

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

**CRA No. S-1027-SB of 2010 (O&M)
DECIDED ON: MAY 31, 2016**

HARPREET SINGH & ANOTHER

.....APPELLANTS

VERSUS

NARCOTIC CONTROL BUREAU, CHANDIGARH

....RESPONDENT

CORAM: HON'BLE MR. JUSTICE JASPAL SINGH

- 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?**

Present: Mr. Vijay K. Jindal, Advocate
for the appellant No.1-Harpreet Singh.

Mr. H.S. Jaswal, Advocate
for the appellant No.2-Paramjeet Singh.

Mr. D.D. Sharma, Advocate
for the respondent-NCB.

JASPAL SINGH, J

By virtue of this appeal, appellants have challenged the judgment of conviction dated March 12, 2010 and order of sentence dated March 13, 2010 passed by learned Judge, Special Court, Chandigarh whereby, they have been convicted under Section 21(c) read with Section 8 of the NDPS Act and have been sentenced to undergo RI for a period of 10 years each; besides to pay a fine to the tune of ₹1,00,000/- and in default thereof, to further undergo RI for a period of one year.

2. Shortly, put the case of prosecution is that appellants were found in possession of Heroin 1 Kg each on October 30, 2007 at about 5.00 PM near the exist gate of ISBT, Sector 43, Chandigarh without any permit or licence by the Investigating Officer.

3. After necessary formalities at the spot and receipt of FSL report, appellants were charge sheeted to face trial under Section 21(c) read with Section 8 of NDPS Act, to which, they pleaded not guilty and claimed trial. Thereafter, the prosecution was asked to substantiate the charge framed against accused/appellants.

4. After the appraisal of evidence brought on record by the prosecution and hearing learned State counsel as well as the defence counsel, both the appellants have been convicted and sentenced as detailed in para 1 of the judgment.

5. At the very outset of the arguments, it has been stated by learned counsel for the appellants in an unambiguous terms that the appellants do not challenge the conviction awarded to them vide impugned judgment of conviction. Rather they pray for to keep their relief qua the quantum of sentence.

6. Moreover, this Court has also scrutinised the impugned judgment of conviction as well as minutely scrutinized the evidence adduced by the respondent-NCB but this Court does not find any scope for interference, so far as the conviction of the appellants is concerned.

7. However, while assailing the impugned order of sentence dated March 13, 2010, it has been ebulliently argued by learned counsel for both the appellants that the sentence awarded to both the appellants is not

commensurative with the offence committed by them, which deserves to be modified.

8. This court has also given an anxious thought to the submissions made by both the learned counsel for the appellants and find the same to be legal and factual force.

9. It is a matter of great astonishment that though, the recovery of one packet each has been recovered individually from both the appellants but the investigating agency while initiating the proceedings against them, made both the packets homogeneous by mixing with each other. It was only thereafter, it was weighed with the help of manual weighing scale which came out to be two kgs. Thereafter, out of the said mixture two samples of 5 gms each were drawn.

10. Here, it would be pertinent to mention that the appellants cannot be fastened with any liability of having with their possession of two kgs Heroin especially, when both the appellants were found in possession one kg each. This action taken by investigating agency in this regard deserves to be depreciated and the liability if any can be fastened upon them for having in their unauthorised possession of heroin one kg each. They cannot be convicted and sentenced for retention of two kgs of heroin by making them jointly liable, keeping in view the total weight of contraband alleged to have been recovered from them. Moreover, this fact has not been disputed by Mr. D.D. Sharma, Advocate for the respondent-NCB, so far as the recovery of one kg heroin from each of the appellants is concerned.

11. Now the question which arises for determination is whether the quantity of whole of contraband should be taken into consideration while

determining commercial quantity under Narcotic Drugs and Psychotropic Substances Act or the content of salt should be taken into account for the said purpose. In the case of **E.Micheal Raj v. Intelligence Officer, Narcotic Control Bureau; (2008) 5 SCC 161**, Hon'ble Supreme Court has observed that percentage of salt of contraband has to be taken in consideration and not the whole of the contraband. The said question arose in view of notification dated November 18, 2009. The afore-said question no more is *res integra*. This, question has already been decided by a Division Bench of this Court in ***Criminal Misc. No. 35827 decided on May 26, 2011 titled Amarjit Singh vs. State of Punjab***, wherein, it was held that entire mixture is to be taken into consideration from the date of publication of the notification dated November 18, 2009 and that the said notification is not retrospective. The following observation was made in this regard:

“In view of the aforesaid judgments, the power exercised by the Central Government in terms of authority on it by Central Act No. 9 of 2001 for all practical purposes is part of the Statute. Therefore, the insertion of note is in exercise of statutory powers and is deemed to be part of the Statute i.e. Narcotic Drugs and Psychotropic Substances Act, 1985.

