

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

CRA-S-2274-SB-2005

Date of decision: 06.01.2015

Nirmal Singh

..... Appellant

Versus

State of Punjab

...Respondent

CORAM : HON'BLE MR. JUSTICE DARSHAN SINGH

1. Whether Reporters of the 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.Ashwani Sharma, Advocate (Legal Aid Counsel)
for the appellant.

Ms.Shivali, Assistant Advocate General
for the State of Punjab.

DARSHAN SINGH, J.

The present appeal has been preferred against the judgment dated 18.11.2005 passed by the learned Judge, Special Court, Sangrur, vide which accused-appellant Nirmal Singh has been held guilty and convicted for the offences punishable under Section 15 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter called the 'NDPS Act') and the order on quantum of sentence of the even dated, vide which the appellant has been sentenced to undergo rigorous imprisonment for a period of ten years and to pay a fine of Rs.1,00,000/-,

in default of payment of fine to further undergo rigorous imprisonment for two years.

2- The brief facts giving rise to this prosecution are that on 05.01.1998 PW2 SI Gurdev Singh along with other police employees was present on the bridge of minor canal on the *Kacha* path leading from village Biggarwal to Khadial, in the area of village Khadial. PW1 Jora Singh met there. They were just talking, in the meanwhile, the present accused came from the side of Khadial on a mare, having Khurjies (saddlebag) on both the sides of mare. On seeing the police party, he got perplexed and tried to turn back the mare. On suspicion, the accused-appellant was apprehended with the help of the fellow police officials. The accused was got down from the mare and he disclosed his identity. Suspecting some intoxication in the Khurjies of military colour, SI Gurdev Singh served the notice Ex.PA expressing his desire to take the search and giving an option to the accused that if he wants arrangements of a Gazetted Officer or a Magistrate can be made to come present for carrying out the search. Accused appellant opted for his search in the presence of a Gazetted Officer. SI Gurdev Singh sent wireless message from his official jeep for sending some Gazetted Officer at the spot. On receipt of the said message, PW3 Amarjeet Singh, the then DSP Moonak reached at the spot. He disclosed his identity to the appellant, then on the direction of the DSP, SI Gurdev Singh carried out the search of the Khurjies after getting down the same from the mare. On checking, the same was found containing poppy husk in both the sides of Khurjies.

Two samples of 250 grams, each, from both side of Khurjies, total four samples, were separated and were kept in the sealed parcels. On weighment, 13.5 Kg. poppy husk was found in one side of Khurji and 11.5 Kg. poppy husk was found in the second side of Khurji. A separate parcel of the residue of the poppy husk was prepared. All the parcels were sealed by the Investigating Officer with his seal with impression 'GS'. The seal after use was handed over to PW1 Jora Singh. The aforesaid articles were taken into possession vide memo Ex.PB. Accused was arrested. The mare and saddle etc. were taken into possession vide memo Ex.PD. The Investigating Officer prepared the rough site plan of the place of occurrence Ex.PJ. He sent ruqqa Ex.PH to the police station. On the basis of which, formal FIR Ex.PH/1 was registered.

3- On further interrogation, accused suffered disclosure statement Ex.PK. In pursuance of the said disclosure statement, he got recovered three bags containing poppy husk concealed in the field of Chand Singh son of Inder Singh resident of Khadial. Two samples of 250 grams, each, were separated from all the three bags. Residue poppy husk came to be 27 Kg. in each bag. The separate sealed parcels of all the six samples and three bags containing remaining poppy husk were prepared and were sealed with seal bearing impression 'GS'. Seal after use was again entrusted to PW1 Jora Singh. All these articles were taken into possession vide memo Ex.PL. The Investigating Officer prepared the rough site plan of the place of recovery Ex.PM. The sample parcels were sent to the Chemical Examiner for examination. The report of the

Chemical Examiner Ex.PN was received and on completion of the investigation, the report under Section 173 of the Code of Criminal Procedure (hereinafter called the 'Cr.P.C.') was presented.

4- The accused-appellant was charge-sheeted for the offence punishable under Section 15 of the NDPS Act by the learned trial Court vide order dated 17.01.2003, to which he pleaded not guilty and claimed trial.

5- In order to substantiate its case, prosecution examined as many as six witnesses. The report of the Chemical Examiner was also tendered into evidence.

6- After closure of the prosecution evidence, the accused-appellant was examined under Section 313 Cr.P.C. He pleaded that he was going back after attending the Court in some case under Section 15 of the NDPS Act on 04.01.1998 and was travelling in a bus to go to his village. He was got alighted by the police at Bus Stand Mahlan and this case was falsely planted upon him. Nothing incriminating was recovered from his possession.

7- No evidence was adduced by the appellant in his defence.

