

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

CRA-S-1096-SB of 2004

Date of Decision : July 6, 2015

Gurdial Singh

..... Appellant

Vs.

State of Punjab

..... Respondent

CORAM: HON'BLE MRS. JUSTICE RAJ RAHUL GARG

1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporters or not?
3. Whether the judgment should be reported in the Digest?

Present: Mr. K.P.S.Virk, Advocate
for the appellant.

Mr. Surjeet Singh Chaudhary, DAG, Punjab.

RAJ RAHUL GARG, J.

Gurdial Singh-appellant has assailed the judgment of conviction dated 19.05.2004 and order on sentence of even date recorded by Sh. Surinder Gupta, the then Judge, Special Court, Patiala, whereby, the appellant was convicted for keeping in his possession 11 kg. of poppy husk without any permit or licence. Thereby, committing an offence punishable under Section 15 of the Narcotic Drugs and Psychotropic Substances Act, 1985, (hereinafter to be called as 'NDPS Act'), the appellant was awarded sentence to undergo rigorous imprisonment for 6 months and to pay a fine of ₹1,000/-. In default of payment of fine, to further undergo rigorous imprisonment for 1 month.

Briefly prosecution story is like this; that on 30.03.2003, ASI Balwant Singh alongwith police officials was going towards Lohsimbli

from village Unthsar side. On reaching the bank of Ghaggar, the accused-appellant was seen coming from village Dirba side, carrying plastic bag on his right shoulder. On the basis of suspicion, he was apprehended. In the meantime, Manjit Singh PW reached there and was joined in the police party. ASI Balwant Singh, then told the accused-appellant that he was suspecting that he (accused-appellant) was possessing some narcotic substance and thus he wanted to take search of the aforesaid bag. ASI Balwant Singh, gave option to the accused as to if he wanted the search of his bag conducted by a Gazetted Officer or a Magistrate. However, accused-appellant, reposed confidence in ASI Balwant Singh. Consent memo. Ex. PA was prepared. Search of the bag was carried out by ASI Balwant Singh and found the same containing poppy husk. Two samples of 250 grams each were taken out from the recovered poppy husk. The remainder was weighed to 10 kg 500 grams. It was put into the same bag and made into a parcel. Two sample parcels were separately prepared. All the samples were sealed with the seal of 'BS'. Sample seal Ex.P1 was also prepared. Seal after use was handed over to Manjit Singh PW. The case property was taken into police possession vide memo. Ex. PB. Ruqa Ex. PD was sent to the police station for registration of the case, whereupon, formal FIR Ex.PD/1 was recorded. Site plan Ex. PE was prepared. Accused was arrested. On return to the police station, ASI Balwant Singh deposited the case property with MHC of the police station.

On the following day, ASI Balwant Singh, took the case property from MHC of the police station and produced the same before the SDJM by moving an application Ex. PG. Learned SDJM, Rajpura verified this fact, signed the case property sealed with the seal of 'BS' produced

before him and returned the same to Investigating Officer for depositing it with MHC. Copy of the order of learned SDJM, Rajpura is Ex.PG/1. Report chemical examiner Ex.PH was obtained, whereby on examination contents of the sample were found containing 'chura poppy heads'.

Statement of witnesses were recorded. After completion of investigations, challan was put in the Court against the accused-appellant.

Finding a prima-facie case against the accused-appellant for committing offence punishable under Section 15 of the N.D.P.S.Act, he was charge-sheeted accordingly, to which, he did not plead guilty but claimed trial.

After taking prosecution evidence, statement of accused under Section 313 Cr.P.C. was recorded, wherein he denied each prosecution allegation and pleaded his innocence. The defence taken by the accused-appellant is this; that he has been falsely implicated in this case and in fact, no recovery was effected from him.

After hearing both the sides and appraising the entire evidence and material coming on record, the learned trial Court recorded the judgment of conviction and held the accused-appellant guilty for keeping in his possession 11 kg. of poppy husk. Thereby, committing an offence punishable under Section 15 of the N.D.P.S.Act, and also sentenced him as mentioned in the earlier part of this judgment.

I have heard learned counsel for the appellant and learned State counsel, besides appraising the entire material coming on record.

Learned counsel for the appellant contended that the appellant has been falsely implicated in this case and actually nothing was recovered from his possession. In order to show that the prosecution case is false, it

was argued that there are several legal infirmities in the prosecution case as well.

