

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH
Crl. Appeal No.D- 779-DB of 2010
Date of Decision : 13.02.2015**

Nek Chand @ Neka and another

..... Appellants

Versus

State of Haryana

..... Respondent

**CORAM: HON'BLE MR. JUSTICE M.JEYAPPAUL
HON'BLE MR. JUSTICE DARSHAN SINGH**

Present : Mr.S.S.Rana, Advocate
learned Counsel for the appellants

Ms. Tanisha Peshawaria, Advocate
learned DAG, Haryana

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

DARSHAN SINGH, J.

1. The present appeal has been preferred against the judgment of conviction dated 26.07.2010, vide which the appellant no.1 Nek Chand @ Neka was held guilty and convicted for the offence punishable under Section 15 of the Narcotic Drugs & Psychotropic Substances Act, 1985 (hereinafter to be referred as 'Act') and appellant no. 2 Piare Lal was held guilty and convicted for the offence punishable under Section 29 read with Section 15 of the Act and the order on the quantum of sentence dated 29.07.2010, whereby appellants have been ordered to undergo rigorous

imprisonment for a period of 15 years and also to pay a fine of Rs.1,50,000/- each, in default of payment of fine they were orders to undergo simple imprisonment for a period of two years.

2. As per the prosecution case, on 30.01.2009, PW-10 Inspector Om Parkash, SHO, Police Station, Samalkha along with PW-7 ASI Kanwar Pal and other police officials was present at bus stop village Basera. He received a secret information that appellant Nek Chand @ Neka had brought the poppy husk in heavy quantity from Gwalior in Tempo no. HR-20-B-2685 and he could go to his village Rakshera via village Dehra. If a naka is held between village Dehra and Basera on the pacca road, he can be apprehended along with his tempo and heavy quantity of the poppy husk. Inspector Om Parkash reduced into writing the said information and sent the same to the police station. On the basis of which Daily Diary Report no. 32 dated 30.01.2009 (for short DDR) copy Ex.P-1 was recorded. Inspector Om Parkash along with other police employees laid the naka at the disclosed place. After half an hour a Tata 407 bearing registration no. HR-20-B-2685 came from the side of village Dehra. The driver was signaled to stop by the Investigating Officer. On the vehicle being stopped, the driver disclosed his name as Nek Chand @ Neka. The notice under Section

50 of the Act was served upon appellant Nek Chand @ Neka. He opted his search in the presence of some Magistrate. Inspector Om Parkash contacted PW-8 Sh. Raj Kumar Bhorla, Tehsildar-cum-Executive Magistrate, Samalkha and requested him to reach at the spot. But, he directed the Investigating Officer to produce the accused before him at his office. The accused along with his vehicle was taken to Tehsil Office, Samalkha and was produced before the Tehsildar. He directed Inspector Om Parkash to carry out the search. The search of the vehicle was carried out under the supervision of PW-8 Sh. Raj Kumar, Bhorla, Tehsildar, Samalkha. Twenty bags containing poppy husk were recovered from the rear portion of the said tempo. On weighment, every bag was found to be containing 19 kg each and total came to be 380 kg of poppy husk. Two samples of 100 gms each were taken out from every bag. The sealed parcels of the samples and remainder poppy husk were prepared. The entire case property including the Tata 407 were taken into possession. The case property was sealed by the Investigating Officer as well as Sh. Raj Kumar Bhorla, Tehsildar-cum-Executive Magistrate, Samalkha. The Investigating Officer sent the ruqa Ex.P-3 to the Police Station, on the basis of which the formal FIR Ex.P-4 was registered.

3. On the next day, accused along with case property was produced before the learned Illaqa Magistrate, who certified the inventory. Co-accused Asha Ram and Bijender Singh were also apprehended in pursuance of the disclosure statement made by the appellant Nek Chand @ Neka and they also suffered the separate disclosure statements with respect to their involvement. On 27.03.2009, appellant Piare Lal was also arrested in this case, who is the registered owner of the Tata 407 bearing no. HR-20-B-2685. He also suffered the disclosure statement Ex.P-47. The registration certificate of the Tata 407 was taken into possession. The sample parcels were sent to the Forensic Science Laboratory (for short FSL) for examination. On completion of the formalities of the investigation, the report under Section 173 Code of Criminal Procedure (for short Cr.P.C), was presented in the Court.