8- On appreciating the evidence on record and contentions raised by learned counsel for the parties, the accused-appellant was held guilty and convicted for the offence punishable under Section 15 of the NDPS Act for having found in his possession 110 Kg. of the poppy husk and he was awarded the sentence as mentioned in the upper part of the judgment.

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

10- I have heard Mr.Ashwani Sharma, Advocate, learned Legal Aid Counsel for the appellant, Ms.Shivali, learned Assistant Advocate General for the State of Punjab and have meticulously examined the record of the case.

11- Initiating the arguments, learned counsel for the appellant contended that PW1 Jora Singh, the alleged independent witness, has not supported the prosecution version. In the absence of the independent corroboration, the testimonies of the official witnesses should not be relied upon.

12- He further contended that the presence of PW3, DSP Amarjeet Singh, at the place of recovery is extremely doubtful. He was not the Supervisory Officer of Police Station Sunam. Some other DSP was posted at that place. PW3 was posted at Moonak, which was at a distance of 50 Km. from the place of recovery. He has also not affixed his seal on the parcels of the case property. The version of the prosecution witness is also discrepant as to how, the message was flashed to PW3 DSP Amarjeet Singh. He contended that signatures of the DSP Amarjeet Singh have been obtained later on only to complete the formalities, otherwise there was no occasion for him to be present at the spot.

13- He further contended that there was delay of 15 days in sending the sample to the Chemical Examiner. Even the seals were found

broken. The delay in sending the sample for chemical examination is violative of the instructions issued by the Narcotic Control Bureau and renders the case of the prosecution doubtful. To support his contentions, he relied upon cases **Parminder Singh Vs. State of Haryana, 2006(4) RCR (Criminal) 495, Makkhan Singh Vs. State of Haryana 2008(2) RCR (Criminal) 449 and Mohmed Salim Vs. State of Haryana 2008(2) RCR (Criminal) 128.**

14- He further contended that it is apparent from the ruqqa Ex.PH that the entire proceedings were completed, so there was absolutely no occasion for the accused to suffer the disclosure statement leading to the second alleged recovery. It is also not believable that the appellant would have concealed the bags containing poppy husk at a distance of 70 kilometers from his village. Chand Singh, the owner of the field, has not been associated in the investigation. There is no evidence on record to establish any connection between the present appellant and said Chand Singh. PW1 Jora Singh has not stated anything about the second recovery. There is also no evidence to establish the conscious possession of the appellant qua the contraband. To support his contention he relied upon case **Jabra Vs. State of Punjab 2000(2) RCR (Criminal) 626.** He further contended that accused has also not been given the proper opportunity in his statement under Section 313 Cr.P.C. to explain the circumstances which is also fatal to the prosecution case. To support his contentions, he place reliance upon case **Avtar Singh and others Vs. State of Punjab AIR 2002 (SC) 3343.** Thus, he pleaded that the

appellant has been falsely implicated in this case.

15- On the other hand, learned State counsel contended that the case of the prosecution is fully established from the statement of PW2 SI Gurdev Singh, the Investigating Officer of the case, PW3 Amarjeet Singh, the then Deputy Superintendent of Police and PW6 ASI Sumit Sood, the witness of recovery. All these PWs have consistently deposed about both the recoveries i.e. recovery at the time of apprehension of the accused and subsequent recovery on the basis of his disclosure statement. The testimonies of these witnesses is also corroborated on material aspects with the statement of PW1 Jora Singh, the independent witness. She further contended that some delay in sending the sample to the Chemical Examiner will not affect the merits of the case, as the seals were intact and there is no material on record to establish that the sample parcels were tampered with. She further contended that as the recovery has been effected on the basis of the disclosure statement of the accused, so, his conscious possession qua the contraband is fully established. Thus, she pleaded that the conviction of the appellant has been rightly recorded by the learned trial Court.

16- I have duly considered the aforesaid contentions.

17- In the instant case, there are two set of recoveries. The first recovery is alleged to have been effected at the place of apprehension of the accused i.e. the bridge of canal, situated on the *Kacha* path from village Biggarwal to Khadial. The second recovery is alleged to have been effected on the same day from the possession of the

accused in pursuance of his disclosure statement Ex.PK.

