

**IN THE HIGH COURT OF PUNJAB & HARYANA
AT CHANDIGARH**

**CRA-S-2475-SB of 2004 (O & M)
Date of decision : 9.2.2005**

Jahid and another

.....Appellants

v.

State of Haryana

.....Respondent

CORAM : HON'BLE MRS. JUSTICE RAJ RAHUL GARG

Present : Mr. Dilpreet Singh, Advocate and
Mr. Gautam Dutt, Advocate, for the appellants

Ms. Kirti Singh, DAG, Haryana

1. Whether Reporters of local papers may be allowed to see the judgment? Yes/No
2. To be referred to the Reporters or not? Yes/No
3. Whether the judgment should be reported in the digest? Yes/No

Raj Rahul Garg, J.

This appeal is directed against judgment dated 27.11.2004 rendered by Sh. K.C. Sharma, Additional Sessions Judge-cum-Special Court under the Narcotic Drugs and Psychotropic Substances Act, 1985 (for brevity 'the NDPS Act'), whereby the appellants were convicted for keeping in their possession 4.9 Kgs. of opium without any permit or licence, thus, committing an offence punishable under Section 20 of the NDPS Act. By passing order on sentence dated 29.11.2004, the appellants were sentenced to undergo rigorous imprisonment for a period of 10 years and to pay a fine of ₹ one lakh each. In default of payment of fine to further undergo rigorous imprisonment for a period of 2 years and six months.

In brief, facts of the prosecution case are; that on 21.4.2002 ASI/SHO Sarup Singh, (PW6), received secret information in the police station to the effect that Jahid and Noordin (appellants) were carrying opium from Rajasthan by Jeep No. RJ 02 C-4163 for selling the same in the area of Mewat via Ferozpur Jhirka/Badkali. In case of nakabandi nearby Badkali area, they can be apprehended with opium. On receipt of this information, ASI along with other police officials reached the turn of Jatka Siswana turn, located on Badkali Ferozpur Jhirka Road and conducted nakabandi. After about half an hour, the aforesaid Marshal Jeep came from Alwar side. It was got stopped on the naka. Two persons were found sitting on the front seat of the jeep. On enquiry, driver of the jeep disclosed his name as Noordin son of Gulzar and also furnished his complete address whereas the other gave his name as Jahid son of Abdul Kudus with full address. ASI Sarup Singh told the appellants that he was suspecting some drugs in the car, as such, they have got a right to get their personal search as well the search of the jeep conducted in the presence of a Magistrate or some gazetted officer. He served notices which are Ex.PH and Ex.PG respectively. Both the appellants exercised their option in favour of DSP. Their replies are Ex.PH/1 and Ex.PG/1 respectively. Thereafter, through wireless message, DSP Devender Yadav was called at the spot. On reaching the spot, personal search of the appellants as well of the Marshal Jeep was taken in the presnce of DSP. From Marshal Jeep, one bag make Reebok, blue/black colour was recovered from the left side of the driver seat. Opium wrapped in polythene was recovered from that bag. From C.Umar Mohammad weighing machine, weights, 2 small containers of plastic and one canny of 5 liters was got managed. Recovered opium was weighed as 24.900 Kgs. Out of this, 2 samples of 100 grams each, were taken separately and were put into separate

containers and sealed with the seal of 'SS'. Residue opium was also put into 5 liters canny and then sealed with the seal of 'SS'. Seal after use was handed over to ASI Mohan Singh. All the aforesaid 3 sealed containers, Reebok Bag were taken into police possession vide memo Ex.PC. Marshal Jeep was taken into police possession vide memo Ex.PD. Ruka Ex.PE was sent to the police station for registration of the case whereupon, ASI Bir Singh made his endorsement Ex.PE/2 and recorded the formal FIR as Ex.PE/1. Special report was also sent to the senior police officers. Rough site plan of the spot Ex.PJ was prepared. Statements of witnesses were recorded. The appellants were arrested. The case property was deposited with the MHC Deep Singh in intact condition. After obtaining the report from FSL as Ex.PF, whereby the contents of sample sent for examination, were reported as that of opium; and after completion of necessary investigation, the challan was put in Court against the appellants.

Finding prima-facie case against the appellants for committing offence punishable under Section 20 of the NDPS Act, they were charge sheeted accordingly, to which they pleaded not guilty and claimed trial.

