

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

CRA No. D-1098-DB of 2009 (O&M)

Date of decision : 06.07.2015

Sunena Devi

.....Appellant

Versus

State of Haryana

....Respondent

**CORAM:- HON'BLE MR. JUSTICE HEMANT GUPTA
HON'BLE MRS. JUSTICE LISA GILL**

Present: Mr. Anshuman Dalal, Advocate
for the appellant.

Mr. Vivek Saini, AAG, Haryana

LISA GILL, J.

Present appeal has been preferred by Sunena Devi and Raj Kumar @ Raju Dube impugning the judgment and order dated 23.10.2009 and 26.10.2009 respectively passed by the learned Additional Sessions Judge-III, Bhiwani whereby they have been convicted for the offence punishable under Section 20/29 of the Narcotic Drugs and Psychotropic Substance Act (for short 'NDPS Act'), 1985 and sentenced to undergo rigorous imprisonment for a life besides to pay a fine of ₹1,00,000/- and in default thereof to undergo simple imprisonment for six months.

Prosecution was set in motion on registration of FIR No.

171 dated 19.10.2008. Said FIR was registered on the statement of

ASI, Amar Nath, PW9. It was revealed by him that he alongwith other police officials was present at platform No. 3 near over bridge railway station, Bhiwani on 18.10.2008 at about 5.45 p.m. for checking a train No. 4519 Kissan express. They were talking with one Gabbar Singh son of Munshi Ram when the train arrived at platform No. 3. A lady holding a white cloth bag with stripes in her right hand was noticed alighting from a second class compartment of a train. She started walking towards Tosham crossing gate (fatak). On suspicion, she was stopped. Notice under Section 50 of NDPS Act was served upon her expressing suspicion that she was carrying some contraband in the bag held by her and she had a right to get her bag searched by ASI Amar Nath or any other Gazetted Officer or a Magistrate. She revealed her name to be Sunena Devi – appellant No. 1 wife of Kishan Yadav resident of slum/huts Juhi Padwana PS Padwana District Padwana (UP). She opted for search before a Gazetted Officer. Consequently, intimation was conveyed to PW5, DSP Randhir Singh Rana, HPS GRPS, Hisar. Lady Constable Meena Devi 1207 was also called on the spot. Deputy Superintendent of Police (DSP) Randhir Singh arrived on the spot at about 8.15 p.m. After his introduction, appellant Sunena was directed to be searched by Meena Devi. Search of the bag was conducted by ASI Amar Nath. Charas wrapped in a yellow plastic wrapper was found present in the bag when searched. Two samples of 100 grams each were separated from the recovered contraband and the remaining contraband was put back in the same bag, which when

weighed was found to be 4kg 800 grams. The appellant could not produce any licence or permit for carrying the said contraband. Separate parcels were prepared and duly sealed by ASI Amar Nath as well as DSP Randhir Singh. All the parcels were taken in possession vide memo Ex.PC, which was duly signed by the DSP as well as the other officials. Ruka Ex. PA was sent to the Police Station through EHC Ram Avtar for registration of the FIR. Formal FIR was registered.

Case property was deposited with MHC Police Post, GRP Bhiwani on 19.10.2008. Case property, accused and witnesses were produced by ASI Amar Nath before SHO Satpal Singh on 19.10.2008. SHO Satpal also affixed his seal 'PR' on each of the parcels. Case property alongwith the accused were also presented before the JMIC, Bhiwani vide application Ex. PK. Inventory report was certified by JMIC, Bhiwani vide Ex. PK/1. Photographs of the accused – Sunena, Ex.P4 were taken in the presence of the above said officer alongwith the case property.

Disclosure statement, EX. PD was suffered by appellant Sunena on 21.10.2008 to the effect that she had obtained the contraband from one Raju – appellant No. 2, who was resident of Bihar. Contraband was to be delivered to one Pappu @ Surender son of Hari Singh whose house she could point out. She revealed that appellant No. 2 – Raju used to give her ₹1,000/- plus fare and expenses per trip for carrying contraband from Bihar to Mitathal in District Bhiwani.

Thereafter, appellant No. 2 - Raj Kumar @ Raju was apprehended on 26.10.2008 in FIR No. 172 dated 19.10.2008. Disclosure statement Ex. PH was suffered by Raj Kumar in the said case to the effect that he gave 16 kg charas to his neighbours Anari Devi, Rukmani and Sunena (present appellant) at their village Ram Nagar for supplying to the accused Papu @ Surender Singh. He revealed that he has kept concealed ½ kg charas with his relative at Mainpuri for giving to Pappu and he can get the same recovered. However, no such recovery was effected. Raj Kumar @ Raju was arrested in the presented case on 30.10.2008 by ASI Amar Nath.