4. Appellant Nek Chand @ Neka was charge sheeted for the offence punishable under Section 15 of the Act, appellant Piare Lal, co-accused Bijender Singh and Asha Ram (since acquitted) were charge sheeted for the offence punishable under Section 29 of the Act, to which the accused pleaded not guilty and claimed trial.

5. In order to substantiate its case, the prosecution examined ten witnesses.

6. When examined under Section 313 Cr.P.C , the appellants pleaded that the Tata 407 bearing no. HR-20-B-2685 was taken into possession by the police from the house of appellant Nek Chand @ Neka. Nothing was recovered by the police. It has been further pleaded by appellant Piare Lal that the said vehicle had fallen to the share of appellant Nek Chand @ Neka in the family partition and appellant Nek Chand @ Neka had separated from the family. They further pleaded that they are innocent and have been falsely implicated. However, no evidence was led by the accused in their defence.

7. On appreciating the evidence on record and the contentions raised by the learned counsel for the parties, appellant Nek Chand @ Neka was held guilty and convicted for the offence punishable under Section 15 of the Act and appellant Piare Lal was held guilty and convicted for the offence punishable under Section 29 read with Section 15 of the Act, co-accused Asha Ram and Bijender Singh were acquitted. The appellants were awarded the sentence as mentioned in the upper part of the judgment.

8. Aggrieved with the aforesaid judgment of conviction and order of sentence, the present appeal has been preferred.

9. Initiating the arguments, learned counsel for the

appellant contended that the link evidence in this case is missing. PW-1, Constable Manjeet Kumar had stated that he deposited the sample with the FSL on 03.02.2009, but the report of the FSL shows that it was received on 04.02.2009. No explanation has been given that where the case property remained for one day. So, tempering with the case property cannot be ruled out.

10. He further contended that as per the admitted case of the prosecution, the recovery is alleged to have been effected on the basis of secret information, but the Investigating Officer has not complied with the mandatory provisions of Section 42 of the Act, which vitiate the conviction.

11. He further contended that no independent witness has been associated by the Investigating Officer. Even though, the recovery is alleged to have been effected at a public place and there are various material contradictions in the statements of the official witnesses. He further contended that there is absolutely no evidence against appellant Piare Lal. There is no evidence to show that he has abetted or conspired with appellant Nek Chand @ Neka for the commission of the offence. There is also no evidence to show that he had knowledge with respect to the transportation of the poppy husk in the vehicle owned by

him. Mere this fact that he happens to be the registered owner of the vehicle is no ground to establish the ingredients of abetment or conspiracy. The confessional statement of the appellant Piare Lal before the Investigating Officer is hit by Section 25 of the Evidence Act and can not be taken into consideration. Except that, there is not an iota of evidence against appellant Piare Lal. Thus, he pleaded that the learned trial Court has erred in recording the conviction of the appellants.

12. On the other hand, learned State counsel contended that the case of the prosecution is fully supported from the statements of PW-10 Inspector Om Parkash, PW-7 ASI Kanwar Pal and PW-6 HC Manoj Kumar on the point of recovery. The search and seizure has been conducted in the presence of PW-8 Sh. Raj Kumar Bhorla, Tehsildar-cum-Executive Magistrate, Samalkha. There is no evidence that the case property was tampered with at any stage. A minor contradiction in the date in the affidavit of PW-1 Constable Manjeet Kumar and the report of the FSL is no ground to conclude that the case property was tampered with. The Investigating Officer has also complied with the provisions of Section 42 of the Act. Accused-appellant Piare Lal is the father of the appellant Nek Chand @ Neka and was having knowledge with respect to all the activities of his

son. He was the registered owner of the vehicle in question. It is not believable that the Tata 407 no. HR-20-B-2685 was being used without his connivance and permission. Thus, she contended that there is no infirmity in the conviction of the appellants recorded by the learned trial Court.

13. We have duly considered the aforesaid contentions.

14. Ex.P-2 is the affidavit of PW-1 Constable Manjeet Kumar, who has carried the sample parcels to FSL, Madhuban. He has deposed that the sample parcels were handed over to him on 03.02.2009 and he deposited the same with the FSL, Madhuban on the same day. But, the report of the FSL Ex.P-9 shows that the said parcels were received in the FSL on 04.02.2009. Constable Manjit Kumar has stepped into the witness box as PW-1. In his cross-examination, he has not been questioned at all by the learned defence counsel with respect to this contradiction. So, PW-1 Constable Manjeet Kumar had no opportunity to explain the contradiction in his affidavit and the report of the FSL with respect to the date of deposit of the samples. Moreover, the report of the FSL Ex.P-9 depicts that the seals were intact on all the twenty sample parcels and tallied with the specimen seal as per the Forwarding Authority Letter. Even, no suggestion has been put to PW-1 Constable

Manjeet Kumar that the samples were tampered with by him or during the period those remained in his custody. So, there is no material on record to infer that the sample parcels were tampered with at any point of time. Contradiction in the date of deposit in the affidavit of PW-1 Constable Manjeet Kumar and report of the FSL, which could be a clerical mistake is no ground to shatter the chain of the link evidence.

