

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

**Criminal Appeal No. D-1222-DB of 2014
Date of Decision: June 2, 2016**

Choudhary Gulam Rasool and Another..... Appellants

Versus

State of Punjab Respondent

Criminal Appeal No. S-3161-SB of 2014

Akhtar Rasool Appellant

Versus

State of Punjab Respondent

**CORAM : HON'BLE MR. JUSTICE MAHESH GROVER
HON'BLE MRS. JUSTICE LISA GILL**

1. Whether Reporters of local newspapers may be allowed to see the judgment? YES/NO
2. To be referred to the Reporter or not? YES/NO
3. Whether the judgment should be reported in the digest? YES/NO

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Present: Mr. D.N.Ganeriwala, Advocate
for the appellants in CRA-D-1222-DB of 2014 and
CRA-S-3161-SB of 2014.

Mr. Gaurav Garg Dhuriwala, DAG Punjab,
for the respondent.

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LISA GILL, J.

This judgment shall dispose of Criminal Appeal No. D-1222-DB of 2014 (Choudhary Gulam Rasool and another v. State of Punjab),
Criminal Appeal No. S-3161-SB of 2014 (Akhtar Rasool v. State of

The appellants Choudhary Gulam Rasool and Masood Ahmed in Criminal Appeal No. D-1222-DB of 2014 have been convicted and sentenced to undergo rigorous imprisonment for 20 years and a fine of ₹2 lacs and in default of fine to further undergo rigorous imprisonment for 2 years for the offence punishable under Section 21(c) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the 'NDPS Act').

Criminal Appeal No. S-3161-SB of 2014 has been preferred by Akhtar Rasool son of Gulam Rasool (accused) challenging the confiscation of Car bearing Registration No. JMU(T) AB-3142, Make Maruti SX4 VDI from which the recovery of narcotics was effected.

Brief facts of the case are that FIR No. 3 dated 05.01.2012 (Ex.P41) was registered on the statement of Inspector Kikkar Singh PW2 to the effect that on 05.01.2012 he along with other police officials had set up barricades for checking and were present at Satiwala chowk. At about 5:30 a.m. when a vehicle approached from Ferozepur Cantt it was signaled to stop with a torch, where upon the driver while slowing the vehicle at first made a bid to escape. On the direction of SI Kikkar Singh, ASI Mukhtiar Singh intercepted the vehicle by overtaking it in his Government vehicle No. PB05-J-4679. On being questioned, the two persons travelling in the car Maruti SX4 VDI bearing registration No. JMU(T) AB-3142, revealed their names to be Masood Ahmed son of Gulam Rasool (driver of the car) and the person sitting on the front passenger seat disclosed his name as Gulam Rasool son of Labh Deen, Caste Gujjer, both residents of Gujjer Nagar Jammu, Police Station Peer Mitha, District Jammu, State Jammu and Kashmir. Both the said persons were apprised by SI Kikkar Singh

separately about his identity and their right to get their search conducted in the presence of a Gazetted Officer or Magistrate as it was suspected that some intoxicant substance was being carried by them. Both the accused vide separate Memos (Ex.P3 and Ex.P4) expressed their desire to be searched in the presence of a Gazetted Officer. Consequently, a wireless message was sent to Hardev Singh, DSP, Sub Division Ferozepur, who arrived on the spot after some time. Hardev Singh, DSP, informed both the appellants separately regarding his own identity as well as the suspicion of carrying of narcotic substance by them in their car. Both the said appellants consented to conduct of search in the presence of DSP. Separate Memos (Ex.P3 and Ex.P4) were prepared and duly signed in English by the said appellants. SI Kikkar Singh, ASI Paramjit Singh and ASI Hardev Singh were witness to the same. Despite efforts, no independent witness from the general public could be associated. On direction of Hardev Singh DSP the search was conducted. On search of Maruti SX4 VDI car driven by Masood Ahmed, one yellow coloured plastic bag having handles was recovered from in-between the legs of Gulam Rasool and the seat of the car. Five packets wrapped in a yellow colour tape containing a bag of white cloth therein were recovered. Round seals blue in colour with inscription in Urdu were found affixed thereon. A number 0336-9410163 was found written on each seal. Recovered narcotic was weighed and each packet was found to weigh one kilogram. All the packets were numbered I to V. Ten grams from each packet was drawn separately as two samples each and converted into small boxes numbered as I to V and IA to VA. Remaining 980 grams of heroin in each packet was converted into separate parcels after putting in plastic

