

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

Crl. Appeal-S No.1293 -SB of 2004 (O&M)

Date of Decision: August 05, 2015.

Raj Kumar

.....**APPELLANT(s).**

VERSUS

State of Punjab

.....**RESPONDENT(s).**

CORAM:- HON'BLE MR. JUSTICE SURINDER GUPTA

Present: Mr. Mandeep Kaushik, Advocate
for the appellant (s).

Mr. Yogesh Gupta, Asstt. A.G., Punjab.

SURINDER GUPTA, J.

The appellant faced trial for the offence punishable under Section 21 of Narcotic Drugs and Psychotropic Substances Act, 1985 (for short-NDPS Act) and was convicted and sentenced to undergo rigorous imprisonment for a period of one year and to pay a fine of ₹5,000/-, in default of payment of fine to undergo further rigorous imprisonment for two months, vide judgment of conviction and order of sentence dated 28.05.2004 passed by Special Judge, Amritsar.

The case of the prosecution, in brief, is that on the basis of secret information on 05.05.2002 received by ASI Balwinder Singh, he sent a ruqa (Ex.PA) to the police station on the basis of which formal FIR (Ex.PA/1) was recorded. One Balbir Singh was joined in the police party as a witness. The appellant was apprehended near telephone exchange and after giving him option to get his search effected before the Magistrate or a Gazetted Officer,

DSP City Jagdish Singh was called as per the option exercised by the appellant. On search being conducted, the appellant was found in possession of 30 grams of smack wrapped in a glazed paper, out of which 5 gram of smack was separated as sample. Separate parcels of sample as well as remaining smack were prepared and sealed with the seal of Investigating Officer Balwinder Singh bearing impression 'BS', by Inspector Prabhdev Singh bearing impression 'PS' and DSP Jagdish Singh by his impression 'JS'. The case property was handed over to SHO Prabhdev Singh, who kept it in double lock and produced the same before the Area Magistrate on the next day. The sample was sent to the Forensic Science Laboratory and vide report Ex.PJ, it was found to be of smack. After completion of investigation, challan against the appellant was presented in Court.

Finding a prima facie case for the offence punishable under Section 21 NDPS Act, appellant was charge-sheeted to which he pleaded not guilty and claimed trial.

In support of its case, prosecution examined ASI Balwinder Singh as PW-1, Inspector Prabhdev Singh as PW-2, DSP Jagdish Singh as PW-3 and Constable Kasam Masih as PW-3(in fact PW-4). Constable Sukhwant Singh, Constable Naresh Kumar and MHC Ravi Kumar were given up as unnecessary, whereas PW Balbir Singh was given up as having been won over by the appellant.

When confronted with the incriminating evidence against the appellant at the time of recording his statement under Section 313 Code of Criminal Procedure, he denied the same and pleaded his false implication. He stated in his defence that on the relevant day, he was going towards Sultanwind Road and had an exchange of hot words with the police, who

wanted to impound his scooter despite all valid documents available with the appellant. He was falsely implicated in this case.

The appellant examined MHC Subegh Singh in his defence as DW-1, who produced on record copy of register No.19.

The trial Court held the prosecution version about the recovery of 30 grams of narcotic from the possession of the appellant as duly proved and convicted and sentenced him as afore-mentioned.

I have heard learned counsel for the appellant, learned State counsel and have perused the trial Court's record with their assistance.

Learned counsel for the appellant argues that there is 10 days delay in sending the sample to the Forensic Science Laboratory, which is fatal to the prosecution case. There is no explanation as to why only one sample was drawn from the smack recovered from the appellant. The case of the prosecution is based on secret information. On receipt of secret information, intimation as required under Section 42 NDPS Act was not sent to the higher police officials. The appellant has alleged his false implication in this case stating that there was exchange of hot words with the police, when his scooter was being impounded despite having all the valid documents. Though the appellant had not been able to produce any evidence in support of his defence, still his version finds support from the fact that he has been implicated in case of a small recovery which are usually planted by the police. He further argued that the entire version of the prosecution is based on testimony of official witnesses. The only independent witness Balbir Singh was not examined, as such, it is not safe to rely on testimony of official witnesses, who are interested in success of their case. He further submits that in case, the conviction of appellant is upheld, a lenient view be

taken regarding quantum of sentence, as the appellant has faced agony of trial for the last 13 years.

Learned State counsel argues that ASI Balwinder Singh, on receipt of secret information sent a ruqa (Ex.PA) to the police station, whereupon formal FIR (Ex.PA/1) was registered. It was mentioned in the FIR that the same was being sent to the higher officers, hence, it is a sufficient compliance of the provisions of Section 42 NDPS Act. Even otherwise, DSP Jagdish Chand was called to the spot, who was a higher police officer. The submission of learned counsel for the appellant that the investigating officer had taken one sample of narcotics has no substance as it is not mandatory to take two samples. The delay of 10 days in sending the sample to the Forensic Science Laboratory is immaterial as in the report of Forensic Science Laboratory, it is specifically mentioned that the seals on the parcels were intact when checked while analyzing the sample. It is proved on file that the seals on sample were not tampered till it reached the Forensic Science Laboratory. The independent witness was given up by the prosecution as having been won over by the appellant. The independent witnesses usually avoid to give evidence against a person involved in such like offences. The testimony of official witnesses is credible and cannot be discarded, as they had no animus or motive to depose against appellant.