15. We do not find any substance in the plea raised by the learned counsel for the appellant that the provisions of Section 42 of the Act have been violated. It is not disputed that the recovery is alleged to have been effected on the basis of the secret information. At the time of receiving the secret information PW-10 Inspector Om Parkash was not present in the police station, rather he was on move and was present at bus stand village Basera. The secret information was also emergent in nature. Even then immediately on receiving the secret information, the Investigating Officer reduced into writing the said information in shape of the notice under Section 42 of the Act Ex.P-41 and forthwith send the same to the Police Station through PW-1 Constable Manjeet Kumar. On the basis of which the DDR no. 32 dated 30.01.2009 was registered at 4.35.p.m. The copy thereof is Ex.P-1. In the

DDR, it has been categorically mentioned that one copy thereof shall be sent to the higher officers for information. So, even before proceeding to the spot for apprehension of the accused and to conduct search and seizure, the Investigating Officer has sent the written information to the Police Station. On the basis of which, the DDR was recorded and copy thereof was to be sent to the Superior Police Officers.

16. All the facts with respect to the secret information have been incorporated in the ruqa Ex.P-3 by the Investigating Officer. The same was sent to the Police Station on 30.01.2009 itself at 7.30.p.m. On the basis of which the formal FIR Ex.P-4 was registered on the same day at 7.45.p.m. The copy of FIR and statement of PW-2 SI Ranbir Singh show that the special report of this case through EHC Kapil Kumar was sent to Illaqa Magistrate, Superintendent of Police and Deputy Superintendent of Police, Panipat. So, the information has been forwarded to the Superior Police Offices within few hours of the search and seizure. As per **Section 42 (2)** of the Act, where an officer takes down any information in writing under **sub Section (1)** or records grounds for his belief under the proviso thereto, he shall within seventy-two hours send a copy thereof to his immediate official superior. But, in the

instant case, the Investigating Officer had reduced into writing the secret information and sent the same to the superior police officers immediately thereafter vide notice Ex.P-40. On the basis of which, the DDR no. 32 dated 30.01.2009 Ex.P-1 was recorded and even after the search and seizure, the special report was forwarded to the superior police officers, which is the substantial compliance of Section 42 of the Act. To support this view reference can be made to cases **Jarnail Singh s/o Jawara Ram Vs. State of Haryana 2013(2) RCR (Criminal) 580(DB)** and **Gurdev Kaur Vs. State of Punjab 2014(1) D.C (Narcotics) 573 (S.C).**

17. The fact that no public witness has been associated by the Investigating Officer in the investigation of the case is also no ground to create any dent in the prosecution case. The search and seizure in this case has been conducted in the presence of PW-8 Sh. Raj Kumar Bhoria, Tehsildar-cum-Executive Magistrate, Samalkha, who is a senior Revenue Officer, exercising the powers of the Executive Magistrate. He was not under the influence of the Investigating Officer. So, there is no reason as to why PW-8 Sh. Raj Kumar Bhoria, Tehsildar-cum-Executive Magistrate, Samalkha, should not be considered as an independent witness. It is not expected that a Senior Revenue Officer

exercising the powers of the Executive Magistrate will succumb to the pressure of the police officials and will become a party to support their false version. Moreover, it is settled principle of law that the testimonies of the official witnesses also carries the same evidentiary value. Their official designation *ipso-facto* is no ground to discard their testimonies. There is absolutely no material on record to show that the prosecution witnesses had any animus or motive for the false implication of the appellant with respect to the recovery of the contraband from appellant Nek Chand @ Neka. The Hon'ble Supreme Court in case **Akmal Ahmed Vs. State of Delhi, 1999(2) RCR (Criminal) 265**, has laid down that the evidence of search or seizure made by the police will not become vitiated solely for the reason that same was not supported by any independent witness. The same ratio of law has been laid down by the Hon'ble Apex Court in cases **State of NCT of Delhi Vs. Sunil (2000) 1 Supreme Court Cases 748, Rohtash Vs. State of Haryana, 2013(3) RCR (Criminal) 355, M. Prabhulal Vs. Assistant Director, Directorate of Revenue Intelligence, 2004(1) RCR (Criminal) 160 and Ravinderan @ John Vs. Superintendent of Customs, 2007 (3) RCR (Criminal) 80**. Thus, the non-joining of independent witness is also no ground to discredit the prosecution version.

