

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

Criminal Appeal No. D-916-DB of 2011

Date of Decision : December 14, 2016

Subhash Chander and another

....Appellants

Versus

State of Punjab

....Respondent

**CORAM : HON'BLE MR. JUSTICE T.P.S.MANN
HON'BLE MR. JUSTICE H.S. MADAAN**

Present : Mr. R.S. Rai, Senior Advocate with
Mr. Deepinder Brar, Advocate
for the appellants.

Mr. S.S. Dhaliwal, Additional A.G., Punjab.

T.P.S. MANN, J.

The appellants were tried for committing the offence punishable under Section 18 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short 'NDPS Act') on the allegations that on 5.10.2009 at about 4.15 p.m. in the area of village Kanganwal they were found in conscious possession of 8 kgs. of opium without any valid permit or license. Vide judgment and order dated 24.8.2011, learned Judge, Special Court, Sangrur convicted them for the said offence and sentenced them to undergo rigorous imprisonment for 11 years and to pay a fine of Rs.1,00,000/- each and in default of payment of fine, to further undergo rigorous imprisonment for one year. The period of

detention already undergone by them was ordered to be set off against the substantive sentence awarded to them.

Aggrieved of their conviction and sentence, the appellants filed the present appeal, in which notice was issued to the State and trial Court record requisitioned.

According to the prosecution, on 5.10.2009 SI Bhagwant Singh, Station House Officer, Police Station, Ahmedgarh, alongwith fellow officials, was present on the link-road leading from village Kanganwal to village Baurh Khurd in connection with checking of anti-social elements as well as checking of vehicles by holding a naka. At about 4.15 p.m. one Maruti car of white colour was seen coming from the side of village Kanganwal. On seeing the police party, the driver of the car tried to make a sudden U-turn towards village side. However, the engine of the car stopped. On the basis of suspicion, SI Bhagwant Singh, alongwith his co-officials, surrounded the car. The car bore registration No.DL-3CC-0710. The car was driven by Hindu gentleman whereas another Hindu gentleman was sitting in the conductor's seat. The whereabouts of the persons were asked. The driver disclosed his name as Ashok Kumar son of Bhagirath, caste Bishnoi, resident of Sangrian, District Hanumangarth, Rajasthan. He was aged about 53 years, clean shaven, fair complexion with healed injury marks on the chin, wearing Kurta Pyjama and height 5'-4'', whereas the other person disclosed his name as Subhash Chander, son of Mehar Chand,

caste Bishnoi, resident of Chak No.1, LNPC Tarawala, District Ganga Nagar, Rajasthan. He was aged about 50 years with hair and beard trimmed, wheatish complexion, height 5'-11" wearing Kurta Pyjama and mark of healed injury on his forehead towards right side. In the meantime, from the side of village Kanganwal, one Roop Singh son of Jangir Singh @ Marru, resident of village Kanganwal, came at the spot on bicycle. After disclosing to him the aforementioned facts he was joined in the police party. SI Bhagwant Singh disclosed his identity to both the car occupants that as there was some intoxicant substance lying in their car, he wanted to effect its search. However, they had a right to get their search and the search of the car conducted in the presence of some gazetted officer or in the presence of a Magistrate it could be arranged. However, both of them replied that their search be conducted in the presence of some gazetted officer. Both, Ashok Kumar and Subhash Chander got recorded their statements and also signed the same. Thereafter, Deputy Superintendent of Police, Malerkotla was requested on wireless to reach the spot. After some time, Shri Gurpreet Singh, PPS, Deputy Superintendent of Police, Sub Division, Malerkotla reached the spot in a government vehicle TATA Sumo, driven by Baljit Singh and accompanied by his gunman. Circumstances were explained to him, whereupon the DSP disclosed his identity to Ashok Kumar and Subhash Chander that he was a gazetted officer and posted as DSP, Sub Division, Malerkotla and some illegal intoxicating substance was lying in