The points raised by learned counsel for the appellant for consideration in this appeal are enumerated as follows:-

- (i) Delay of 10 days in sending the sample to Forensic Science Laboratory.
- (ii) One sample, instead of two samples from the contraband, was drawn.
- (iii) Non-compliance of provisions of Section 42 NDPS Act.

- (iv) Lack of independent corroboration to the testimony of the official witnesses.
- (i) Delay of 10 days in sending the sample to Forensic Science Laboratory.

The sample in this case was sent to the Forensic Science Laboratory after 10 days of the recovery. In the report of FSL, it has been mentioned that the seals were intact when the sample was received in the office of FSL. The delay of 10 days in sending the sample is immaterial and not fatal to the case of prosecution. Hon'ble Supreme Court in the case of **Jarnail Singh versus State of Punjab, 2011(3) SCC 521** has observed that the delay of 12 days in sending the sample is not fatal to the case of the prosecution.

In this case, Constable Kasim Masih who had taken the sample to the office of Forensic Science Laboratory while appearing as PW-3(in fact PW-4) has stated by way of his affidavit Exhibit-PA that he kept the sample intact during the period it remained in his custody.

The Hon'ble Supreme Court in the case of **State of Punjab Vs. Lakhwinder Singh and another (2010) 4 SCC 402**, did not find the delay of seven days in sending the samples to Forensic Science Laboratory as relevant when it is proved that the seals were intact when the samples reached the office of Forensic Science Laboratory.

In view of the above circumstances the delay in sending the sample to the Forensic Science Laboratory pales into insignificance and the argument of learned counsel for the appellant in this respect is rejected.

- (ii) One sample, instead of two samples from the contraband, was drawn.

Though it is advisable to draw one sample in duplicate as per instructions contained in Standing Order No.1/89 dated 13th June, 1989 issued by Government of India, Ministry of Finance (Department of Revenue) but its compliance is not mandatory. NDPS Act does not provide any liberty to the police or the accused to seek sending of 2nd sample for re-examination by the Forensic Science Laboratory. Moreover, it is proved that sanctity of the sample was duly maintained. The appellant was not put to any prejudice due to drawing of one sample, as such, this submission of learned counsel for the appellant has no substance.

(iii) Non-compliance of provisions of Section 42 NDPS Act.

A perusal of the FIR Ex.PA/1 shows that on registration of the FIR, copies of the same were sent to the higher officers through Constable Balwinder Singh. DSP Jagdish Singh had also reached the spot on receipt of information. The case property was also produced before the SHO of the police station, who had put his seal on the same. In these circumstances, this argument of learned counsel for the appellant is of no avail or can be given any weight.

(iv) Lack of independent corroboration to the testimony of the official witnesses.

The only independent witness namely Balbir Singh joined by the police party was not examined and given up as having been won over by the accused (appellant).

Now the question is as to whether any adverse inference can be drawn against the prosecution due to non-examination of independent witness.

The Hon'ble Division Bench of this Court in the case of **Ramesh Kumar Versus State of Punjab, 2013(4) RCR (Criminal) 320**, has observed that the testimony of official witnesses cannot be discarded until it is proved that they have any animus or hostility against the accused for his false implication. While discussing the question of non-joining of the independent witnesses, it was observed that they are averse to join the police and depose in favour of prosecution as they are afraid of the fact that joining the police and deposing in favour of the prosecution may expose them to serious consequences.

In case of **Sumit Tomar versus State of Punjab, 2013(1) SCC 395**, Hon'ble Supreme Court on the point of non-examination of independent witness joined by the police, has observed as follows:

“In view of the above discussion, we hold that though it is desirable to examine independent witness, however, in the absence of any such witness, if the statements of police officers are reliable and when there is no animosity established against them by the accused, conviction based on their statement cannot be faulted with. On the other hand, the procedure adopted by the prosecution is acceptable and permissible, particularly, in respect of the offences under the Narcotic Drugs and Psychotropic Substances Act.”

In view of the above observations and keeping in view the fact that testimonies of recovery witnesses and supervisory officer are reliable, unshattered and without any animus, this argument of learned counsel for the appellant is repelled.

In view of the above discussion, I find no legal or factual infirmity in the judgment of conviction passed by the trial Court, calling for

any interference. The conviction of the appellant for the offence punishable under Section 21 NDPS Act is maintained.

Keeping in view the fact that the case is pending for the last 13 years, the sentence of imprisonment awarded in this case is reduced from rigorous imprisonment for one year to rigorous imprisonment for nine months. However, the sentence of fine is maintained.

The bail bond and surety bond furnished by the appellant in terms of order dated 09.08.2004 vide which his further sentence was suspended, are cancelled. The appellant be taken into custody and sent to jail for undergoing the remaining part of his sentence.

August 05, 2015.
Sachin M.

(SURINDER GUPTA)
JUDGE