18. The discrepancies pointed out by the learned counsel for the appellants are mostly with respect to the timings. Such discrepancies can not be considered to be material in nature as the police officials in discharge of their official duties take part in the several such kind of raids. So, it is not expected that even with the lapse of time, they will be able to remember the minute details. The mathematical accuracy in the testimonies of the witnesses is not expected. So, the discrepancies pointed out by the learned counsel for the appellants is also no ground to render the recovery of the contraband from the possession of appellant Nek Chand @ Neka doubtful.

19. From the testimonies of PW-6 HC Manoj Kumar, PW-7 ASI Kanwar Pal, the witnesses of recovery and PW-10 Inspector Om Parkash, the Investigating Officer of the case, it is established that on 30.01.2009, appellant Nek Chand @ Neka was apprehended by the police. At that time, he alone was driving Tata 407 bearing no. HR-20-B-2685. The search and seizure as per the option exercised by the appellant Nek Chand @ Neka was conducted in the presence of Sh. Raj Kumar Bhoria, Tehsildar-cum-Executive Magistrate, Samalkha, which resulted into the recovery of 20 bags containing 19 kg poppy husk each. As appellant Nek Chand @ Neka was alone carrying Tata 407 bearing no. HR-

20-B-2685 at the time of recovery, so it is established that he was in conscious possession of the contraband. Thus, we do not find any infirmity in the conviction of the appellant Nek Chand @ Neka recorded by the trial Court and the same deserves to be affirmed.

20. However, the case of the appellant Piare Lal is entirely on different footing. He was charge sheeted for the offence punishable under Section 29 of the Act, which reads as under:-

29. Punishment for abetment and criminal conspiracy.-(1) Whoever abets, or is a party to a criminal conspiracy to commit an offence punishable under this Chapter, shall, whether such offence be or be not committed in consequence of such abetment or in pursuance of such criminal conspiracy, and notwithstanding anything contained in section 116 of the Indian Penal Code (45 of 1860), be punishable with the punishment provided for the offence.

(2) A person abets, or is a party to a criminal conspiracy to commit, an offence, within the meaning of this section, who, in India abets or is a party to the criminal conspiracy to the commission of any act in a place without and beyond India which--

- (a) would constitute an offence if committed within India; or
- (b) under the laws of such place, is an offence relating to narcotic drugs or psychotropic substances having all the legal conditions required

to constitute it such an offence the same as or analogous to the legal conditions required to constitute it an offence punishable under this Chapter, if committed within India.

21. As per the aforesaid provision of law whoever abets or is a party to the criminal conspiracy to commit an offence punishable under this chapter shall also be punishable with the punishment provided for the offence. In order to establish the charge under this Section, the prosecution is required to establish that the accused has either abetted or entered into a criminal conspiracy with his co-accused for the commission of the offence under this chapter. The abetment has been defined in **Section 107 Indian Penal Code**. According to this Section a person abets the doing of a thing, who---

- (i) Instigate any person to do that thing; or
- (ii) Engages with one or more other person or persons in any conspiracy for the doing of that thing; or
- (iii) Intentionally aids, by any act or illegal omission, the doing of that thing.

22. In order to constitute the criminal conspiracy, it is essential for the prosecution to establish;

- (i) an agreement between two or more persons;
- (ii) the agreement must relate to doing or causing to be done either

- (a) an illegal act;
- (b) an act which is not illegal in itself but is done by illegal means.

23. So, in order to bring home the guilt of the offence punishable under Section 29 of the Act, the prosecution in this case was required to establish the aforesaid ingredients. But, no such evidence has been collected and adduced by the prosecution. In the instant case, the prosecution is simply relying upon the disclosure statement of the accused, which is in fact simply and purely a confessional statement made by appellant Piare Lal before PW-10 Inspector Om Parkash, a police officer. PW-10 Om Parkash has categorically stated that on 27.03.2009, Piare Lal was arrested in this case on the basis of the disclosure statement of his co-accused. Thereafter, Piare Lal was interrogated in this case. During interrogation, he suffered the disclosure statement Ex.P-47. Learned State counsel has not been able to point out any disclosure statement of co-accused involving accused/appellant Piare Lal. Ex.P-6 is the disclosure statement of co-accused Asha Ram (since acquitted) recorded in case FIR no. 49 dated 31.01.2009, under Section 25 of Arms Act, Police Station, Samalkha, wherein the name of appellant Piare Lal does not figure at all. Only the name of appellant Nek Chand @ Neka figures