First of all, it was argued that as per prosecution case Manjit Singh was joined as independent witness but he was not examined by the prosecution. He was simply given up as having been won over by the accused. Had he been examined, the genuineness of the prosecution case would have been disclosed. As such prosecution case cannot be said to be free from doubt.

Of course, joining of independent witness is warranted for the purposes of corroboration but now-a-days, Courts are not oblivious of the fact that the independent witness seldom support the prosecution case for various reasons. There are many types of undue pressures on them of the accused so that they may not depose against him. Even, the independent witness succumb to their pressure and do not want to earn enmity with the accused. As such, no alternative is left with the prosecution to give up such a witness as the witness has been won over by the accused.

By now, it is settled proposition of law that conviction can well be based on the testimonies of the official witnesses if the same are consistent and inspire confidence in the mind of the Court regarding guilt of the accused. Everything cannot be left in the hands of the independent witness, simply because prosecution does not examine independent witness or the independent witness has been won over by the accused or does not support the case of the prosecution, if examined; it is not safe to record acquittal straightway. In that eventuality, it becomes the duty of the Court to scrutinize the statements of prosecution witnesses minutely and if the statements of prosecution witnesses are consistent and inspire confidence in

the mind of the Court regarding guilt of accused; the conviction can well be based. As such, the aforesaid contention of learned counsel for the appellant, is not sustainable.

It was next argued by learned counsel for the appellant that in this case, compliance of Section 50 of the N.D.P.S. Act, has not been made. Though, option was given to the accused-appellant about his right to get the search of contraband conducted either by a Gazetted Officer or Magistrate. Yet neither a Gazetted Officer nor a Magistrate was called at the spot nor the search was taken in their presence.

On the other hand, learned State counsel contended that in this case compliance of Section 50 of N.D.P.S. Act was not necessary. It is not a case of personal search. Contraband was recovered from the plastic bag carried by the accused-appellant. In that case, simply because option was given to the accused-appellant regarding his right of search and if accused-appellant reposed confidence in ASI Balwant Singh himself and if search was conducted by him, it would not vitiate the prosecution case.

On this aspect, the contention of learned State counsel carries weight. Section 50 of the N.D.P.S. Act, is applicable only in cases of personal search and not otherwise. Therefore, if search was not conducted by a Gazetted Officer or a Magistrate or in their presence, it would not vitiate the trial. Undisputedly, the present case is not the case in which contraband was recovered from the person of the accused-appellant. As such this contention of learned counsel for the appellant is also of no avail.

It was further argued by learned counsel for the appellant that in this case Section 55 of the N.D.P.S. Act has not been complied with.

After, recovery of contraband, it was not produced before the SHO of the

police station for safe custody. Prosecution witness particularly ASI Balwant Singh (PW-1) did not state that he produced the case property, accused and witnesses before the SHO of the police station. As such, there is no compliance of Section 55 of the N.D.P.S. Act.

Again, this contention of learned counsel for the appellant is not sustainable as ASI Balwant Singh, himself was the SHO of the police station, Ghanaur. Since, he himself was the SHO of the police station, Ghanaur, therefore, there was no point for him to produce the case property, accused and witnesses before anybody else. Under these circumstance, it cannot be said that the provision of Section 55 of the N.D.P.S. Act is not complied with.

For facility of reference Section 55 of the N.D.P.S. Act, is as follows:-

“ An officer-in-charge of a police station shall take charge of and keep in safe custody, pending the orders of the Magistrate, all articles seized under this Act within the local area of that police station and which may be delivered to him, and shall allow any officer who may accompany such articles to the police station or who may be deputed for the purpose, to affix his seal to such articles, or to take samples of and from them and all samples so taken shall also be sealed with a seal of the officer-in-charge of the police station”

The bare reading of the Section shows that there were two options open for a Magistrate, one is to affix his seal to such articles or second to take samples of and from them and all samples so taken shall also be sealed with a seal of the officer-in-charge of the police station. Ex.PG/1 order shows that the case property sealed with the seal of 'BS,' was

produced before a Magistrate, the same was seen, signed and then returned to the Investigating Officer for depositing with the MHC. This order, thus, shows that the Magistrate had seen that the case property produced before him, was sealed and the seals were intact and, thereafter, he had put his signatures on the same and then returned to Investigating Officer for depositing with MHC. Under these circumstance, it cannot be said that Section 52-A of the N.D.P.S. Act, was not complied with.

