

CRA-S-1764-SB-2014
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KUMAR MANOJ
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**IN THE HIGH COURT OF PUNJAB AND HARYAN AT
CHANDIGARH**

1. CRA-S-1764-SB-2014

Gulshan

....Appellant

Versus

State of Haryana

Respondent (s)

2. CRA-S- 1981-SB-2014

Gurbax Singh

....Appellant

Versus

State of Haryana

Respondent (s)

3. CRA-S-1997-SB-2014

Nand Kishore

....Appellant

Versus

State of Haryana

Respondent

4. CRA-S-2108-SB-2014

Pawan Kumar

....Appellant

Versus

State of Haryana

Respondent

Date of decision: 05.02.2015

CORAM: HON'BLE MRS JUSTICE RAJ RAHUL GARG

1. Whether Reporters of 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?

Argued by: Mr. Sanjeev Gupta, Advocate for the appellant.
(in CRA-S-1764 and 1981-SB of 2014)

Mr. G.S. Sidhu, Advocate for the appellant.
(in CRA-S-1997-SB of 2014)

Mr. Kanisth Ganeriwala, Advocate for the appellant.
(CRA-S-2108-SB of 2014)

Ms. Mahima, AAG, Haryana.

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RAJ RAHUL GARG, J.

This order shall dispose of four appeals bearing CRA-S-1764-SB-2014, CRA-S-1981-SB-2014, CRA-S-1997-SB-2014 and CRA-S-2108-SB-2014 preferred by accused-appellants separately since these arise against one judgment.

By filing the instant appeals, all the four accused-appellants have laid a challenge to the judgement dated 25.03.2014 and order on quantum of sentence dated 27.03.2014 respectively passed by Sh. R.P. Goyal, learned Additional Sessions Judge, Sirsa, whereby they have been convicted for the offence under Section 18 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for brevity 'NDPS' Act), and sentenced to undergo rigorous imprisonment for a period of two years and to pay a fine of Rs. 10,000/- as fine each and in default of payment of fine they were to further undergo rigorous imprisonment for three months each.

Put shortly, the case of the prosecution is this: that on 24.02.2011 a police party headed by ESI Ramesh Chander was present at GTM Chowk, in connection with checking of vehicles. In the mean time, one Maruti car bearing registration No.DL-9CB-1450 came there from the side of HUDA Sector and the same was got stopped. Four persons including the driver were travelling in the said car. On inquiry, the driver of the Car disclosed his name Pawan Kumar son of Madan Lal. The person sitting in the front seat disclosed his name as Nand Kishore son of Kamali, and the persons who were sitting in the rear seat of the car disclosed their names as Gulshan son of Parkash Chand and Gurbax Singh son of Major Singh. Suspecting some narcotic substance in the car, PW4-Ramesh Chander, ESI

served a notice Ex.PD under Section 50 of the NDPS Act to all the accused telling them that he suspects some narcotics substance like opium and charas in their Maruti Car bearing No.DL-9CB-1450 and the same was to be searched and further that they have got a legal right of search either before a Magistrate or a Gazetted Officer, who can be called at the spot upon which accused-appellants vide their reply Ex.PE opted to give search of the Car before some Gazetted Officer. Notice Ex.PD and reply Ex.PE were signed and thumb marked by the accused and were attested by ASI Rajender Singh and EHC Mani Ram. Thereafter, PW4-ESI Ramesh Chander called telephonically Rajender Singh Tehsildar on the spot. He was apprised about the facts of the case and thereafter on his direction, search of the car was conducted. A plastic bag containing opium, under neath the driver-seat was recovered. Two samples of 20 grams each were separated from said opium and on weighment the residue was found to be one kilogram and 460 grams. Both the samples and residue were converted into separate parcels and sealed with seal "RC" of Ramesh Chander ESI the Investigating Officer of this case and seal "RS" of the Tehsildar. The entire case property along with car were taken into possession vide recovery memo Ex.PF which was thumb marked by all the four accused and attested by ASI Rajender Singh, HC Mani Ram and Rajender Singh Tehsildar. PW4 had prepared ruqa Ex.PG and sent the same to the police station on the basis of which formal FIR Ex.PG/1 was recorded. Thereafter, PW4 prepared rough site plan Ex.PH with correct marginal notes and recorded the statements of witnesses under Section 161 Cr.P.C. During the course of investigation, accused Gurbax Singh suffered a disclosure statement Ex.P1 to the effect that he had

