



CRA-S-67-2024 (O&M)

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**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

CRA-S-67-2024 (O&M)

Reserved on: 03.05.2024

Pronounced on :- 31.07.2024

MANGA SINGH

.....Appellant

Versus

STATE OF PUNJAB

.....Respondent

CORAM: HON'BLE MR. JUSTICE ALOK JAIN

Present: Mr. Inder Preet Singh, Advocate
for the appellant.

Mr. R.S. Bhatta, DAG, Punjab.

ALOK JAIN, J.

1. The present appeal has been filed against the judgment/order of conviction dated 07.10.2023 passed by the learned Special Judge (NDPS Act), SAS Nagar, Mohali whereby, the appellant has been convicted under Section 18 of Narcotic Drugs and Psychotropic Substances Act, 1985, and sentenced to undergo imprisonment for a period of 5 years and has been imposed with a fine of Rs. 1,000/-.

2. The Factual Matrix of the case as stated by the prosecution is as follows:

“On 27.04.2016, ASI Mohan Singh along with police party were present at Tepla Road, T Point, Khaspur, Banur. One person with a bag was seen by the police party who was



coming on foot but on noticing the presence of the police, that person tried to turn back and evade the police officials. However, with the help of the police party he was apprehended and he disclosed his name as Manga Singh. ASI Mohan singh told Manga Singh that they want to conduct a search on him and Manga Singh was also informed about his legal rights that he can get his search conducted from a Gazetted officer or a Magistrate. However, Manga Singh reposed confidence upon the Police party and thereafter the police party searched the accused and his bag. When Manga Singh's bag was searched, it was found that the bag contained 2 KG opium and accordingly an FIR under section 18 of the NDPS Act was registered against Manga Singh."

3. Learned counsel for the appellant opened his arguments by submitting that the learned trial Court wrongly convicted the appellant as it did not properly appreciate the evidence presented before it by the prosecution. He points out the following lacunae in the prosecution evidence:

- (i) There is a delay of 7 days in depositing the samples of the alleged contraband with the FSL.
- (ii) There is a violation of Section 50 of the NDPS Act as the search of the accused was neither conducted by a Gazetted Officer nor a Magistrate.
- (iii) There is a contravention of Section 52-A of the NDPS Act as two samples weighing 10 grams each from the contraband were drawn, however not in the presence of a Magistrate.



(iv) The IO in this case was not competent to conduct investigation under the NDPS Act as he was drawing the salary of a Head constable and not that of an Assistant Sub-Inspector.

(v) That after the cross-examination of the Investigating officer it came out that *ruqa* EX. PW1/A and recovery memo Ex. PW1/B were prepared before the registration of the FIR itself, which means that the entire recovery was planted on the accused.

4. Learned counsel for the appellant to substantiate his arguments relies upon the following judgments: -

(i) ***Mohammad Khalid v/s State of Telangana 2024 (2) RCR (Criminal)102*** wherein, the Hon'ble Supreme Court in this case rejected the authenticity of the FSL report on the ground that there was non-compliance of Section 52-A NDPS Act by the Investigating Officer.

(ii) ***Buta Khan v/s State of Punjab in CRA-S-262-SB-2018*** decided on **26.08.2022** wherein, this Court held that the accused may ask for re-examination of the seized contraband and the Trial Court may ask the sample to be produced before it if the entire chain of sampling is under doubt.

5. Learned State counsel on the other hand submitted that the prosecution was successful in proving the guilt of the appellant that he was in conscious possession of 02 kg opium beyond reasonable doubt by producing all the relevant evidence, both oral and documentary. The



lacunae pointed out by the counsel for the appellant was agitated before the learned trial Court and the Court after meticulous analysis of the same came to a conclusion that the defence raised by the appellant that there are certain shortcomings in the evidence so presented was not fatal to the case of the prosecution. He further submits that the appellant is raising identical grounds in his defence in this appeal which stand already adjudicated and hence, prays for the dismissal of this appeal. As regards the delay in sending the sample to the FSL, he relies upon the judgement passed by this Court in the case of *Sanjiv Kumar @ Sanju vs. State of Punjab, 2007 (4) RCR (Criminal) 744* in which it was held that when there is no allegation of tampering with the samples of the seized contraband, then the case of the prosecution is impervious even if there is a delay of sending the samples to FSL.