boxes. The samples along with 10 small plastic boxes of heroin were sealed by SI Kikkar Singh with his seal bearing impression 'KS' and the DSP with his seal bearing impression 'HS'. Form M-29, Ex.P-27 was prepared on the spot on which the seal 'KS' and 'HS' were affixed by SI Kikkar Singh and DSP Hardev Singh respectively. SI Kikkar Singh handed over his seal after use to ASI Paramjit Singh. The seal used by the DSP was retained by him. Five parcels of heroin weighing 980 grams each, contained in plastic boxes, 10 parcels of heroin as samples contained in small plastic boxes duly sealed with seal KS and HS, Form M-29, plastic bag yellow in colour having handles and Maruti SX4 VDI Car white in colour bearing No. JMU(T) AB-3142 were taken into police custody vide separate memos. From the personal search of accused Gulam Rasool, a sum of ₹one lac (100 currency notes of ₹1000 denomination) two mobile phones along with sim cards (Nokia and Spice) were recovered and taken into possession vide Memo Ex.P22. From the personal search of Masood Ahmed a sum of ₹60,000/- (1000 x 60 currency notes and three mobile phones along with sim card (Nokia) were recovered and taken into possession vide Ex.P23. Site plan (Ex.P24) was prepared. Both the accused could not produce any licence or permit to keep the heroin. Ruqa (Ex.P40) was sent to Police Station Kulgarhi through HC Pippal Singh for registration of FIR (Ex.P41). Both the accused were arrested (Memos Ex.P25 and Ex.P26). Statements of the concerned witnesses on the spot were recorded. DSP Hardev Singh left the place after giving necessary instructions.

Inspector Kikkar Singh returned to police station and handed over entire case property duly sealed along with both the accused to Inspector Surinderpal, SHO of Police Station Kulgarh, who verified the

facts of the case as well as the case property and also sealed all the parcels and CFSL Form (Ex.P27) with his seal bearing impression 'SP'. The entire case property was taken into possession by him vide memo of handing over (Ex.P42). On interrogation of Gulam Rasool, it came to light that the recovered heroin was given to them by Puran Singh @ Makhan son of Kala Singh who was arrested on 12.1.2012 (Ex.P29). Two mobile phones along with Pakistani sim card were recovered from Puran Singh and taken into possession vide memo Ex.P30. The Pakistani sim card and mobile phones were converted into separate parcels and sealed with the seal 'KS' by SI Kikkar Singh. Counterfeit currency notes to the tune of ₹2,30,000/- were also recovered from Puran Singh in respect of which a separate FIR was registered.

Puran Singh during investigation revealed that he had delivered a Pakistani sim card used in the commission of offence to Kirpal Singh @ Pala who was arrested on 18.3.2012 (Ex.P26). One mobile phone along with Pakistani sim card was recovered from Kirpal Singh and taken into possession vide memo Ex.P35. The samples of the recovered narcotics were sent for chemical examination on 10.1.2012. Report, Ex.P28 was received certifying the recovered substance to be heroin with purity ranging from 78.23% to 80.44%.

On completion of the investigation, challan/report under Section 173 Cr. P.C. was presented against the accused and charge under Section 21 of the NDPS Act was framed against the appellants Masood Ahmed and Gulam Rasool. All the accused persons were charged for the offence punishable under Section 29 of the NDPS Act and the appellants Puran Singh @ Makhan, Kirpal Singh @ Pala were charged for the offence

punishable under Sections 67-D and 67-F of the Information Technology Act. Puran Singh and Kirpal Singh were ultimately not proceeded against for an offence punishable under the NDPS Act. The sim cards recovered from Puran Singh and Kirpal Singh were sent to the Cyber Crime Investigation Lab Punjab and the report (Ex.P39) was received. Evidence was led and as many as 09 witnesses were examined by the prosecution to prove its case. All the accused pleaded innocence and false implication while denying the incriminating material put to them in the statement under Section 313 Cr. P.C. In defence, DW1 HC Baldev Singh was examined.