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concealed the motorcycle Make Discover bearing registration No.HR-24-5131, which was used for tracing the passage for transporting the opium. In pursuance of the aforesaid disclosure statement, the said motorcycle along with registration certificate was got recovered by him which was taken into possession vide recovery memo Ex.PJ. In the mean time, Smt. Krishna Yadav, the then SHO of P.S Baragudha (PW3) reached at the spot and before whom the Investigating Officer produced the accused and entire case property. PW3 verified the facts from all the accused and the witnesses, checked the case property affixed her seal 'KD' on all the parcels. The Investigating Officer had also produced report u/s 57 of NDPS Act Ex.PB before PW3 who made her endorsement Ex.PC/1 on it and sent the same to the DSP, Head Quarter, Sirsa, who signed the same with his initials Ex.PC/2. Case property was deposited with the MHC of the Police Station with seals intact.

On the next day i.e 25.2.2011 PW4 ESI Ramesh Chander, obtained the case property from MHC and produced the same along with accused before the learned Illaqa Magistrate at Sirsa along with application (Ex.PK). Constable Nahan Singh Govt Photographer (PW6) took photographs of the entire case property. Learned Illaqa Magistrate attested the inventory and passed detailed order Ex.PL. Thereafter, Investigating Officer deposited one sample parcel along with residue with the judicial Malkhana, Sirsa whereas the other parcel and sample seal were deposited with the MHC of the Police Station, City Sirsa. Sample was sent to the office of FSL Madhuban. The Director FSL vide his report Ex.PX opined the contents of the sample as opium. After completion of investigation, challan against

accused under Sections 17,18,61,85 of NDPS Act was filed in the court for trial.

On having been found a prima facie case against all the accused, they were accordingly charge sheeted for the offence under Sections 18 read with Section 8(c) of NDPS Act to which they pleaded not guilty and claimed trial.

After taking prosecution evidence, statement of accused under Section 313 Cr.P.C was recorded putting all incriminating circumstances appearing against the accused to them to which they pleaded their innocence and false implication at the instance of Krishan Lal, registered owner of car bearing No.DL-9CB-1450 in question.

After hearing learned Public Prosecutor for the State and defence counsel and appraising the entire material coming on record, the learned Additional Sessions Judge, Sirsa held all the appellants guilty for committing offence under Section 18 of the NDPS Act by passing judgment dated 25.3.2014 and vide order dated 27.3.2014 sentenced them accordingly as mentioned in the earlier part of the judgment.

I have heard S/Sh. Sanjeev Gupta, G.S. Sidhu and Kanisthth Ganeriwala Advocates appearing for the appellants as well as Ms. Mahima, AAG, Haryana for the State and have also appraised the entire material coming on record.

It was contended by learned counsel for the appellants that the falsity of the prosecution case is evident from the fact that the prosecution intentionally involved Motorcycle No.HR24-5131 attributing that the same was used by Gurbax -appellant for acquainting himself of the passage

through which they were to take their car with contraband. In the end by recording disclosure statement of Gurbax Singh as Ex.P.1 and then showing the recovery of that Motorcycle at the instance of Gurbax-appellant vide memo (Ex.PJ) they wanted to connect Gurbax with this crime and also wanted to make case of the prosecution foot-proof so that the appellants may not go scotfree. It was further contended that in order to prove the ownership of Car as that of Pawan Kumar-appellant, affidavit Ex.PN was forged. It was attested on 01.03.2011. In fact, on that day, Pawan Kumar-appellant was in custody and it was not possible for him to go to the Notary for getting his affidavit attested. Investigating Officer as PW4 admitted that for getting affidavit attested from the Notary, one has to sign before the Notary. Investigating Officer has admitted during the course of his cross-examination that Krishan is the registered owner of the Car. Krishan has not been examined as witness. Yadwinder Singh-PW5 also deposed that he had sold the car in question on 30.1.2011 to Pawan Kumar-appellant and obtained his affidavit in this regard. He admitted that he did not get the registration of this Car changed in his name, as such unless the registration of the Car is in the name of Yadwinder Singh, he could not pass better title to Pawan Kumar-appellant and the entire prosecution story becomes doubtful.

