

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

**Criminal Appeal No.S-2211-SB of 2003 (O&M)
Date of Decision: March 23, 2017**

Chhotu Ram

.....APPELLANT(s).

VERSUS

The State of Haryana

.....RESPONDENT(s).

CORAM:- HON'BLE MR. JUSTICE SURINDER GUPTA

Present: Mr. Surender Dhull, Advocate
for the appellant (s).

Ms. Harpreet Kaur, AAG Haryana.

SURINDER GUPTA, J.

This is appeal against the judgment dated 24.09.2003 and order dated 26.09.2003, whereby the appellant was convicted and sentenced for the offence punishable under Section 18(c) of Narcotic Drugs and Psychotropic Substances Act, 1985 (later referred to as 'NDPS Act') and sentenced to undergo rigorous imprisonment for ten years and to pay a fine of ₹1 lakh and in default of payment of fine, to further undergo rigorous imprisonment for two years.

Brief Facts:-

As per case of the prosecution, on 10.03.2001, Inspector Sukhraj Singh along with his police party reached Bus Stand Bhuna in connection with patrolling and checking of crime, where Head Constable Khyaliram and others met them and were joined in the police party. When

the police party was going towards village Nadhori via *kacha* path through village Jandali Khurd, appellant was spotted near Bhuthan minor canal, carrying a plastic bag in his hand. On witnessing the police party, he immediately took left turn towards the fields and was apprehended on the basis of suspicion. On inquiry, appellant narrated his name as Chhotu Ram son of Ram Ridh, resident of Nadhori. Inspector Sukhraj Singh suspected that appellant was carrying some intoxicant in his bag and intended to search the same and apprised the appellant of his legal right of getting his search conducted before some Magistrate or Gazetted Officer. The appellant opted for getting his search conducted at the spot before some Gazetted Officer. Memo to this effect was prepared and intimation was sent to DSP Ashok Kumar through control room with request to reach at the spot. He reached the spot at about 1.30 pm. On the instructions of DSP Ashok Kumar, search of the bag of appellant was conducted and it was found containing three packets of opium wrapped in glazed paper. Two samples of 50 grams each were separated from each packet and were put in small tin containers while the remaining opium on weightment was found to be 2700 grams i.e. 900 grams in each packet. Remaining opium was also put in a plastic container. Separate parcels of samples as well as remaining opium were prepared and sealed with seal of Investigating Officer 'KR' and DSP Ashok Kumar also affixed his seal 'AK'. Entire opium was taken into possession vide recovery memo Ex.P5. Ruqa Ex.P1 was sent to Police Station, Bhuna, whereupon formal FIR (Ex.P2) was registered. Rough site plan of the place of recovery was prepared. On personal search of the appellant, a purse containing ₹50/- and a watch in working condition were

recovered, which were taken into possession vide recovery memo (Ex.P10). On reaching the police station, appellant and the case property were produced before SHO, Police Station Bhuna, who made inquiries from the witnesses and the accused (appellant) and put his seal 'HC' on the case property, which thereafter was deposited with MHC. Samples were sent to Forensic Science Laboratory, Madhuban and vide report (Ex.P12), the same were found to be of opium.

After completion of investigation, challan against the appellant was presented in the Court. On finding a prima facie case for the offence punishable under Section 18 NDPS Act, the appellant was charge-sheeted to which he pleaded not guilty and claimed trial.

In support of its case, prosecution examined PW1 ASI Madan Lal, PW2 HC Mahinder Singh, PW3 HC Raghubir Singh, PW4 DSP Ashok Kumar, PW5 Constable Subhash Chand, PW6 Inspector Jaipal Singh, PW7 Inspector Sukhraj Singh and PW8 SI Harish Chander. After tendering report of FSL (Ex.P12), evidence of prosecution was closed by learned Public Prosecutor.