their car. The DSP told them that he wanted to conduct their search but they had a right to get their search as well as that of the car in the presence of some other gazetted officer or in the presence of a Magistrate which could be arranged. In response thereto, they expressed full faith in him that their personal search and search of the car be conducted by him. The DSP recorded their separate consent statements and they put their signatures thereupon. Upon this, SI Bhagwant Singh conducted the search of the car in the presence of the witnesses and also as per the directions of the DSP. One plastic box was lying near the seats of Subhash Chander and Ashok Kumar. The box was opened and found to contain opium, which was wrapped in a glazed paper. Two samples of 10 grams each were taken out and the remaining was put in the same plastic box and turned into a parcel. The remaining opium when weighed came to be 7 kgs.980 gms. The plastic box as well as the two sample parcels were sealed by SI Bhagwant Singh. Separate impression of the seal bearing inscription 'BS' was prepared. The seal after use was handed over to ASI Harinder Singh, Incharge, Police Station City, Ahmedgarh. The DSP also affixed the seals on the three parcels bearing inscription 'GS'. Specimen of seal was prepared. SI Bhagwant Singh then took the two sample parcels as well as the plastic box containing 7 kgs. 980 gms. alongwith specimens of the seals in his possession by preparing a memo. The memo was attested by the DSP. SI Bhagwant Singh also took into possession the car alongwith its registration certificate vide

separate memo. The witnesses attested the memo. The DSP also attested the memo. As both Subhash Chander and Ashok Kumar had kept 8 kgs. of opium in their possession without any permit, they were found to have committed the offence under Section 18 of the NDPS Act. Accordingly, ruqa was prepared by SI Bhagwant Singh and sent to the Police Station through HC Malkiat Singh for registration of the case against Subhash Chander and Ashok Kumar. Accordingly on its basis, FIR No.143 dated 5.10.2009 under Section 18 of the NDPS Act was registered at Police Station Ahmedgarh at 8.00 p.m. Special report was, thereafter, sent through Constable Jaspal Singh, which was received by the Ilaqa Magistrate on 6.10.2009 at 1.00 a.m.

It is also the prosecution case that after both the accused were formally arrested their personal search was conducted, which led to recovery of two currency notes of the denomination of Rs.100/- each from Ashok Kumar and of Rs.500/- from Subhash Chander. Rough site plan of the place of recovery was prepared. The case property and the accused were brought to Police Station, Ahmedgarh. The case property was handed over to MHC Jaswinder Singh for being kept in the Malkhana and accused were lodged in the lockup. On 6.10.2009, SI Bhagwant Singh received the case property from MHC Jaswinder Singh and produced it alongwith the accused before Judicial Magistrate 1st Class, Malerkotla, who drew a sample weighing 10 gms. of opium from the plastic box. The

sample so drawn was put in a small plastic box and then put into cloth parcel, which was sealed by the Judicial Magistrate with his seal bearing inscription 'GS' and also by SI Bhagwant Singh with his seal bearing inscription 'BS'. Specimen of the seal was prepared. The plastic box was sealed with seal of the Judicial Magistrate and of the SHO. All the parcels were brought to Police Station, Ahmedgarh and deposited with MHC Jaswinder Singh. The Judicial Magistrate had also prepared an inventory report. On 3.12.2009, one Manoj Kumar visited Police Station, Ahmedgarh and produced an affidavit before SI Bhagwant Singh, which was taken into possession vide recovery memo Ex.PP signed by Manoj Kumar and Constable Balwinder Singh. On receipt of the report of Chemical Examiner, challan was compiled and presented in the Court. Both the accused were, thereafter, charged for the aforementioned offence, to which they pleaded not guilty and claimed trial.

In support of its case, the prosecution examined PW1 SI Bhagwant Singh; PW2 ASI Harinder Singh; PW3 Constable Sham Lal; PW4 HC Jaswinder Singh; PW5 ASI Gurmail Singh; PW6 Parveen Kumar, Nazir Malkhana, Court of Chief Judicial Magistrate, Sangrur; PW7 DSP Gurpreet Singh and PW8 Parmod Rishi, Reader to SDJM, Dhuri.