Learned trial Court on considering the evidence on record as well as the entire facts and circumstances of the case found sufficient ground to convict the accused for the offences as mentioned above and they were subjected to the sentence as detailed in the foregoing paras. It further directed that Maruti SX4 VDI car No. JMU(T) AB-3142 used for transportation of the contraband would stand confiscated with the State of Punjab as no claim had been made regarding the said car.

Aggrieved therefrom the present appeals have been preferred by Gulam Rasool and Masood Ahmed convicts against their conviction and sentence as above. Criminal Appeal No. S-3161-SB of 2014 has been preferred by Akhtar Rasool challenging the confiscation of the Maruti SX4 VDI car. Appeals preferred by Puran Singh challenging his conviction and sentence under Sections 67-D and 67-F of the Information Technology Act is decided separately. Appeal by Kirpal Singh stands decided on 19.1.2016.

Learned counsel for the appellants, Gulam Rasool and Masood Ahmed, vehemently argues that the impugned judgment and order are liable to be set aside as the mandatory provisions of the NDPS Act have not been

complied with thereby vitiating the entire proceedings against the appellants. It is vehemently argued that the link evidence in this case is missing, specifically urging that case property was never deposited as the concerned MHC Kulwinder Singh in his affidavit Ex.PW8/A has not made mention of deposit of the narcotic substance with him. He merely mentions the deposit of sim cards, CDs, phones etc. on 12.1.2012 recovered from Puran Singh and Kirpal Singh. There is no evidence on record to show that the case property was not tampered with, from the time of alleged recovery on 05.01.2012 till the time it was sent for testing to the Chemical Examiner. Furthermore, there is no evidence on record to show that specimen seal was deposited in the Malkhana along with the sample parcels. Learned counsel for the said appellants submits that there is a complete non compliance of the provisions of Section 50 of the NDPS Act which in itself is enough to set aside the impugned judgment. In the same manner it is argued that the seizure memo reflects the FIR number along with the date which reflects that all the documents have been prepared while sitting in the police station. No recovery as alleged was effected from the appellants. Learned counsel also points out to discrepancies in the testimonies of vital witnesses especially with regard to the method/scale used for weighing the samples as well as discrepancy in the time line put forth by the witnesses.

Learned counsel for the State however refutes the above said arguments and prays for upholding the impugned judgment and order which is stated to be passed after due consideration of the evidence on record and the entire facts and circumstances of the case. It is submitted that no *mala fides* are alleged, much less proved against the officials, which would lead to false implication of the appellants. There is strict compliance with the

mandatory provisions of the Act and the appellants have been rightly convicted and sentenced.

We have heard learned counsel for the parties and have perused the record.

Much stress has been laid by the learned counsel for the appellants Gulam Rasool and Masood Ahmed on the absence of link evidence vitiating the entire proceedings and rendering the conviction of the accused to be totally unjustified. A perusal of the record reveals that present is a case of chance recovery. It is specifically deposed by PW2 Inspector Kikkar Singh that on 5.1.2012 when he was posted as Incharge CIA Staff, Ferozepur, he along with other police officials including ASI Paramjit Singh and ASI Hardev Singh were present at Satiwala chowk having raised barricades for random checking. A Maruti car SX4 VDI approaching from the side of Ferozepur cantt was signaled to stop. The occupants tried to evade the police force but were apprehended. The driver of the car was Masood Ahmed and the person traveling in the front passenger seat was his father Gulam Rasool. Proper procedure as mandated by the NDPS Act was followed and when the accused expressed their desire to get their search conducted in the presence of a Gazetted officer, Hardev Singh DSP Sub Division Ferozepur was requested to reach the spot. Separate consent memos (Exs. P3 and P4) of both the accused were prepared after DSP Hardev Singh apprised both the accused separately about their right under the Act. Despite efforts independent witnesses could not be associated in the wee hours of a winter morning. Five plastic packets with some writing in Urdu and certain seals were recovered. Each packet weighing one kilogram was numbered and two samples of 10 grams each