The above contention of learned counsel for the appellant is not sustainable as firstly the story of the Motorcycle propounded by the prosecution, even if not proved on the file, has no bearing on the recovery of one and half kg of Opium from the possession of appellants. In fact, the contraband was recovered from the Car in question occupied by the

appellants, as such the use or no use of Motorcycle by Gurbax for acquainting himself about the path by which they were to take the car is not fatal for the prosecution case. Secondly, proof of ownership of the Car is also not necessary. For the success of this case, offence under Section 18 of the NDPS Act is said to be made out if the appellants are found in conscious possession of opium. Appellants were the occupants of Car in question. Pawan was the driver of the Car. The other three appellants were occupying the car. Opium was recovered from beneath the driver's seat. None of the appellants had taken the defence that they were not aware about the car carrying Opium.

It is settled proposition of law that if a contraband is being carried by a vehicle, the occupants of that vehicle are said to be in conscious possession of that contraband, unless they prove that they were having no knowledge about the contraband in that vehicle. As such, the whole discussion regarding the ownership of the Car becomes redundant. Even otherwise, affidavit (Ex.PN) was dated 30.1.2011. On 01.03.2011, copy of the affidavit was got attested. So 01.03.2011 is not the date of attestation of the affidavit. As such, this contention of learned counsel for the appellants is devoid of any merit.

It was next argued by learned counsel for the appellants that the alleged recovery was effected from the Car as such, the accused cannot be said to be in conscious possession of the contraband. Even if four people were occupying the car, it cannot be said that who was in actual physical possession of the contraband.

This contention of learned counsel for the appellants is not

sustainable in view of the law laid down in **Parminder Singh Vs. State of Punjab 2000 (3) RCR (Crl.) 154**. In that case, 54 bags of poppy husk were recovered from a truck. Accused were held in conscious possession ruling that it cannot be said that the driver-Conductor and other accused had no knowledge of the contraband. In **Dehal Singh Vs. State of Himachal Pradesh AIR 2010 SC 3594**, it has been held that Section 35 of NDPS Act recognized that once the possession was established, the Court could presume that accused had culpable mental state, meaning thereby conscious possession. Presumption of conscious possession was available under Section 54 of the NDPS Act, which provided that accused might be presumed to have committed the offence unless he account for satisfactorily possession of contraband. It has further been held that if conscious possession has been established then accused may be presumed to have committed the offence.

In the present case, as the appellants were occupying the car in question from which one and half kg of Opium was recovered, the conscious possession is established on record.

The next point argued by learned counsel for the appellants is this that there is difference in weight of sample. Case property as well the sample when produced in the court of learned Chief Judicial Magistrate, Sirsa, he passed order (Ex.PL). As per this order, the weight of the samples was found to be 86 grams whereas as per report (Ex.PX) of FSL, the weight of sample received with container was 34.1 gram, thus this difference in weight makes the prosecution case doubtful and further goes to show that in fact the sample sent to FSL for examination is not the sample drawn in this

case. In support of his contention, learned counsel for the appellants cited a judgment of Hon'ble Supreme Court reported as **Rajesh Jagdamba Avasthi Vs. State of Goa (2005) 9 SCC 773** and a judgment of this Court passed in **Crl.Misc.No.226-MA of 2010 titled State of Haryana Vs. Hari Dass @ Lindu and Anr.**

The aforesaid two authorities are not applicable to this case as in these cases, the weight of sample was found to be considerably less than the weight of sample actually drawn in the case whereas so is not the present case. In the case in hand, 20 grams of Opium was separated as sample whereas the weight of sample received in FSL was 34.1 grams with container.

On the other hand, Ms. Mahima, learned Assistant Advocate General, Haryana contended that little variations in the weight is immaterial and it can be on account of difference in weighing scales. In support of her contention, she has cited a judgment of Hon'ble High Court of Delhi at New Delhi passed in **CRL.A.391 of 2011 and Crl.M.A No.4401 of 2012 titled Baij Nath and Ors. Vs. State.** In Baij Nath's case (supra), as per prosecution, 2 kg 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 kg, 2.6 kg., 2.1 kg. And 2.1 kg respectively. In those circumstances, it was held that undue importance cannot be laid to this difference in the weight because at the spot, the samples were weighed with a normal scale whereas in the FSL Lab, the same were weighed with electronics weight and thus some difference is bound to take place. As such on account of difference in weighing scales and further the learned Magistrate has given

the weight of two samples collectively as such it cannot be said as to what was the actual weight of one sample sent to FSL for examination, thus for these reasons, the difference in weight cannot be said to be fatal for the prosecution case.