It was further argued by learned counsel for the appellant that, in fact, the compliance of Section 52-A of the N.D.P.S. Act, is not there in this case. As per Section 52-A of the N.D.P.S. Act, two representative samples are to be obtained from the case property produced before the Magistrate and even photographs are to be obtained but the learned SDJM did not do that. He simply saw the case property, signed it and then returned to the Investigating Officer by passing an order Ex. PG/1.

It was next argued by learned counsel for the appellant that there is a delay in sending the sample to FSL for examination. Sample was taken on 30.03.2003 whereas the same was sent to FSL on 10.04.2003. It was also argued that provisions of Section 57 of the N.D.P.S. Act are also not complied with. As no report was sent to senior police officer as per Section 57 of the N.D.P.S. Act and further that no question was put to the accused while recording his statement under Section 313 Cr.P.C. that he was found in conscious possession of contraband. Thus, for these reasons as well, the accused is entitled to acquittal.

This argument of learned counsel for the appellant, is again not sustainable as Section 57 of the N.D.P.S. Act is directive in nature. In this

case, recovery was effected by the SHO himself. He deposited the case property with MHC of the police station with the seal intact and, thereafter, the very next day, he produced the duly sealed case property with the SDJM, Rajpura. At no stage, it was found that the seals were not intact till the time the samples were examined in the FSL. Simply because H.C. Roop Singh (PW-2) deposed during the course of his cross-examination that the seals of the case property are broken, when produced in the Court; that would not make any difference. There is no evidence on the file to show that the inscription

of the seal was not readable or that the seal was broken on the case property to such an extent that the possibility of tampering with the case property could not be ruled out. In fact, there is no material on record to show as to in what sense the witness has deposed that the seals of the case property are broken. In the absence of any evidence which could lead this Court to believe that the case property was tampered with, it cannot be said that the seals on the case property were broken in such a manner that the tampering with the case property, cannot be ruled out. The specific question was put to the accused when his statement under Section 313 Cr.P.C. was recorded that he was seen coming by ASI Balwant Singh, from opposite side, carrying a plastic bag on his right shoulder and on suspicion, he was apprehended and on search of the bag, poppy husk was found in the same and, thereafter, samples were drawn and the remainder was weighed to 10.500 kg. With these questions, it cannot be said that no question was put to the witness regarding his conscious possession of contraband.

Lastly, it was argued by learned counsel for the appellant that

the accused-appellant has faced protracted trial. The case is of the year 2003. For the last 12 years, he faced the agony of the trial. Now, he is more than 40 years of age. He has grown up children. He is leading his life peacefully. He has not committed any other offence of the like nature. Had he done so, the same would have been mentioned in his custody certificate placed on file recently. Now, no purpose would be served in sending him to jail. As such, his sentence may be reduced to the period, he has already undergone.

Though, sentence awarded to the appellant is on lower side yet the fact that the accused-appellant is middle aged person, must be having grown up children who require his help the most, at this juncture in their development. Above all, in case, accused-appellant is sent to prison, there is every likelihood of his coming in contact with the criminals and may spoil his life. Since, the accused did not commit any other offence of the like nature during the aforesaid period of 12 years, I consider that it is a fit case in which reduction of sentence to the one already undergone is warranted.

As per custody certificate, accused-appellant had already undergone 2 months and 20 days of sentence. As such, modifying the order on sentence dated 19.05.2004 recorded by the learned trial Court, accused is sentenced only to the period he has already undergone till date.

For the reasons recorded above, finding no merit in this appeal, the appeal stands disposed of. However, while maintaining the impugned judgment of conviction recorded by the learned trial Court only on the point of sentence, the order on sentence dated 19.05.2004, recorded by the learned trial Court is modified to the extent indicated above. Sentence of fine shall also remain the same. Fine if not deposited before the learned trial

Court, shall be deposited by the accused-appellant forthwith. Copy of the judgment be sent to the learned trial Court for compliance and the compliance report be sent within a period of two months, from the receipt of copy of this order, by the learned trial Court.

July 6, 2015

smriti

(RAJ RAHUL GARG)

JUDGE