When examined under Section 313 Cr.P.C., both the accused denied the prosecution allegations and claimed that they

were innocent. According to them nothing was recovered from them as alleged by the prosecution. Accused Ashok Kumar's son Amit Kumar was a property dealer, who would usually go to Ludhiana in order to meet Randhir Singh Sodhi. Both Amit Kumar and Randhir Singh Sodhi became good friends. Randhir Singh Sodhi came to Sanghrian and Amit Kumar showed various properties to him. On 3.10.2009, Amit Kumar went to Ludhiana when he was asked by Randhir Singh that some land was required on Abohar-Ganga Nagar road for installing a petrol pump. Ashok Kumar accused called Subhash Chander accused on telephone about the land who informed him that there was land of Dr. Rajnish Kumar, which was available. Randhir Singh and Ashok Kumar accused went to Subhash Kumar accused. From there, they went to meet Dr. Rajnish Kumar. Subhash Chander and Ashok Kumar met near Kataria Filling Station at about 5.00 p.m. on 4.10.2009. In the meantime, a Maruti car came from Ganga Nagar side. Two persons alighted from the same. One of them was Gurpreet Singh. Thereafter, both the accused and others reached near the link road of village Panniwala and showed 4/5 acres of land. Those persons agreed to purchase the land and told the accused to reach Abohar for payment of earnest money. Subhash Chander and Ashok Kumar reached village Kherkhara where three vehicles of Police Station Ahmedgarh surrounded them and forced them to accompany them to Police Station Ahmedgarh and that person informed the accused that he was SHO, Police Station Ahmedgarh. Thereafter, both the

accused were brought to Police Station, Ahmedgarh at about 1.00 a.m. and locked up in the Police Station. At that time one Joginder Singh son of Modan Singh was already in the police lockup. SI Bhagwant Singh contacted on telephone Naveen Kumar, cousin brother of Subhash Chander through Constable Pargat Singh, to come to the Police Station for settlement of the matter. The relatives of the accused reached the Police Station in the morning of 5.10.2009. SI Bhagwant Singh started to bargain with relatives of the accused. However when their relatives refused to pay the money demanded by him, false case was planted against them.

In their defence, the accused had examined DW1 Dinesh Singh, Junior Telecom Officer, Office of GMT, District Sangrur, DW2 Jatinder Singh, Nodal officer, Bharti Airtel Limited, I.T. Park, Chandigarh, DW3 Vishnu Dutt, DW4 Joginder Singh, DW5 HC Raj Kumar, DW6 MHC Teja Singh, DW7 Navdeep Gupta, Handwriting and Finger Prints Expert, Patiala, DW8 Sunil Rana, Nodal Officer, Bharti Airtel Limited, DW9 Surjit Singh, Nodal Officer, Idea and DW10 Navin Kumar, cousin brother of Subhash Chander accused, besides tendering in evidence copy of statement of the Sarpanch of village of Subhash Chander accused as Ex.D10 to Ex.D16 and copy of the complaint Ex.D17 moved by Ashok Kumar to the District and Sessions Judge, Sangrur.

After hearing learned counsel for the parties and on going through the record, the learned trial Court believed the

prosecution case and, accordingly, convicted and sentenced the appellants, as mentioned above.

This Court has heard learned counsel for the appellants as well as learned State counsel besides scanning the evidence with their able assistance.

According to the appellants, the car in question from which the alleged recovery was effected, was owned by Manoj Kumar. Affidavit Ex.P5 brought on record by PW1 SI Bhagwant Singh as per which the car had been purchased by Ashok Kumar accused from Manoj Kumar was nothing but a procured document. Even said Manoj Kumar was not examined by the prosecution and, thus, it is difficult to hold that the vehicle in question was owned by Ashok Kumar accused. Further, DW7 Navdeep Gupta, Handwriting and Fingerprints Expert has opined that the signatures of Ashok Kumar appeared on the affidavit do not tally with his standard specimen signatures.

It is the prosecution case that on 3.12.2009, Manoj Kumar son of Pawan Kumar had appeared before SI Bhagwant Singh and produced the affidavit of Ashok Kumar accused wherein it stood mentioned that he had sold the car in question to Ashok Kumar on 4.8.2009. The statement of Manoj Kumar in that regard was also recorded under Section 161 Cr.P.C. by the Investigating Officer.