6. Lastly, learned counsel for the petitioner submits that the conviction and the order of the quantum of sentence was passed on the same day itself without providing appropriate opportunity to the defence for arguing on the mitigating circumstances peculiar to the case of the appellant. He further submits that the appellant is a father of three young children and his own father is on his last legs and has already undergone imprisonment for more than four years, hence, the case of the appellant deserves to be considered from the lens of humanitarian grounds

7. Heard learned counsel for the parties and perused the lower Court record.

8. The issues for consideration before this Court are as follows:



“i. Whether the judgment dated 07.10.2023 convicting the appellant was passed after proper appreciation of evidence and is it legally sustainable?

ii. If yes, then whether the order of sentence dated 7.10.2023 requires any modification or not?”

9. Section 102 of the Evidence Act (Section 105 of the Bhartiya Sakshya Adhiniyam, 2023) states that the Burden of Proof lies on the person whose case would fail if no evidence was presented on either side, hence, it has to be seen that whether the lacunae in the evidence submitted by the appellant is sufficient enough to hollow out case of the prosecution.

10. The first shortcoming pointed out is with regard to the delay of 7 days in sending the sample to FSL. It is a well settled law that the delay itself is not material if it is not accompanied by verifiable allegations of tampering with the sample of the seized contraband. From the testimonies of PW-3 MHC Balkar Singh who presented the case property before the Court and PW-5 H.C Rajinder Singh who deposited the sample of the contraband with the FSL, nothing is coming forth as regards to any tampering with the sample of contraband, therefore, the delay of sending the sample to the FSL cannot stand alone be held fatal to case of the prosecution.

11. The second issue is with regard to compliance of Section 50 of NDPS Act, which reads as under:-

“50. Conditions under which search of persons shall be conducted:-

(1) When any officer duly authorised under section 42 is about to search any person under the provisions of section



41, section 42 or section 43, he shall, if such person so requires, take such person without unnecessary delay to the nearest Gazette Officer of any of the departments mentioned in section 42 or to the nearest Magistrate.

(2) If such requisition is made, the officer may detain the person until he can bring him before the Gazetted Officer or the Magistrate referred to in subsection (1).

(3) The Gazette Officer or the Magistrate before whom any such person is brought shall, if he sees no reasonable ground for search, forthwith discharge the person but otherwise shall direct that search be made.

(4) No female shall be searched by anyone excepting a female.

(5) When an officer duly authorised under section 42 has reason to believe that it is not possible to take the person to be searched to the nearest Gazetted Officer or Magistrate without the possibility of the person to be searched parting with possession of any narcotic drug or psychotropic substance, or controlled substance or article or document, he may, instead of taking such person to the nearest Gazette Officer or Magistrate, proceed to search the person as provided under section 100 of the Code of Criminal Procedure, 1973 (2 of 1974).

(6) After a search is conducted under sub-section (5), the officer shall record the reasons for such belief which necessitated such search and within seventy-two hours send a copy thereof to his immediate official superior.”

11.1 On the bare perusal of this Section, what comes forth is that the consent of the individual about to be searched is not required to be taken in a particular form. Mere Communication to that person would



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suffice i.e. oral consent can also be taken from the person about to be searched. It is not necessary that the search must be conducted in the presence of a Magistrate/Judicial Officer in all cases. An officer under Sections 50(5) and 50(6) of the NDPS Act may search an accused person in the absence of a Gazetted Officer/Magistrate provided that he sends a report to his immediate superior within 72 hours. To corroborate the version of the prosecution, the immediate superior of ASI Mohan Singh is PW-4 Inspector Bhagwant Singh who stated in his examination *that on 27.04.2016, I was posted as SHO, PS Banur. On that day, I received one ruqa through C. Kumar Sharma. On the basis of above ruqa, I recorded FIR Ex. PW2/B. I identify my signatures on the same. On return to the police station, IO ASI Mohan Singh produced before me case property, accused and witnesses. Case property consisting of 2 sample parcels of 10 gram Opium each and one bulk parcel containing 1 Kg 980 gram Opium seated with seal bearing impression MS alongwith sample seal and Form No. M-29. After verifying the facts from witnesses and accused. I affixed my seal bearing impression BS on the above said parcel and sample seal. I also attested form No. M-29. Thereafter, I got deposited the case property with MHC. Accused was also put into the lock up.*

On 02.05.2016, MHC Balkar Singh produced before me one sample parcel containing 10 gram Opium which was duly sealed with the seal of BS and MS. I put the above said sample into new parcel and sealed the same with my seal bearing impression BS. I also affixed the secret code 005 on the same and handed over the same to HC Rajinder Singh for depositing the same with PSL. My statements were recorded by the IO.



