic drugs or psychotropic substances, hence, conviction can not be sustained under any of the provisions of the NDPS Act. Mr. Thakur has referred to the case of **Aditya Raj @ Suraj Kumar vs. State of Bihar (Cr. Misc. No. 72197 of 2022)** wherein seizure of Phenothiazine and Promethazine was made and a report was called for from the FSL as to whether the substance was psychotropic substance or not. The FSL, in its report dated 08.04.2023, clarified that seized substance is not a psychotropic substance and on this ground bail was granted to the petitioner of the said case vide order dated 27.04.2023. Similar issue was raised in **Roshan Lal vs. State of Bihar (Cr. Misc. No. 39411 of 2020)** wherein a form of Phenothiazine and Promethazine were seized. The Union of India, by way of an affidavit, admitted that as per the opinion of the FSL, Patna, recovered substances do not fall under the NDPS Act or the Schedule



thereto. Thus, Mr. Thakur has finally contended that in the background of the aforesaid facts and circumstances, the judgment of conviction and order of sentence *qua* the appellants are illegal and unsustainable, hence during pendency of the aforesaid appeals, the appellants be enlarged on bail after suspending their sentence.

6. Ms. Shashi Bala Verma, learned APP, appearing on behalf of the State has though conceded that the seized substances do not find mention in the list of psychotropic substances under the NDPS Act, but has contended that these substances are used as ‘cutting agent’ to enhance the potency. The learned APP has further submitted that the expression “cutting agent” is used in forensic and narcotics parlance to denote a substance which is mixed with an illicit narcotic drug for specific purposes, namely, (i) to increase the bulk/ weight of the contraband so as to maximise illegal profit; (ii) to reduce the purity/ strength of the narcotic substance and thereby make it suitable for street-level sale; (iii) to modify, mimic or enhance the Pharmacological effect (such as sedation or euphoria) perceived by the consumer; and (iv) to mask the identity of the narcotic drug and to evade detection during preliminary screening. The learned APP has further submitted that the seized substances are capable of enhancing sedative effects and are



used for dilution/adulteration and in the DD Kit testing, which is used for *prima facie* test, a positive result for Heroin was found. The learned APP has further submitted that NDPS Act is special statute enacted with a clear legislative intention to curb the growing menace of drug abuse and illicit trafficking by providing stringent control over narcotic drugs and psychotropic substances, by ensuring that offenders dealing in such contraband are dealt with strictly, particularly in cases involving commercial quantity. The object of the NDPS Act is not merely to regulate scheduled substances in isolation, but to effectively combat illicit drug trade and the public health hazards arising therefrom. If an unduly narrow interpretation is adopted in such matters, the very purpose and object of the NDPS Act would be defeated.

7. We have given our thoughtful consideration to the rival submission of the parties and perused the record.

8. Section 2 (xiv) of the NDPS Act defines “narcotic drug” to mean coca leaf, cannabis (hemp), opium poppy straw and includes all manufactured drugs. Similarly Section 2 (xxiii) defines “Psychotropic Substance” as any substance, natural or synthetic, or any natural material or any salt or preparation of such substance or material included in the list of psychotropic substances specified in the Schedule. Thus, these provisions



broadly define the contours under which a substance would be qualified to be classified as a narcotic drug or psychotropic substance.

9. Further power has been given to the Central Government to add or omit from the list of psychotropic substances. Section 3 of the NDPS Act reads as under :

*“3. **Power to add to or omit from the list of psychotropic substances.**—The Central Government may, if satisfied that it is necessary or expedient so to do on the basis of— (a) the information and evidence which has become available to it with respect to the nature and effects of, and the abuse or the scope for abuse of, any substance (natural or synthetic) or natural material or any salt or preparation of such substance or material; and (b) the modifications or provisions (if any) which have been made to, or in, any International Convention with respect to such substance, natural material or salt or preparation of such substance or material, by notification in the Official Gazette, add to, or, as the case may be, omit from, the list of psychotropic substances specified in the Schedule such substance or natural material or salt or preparation of such substance or material”.*

10. Under the mandate of Section 3 of the NDPS Act, the Central Government from time to time can add or omit substances from the list of psychotropic substances. The Schedule attached with the NDPS Act provides the list of



psychotropic substances under Clause (xxiii) of Section 2 as on date since certain substances have been substituted/inserted time to time. But this list does not contain either Phenothiazine or Promethazine. Similarly, Schedule I of NDPS Rules, 1985, which contains a list of narcotic drugs and psychotropic substances for which import into and export out of India has been provided for medical, scientific and training purposes, also does not contain the aforementioned two substances, i.e., Phenothiazine and Promethazine.