were drawn therefrom and converted into separate sample parcels in plastic boxes. All the ten sample parcels and the five bulk parcels were sealed with the seals 'KS' and 'HS' i.e. the seal of PW2 Inspector Kikkar Singh as well as DSP Hardev Singh. The case property along with the car was taken into custody vide Memo (Ex.P5) which was duly witnessed by ASI Paramjit Singh and ASI Hardev Singh and attested by Hardev Singh, DSP Sub Division, Ferozepur. Bill of Maruti Suzuki Car No. JMU (T) AB-3142, Driving Licence of Masood Ahmed, Identity Card, Debit Card, PAN Card, Cheque Books, Pass Book and Tab Spice were recovered as reflected in Recovery Memo (Ex.P6). The case property was produced before PW9, SHO Inspector Surinder Pal of Police Station Kulgarhi. The said SHO verified the facts of the case and the case property and sealed all the parcels and the CFSL Form No.29 (Ex.P27) with the seal impression 'SP'. The case property was taken into his possession vide Ex.P42.

The said case property was produced before the JMIC Ferozepur on 6.1.2012 which is borne out from Ex.P27 i.e. Form M-29. Contention raised by learned counsel for the appellant that Ex.P27 is not available on record is incorrect. We have perused Ex.P27 (Form M-29) which bears the sample seal impressions as deposed by the witnesses as well as the endorsement of JMIC Ferozepur on 6.1.2012. The said samples were sent for chemical examination to the office of the Chemical Examiner, Kharar through HC Hari Ram, PW5. The samples along with Form M-29 were handed over to him on 9.1.2012 by Inspector Surinder Pal after preparing the docket and HC Hari Ram was directed to obtain docket number from the office of Senior Superintendent of Police, Ferozepur and deposit the samples for chemical examination. The samples along with

Form M-29 was deposited by HC Hari Ram at the office of Chemical Examiner, Kharar on 10.1.2012. HC Hari Ram in his affidavit PW5/A has given the details and has affirmed that as long as the case property remained in his possession, neither he nor anyone else tampered with it.

It is verified by the Chemical Examination Report (Ex.P28) that the samples were received with seals intact and were duly verified and compared with the sample seals which were found intact. Diacetylmorphine was found in the samples ranging from 78.23% to 80.44%.

Thus, reference by the learned counsel for the appellants to Register No.19 produced by DW1 to say that the said samples were in fact never deposited with the MHC is of no avail for the reason that it is borne out from the record that the case property i.e. narcotics recovered remained in the possession of PW9 Inspector Surinder Pal. Therefore, the appellants cannot draw any advantage from the affidavit (Ex.PW8/A) of MHC Kulwinder Singh to the effect that it was only the sim cards and the mobile phones which were entrusted to him. The said fact does not in any manner prove that the recovered narcotics or the samples were not taken in police custody or they were tampered with in any manner. MHC Kulwinder Singh was in fact entrusted only with the Pakistani sim cards, mobile phones etc. recovered from Puran and Kirpal Singh. The recovered narcotics remained in the custody of Inspector Surinder Pal after the recovery. The same was duly produced before the JMIC on 6.1.2012 as is evident from the endorsement on Ex.P-27 as well as Ex.P47 and Ex.P48 i.e. the application dated 6.1.2012 moved by the police for retaining the case property in the Judicial Malkhana and order dated 6.1.2012 passed thereon by the learned JMIC, Ferozepur respectively. After production before the JMIC and his

direction to deposit the case property in the Judicial Malkhana, it was deposited therein and remained in the custody of Inspector Surinder Pal, Police Station, Kulgarhi who has duly deposed to this effect. This fact is reflected in Ex.DW1/A as well. Inspector Surinder Pal PW9 handed over five sample parcels (of narcotics) and docket (P27) duly sealed on 9.1.2012 to HC Hari Ram for depositing the same in the office of Chemical Examiner, Kharar. The docket was got forwarded from the office of SSP Ferozepur on the same day and the sample parcel and docket were deposited in the laboratory at Kharar on 10.1.2012. Receipt was handed over to Inspector Surinder Pal. HC Hari Ram-PW5 has also proved the same and has submitted his affidavit (PW5/A). Both the said officials i.e. PW5 and PW9 have deposed that as long as the case property remained in their possession it was not tampered with in any manner by them or anyone else.