The averment of the appellant that there was non-compliance of Section 50 does not hold ground.

12. The third issue is with regard to the non-compliance of section 52-A NDPS, which is reproduced herein:-

“[52A. Disposal of seized narcotic drugs and psychotropic substances.-- ²[(1) The Central Government may, having regard to the hazardous nature, vulnerability to theft, substitution, constraint of proper storage space or any other relevant consideration, in respect of any narcotic drugs, psychotropic substances, controlled substances or conveyances, by notification in the Official Gazette, specify such narcotic drugs, psychotropic substances, controlled substances or conveyance or class of narcotic drugs, class of psychotropic substances, class of controlled substances or conveyances, which shall, as soon as may be after their seizure, be disposed of by such officer and in such manner as that Government may, from time to time, determine after following the procedure hereinafter specified.]

(2) Where any ³[narcotic drugs, psychotropic substances, controlled substances or conveyances] has been seized and forwarded to the officer-in-charge of the nearest police station or to the officer empowered under section 53, the officer referred to in sub-section (1) shall prepare an inventory of such ³[narcotic drugs, psychotropic substances, controlled substances or conveyances] containing such details relating to their description, quality, quantity, mode of packing, marks, numbers or such other identifying particulars of the ³[narcotic drugs, psychotropic substances, controlled substances] or conveyances or the packing in which they are packed, country of origin and other particulars as the officer referred to in sub-section (1) may



consider relevant to the identity of the ³[narcotic drugs, psychotropic substances, controlled substances or conveyances] in any proceedings under this Act and make an application, to any Magistrate for the purpose of-

(a) certifying the correctness of the inventory so prepared; or

(b) taking, in the presence of such magistrate, photographs of such drugs, substances or conveyances] and certifying such photographs as true; or

(c) allowing to draw representative samples of such drugs or substances, in the presence of such magistrate and certifying the correctness of any list of samples so drawn.

(3) Where an application is made under sub-section (2), the Magistrate shall, as soon as may be, allow the application.

(4) Notwithstanding anything contained in the Indian Evidence Act, 1872 (1 of 1972) or the Code of Criminal Procedure, 1973 (2 of 1974), every court trying an offence under this Act, shall treat the inventory, the photographs of⁵[narcotic drugs, psychotropic substances, controlled substances or conveyances] and any list of samples drawn under sub-section (2) and certified by the Magistrate, as primary evidence in respect of such offence.] ”

12.1 It is a matter of record that the case property along with the accused was produced before the Illaqa Magistrate on 28.04.2016, hence, it cannot be said that there was non-compliance of Section 52-A NDPS Act. As regards the judgment **Mohammad Khalid (supra)** relied upon by the learned counsel for the appellant, the same cannot be made applicable *mutatis mutandis* to this case as the Apex Court in **Mohammad Khalid** acquitted the accused on the ground that there was non-compliance of Section 52-A NDPS and coupled with the fact that there was insufficient



prosecution evidence so as to warrant the conviction of the accused. In the present case however, one independent witness namely PW-6 Gurinder Singh was also examined in addition to all the Official witnesses. Hence, the argument that there is non-compliance of Section 52-A is not plausible.

13. The issue with regard to the competency of the investigating officer has been dealt by the trial Court which records its findings in Para 13 of its judgment as under:-

“The accused tried to establish that ASI Mohan Singh was withdrawing the salary of Head constable at that time but in his cross-examination he stated that ASI Mohan Singh was promoted as ASI with effect from 20.02.2012. Meaning thereby that ASI Mohan Singh is fully competent to investigate the matter.”

13.1 Keeping in view the findings of the trial Court *qua* the competency of ASI Mohan Singh, to investigate this case, this Court finds no reason to take an adverse view of the same.

14. The last issue is *qua* the bearing of FIR number on the *ruqa* EX. PW1/A and recovery memo Ex. PW1/B. The Trial Court again had already recorded this finding in its judgment which stated that it was on the *ruqa* sent by the investigating officer that the FIR was registered. The police generally noted the FIR number on the *ruqa* and the recovery memo.

15. Based on the above findings, this Court concludes that there is no perversity in the judgment dated 07.10.2023 vide which the



appellant was convicted under Section 18 of the NDPS Act, accordingly the judgment dated 07.10.2023 is upheld.