After taking prosecution evidence, statements of accused under Section 313 Cr.P.C. recorded. Each and every incriminating allegation was put to the appellants to which they denied and pleaded their innocence. The defence taken by the accused is this; that the jeep in question is owned by Sakir, brother of Jahid. It was used as a taxi. On the day of occurrence, the said jeep was at Taxi Stand of Kishangarh, where it was booked by some person for going to village Bukara Kha in the area of Police Station Nagina. The appellants were not present at the Taxi Stand nor they were present in the jeep. Later on, on account of enmity and because of serious party faction, they have been

implicated falsely in this case.

In defence, accused have also examined Abbas Khan as DW 1 who is an employee of a STD Booth, located at Badkali Chowk near Police Station Nagina. Kishan Lal son of Laxmi Narain was examined as DW 2. He proved the copy of telephone bill of connection No. 238448-ISP Ex.DB. Nasir Hussain son of Abdul Kundooj, who owns telephone No. 38448 at his residence, appeared as DW 3.

After hearing learned counsel for both the parties and appraisal of entire evidence and material coming on record, the judgment of conviction dated 27.11.2004 was recorded and as per order dated 29.11.2004, the appellants were suitably sentenced, as mentioned in earlier part of this judgment.

I have heard Mr. Dilpreet Singh, Advocate, Mr. Gautam Dutt, Advocate, for the appellants and Ms. Kirti Singh, DAG, Haryana for the State and have appraised the entire material coming on record.

Learned counsel for the appellants advanced arguments only on three counts i.e. non compliance of the provisions of Section 42 of the NDPS Act. Secondly, that no independent witness was joined in the investigation of the case though available. As such, prosecution case is not credible and is doubtful. Thirdly, that the weight of the samples sent to FSL for tests was reported as lesser than the weight of the samples drawn from the allegedly recovered opium.

First of all, it was argued by learned counsel for the appellants that the Investigating Officer ASI Sarup Singh had swung into action only on receipt of secret information against the appellants. He did not record this information into writing nor he sent the information about it to his senior officers. DSP

Devender Singh as PW7 deposed that he reached the spot around 8.15 P.M. Even ASI Sarup Singh as PW 6 deposed that they started from the police station at 6.30 P.M. and DSP arrived at the spot at 7.45 P.M. Thus, the search of vehicle was conducted after sunset and before sunrise. Investigating Officer did not record any reason for conducting search after the sunset. As such, there is violation of Section 42 of the NDPS Act, which is fatal for the prosecution case and only on this count the judgment of conviction, recorded by the learned trial Court is liable to be set aside. In support of his contention, he has cited **“Karnail Singh v. State of Haryana, 2009 (5) RCR (Criminal) 515”**.

On the other hand, learned State counsel has drawn my attention towards Para No. 20 of the impugned judgment. She contended that Sections 42 and 43 contemplates two different situations. Section 42 contemplates entry into and search of any building, conveyance or enclosed place, while Section 43 contemplates the seizure made in any public place or in transit. In the case in hand, opium was recovered from Marshal Jeep at Jatka turn, which is a public place and further, when the vehicle was in transit. As such, in the case in hand, provisions of Section 43 of the NDPS Act are attracted and not of Section 42.

Learned trial Court has considered this aspect very minutely and in detail and also relied upon the judgment of the Hon'ble Supreme Court titled as **“State of Haryana v. Jarnail Singh and others, 2004 (5) SCC 188”**. In that case, 73 gunny bags of poppy husk were being carried by a tanker, which was got stopped on public highway and searched at 8.00 P.M. In that case, Supreme Court considered the definition of Section 42 and 43 of the NDPS Act and held that if the seizure is made under Section 42 between sunset and sunrise, the requirement of the proviso thereto, has to be complied with. Section 42 of the NDPS Act contemplates entry into and search of any building, conveyance or