It is pertinent to note that there is no allegation or averment that the police officials were inimical towards the appellants. There is no reason whatsoever to disbelieve the testimony of the concerned officials who admittedly have no axe to grind against the appellants. It is a settled position of law that the testimony of the official witnesses cannot be discarded until and unless circumstances are proved to discredit them. Additionally the quantity and purity of the recovered narcotic does not permit of a hypothesis of false implication of the appellants by planting the said recovery upon them. Similarly, contention of learned counsel for the appellants that the entire paper work was carried out in the police station and no recovery as alleged was effected from the appellants is not tenable. Mention of the FIR number along with the date on the seizure memos or

non examination of HC Pippal Singh who had taken the Ruqa for registration of the FIR does not impinge on the veracity of the prosecution case in any manner. Alleged discrepancies sought to be pointed out in the testimony of the official witnesses in respect to the time of the recovery or manner of weighment are not material and have absolutely no bearing on the case.

It is proved from the record that the accused Gulam Rasool and Masood Ahmed were apprehended in a Maruti Car SX4 VDI belonging to the son/brother of the accused, Akhtar Rasool, at 5:30 a.m. on a winter morning, in conscious possession of five kilograms of heroin without any permit or sanction to carry it. The Hon'ble Supreme Court in ***Dharam Pal v. State of Punjab*** 2010 (9) SCC 608 while referring to Section 54 of the Act which raises a presumption from possession of illicit articles has observed as under:-

“From a plain reading of the aforesaid it is evident that it creates a legal fiction and presumes the person in possession of illicit articles to have committed the offence in case he fails to account for the possession satisfactorily. Possession is a mental state and [Section 35](#) of the Act gives statutory recognition to culpable mental state. It includes knowledge of fact. The possession, therefore, has to be understood in the context thereof and when tested on this anvil, we find that the appellants have not been able to account for satisfactorily the possession of opium. Once possession is established the Court can presume that the accused had culpable mental state and have committed the offence.”

Another contention of learned counsel for the appellants that there is a violation of Section 50 of the NDPS Act is not borne out from the record. The decision of the Hon'ble Supreme Court in *State of Rajasthan v. Parmanand & Another*, AIR 2014 SC 1384 is of no avail to the appellants. Apart from the fact that recovery of the contraband was effected from the car of the appellants, separate and proper communication of their rights under Section 50 of NDPS is evident from Ex.P1 to Ex.P4. Hardev Singh, DSP, was called to the spot when they opted to be searched before a Gazetted Officer. The accused were again apprised of their right separately and in due compliance with the provisions of Section 50 of the Act. Learned counsel for the appellants is unable to point out any illegality to the advantage of the appellants. Thus, we do not find any merit in the arguments advanced on behalf of the appellants and find no illegality or infirmity which calls for any interference in the impugned judgment dated 4.6.2014 passed by the Special Judge-III, Ferozepur.

At this stage, learned counsel for the appellants Gulam Rasool and Masood Ahmed submits that there is nothing to show that the said appellants are previous convicts or have a criminal history or fall under any of the categories mentioned in Section 32B of the Act to invite enhanced punishment. It is argued that the appellants could not have been sentenced to a punishment beyond the prescribed minimum sentence of 10 years in this eventuality. Therefore, the sentence of 20 years rigorous imprisonment imposed upon them is excessive and should be reduced.