11. It is pertinent to take note of the fact here that the Central Government has issued a notification bearing no. S.O. 1055(E) dated 19.10.2001 wherein exercising the power under clauses (viia) and (xxiiia) of Section 2 of NDPS Act, a table has been provided wherein while mentioning the names of narcotic drug and psychotropic substance, their small and commercial quantity have been prescribed respectively. But even this list does not contain either Phenothiazine or Promethazine. However, the substances Phenothiazine and Promethazine find mention under Schedule H and G, respectively of the Drugs Rules, 1945. The substance “Phenothiazine, derivatives of and salts of its derivatives” has been mentioned as item no.397 in Schedule H. Similarly, the substance “Promethazine” has been mentioned under the heading ‘Antihistaminic substances the



following, their salts, their derivatives, salts of their derivatives' in Schedule G of Drugs Rules, 1945. These two Schedules are relatable to Rule 65 and 97 of the Drugs Rules, 1945. Rule 65 deals with condition of licenses and Rule 97 deals with the labelling of medicines.

12. Cumulative reading of these two provisions makes it clear as to how licenses are to be provided and what condition should be imposed while providing licenses and at the same time how labelling of these medicines are to be done. Violation of the conditions of the provision in this regard has been made punishable under Section 27 of the Drugs and Cosmetics Act, 1940, which prescribes penalty for manufacture, sale, etc. of drugs in contravention of Chapter IV.

13. Further it is also pertinent to take note of the law in this regard to the effect that if any cognizable offence has been committed under Chapter IV of Drugs and Cosmetics Act, 1940, the police is not empowered to register an FIR. It has been held by the Hon'ble Supreme Court in the case of ***Union of India vs. Ashok Kumar Sharma and Ors.*** reported in (2021) 12 SCC 674 that for the offence under Chapter IV of the Drugs and Cosmetics Act, 1940, the Drug Inspector alone is authorized to register an FIR and arrest the offender.

14. Further in the case of ***Bablu @ Rajesh Kumar vs.***



The State of Bihar & Ors. reported in *2021(3) PLJR 220*, the Hon'ble Special Bench of this Court has held that police has no power to institute FIR and investigate the offences under Chapter III, IV and IV-A of the Drugs and Cosmetics Act, 1940. The Hon'ble Special Bench further held that the prosecution under Section 32 of the Drugs and Cosmetics Act, 1940 shall be instituted only by way of filing of complaint and that police cannot register and investigate offences under Chapter IV. Thus, the prosecution for violation of any of the offences under the Drugs and Cosmetics Act, 1940 is not maintainable on a police complaint.

15. The discussions made hereinbefore clearly shows that the seized articles which have been found to be Phenothiazine and Promethazine do not come within the ambit of any narcotic drug and psychotropic substances for the purposes of NDPS Act. Therefore, the judgment of conviction and order of sentence *qua* the appellants for possession of these two substances, *prima facie*, appears to be against the provisions of the NDPS Act and might not be sustainable, hence we find that the appellants have been able to make out a strong case in their favour for suspension of sentence and grant of bail to them during the pendency of their respective appeals. Therefore, we are inclined to suspend the sentence and release the appellants



on bail during the pendency of their respective appeals.

16. Accordingly, we direct suspension of order of sentence dated 08.01.2025 *qua* the appellants above-named as also direct to release them on bail, during the pendency of their respective appeals, on furnishing bail bonds of Rs.10,000/-(Ten Thousand) each with two sureties of the like amount each to the satisfaction of learned Additional Sessions Judge-II-cum-the Special Judge (NDPS Act), Gaya, in connection with NDPS Case No. 39/2022, arising out of Bodh Gaya P.S. Case No. 379 of 2022.

17. It is made clear that the discussion hereinbefore has been made for the purpose of suspension of sentence of the appellants and their release on bail during the pendency of their respective appeals and their respective appeals would be taken up for consideration on the merit of their respective cases, without any prejudice being caused by the present order.

18. List the aforesaid appeals for hearing in their own turn.

(Mohit Kumar Shah, J)

(Arun Kumar Jha, J)

V.K.Pandey/-

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