enclosed place. There is no such proviso in Section 43 of the NDPS Act. Therefore, it is obvious that if a public conveyance is searched in a public place, the officer making the search is not required to record his satisfaction as contemplated by the proviso to Section 42 of the NDPS Act for searching the vehicle between sunset and sunrise. It was further held that the tanker was moving on the public highway when it was stopped and searched. As such, Section 43 clearly applies to the facts of the case and there was no requirement of the officer conducting the search, to record the ground of his belief as contemplated by the proviso to Section 42. Learned trial Court has relied upon several other judgments which support the argument of learned State counsel. In **“Dharminder Kumar v. State of Punjab, 2003 (1) Crimes 19”**, it was held by a Division Bench of this Court that if the seizure is made from any animal, conveyance or article in a public place or in transit, then Section 43 of the NDPS Act would be applicable, Sections 43 and 42 of the NDPS Act operate in different spheres. Since the conveyance has been specifically included in Section 43 of the NDPS Act also, therefore, the conveyance itself found in a public place, or in transit would be covered under the provisions of Section 43 of the NDPS Act, whereas conveyance used in Section 42 of the Act, has to be read as conveyance which is other than in a public place. In the light of the afore discussed judgment, there remains no doubt on the point that in this case Section 43 of the Act applies and not Section 42. Thus, above argument of learned counsel for the appellants is devoid of any force.

It was next argued by learned counsel for the appellants that nakabandi was held after receipt of secret information. In that eventuality, it was incumbent upon the Investigating Officer to join independent witnesses so as to prove the genuineness of the prosecution case. Police witnesses are

generally interested in the success of the case. Investigating Officer ASI Sarup Singh, PW6, stated during the course of cross examination, that many vehicles on the road had passed during the intervening period of half an hour. No independent witness was associated in the investigation. He further stated that, in fact, no person was willing to join the investigation. DSP Devender Singh, PW7, deposed that the traffic was flowing on the road during the period of search and seizure, which shows that the independent witnesses were available but not joined by the prosecution. This makes the prosecution case doubtful. It was also contended by learned counsel for the appellants that in this case stringent punishment has been awarded to the appellants. Before awarding stringent punishment, prosecution was required to prove its case very strictly. Had prosecution joined independent witnesses in the investigation, the prosecution case would have been disclosed. By non joining of independent witnesses, serious prejudice has been caused to the accused for which they are entitled to acquittal.

DSP Devender Singh, PW7, deposed that ASI had tried to associate public witnesses but all went in vain. Even Investigating Officer deposed that, in fact, no person was willing to join the investigation. The statements of these two witnesses, thus, show that an effort was made by the Investigating Officer to join the independent witnesses in the investigation. There is, thus, no reason to disbelieve the explanation furnished by the Investigating Officer regarding non joining of independent witnesses. The learned trial Court has relied upon the case law on the point and took the same into consideration in detail while deciding the matter in issue. It is the settled preposition of law that we cannot disbelieve the statements of police officials simply for the reason that they are official witnesses. The testimonies of official witnesses are at par with the

testimonies of non official witnesses. The only requirement in such cases is this; that their testimony is required to be scrutinized with more care and caution before recording judgment of conviction. It is also the settled law that if the testimonies of official witnesses are consistent and inspire confidence in the mind of the court, regarding guilt of the accused, conviction can well be based on their testimonies. Search of the vehicle as well of the bag, which was conducted in the presence of a gazetted officer of the rank of DSP, no enmity of Investigating Officer or that of DSP is pleaded by the accused. It is not believable that having no enmity with the appellants, the gazetted officer of the rank of DSP, would plant the commercial quantity of opium on the appellants. In case the testimonies of official witnesses are discarded, only on account of the fact that no independent witness was joined in the investigation of the case, it will have a serious effect on the credibility of a gazetted officer of the rank of DSP. This Court is also not oblivious of the fact that in the present scenario, the public do not come forward to assist the Investigating Officers in their investigation. Under these circumstances, if the statements of the official witnesses are consistent, credible and worthy of placing reliance, it becomes more important to make their statements basis of conviction. Resultantly, this argument of learned counsel for the appellants is devoid of any force.

The next point raised by the counsel for the appellants is this; that as per ASI Mohan Singh, PW4, ASI Sarup Singh, PW6, and DSP Devender Singh, PW7, two samples of 100 grams each were drawn from the recovered opium. One sample was sent to FSL for test. Report FSL Ex.PF shows the weight of sample received in the FSL as 87 grams. Since the sample sent to FSL was not of 100 grams, therefore, the sample about which report Ex.PF was given by the FSL, does not belong to the case in hand and the entire prosecution

case becomes doubtful, for which benefit of doubt has to be given to the appellants.

On the other hand, learned State counsel contended that this discrepancy of weight can be for hundred and one reasons. The discrepancy is not material one but a minor discrepancy, for which no benefit can be given to the appellants. Commercial quantity of opium was recovered from the possession of the appellants.