18- Before taking up the credibility of the prosecution version about the recovery of the poppy husk from the possession of the accused, it is appropriate to deal with the other ancillary contentions raised by learned counsel for the appellant. It is not disputed that PW3 Amarjeet Singh, the then DSP Moonak was not the Supervisory Officer of Sunam in whose supervision the search has been conducted. As per the statements of the prosecution witnesses, one Shri Jasdev Singh DSP, Sunam, was the Circle Officer of this area but mere this fact that PW3 Amarjeet Singh, DSP, Moonak has arrived at the spot to supervise the search, is no ground to discard the prosecution case, firstly, on the ground that as per the statement of PW3 DSP Amarjeet Singh, he was deputed to go to the spot by the Senior Superintendent of Police, Sangrur. So, PW3 Amarjeet Singh has not arrived at the spot at the instance of the Investigating Officer or out of his own, rather he came at the spot as per the directions of the Senior Superintendent of Police, District Sangrur. Secondly, in the instant case even the provisions of Section 50 of the Act were not applicable as the recovery was not effected from the personal search of the accused. The option given by the Investigating Officer to the accused was rather a superfluous action. The contradiction in the statements of the prosecution witnesses, in which manner the message was received by PW3 DSP Amarjeet Singh to reach at the spot, is minor in nature and does not go to the root of the case.

19- The recovery in this case is alleged to have been effected

on 05.01.1998. As per the report of the Forensic Science Laboratory, the samples have been received in the Laboratory on 20.1.1998 i.e. after 15 days. No doubt there is delay of 15 days in sending the sample parcels to the Laboratory but there is absolutely no evidence on record to establish that the sample parcels were tampered with. The prosecution has examined PW4 ASI Darshan Singh the then MHC Police Station, Sunam, who has filed his affidavit Ex.PM wherein he has categorically deposed that the sample parcels were deposited with him in intact condition. He properly kept the samples in the Malkhana. Neither he himself tampered with the same nor allowed anybody else to do so. The samples were taken to the Laboratory by PW5 HC Gurtej Singh, whose affidavit is Ex.PN. He has also deposed about the intactness of the sample parcels during transit. In the report of the Chemical Examiner also it is categorically mentioned that the seals of the exhibits were intact on arrival and agreed with the specimen seals sent. It is further mentioned that the exhibits remained in his safe custody after receipt till analysis was started.

20- From the aforesaid evidence, it comes out that the sample parcels through out remain intact and there is nothing to show that those were tampered with. In case **Mohan Singh Vs. State of Punjab 2007(4) RCR (Criminal) 705**, there was delay of 10 days in sending the samples to the Laboratory. The Division Bench of this Court held that same was not fatal to the prosecution case as the seized articles were kept in proper and safe custody. The Hon'ble Supreme Court in case **State of Orrisa**

Vs. Kanduri Sahoo 2004(1) RCR (Criminal) 196 has also laid down that mere delay in sending the samples to the Laboratory is not fatal where there is evidence that seized articles were kept in proper and safe custody. The same ratio of law has been reiterated in cases **Baggar Singh alias Gaggi Vs. State of Haryana 2009(4) RCR (Criminal) 183**, **Raju Vs. State of Haryana 2009(1) RCR (Criminal) 778** and **Pritam Singh and another Vs. State of Punjab 2013 RCR (Criminal) 801**. In view of the aforesaid authorities, the cases relied upon by learned counsel for the appellant on this aspect of the case are of no help to him.

21- As per the statement of PW2 SI Gurdev Singh and PW6 ASI Sumit Sood, when the police party was present at the bridge of minor canal in the area of village Khadial, the present accused came riding on a mare from the side of village Biggarwal. There was Khurjies on the back of the mare. On seeing the police party, he tried to turned back the mare. He was apprehended on suspicion. The Investigating Officer served the notice Ex.PA giving him an option for search in the presence of the Gazette Officer or the Magistrate. The appellant opted for his search in the presence of a Gazette Officer. So, PW3 Amarjeet Singh, the then DSP Moonak, arrived at the spot and the search of the Khurji was carried out. The poppy husk was recovered from both the sides of the Khurji. The total weight of the poppy husk recovered from the both the sides of Khurji comes to 26 Kg. including the sample parcels. The testimonies of PW2 SI Gurdev Singh and PW6 ASI Sumit Sood on the point of this recovery are also corroborated from the testimony of PW3 Amarjeet

Singh, the Gazetted Police Officer who supervised the search and seizure. Learned counsel for appellant has not been able to point out any material contradictions in their statements on the point of apprehension of the accused and this recovery of the contraband from his possession.

22- Prosecution has also examined PW1 Jora Singh, the independent witness, who was joined in the investigation of the case. Though, he has turned hostile but has supported the prosecution version on certain material aspects. It is settled principle of law that the statement of a hostile witness is not totally effaced of the record. That portion of testimony of a hostile witness which corroborates the prosecution version can be taken into consideration. To support this view, reliance can be placed upon case **Paulmeli and another Vs. State of Tamil Nadu through Inspector of Police 2014 (4) RCR (criminal) 335**, wherein Hon'ble Supreme Court has laid down that the evidence of hostile witness cannot be treated as effaced or washed off the record altogether. The same can be taken into consideration to the extent the version is found dependable on careful scrutiny.