Though DW7 Navdeep Gupta had opined that the

signatures of accused Ashok Kumar were not there on the affidavit Ex.P5 yet in his cross-examination he admitted that a person could change shape, size, slant of letters, speed of writing and number of pen operations in an attempt to disguise while appending his signatures on document like affidavit Ex.P5 in the present case. Therefore, it cannot be said that affidavit Ex.P5 is a procured document.

It is then contended by learned counsel for the appellants that Roop Singh, the alleged independent witness was never examined by the prosecution before the trial Court. According to the prosecution, SI Bhagwant Singh had handed over his seal after use to ASI Harinder Singh and in case the independent witness was available the seal ought to have been delivered to him. As the joining of the alleged independent witness is in doubt, the prosecution case deserves to be outrightly rejected. However, this Court finds that merely because PW1 SI Bhagwant Singh had handed over seal to SI Harinder Singh instead of independent witness Roop Singh is not sufficient to disbelieve the presence of Roop Singh at the time of recovery of the contraband from the accused. There is no evidence on the record that samples and the case property were ever tampered with at any stage. In the report Ex.PQ of the Chemical Examiner it stood mentioned that the sample taken by Constable Sham Lal was intact and in good condition. The non-entrustment of seal to an independent witness

does not affect the merits of the case, especially when there is no evidence that the case property or the samples were tampered with at any stage. Thus, this Court is of the view that no benefit can be extended to the appellants on account of non-examination of PW Roop Singh by the prosecution.

It is then argued that SI Bhagwant Singh served joint notice upon the appellants whereas both the appellants were required to be served with separate notices in order to find out as to whether they wanted their search as well as of their car conducted in the presence of a gazetted Officer or a Magistrate. However, on perusal of the record, this Court finds that the initial non-consent statements of the appellants were recorded separately by PW1 SI Bhagwant Singh, which are Ex.PA and Ex.PB. Further, even when DSP Gurpreet Singh had arrived at the spot he had given separate offers to both the appellants of being searched in the presence of some other gazetted Officer or a Magistrate. At no point of time any joint notice was served upon the appellants seeking their consent as to whether they would like to be searched in the presence of a gazetted Officer of a Magistrate.

It is then contended that the recovery was effected on 5.10.2009 but the sample alongwith the seal impression was deposited with the Chemical Examiner on 13.10.2009. The delay of eight days in sending the sample to the Chemical Examiner was fatal for the prosecution.

It is the prosecution case that the recovery of 8 kgs. of opium was made on 5.10.2009 and the sample parcel alongwith the seal impression was deposited with the Chemical Examiner by Constable Sham Lal on 13.10.2009. Merely because there was a delay of eight days in depositing of the sample parcel with the Chemical Examiner is no ground to absolve the appellants of the charge against them. The Chemical Examiner had noticed that the sample parcel of the case property was not tampered with and the seals tallied with the specimen seal as per the forwarding authority letter. Thus, the prosecution has led cogent and convincing evidence that the sample was not tampered with during the period it remained with the Investigating Agency and, thus, the delay in receipt of the sample parcel by the Chemical Examiner is not fatal to the prosecution.

It is then contended by learned counsel for the appellants that PW1 SI Bhagwant Singh did not send report to the senior officer from the spot. Further, he was also required to fill CFSL form at the spot which he did not do.

It is the prosecution case that after the recovery of the contraband was effected and receipt of a ruqa from SI Bhagwant Singh, FIR was registered on 5.10.2009 at 8.00 p.m. at Police Station, Ahmedgarh. Special report was, thereafter sent to the Ilaqa Magistrate, who received the same on 6.10.2009 at 1.00 a.m. Further, the case property was deposited with MHC Jaswinder

Singh, who kept the same in Malkhana and the accused were lodged in the lockup. On the following day, i.e. 6.10.2009, the case property as well as the accused were produced before the Ilaqa Magistrate who drew the sample weighing 10 gms, from the plastic box. The Ilaqa Magistrate had sealed the said sample with his seal, besides he had prepared inventory report. There was thus, substantial compliance of Section 42 of the NDPS Act and no prejudice is shown to have been caused to the appellants.