On completion of investigation, report under Section 173 Cr.P.C. was prepared by SHO, GRP Hisar. Accused Pappu @ Surender was declared a proclaimed offender on 07.02.2009. Charge under Sections 20 and 29 of NDPS Act against both the accused was framed on 24.02.2009. Accused pleaded not guilty and claimed trial.

As many as nine witnesses were examined by the prosecution to substantiate its case. Accused while denying incriminating evidence put to them pleaded innocence and false implication in their statement under Section 313 Cr.P.C.

Learned trial Court on appreciation of the evidence concluded that the prosecution had proved its case beyond reasonable doubt against the accused thereby convicting and sentencing them as detailed above.

Learned counsel for the appellants has vehemently argued that the appellants have been falsely implicated in this case

and there is no evidence on record to justify the conviction of the accused. It is submitted that the alleged independent witness Gabbar Singh was not examined by the prosecution thereby casting a doubt on the alleged recovery. It is further argued that there is delay in sending the sample, therefore, the possibility of tampering with the same cannot be ruled out. Recovery was effected on 18.10.2008 and the sample was sent on 24.10.2008. There is no explanation for this unwarranted delay.

Link evidence in this case is stated to be missing entitling the appellants to acquittal. It is argued that there is no explanation for delay in producing the case property before the SHO as it was produced before him at 8.30 a.m. on 19.10.2008 while recovery was effected on 18.10.2008 at about 8.30 p.m. There is also no explanation as to why the seal used by ASI Amar Nath was not handed over to independent witness despite being present but to ASI Ram Mehar a colleague of the above said official. DSP, Randhir Singh retained his seal after use, therefore, possibility of tampering is not ruled out. It is urged that benefit of these material shortcomings should, thus, accrue to the accused.

In regard to appellant No. 2 - Raj Kumar @ Raju Dube, it is vehemently urged that there is not a shred of evidence on record to inculcate him in the commission of offence as alleged. Reliance on disclosure statement Ex. PD suffered by appellant No. 1 and Ex. PH suffered by appellant No. 2 in FIR No. 172 have been wrongly relied upon to convict the said appellant. He could not have been convicted

on the basis of said disclosure statement suffered by his co-accused or by him in pursuance of which no new fact was discovered. Therefore, it is prayed that the impugned judgment and order be set aside.

Learned counsel for the State while refuting the above said arguments submit that there is ample and sufficient evidence on record, which justifies the conviction and sentence imposed upon the appellants.

We have heard learned counsel for the parties and gone through the record.

It is proved on record that appellant No. 1 - Sunena Devi was apprehended by the police at railway station, Bhiwani on 18.10.2008. She was found carrying a cloth bag in her hand. She was stopped on suspicion of carrying some contraband and was given an option to be searched before a Gazetted officer or a Magistrate. She opted for the search to be conducted before a Gazetted Officer. Randhir Singh, DSP, GRPS Hisar, PW5 was called for. He reached the spot. In his presence charas weighing 5 kg was recovered from the cloth bag carried by appellant No. 1 - Sunena Devi. Two samples were separated, sealed and converted into separate parcels. Perusal of the record reveals that the entire process was carried out in accordance with mandatory provisions of the NDPS Act. There is no material irregularity or illegality therein as is sought to be projected.

Plea on behalf of Sunena Devi that there is no

compliance of mandatory provisions of Section 50 of the NDPS Act is not acceptable as the contraband was not recovered from personal search of the accused but from bag, which was held by her. Therefore, Section 50 of the NDPS Act would not be applicable in this case though it is noted that there is due compliance of Section 50 of NDPS Act as well. Recovery of the contraband i.e. 5 kg charas was duly effected from the possession of appellant – Sunena Devi in the presence of DSP Randhir Singh. Prosecution case is duly supported by all the prosecution witnesses.

Argument on behalf of the appellants that only one independent witness was associated namely Gabbar Singh and the said witness was also not examined by the prosecution thereby entitling the appellants to acquittal is devoid of any merit. Gabbar Singh was given up by the prosecution as having been won over by the accused. To say that the trial is vitiated on account of said fact or that more than one independent witness should have been associated is clearly untenable. It is a settled position of law that even in the absence of an independent witness, testimony of the official witnesses is not rendered untrustworthy and is not liable to be discarded on that count alone. It is only to be subjected to greater scrutiny and in case it is found genuine, conviction can be based thereon.

It has been held by the Hon'ble Supreme Court in **Dharampal Singh versus State of Punjab 2010 (4) R.C.R. (Criminal) 504** that mere absence of independent witness in itself

would not vitiate the proceedings until and unless it is shown that evidence on record is unreliable and untrustworthy. There is nothing on record to show that the official witnesses held any grudge or ill will or had an axe to grind against the appellant.