16. Now coming to the second issue: Whether the order of sentence dated 7.10.2023 requires any modification or not?

17. The appellant was held guilty for conscious possession of 02 kg of opium which as per the schedule to the NDPS Act falls in the category of intermediate quantity and comes under the ambit of Section 18 of the NDPS Act. Section 18 of the NDPS Act reads as follows:-

“Section 18. Punishment for contravention in relation to opium poppy and opium.-

Whoever, in contravention of any provision of this Act or any rule or order made or condition of licence granted thereunder, cultivates the opium poppy or produces, manufactures, possesses, sells, purchases, transports, imports inter-State, exports inter-State or uses opium shall be punishable,

(a) where the contravention involves small quantity, with rigorous imprisonment for a term which may extend to one year, or with fine which may extend to ten thousand rupees, or with both;

(b) where the contravention involves commercial quantity, with rigorous imprisonment for a term which shall not be less than 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 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;



(c) *in any other case, with rigorous imprisonment which may extend to ten years and with fine which may extend to one lakh rupees.*

18. The Trial Court while deciding the quantum of sentence under Section 235 Cr.P.C., heard the prosecution as well as the defence and vide order dated 07.10.2023 sentenced the appellant to 5 years rigorous imprisonment and imposed a fine of Rs. 1,000/-.

19. The Trial Court convicted the appellant and passed the order of conviction on the same day itself i.e. 07.10.2023. Under Section 235(2) Cr.P.C. it is mandatory to hear the prosecution and the accused on the question of quantum of sentence and it is generally expected that the trial court after convicting an accused adjourns the case to a future date to let the parties present all the aggravating and mitigating circumstances in the case. The Trial Court though afforded an opportunity of hearing to the accused before imposing the sentence of imprisonment for 5 years, however the matter could have adjourned to a future date to let the parties prepare the matter for arguments on the quantum of sentence.

20. The Hon'ble Supreme Court in the case of ***State of M.P. v. Babbu Barkare alias Dalap Singh (2005 (5) SCC 413)*** laid down the guidelines which have to be adhered to while awarding a sentence under Section 235 Cr.P.C:

(i) It is duty of court to award proper sentence having regard to nature of offence.

(ii) Undue sympathy to impose inadequate sentence would do more harm to the justice system to undermine the public



confidence in the efficacy of law and society could not long endure under such serious threats.

(iii) Judges in essence affirm that punishment ought always to fit the crime; yet in practice sentences are determined largely by other considerations - Sometimes it is the correctional needs of the perpetrator that are offered to justify a sentence.

(iv) The principle of proportionality has to be adhered to while imposing any form of punishment to deliver substantial justice.

(v) For deciding just and appropriate sentence to be awarded for an offence, the aggravating and mitigating factors and circumstances in which a crime has been committed are to be delicately balanced on the basis of really relevant circumstances in a dispassionate manner by the Court.

21. In another case *Rajesh Kumar vs. State through Govt of NCT 2011(13) SCC 706*, the Hon'ble Apex Court commuted the death sentence into life imprisonment based on the following mitigating circumstances: -

(i) State had failed to show that the appellant is a continuing threat to the society or that he is beyond reform and rehabilitation.

(ii) The very fact that the accused can be rehabilitated in the society is itself a mitigating circumstance.

22. *In Ravji v. State of Rajasthan (1996(2) SCC 175)*, the Hon'ble Supreme Court held that it is the nature and gravity of the crime but not the criminal, which are germane for consideration of appropriate punishment in a criminal trial.



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23. Taking into account all the relevant aspects of this case in background of the principles governing award of appropriate sentence, this Court while taking a lenient view deems appropriate **to reduce the sentence of the appellant to already undergone** by modifying the order dated 07.10.2023 passed by the Trial Court as:

- i. The appellant has three dependent children ; and
- ii. He belongs to an economically weaker section and his father is bedridden; and
- iii. He has already undergone a substantive period of the punishment awarded to him, which is more than 4 years out of the total conviction period of 5 years.

24. However, the appellant shall pay the fine which is enhanced to Rs. 5,000/- from Rs. 1,000/- imposed on him vide order dated 07.10.2023 and is hereby directed to be released from custody.

25. The instant appeal stands disposed of in the above said terms.

26. All pending application(s), if any, shall also stand disposed of.

31.07.2024
parul

(ALOK JAIN)
JUDGE

Whether speaking/reasoned:- Yes/No
Whether Reportable:- Yes/No