

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CRA-S-1139-SB-2004

DATE OF DECISION: SEPTEMBER 2, 2015

SUKHWINDER SINGH

...APPELLANT

VERSUS

STATE OF PUNJAB

...RESPONDENT

CORAM: HON'BLE MR. JUSTICE M. JEYAPPAUL.

1. Whether the judgement should be reported in the digest? Yes

PRESENT: MR. HARSHIT SETHI, ADVOCATE FOR THE APPELLANT.
MR. PREMJIT SINGH HUNDAL, ADDL.A.G., PUNJAB.

M. JEYAPPAUL, J.

1. Accused Sukhwinder Singh has challenged the judgement passed by the trial Court vide which he was convicted under Section 21 of the Narcotics and Psychotropic Substances Act, 1985 (for short 'NDPS Act') for being in unauthorized possession of 115 intoxicant injections and sentenced to undergo R.I. for 5 years and to pay a fine of ₹5000/- and in default to undergo a further period of 6 months R.I.

2. On 3.12.1998, PW2 Malkiat Singh, SI/SHO of Police Station Bhikhiwind proceeded alongwith the police party in connection with patrol duty. He received a secret information that accused Sukhwinder Singh was indulging in the sale and purchase of intoxicant injections. Accused came from the side of village Chung. He was apprehended when he was about to escape. Suspecting that he was carrying some narcotic substance, he was apprised of his right to be searched either before him or before some Gazetted Officer or before the Magistrate. Accused preferred to have the

search in the presence of a Gazetted Officer. The presence of PW1 DSP Amarjit Singh Bajwa was secured by PW2. PW1 having disclosed his identity to the accused and having ascertained his preference, directed PW2 to make a search of the bags carried by the accused. On a search made by PW2, 115 injections without any label were recovered from the cardboard box. All the injections were put in a parcel and were sealed with seal bearing impression 'MS'. The parcel alongwith the sample was taken into possession vide memo Ex.PD. PW2 sent ruqa Ex.PE to the police station. A formal first information report Ex.PW1/A was registered by SI Gurbachan Singh. Personal search of accused also was also conducted which resulted in recovery of ₹130/-. Accused was arrested. Rough sketch was prepared. The contraband was sent for chemical examination. The chemical examiner report would disclose that the injections contained Morphine Sulfate.

3. The trial Court having thoroughly analyzed the evidence of PW1, PW2 and PW3 arrived at a conclusion that the prosecution established beyond reasonable doubt that the accused committed the offence punishable under Section 21 of the NDPS Act, 1985.

4. I thoroughly scanned the evidence of PW1, PW2 and PW3. It is found from their testimony that the accused was intercepted based on the secret information received by PW2 and on search of the bag carried by accused in the presence of PW1, in whom accused reposed faith, 115 injections containing Morphine Sulfate as per the report submitted by Chemical Examiner were recovered.

5. I do not find any material inconsistency in the evidence of PW1, PW2 and PW3. Even in the absence of evidence from any

independent witness, the prosecution established beyond reasonable doubt that the accused was found in possession of 115 injections containing Morphine Sulfate.

6. Learned counsel appearing for the appellant vehemently submitted that Section 50 of the NDPS Act was not complied with by PW2.

7. Firstly, I found that the search of the bag was undertaken by PW2, based on the furtive information he received in order to recover the contraband. It is a well settled position of law that carrying search of a bag would not amount to search of a person. Therefore, the provision under Section 50 of the NDPS Act is not attracted to the facts and circumstances of this case.

8. Even assuming that provision under Section 50 of the NDPS Act is attracted as there was some personal search also which resulted in recovery of ₹130/-, it is found that PW2 having apprised the accused of his right to be searched either before him or a Gazetted Officer or Magistrate, requisitioned the services of PW1 DSP Amarjit Singh Bajwa for the purpose of making a search in his presence. In fact, the search was conducted only in the presence of PW1 DSP Amarjit Singh Bajwa. Therefore, Section 50 of the NDPS Act has been substantially complied with.

9. The other minor lapses pointed out by learned counsel appearing for the appellant on the part of the investigating official do not materially affect the case of the prosecution. Therefore, I have no hesitation to confirm the conviction recorded by the trial Court under Section 21 of the NDPS Act, 1985.

10. Now let me take up the issue as regards the punishment

awarded to the accused under Section 21 of the NDPS Act. The occurrence had taken place on 3.12.1998 prior to the notification specifying small quantity and commercial quantity issued by the Central Government on 19.10.2001. Earlier thereto was no distinction between small quantity and commercial quantity. A notification was issued on 27.9.2001 as regards the application of the Narcotic Drugs and Psychotropic Substances (Amendment) Act, 2001 to the pending cases. As per the above Amendment Act, even though the offence was committed prior to the Amendment Act, 2001, the accused is entitled to a lesser punishment prescribed as per the Principal Act as amended. In other words, as per Section 21 of the Narcotic Drugs and Psychotropic Substances Act, 1985 as amended w.e.f. 2.10.2001, the accused who has committed an offence under Section 21-A of the Act for possession of small quantity of contraband, is liable to be punished to the maximum period of 6 months.

11. In the instant case, though 115 injections containing Morphine Sulfate had been recovered from the accused, the FSL report would disclose that only 3.45 gms. of pure quantity of Morphine Sulfate was found in 115 injections recovered from the accused.

12. The Hon'ble Supreme Court in **Harjit Singh vs. State of Punjab, (2011) 4 SCC 441** has held as follows:-

“14. Thus, it is evident that under the aforesaid Notification, the whole quantity of material recovered in the form of mixture is to be considered for the purpose of imposition of punishment. However, the submission is not acceptable as it is a settled legal proposition that a penal provision providing for

enhancing the sentence does not operate retrospectively. This amendment, in fact, provides for a procedure which may enhance the sentence. Thus, its application would be violative of restrictions imposed by Article 20 of the Constitution of India. We are of the view that the said Notification dated 18.11.2009 cannot be applied retrospectively and therefore, has no application so far as the instant case is concerned.”

13. Though a notification was issued on 18.11.2009 by the Central Government to the effect that the entire mixture or any solution in dosage form including salts such as easters, ethers and isomers shall be taken into account while quantifying the narcotic drugs and psychotropic substances and not just the pure drug content, the Hon'ble Supreme Court in the above decision has declared that the above notification would apply prospectively, i.e. From 18.11.2009, and not retrospectively.

14. The recovery was effected from the accused on 3.12.1998, long before the above notification was issued on 18.11.2009. Therefore, the pure drug content which was quantified at 3.45 gms. by the FSL report alone should be taken into consideration to conclude whether the accused was found in possession of a smaller quantity or commercial quantity. It is found that the accused was found in possession of 3.45 gms of pure quantity of Morphine Sulphate which is far below the smaller quantity as notified by the Central Government.

15. In view of the above, confirming the conviction recorded by the trial Court under Section 21 of the NDPS Act, the sentence of 5 years R.I. imposed on the accused-appellant is reduced to the period of 3 months and

14 days, already undergone by him as per the custody certificate produced before the Court. The fine amount and the default sentence imposed by the trial Court is sustained. The accused-appellant shall pay the fine amount before the trial Court, if not paid, within 15 days from the date of this judgement, failing which he shall undergo the default sentence.

September 2, 2015
Gulati

(M. JEYAPPAUL)
JUDGE