It was next contended by learned counsel for the appellants that the Investigating Officer did not make a mention in Ruqa (Ex.PG) that he had handed over the seal to ASI Rajinder Singh. Later on, when he appeared in the Court, he deposed that after sealing the case property, he handed over the same to ASI Rajinder Singh. This is an improvement in the statement of Investigating Officer, which is fatal for the prosecution case.

It was further contended that since he did not hand over the seal to anybody and kept the seal with himself and also did not deposit the case property with MHC of the Police Station, rather kept the same with himself during the night and on the next day produced the case property before the Illaqa Magistrate, goes to show that the possibility of tampering with the case property cannot be ruled out.

The above contention of learned counsel for the appellant is factually wrong. Investigating Officer-PW4 categorically stated that after production of the case property, accused and the witnesses before the SHO Krishna Yadav-PW3, he deposited the same with the MHC of the Police Station and thereafter on the next day, he had taken out the case property from the Malkhana and also took out accused from the lock up and then produced them before the court of Sh. Naresh Kumar Singhal, the then Chief Judicial Magistrate, Sirsa along with the application (Ex.PK). With this evidence on file, it cannot be said that the Investigating Officer had kept

the case property with himself during the night or that he did not deposit the same with the MHC of the police station. Investigating Officer as PW4 deposed during the course of cross examination that the seal was returned to him after five days by Rajender Singh ASI (PW10). Rajender Singh (PW10) also categorically stated that after use, seal was handed over to him by Ramesh Chander-ESI. Thus with this evidence on the file, it is proved that the seal was not kept by the Investigating Officer with himself after its use.

It is true that contraband was seized on 24.2.2011 whereas the sample was received in FSL on 03.03.2011. Time taken in sending the sample to FSL cannot be said to be the factor for tampering with the case property. Even if the seal was returned to Investigating Officer after 5 days that would not mean that the sample stood tampered with, as the sample sent to FSL was already lying deposited with the MHC of the police station. There is nothing on record to show that at any stage after receiving back seal, the Investigating Officer had taken out the sample from the Malkhana. Even otherwise, on all the samples, the seal of the Investigating Officer alone was not there. Even the Rajender Singh-Tehsildar, Executive Magistrate had also put his seal "RS" on the samples besides the seal of SHO-Krishna Devi. Thus, there is no possibility of tampering with the case property by the Investigating Officer and thus the contention of the appellant is devoid of any force.

It was next contended by learned counsel for the appellants that the independent witnesses were available at the spot but none was joined in the investigation. PW4-SI Ramesh Chander during the course of

examination deposed that there were number of shops near the place of the recovery. The place of recovery was a busy place and number of persons were passing through that place. Investigating Officer even deposed that he had tried to join independent witnesses but all the witnesses refused to join the investigation. Investigating Officer did not take any action against anyone of them nor could even tell the names and addresses of those persons, who had refused to stand as witness. The case in hand entails stringent punishment as such non-joining of independent witnesses seriously prejudice the rights of the appellants.

It is of course true that independent witnesses when available should have been joined by the Investigating Officer but the Investigating Officer in this case has tried to join them as witnesses but they refused to stand as witnesses. It is generally seen now-a-days that no one comes forward to help the Investigating Officer in his investigation. It is also settled proposition of law that the statements of police witnesses are at par with the statements of non-official witnesses. Simply because independent witnesses were not joined or if joined not supported the prosecution case, the entire prosecution case, which is otherwise proved cannot be thrown away. If the statements of official witnesses are consistent and inspire confidence in the mind of the court regarding guilt of the accused, conviction can well be recorded so has been done in this case, as such this contention of learned counsel is also devoid of any merit.

No other point was urged before this Court.

For the above said reasons, maintaining the judgment of conviction dated 25.03.2014 and order of sentence dated 27.03.2014,

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this appeal is ordered to be dismissed. If the appellants are on bail, their bail bonds, shall stand cancelled and they be taken in custody for serving the remaining period of sentence. The concerned Chief Judicial Magistrate, shall take necessary steps, to comply with the judgment, with due promptitude, keeping in view the applicability of the provisions of Section 428 of the Criminal Procedure Code, 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, Sirsa, 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.

05.02.2015
manoj

(RAJ RAHUL GARG)
JUDGE