As regards the plea of the appellants that the presence of DSP Gurpreet Singh at the spot was doubtful, it may be noticed that after being informed on wireless, DSP Gurpreet Singh reached the spot and after disclosing his identity had asked them as to whether they wanted their search to be effected from any other gazetted Officer or a Magistrate, both the appellants agreed to the search in his presence. Accordingly, their respective consent memos were prepared, which were duly signed by DSP Gurpreet Singh. Merely because he had kept his seal with himself and did not hand over the same to someone else is no ground to disbelieve his presence at the spot.

As regards the conscious possession of the appellants, it may be noticed that at the time of their apprehension both the appellants were sitting on the front two seats of the car. The plastic box containing opium was lying in between them. As such, both the appellants were in conscious possession of 8 kgs. of opium.

Such a huge recovery of contraband could not be planted. Even Section 54 of the NDPS Act allows raising of presumption against the appellants of being in conscious possession of contraband. As regards the plea of false implication of the appellants on account of some land dealing followed by SI Bhagwant Singh asking for bribe in order to set the appellants free, it may be noticed that in case there was any property dispute, some documentary evidence could have been brought on the record by the defence. The defence has failed to establish about the identity of Randhir Singh Sodhi and further as to whether he was having any connection with the police. Both the appellants belonged to Ganga Nagar district in the State of Rajasthan and the appellants claimed to have been apprehended from village Kalarkhera which place is not shown to be within the jurisdiction of Police Station, Ahmedgarh. There was no occasion for the police officials of Police Station, Ahmedgarh to go to a distant place. i.e. village Kalarkhera to apprehend the appellants and falsely involve them under the provisions of NDPS Act. Though according to DW4 Joginder Singh, he was kept in the police lockup of Police Station, Ahmedgarh on the intervening night of 4/5.10.2009 and both the appellants were also brought there yet it may be noticed that said Joginder Singh was already facing trial in a case under Section 21 of the NDPS Act. According to DW2 Jatinder Singh, Nodal Officer, mobile No.97795-95101 was in the name of SHO, Police Station, Ahmedgarh and on 5.10.2009 at 4.15 p.m. call was made from this mobile on the same day at 4.50 p.m.

and the location of tower was Halla Model, Ahmedgarh. Another call was received from mobile No.94173-89900 on the mobile of SHO and the location of tower was village Akbarpur Channa, Police Station, Rohira, District Malerkotla, Sangrur. Thus, according to the defence, the presence of SI Bhagwant Singh at the spot was doubtful. However, it may be noticed that all the calls made by SI Bhagwant Singh were from the places within the jurisdiction of Police Station, Ahmedgarh and the appellants were apprehended within the jurisdiction of the said Police Station. DW10 Naveen Kumar is none-else but the cousin of Subhash Chander appellant and, accordingly, had reasons to come up with a false version so as to save his kith and kin from punishment. Similarly, DW3 Vishnu Dutt, who was Sarpanch of village Panniwala deposed that the appellants were picked up on 4.10.2009 when he was present at the Aulakh Filling Station, Village Kalerkhera. Later on, he came to know that the appellants had been falsely implicated in a case of opium. However, despite being Sarpanch of his village, DW3 Vishnu Dutt made no attempt to note the aforementioned fact in the Panchayat register. He also could not state about the registration number of the vehicles which had reached there and used by PW1 SI Bhagwant Singh and other police officials.

In view of the above, no case is made out for any interference in the conviction of the appellants under Section 18 of the NDPS Act. However, as Subhash Chander appellant had

remained Sarpanch of his village while Ashok Kumar appellant remained Member Panchayat of his village and both of them are married and having children, this Court is of the view that the sentence of 11 years imposed upon them is on the higher side. Ends of justice shall be suitably met if their sentence of imprisonment is reduced from 11 years to 10 years.

Resultantly, the conviction of the appellants under Section 18 of the Narcotic Drugs and Psychotropic Substances Act is upheld. However, their substantive sentence of imprisonment of 11 years is reduced to rigorous imprisonment for 10 years each. The sentence of fine, alongwith its default clause, is maintained.

The appeal is, accordingly, disposed of.

December 14, 2016

(T.P.S. MANN)
JUDGE

(H.S. MADAAN)
JUDGE

satish

Whether reasoned/speaking : YES / NO

Whether reportable : YES / NO