Section 32-B of the Act reads as under:-

“32B. Factors to be taken into account for imposing higher than the minimum punishment - Where a minimum term of

imprisonment or amount of fine is prescribed for any offence committed under this Act, the **court may, in addition to such factors as it may deem fit**, take into account the following factors for imposing a punishment higher than the minimum term of imprisonment or amount of fine, namely:

- (a) the use or threat of use of violence or arms by the offender;
- (b) the fact that the offender holds a public office and that he has taken advantage of that office in committing the offence;
- (c) the fact that the minors are affected by the offence or the minors are used for the commission of an offence;
- (d) the fact that the offence is committed in an educational institution or social.
- (e) the fact that the offender belongs to organised international or any other criminal group which is involved in the commission of the offences; and
- (f) the fact that the offender is involved in other illegal activities facilitated by commission of the offence.”

A bare reading of the above-said provision makes it clear that there is no bar to impose a punishment higher than the prescribed minimum. It has been held by the Hon'ble Supreme Court in *State of Punjab v. Saurabh Bakshi*, Criminal Appeal No. 520 of 2015, while dealing with the question of reduction of sentence imposed for the offence punishable under Section 304-A, that the court must be alive to the impact which the crime would have on society and should not be swayed by any misplaced sympathies. There can be no doubt about the impact of the offence in the present case on society as a whole and its ramifications on the immediate

collective. The very fabric of society is seriously indented. Huge quantity of heroin i.e. five Kgs has been recovered from the conscious possession of the accused in the instant case. Purity of the said heroin ranges from 78.23% to 80.44%. The recovery of SIM cards of a neighbouring country points to a possibly wider network at Play hunting at cross border operations.

In the given factual matrix, we do not find any ground to reduce the sentence of 20 years imposed upon the accused. However, the fine imposed upon the appellant is reduced to ₹1 lakh each from ₹2 lakh and in default thereof to undergo one year of rigorous imprisonment instead of two years.

We, thus, uphold the conviction of the appellants under Section 21(c) of the NDPS Act and maintain the sentence of 20 years with the reduction in fine as aforesaid.

Criminal Appeal No. S-3161-SB of 2014 preferred by Akhtar Rasool challenging the confiscation of the Maruti car SX4 VDI bearing registration No.JMU(T) AB-3142 from which the contraband has been recovered is equally devoid of any merit. It is mentioned that an application for release of the said car on supardari was moved by Akhtar Rasool son of the appellant Gulam Rasool in Criminal Appeal No. D-1222-DB of 2014 but it was withdrawn. Thereafter, another application was moved by the appellant through a Special Power of Attorney which is allegedly not decided. In such circumstances the car in question could not have been confiscated.

It is proved on record that the contraband in question was recovered from the above said car being driven by Masood Ahmed who is

the brother of Akhtar Rasool. Their father Gulam Rasool was traveling in the car at the time of recovery. Documents Ex.P7-Sale Certificate as well as Ex.P9-The Certificate of Insurance, Ex.P10-Certificate of Extended Warranty, Ex.P11-Vehicle and Charges Invoice and Ex.P12-Initial Certificate of Pollution reflect the ownership of the said car to be of Akhtar Rasool who is admittedly the son and brother of Gulam Rasool and Masood Ahmed respectively. Akhtar Rasool has not been proceeded against under Section 25 of the NDPS Act. Therefore, withdrawal of his application for release of the car on supardari is understandable. The facts and circumstances of the case reveal that he had complete and due notice of the proceedings in question and the car used in the commission of the offence is liable to confiscation under Section 63 of the Act. It is mentioned in the impugned judgment dated 4.6.2014 that no claim had been made regarding the said car used for the transportation of the contraband. Be that as it may, the facts and circumstances of the case call for no interference with the direction to confiscate the said car.

Consequently, while maintaining the conviction of the appellants as well as the sentence of 20 years imposed upon them in Criminal Appeal No. D-1222-DB of 2014 is dismissed with modification as above in the quantum of fine imposed upon the appellants. Criminal Appeal No. S-3161-SB of 2014 is dismissed being devoid of any merit.

June 2, 2016
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(MAHESH GROVER)
JUDGE

(LISA GILL)
JUDGE