In **“Bajinath and others v. State, Delhi High Court**, there was variation in the weight of contraband sent to FSL and the weight of the sample actually drawn at the spot. In that case, as per prosecution, 2 Kgs. of samples were taken from each of the case property, however, when the same were weighed at the FSL, they were found to be 2.3 Kgs., 2.6 Kgs., 2.1 Kgs. and 2.1 Kgs. respectively. In those circumstances, it was held that no undue importance can be led to this difference in the weight because at the spot, samples were weighed with a normal scale whereas in the FSL, the same were weighed with electronic weighing machine and thus, some difference, is bound to take place. In the case in hand, as well the difference in weights can well be said to be on account of variation in the weighing scales. The fact remains that the sample drawn from the contraband, was sealed at the spot, seals remained intact, till the time, same was sent to FSL. Even report FSL Ex.PF says so. When there was no possibility of tampering with the sample sent to FSL, little variation in the weight, cannot be said to be fatal for the prosecution case.

It was next argued by learned counsel for the appellants mainly relying upon the judgment of **“E.Micheal Raj v. Intelligence Officer, Narcotic Control Bureau, (2008) 5 SCC 161”** and also cited **“Vinod Kumar v. State of Punjab, 2003 (1) RCR (Criminal) 428”**, that the quantity of morphine

reported by FSL is 4.554\w/w. As such, this is the quantity which can be taken into consideration. If at all, judgment of conviction is to be recorded and sentence is to be awarded, whole bulk cannot be taken into consideration in order to come to the conclusion as to what quantity of opium was, in fact, recovered from the possession of the appellants.

On the other hand, learned State counsel cited **“Inderjeet Singh @ Laddi and others v. State of Punjab, 2014 (1) Drugs Cases (DC) 440”** and contended that the Central Government has issued Notification dated 18.11.2009, wherein the Central Government has declared that in case of a mixture or preparation, with or without a neutral substance, the entire quantity of mixture/preparation shall be taken into consideration to know as to whether the narcotic drugs/psychotropic substance is a “small quantity” or “commercial quantity”, therefore, in view of the said Notification, in respect of the offences committed on or after 18.11.2009, “pure content test” need not be conducted and a ratio laid down in **E.Micheal Raj's case** (supra), is not applicable to such cases.

Section 2 clause (XV) of the NDPS Act contains the definition of opium which is as follows :

““Opium” means -

- (a) the coagulated juice of the opium poppy; and
- (b) any mixture, with or without any neutral material, of the coagulated juice of the opium poppy,

but does not include any preparation containing not more than 0.2 per cent of morphine.”

Report FSL Ex.PF says that the morphine percentage found, was 4.554/w/w. With this percentage of morphine, the entire preparation becomes opium. Thus, the definition itself makes it clear that any preparation containing

more than 0.2% of morphine is opium. Notification specifying “small quantity” and “commercial quantity”, as per table given under sub clause vii (a) and xxiii (a) of Section 2 of the NDPS Act, says that the quantity of 2.5 Kgs. of opium is “commercial quantity” and Column 4 of this table respecting “Chemical name” shows “And any preparation containing opium”. Thus, with all this, it is evident that the entire bulk is to be taken as the quantity for deciding as to if the quantity recovered was commercial quantity or not. **E. Micheal Raj's case** (supra) pertains to heroin, which has neutral substance. Even **Vinod Kumar's case** (supra) pertains to medicines like capsules spasmo proxivon etc. As such, the contention of learned counsel for the appellants that in the matter of sentence, only the quantity of morphine is to be taken into consideration, is devoid of any force.

No other point was urged before me.

For the reasons recorded above, maintaining the judgment of conviction dated 27.11.2004 and order on sentence dated 29.11.2004, this appeal is ordered to be dismissed. If the appellants are already on bail, their bail bonds shall stand cancelled and they be taken in custody for serving the remaining period of their sentence. The Chief Judicial Magistrate concerned shall take necessary steps to comply with the judgment, with due promptitude, keeping in view the applicability of the provisions of Section 428 Cr.P.C., and submit compliance report to this Court, within a period of two months from the date of receipt of a copy thereof.

The District & Sessions Judge concerned shall ensure that the directions are complied with, within the time frame and the compliance report is submitted immediately thereafter.

The Registry shall keep track of the submission of compliance

reports and put up the papers whether the reports are received or not within the time frame, immediately after the expiry thereof.

(RAJ RAHUL GARG)
JUDGE

9.2.2015
Ashwani