Furthermore, it is revealed from report of the Forensic Science Laboratory Ex. PJ that the seals on the parcels received were intact and tallied with the specimen seal as per Forwarding Authority's letter. PW3 MHC Sushil Kumar has tendered his affidavit, Ex. PE to show that the property was deposited with him and thereafter samples were sent to FSL for the first time on 20.10.2008. It being a holiday, they were deposited back with him on 20.10.2008 itself. They were sent again to FSL, Madhuban on 21.10.2008 but returned back with the objection that seals of coin on the samples were not acceptable.

PW7, Ms. Shashi Chauhan, Additional Civil Judge, Senior Division-cum-Judicial Magistrate First Class, Bhiwani has testified that an application Ex. PL submitted on 22.10.2008 by the police for putting ink impression on the sample was rejected by her. Application under Section 52-A of NDPS Act had been moved before her on 19.10.2008 for certification of inventory Ex. PK alongwith case property. She had certified the same (Ex. PK/1). Therefore, there is nothing on record, which could point to or raise suspicion regarding tampering of the case property or the samples in question. Similarly, proceedings are not vitiated in this case by delay of six days in sending the sample. Reason for the samples being deposited on

24.10.2008 with Forensic Science Laboratory, Madhuban has been duly and sufficiently explained. No prejudice has been caused to the appellant due to this delay. Keeping in view the facts, as stated above, accused cannot derive any benefit from the same. We, thus, find no merit in the arguments raised on behalf of the appellant - Sunena Devi.

However, there is merit in the argument raised on behalf of appellant No. 2 – Raj Kumar @ Raju. It is an admitted position that the only evidence sought to be used against appellant No. 2 is disclosure statement Ex. PD suffered by appellant No. 1 as well as his own disclosure statement Ex. PH in another FIR No. 172.

Learned counsel for the State could not point out to any other evidence on record against appellant No. 2. It is noticed that the disclosure statement of Sunena Devi cannot be used to incriminate appellant No. 2. Prosecution cannot lay the foundation of its case against appellant No. 2 on the disclosure statement of the co-accused Sunena. It is settled that said disclosure cannot be raised to the level of substantive evidence to form the basis of the conviction of appellant No.2. At best it could be relied on to lend an assurance or corroboration to other evidence available on record. Reference in this respect can gainfully be made to a judgment of the Hon'ble Supreme Court in **Sidharth versus State of Bihar 2005 (12) SCC 545.**

Admittedly there is no other evidence on record against appellant No. 2. Contention of the learned State counsel that Section

30 of the Evidence Act would come to the aid of the prosecution in this situation is untenable in the absence of any corroboration, hence does not merit acceptance. The reliance of the prosecution on disclosure statement of appellant No. 2 (Ex. PH) that too in another FIR is equally misplaced. It is an admitted position that no recovery was affected in pursuance to Ex. PH. Recovery of the contraband had already been effected from appellant No. 1 much prior to apprehension of appellant No. 2. Appellant No. 2 was allegedly apprehended by PW6 ASI Manphool Singh on 26.10.2008 in a separate FIR. Ex. PH is the disclosure statement made by appellant No. 2 in the said FIR. Appellant No. 2 is stated to have been arrested from his residence at Bihar. He was not identified by any person not even appellant No. 1. In this situation, it would not be safe to rely upon his disclosure statement Ex. PH. Section 27 of the Evidence Act which permits the admissibility of that portion of a statement of the accused which leads to a discovery of a fact can, thus, not be pressed into service by the prosecution. Evidence on record does not justify conviction of appellant No. 2 who is indeed entitled to the benefit of doubt.

Consequently, appeal is accepted on behalf of appellant No. 2 – Raj Kumar @ Raju Dube, who is acquitted of the charges against him extending benefit of doubt.

At this stage, learned counsel for appellant No. 1 submits that sentence of rigorous imprisonment for life imposed upon appellant No. 1 is extremely harsh and is not in consonance with

gravity of offence, keeping in view the antecedents of appellant No.

1. She is a lady, having children to look after, therefore, he prays for reduction in the sentence imposed upon her. We find that, in the peculiar facts and circumstances of the case, it would be in the interest of justice to reduce the sentence of rigorous imprisonment for life imposed upon appellant No. 1 to be reduced to that of rigorous imprisonment for 12 years. Fine imposed upon her shall remain the same i.e. ₹1,00,000/- and in default of payment of fine she would undergo simple imprisonment for a period for six months.

Consequently, the present appeal is allowed qua appellant No. 2, who is directed to be released forthwith if not required in any other case. Appeal qua appellant No. 1 is dismissed with the above said modification in the sentence imposed upon her.

(Hemant Gupta)
Judge

(Lisa Gill)
Judge

06.07.2015
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