Such note has been inserted to clarify the commercial quantity, so as to make it clear that the entire mixture or any solution or any one or more narcotic drugs and psychotropic substances has to be taken into consideration and not just its pure content. By virtue of said clarification, the judgments rendered by the Court are not ignored, but the defect which came to the notice of the Central Government, has been sought to be clarified.

XXXXX XXXXXX XXXXXX XXXXX XXXXXX

Since in the present case, the contraband is alleged to have been recovered from the petitioner on 14.10.2010 i.e. after the publication

of notification dated 18.11.2009, therefore the position in law as it existed on the date of recovery of the contraband has to be examined. Since on that day the as per the clarification, the entire mixture is to be taken into consideration, therefore, the quantity alleged to be recovered from the petitioner is a commercial quantity.”

12. The ***E.Micheal Raj's*** case (Supra) has been further relied upon by a Division Bench of this Court in the case of ***Dharminder Singh v. State of Haryana; 2012 (5) RCR (Criminal) 600*** passed in CRM No. M-5037 of 2011.

13. Adverting to the facts of the case in hand, the contraband is alleged to have been recovered from the appellants on October 30, 2007 i.e. much prior to the issuance and promulgation of notification dated November 18, 2009. Therefore, the said notification is inapplicable to the facts and circumstances of the case in hand.

14. Undisputably the sample was sent for chemical examination to the Chemical Examiner, CRCL, New Delhi, who after conducting its analysis submitted its report Ex.P-30. A glance at the report of CRCL transpires that in the contents of the sample 2.7% diacetylmorphine and 14.5% morphine were detected. It is also an undisputed fact that two separate narcotic substances of 1 kg each have been recovered from each of the appellants and while applying the ratio laid down by Hon'ble Apex Court in ***E.Micheal Raj's*** case (Supra), actual narcotic substance falls within non-commercial quantity as the percentage of diacetylmorphine and morphine comes to 2.7% and 14.5% respectively. To fortify this observation, we can have the reference of testimony of DW-4 V.P. Bahuguna. If the calculation is made as per the report of chemical examiner, out of 1 kg bulk; diacetylmorphine comes to only 54 gms and morphine comes

to only 145 gms., taking into consideration the percentage observed by the chemical analyst.

15. It would also not be out of place to mention here that Heroin is part of Opium derivative as describe under Section 2(xvi) of the NDPS Act, which read as under:-

(xvi) "OPIUM DERIVATIVE" MEANS

(a) medicinal opium, that is, opium which has undergone the processes necessary to adapt it for medicinal use in accordance with the requirements of the Indian Pharmacopoeia or any other pharmacopoeia notified in this behalf by the Central Government, whether in powder form or granulated or otherwise or mixed with neutral materials;

(b) prepared opium, that is, any product of opium by any series of operations designed to transform opium into an extract suitable for smoking and the dross or other residue remaining after opium is smoked;

(c) phenanthrene alkaloids, namely, morphine, codeine, thebaine and their salts;

(d) diacetylmorphine, that is, the alkaloid also known as dia morphine or heroin and its salts; and

(e) all preparations containing more than 0.2 per cent. of morphine or containing any diacetylmorphine;

16. As per table provided vide notification No. S.O.527(E) dated July 16, 1996 under serial No. 56 heroin is chemically named as diacetylmorphine and the quantity of more than 250 gms falls within the definition of commercial quantity. Similarly, morphine is covered by item mentioned at serial No. 77 of the afore-said table and more than 250 gms of morphine comes within the purview of commercial quantity. So, if the calculation of diacetylmorphine as well as morphine as detected by chemical

examiner is calculated keeping in view the recovery of one kg each from each of the appellants, it works out to be less than 250 gms. As such, without any hesitation it can be said that the recovery of heroin from the appellants falls within ambit of non-commercial quantity.

17. As has been observed in the foregoing discussion, the sentence imposed upon the appellants is not commensurative with the offence complained of against them, keeping in view the quantity of contraband which undoubtedly falls in the definition of non-commercial quantity. The appellants have been sentenced to undergo RI for a period of 10 years; besides a fine of ₹1,00,000/- and in default thereof, to further undergo RI for a period of one year.

18. Taking into consideration the aforesaid aspects and the major fact that recovery of heroin from each of the appellants is a non-commercial quantity; the sentence imposed upon the appellants by Judge, Special Court, Chandigarh to the extent of 10 years is on higher side, which deserves to be modified.

19. The appellant No.1 has already undergone the sentence for a period of 08 years and 01 day whereas, appellant No.2 has already undergone the sentence for a period of 08 years 04 months and 15 days, as on today out of total substantive sentence of RI for a period of 10 years.

20. Thus, keeping in view the afore-said discussion, instant appeal is dismissed but with modification in the quantum of sentence, which stands reduced to the period already undergone by the appellants with no change in the fine clause.

CRM No. 12956 of 2016

In view of above order, instant application seeking suspension of sentence of imprisonment has become infructuous. As such the same is dismissed.

MAY 31, 2016
sham

(JASPAL SINGH)
JUDGE