23- PW1 Jora Singh has corroborated the prosecution version about the presence of the accused at the *Kacha* path leading from Biggarwal to Khadial along with the police. He also corroborated the prosecution version that the appellant was having a mare and Khurjies were there on the back of the mare. He further corroborated the prosecution version that the poppy husk was recovered from both the sides of Khurji lying on the mare. So, even the independent witness has

corroborated the prosecution version about the recovery of 26 Kg. poppy husk from the possession of the accused.

24- However, I find considerable substance in the contention of learned counsel for the appellant that the second recovery of 84 Kg. of poppy husk from the possession of the accused on the basis of his disclosure statement seems to be extremely doubtful. From the perusal of the written information Ex.PH it comes out that said written statement was prepared by the Investigating Officer after concluding the substantial investigation at the spot. There is absolutely no reference of the disclosure statement of the accused in the written information. When the accused was apprehended, his search was conducted and 26 Kg. poppy husk was recovered from his possession. It is not believable that he might not have been interrogated by the police at that very time. The written information Ex.PH was sent to the Police Station for registration of the case only with respect to the recovery of 26 Kg. poppy husk.

25- It is alleged that three bags containing 28 Kg. poppy husk each were kept concealed by the appellant in the field of one Chand Singh son of Inder Singh, resident of village Khadial. The Investigating Officer has not associated said Chand Singh in the investigation of the case. The Investigating Officer has also not collected any evidence to establish any connection/relation between said Chand Singh and the present appellant. PW6 ASI Sumit Sood has stated that the second place of recovery is situated at a distance of 60/70 kilometers from the village of the accused. Accused belongs to village Seo Majra, Police Station

Guhla, Distt. Kaithal, Haryana. The said place of concealment is situated in the revenue estate of Khadial, Distt. Sangrur (Punjab). As already mentioned as per testimony of PW6 ASI Sumit Sood, the distance between the village of the appellant and the said place of recovery is about 60/70 kilometers. The purpose of keeping the poppy husk can be for sale or for personal consumption. It is not believable that a person will store the contraband at such a long distance from his native village. The Investigating Officer has also not collected any evidence to establish that the appellant had any relation in village Khadial. So, it is not believable that he could have kept concealed the contraband at such a distant place with which he has absolutely no connection.

26- PW1 Jora Singh, the independent witness of recovery has also not supported the prosecution version at all with respect to the second recovery. PW2 SI Gurdev Singh, the Investigating Officer of the case, has stated that the DSP was also present at the time of second recovery but he had not attested the same. This version of SI Gurdev Singh is against the record as the attestation of PW3 DSP Amarjeet Singh has been shown on the disclosure statement Ex.PK and seizure memo Ex.PL. It shows that the signatures of the DSP have been obtained later on.

27- As already discussed as there is no evidence on record to establish any connection of the appellant with the place of second recovery, his native village is situated at 60/70 kilometers away, so the conscious possession of the appellant over this contraband is not

established. Consequently, the prosecution version with respect to the second recovery of 84 Kg. poppy husk from the possession of the appellant is extremely doubtful and is not established.

28- Thus, keeping in view my aforesaid discussion, the prosecution has been able to established the recovery of 26 Kg. poppy husk from the possession of the accused-appellant, however, the case of the prosecution with respect to the second recovery of 84 Kg. of the poppy husk on the basis of his disclosure statement is not established. So the conviction of the appellant can only be maintained qua the recovery of 26 Kg. poppy husk from his possession. The recovery of 26 Kg. of poppy husk does not fall within the definition of commercial quantity as the same is below 50 Kg. In consequence thereof, the appellant deserves the modification in the matter of quantum of sentence. The custody certificate placed on record by the learned State Counsel shows that the appellant has already undergone 04 years 02 months and 13 days of the sentence which is quite sufficient period. He was also ordered to pay a sum of Rs.1,00,000/- as fine by the learned trial Court, which is also required to be reduced.

29- Resultantly, the present appeal is hereby partly allowed. The conviction of the appellant for the offence punishable under Section 15 of the Act with respect to the recovery of 26 Kg. of poppy husk is hereby confirmed. The prosecution has failed to establish the recovery of 84 Kg. of poppy husk from the possession of the appellant beyond shadow of reasonable doubt. Consequently, the sentence awarded to the

appellant is hereby modified. He is sentenced to the imprisonment already undergone by him and is also ordered to pay a fine of Rs.10,000/- . The appellant is given one month's time from the date of this judgment to deposit the fine of Rs.10,000/- with the learned trial Court, failing which he will undergo rigorous imprisonment for a period of two months.

06.01.2015

sunil yadav

**(DARSHAN SINGH)
JUDGE**