therein. Then, there is the disclosure statement of co-accused Bijender Singh (since acquitted) Ex.P-46. In his statement also the name/role of appellant Piare Lal nowhere figured. Then, there is the disclosure statement of appellant Nek Chand @ Neka, the son of appellant Piare Lal Ex.P-16. In the said disclosure statement also there is absolutely no reference of appellant Piare Lal. So, the name of appellant Piare Lal had not figured in the disclosure statement of any of the co-accused. Moreover, it is the settled principle of law that an accused can not be convicted on the basis of the confessional statement of the co-accused. To support this view reference can be made to case **Union of India Vs. Bal Mukund & Ors. 2009(2) RCR (Criminal) 574(S.C).**

24. The only evidence upon which the prosecution is relying upon against appellant Piare Lal is his own disclosure statement Ex.P-47. As per the statement of PW-10 Inspector Om Parkash, the Investigating Officer of the case, after the arrest of accused Piare Lal, he was interrogated and then, he suffered the disclosure statement Ex.P-47. It means that appellant Piare Lal was already arrested as an accused in this case by PW-10 Inspector Om Parkash and thereafter, he was interrogated by him and recorded his disclosure statement Ex.P-47. The disclosure statement Ex.P-47 is in fact a confessional statement

allegedly suffered by appellant Piare Lal before a police officer. The same is clearly hit by Section 25 of the Indian Evidence Act. No recovery whatsoever has been effected on the basis of the disclosure statement Ex.P-47. So, the disclosure statement Ex.P-47 is inadmissible in evidence and can not be taken into consideration. Except that there is no evidence to establish that accused-appellant Piare Lal had in any manner abetted or conspired with appellant Nek Chand @ Neka for transportation of the contraband in the vehicle owned by him.

25. The learned trial Court has erred in placing the burden upon accused-appellant Piare Lal to prove that he was not having the knowledge that his vehicle was being used as such. This was totally the erroneous approach of the learned trial Court. Section 29 of the Act is applicable only where a person abets or hatches a criminal conspiracy for the commission of the offence under the Act. The burden to establish the ingredients of abetment and criminal conspiracy are always on the prosecution, in which the prosecution has utterly failed in this case. Mere this fact that appellant Piare Lal happens to be the father of appellant Nek Chand @ Neka will not establish the ingredients of abetment or the criminal conspiracy in the absence of any evidence. So, the conviction of appellant

Piare Lal is not sustainable in the eyes of law.

26. Faced with this situation, learned counsel for the appellant has pleaded for reduction in the sentence awarded to appellant Nek Chand @ Neka. The custody certificate of appellant Nek Chand @ Neka placed on record shows that he was not involved in any other such case. So, appellant Nek Chand @ Neka had no previous conviction to his discredit. He has already undergone the actual sentence of more than five years and eight months. As per his statement recorded on the quantum of sentence by the learned trial Court, he is having two minor sons and a minor daughter and was the only earning member of the family. He resides separate from his parents. His wife remains ill and he is not a previous convict. Thus, keeping in view the antecedents of appellant Nek Chand @ Neka, the facts and circumstances of the case, he deserves the reduction in the sentence awarded to him by the learned trial Court.

27. Thus, keeping in view our aforesaid discussion, the present appeal qua appellant Piare Lal is hereby allowed. His conviction and sentence is hereby set aside and he stands acquitted of the charges. However, we do not find any infirmity or impropriety in the conviction of the appellant Nek Chand @ Neka recorded by the learned trial Court. However, impugned order on his quantum of

sentence is hereby modified. Appellant Nek Chand @ Neka is ordered to undergo rigorous imprisonment for a period of ten years and to pay a fine of Rs. 1 lac, in default of payment of fine he will further undergo simple imprisonment for a period of one year for the offence punishable under Section 15 of the Act instead of the sentence awarded by the learned trial Court. With this modification in the sentence awarded to the appellant Nek Chand @ Neka, the appeal qua him has no merits and the same is hereby dismissed.

(M. JEYAPPAUL)
JUDGE

(DARSHAN SINGH)
JUDGE

February 13, 2015
s.khan