After completion of prosecution evidence, statement of appellant as required under Section 313 Code of Criminal Procedure (for short-Cr.P.C.) was recorded, wherein he pleaded his false implication and alleged that on 10.03.2001, he was present at Bus Stand, Bhuna, where he had altercation with Head Constable Khyaliram, who got him falsely implicated in this case.

Appellant examined Jagdish Chander, Revenue Patwari as DW1, who stated that Bhuthan minor does not existed within the area of

village Jandali. This minor falls within the area of village Nadoli.

After hearing learned Public Prosecutor and learned defence counsel, the trial Court held that the offence punishable under Section 18(c) NDPS Act is duly proved against the accused (appellant) and he was convicted and sentenced as discussed above.

Arguments:-

I have heard learned counsel for the appellant, learned State counsel and have perused the lower Court's record and paper book with their assistance.

Learned counsel for the appellant has raised following submissions while assailing the judgment of the trial Court:-

- (i) The case of the prosecution is not supported by any independent witness.
- (ii) Vikram Singh, who had signed the arrest memo of the appellant, was not examined by the prosecution and there is no explanation as to why he was not joined as independent witness while effecting the recovery.
- (iii) Prosecution witnesses are discrepant regarding the place on recovery. While in the FIR, no distance of place of recovery from Fatehabad is mentioned, one of the witness has stated that it is 20 to 25 kilometres from Fatehabad, whereas PW6 Inspector Jaipal Singh has stated that the place of occurrence was 5-6 kms from Bhuna.
- (iv) Appellant has raised specific defence that he was falsely implicated at the instance of Head Constable Khyaliram with whom he had a quarrel at Bus Stand, Bhuna. Despite being member of police party,

Khyaliram was not examined by the prosecution. In case, he had been examined, appellant could be in a position to put forth his defence.

(v) Statements of official witnesses, which have several contradictions, cannot be relied on in the absence of any independent corroboration.

(vi) As per the case of prosecution, DSP Ashok Kumar was called to the spot and had signed the recovery memo but he had not signed the arrest memo and personal search memo of appellant which creates doubt about his presence at the spot. Carbon print of the signatures of SI Jaipal Singh and HC Khyaliram on the carbon copy of notice Ex.D2 and D3 given to the appellant while giving him option to get his search conducted from Magistrate or before the Gazetted Officer, is different than the carbon print of remaining body part of notice which shows that signatures of these witnesses on this memo, copy of which has been placed on file as Ex.D2 and reply given by the appellant as Ex.D3, were taken later on.

Learned State counsel has argued that it was a case of chance recovery. Police party was going on routine patrolling when the appellant came across it all of a sudden and was apprehended on the basis of suspicion. The place of recovery is a kacha path leading from village Nadhori to Jandali Khurd. There were fields all around, as such, there was no independent witness, who could be called or joined in the investigation. Vikram son of Banwari Lal was called to the spot to intimate about arrest of the appellant at later stage and was not a witness of recovery of opium from appellant. DSP Ashok Kumar had signed the recovery memo and his signatures were not required on the arrest memo or personal search memo.

About the difference of carbon print on the memo Ex.D2 and D3, Investigating Officer has explained that different carbons were used and the difference of print of signatures of SI Jai Pal Singh and HC Khyaliram may be due to this reason. The appellant has taken a defence in his statement recorded under Section 313 Cr.P.C. that he had an altercation with HC Khyaliram at Bus Stand Bhuna and due to this reason, he was falsely involved in this case. No such suggestion was given to DSP Ashok Kumar, who appeared as PW4. Suggestion to this effect were given to Inspector Sukhraj Singh and SI Jaipal Singh, who appeared as PW7 and PW6 respectively but no evidence was produced to substantiate this plea taken by the appellant. After his arrest in this case on 10.03.2001, the appellant never represented before any authority that he has been falsely implicated in this case due to altercation with HC Khyaliram. The most important witness of the prosecution was DSP Ashok Kumar, who reached the spot being a Gazetted Officer and before whom recovery has been effected. Had the appellant been falsely implicated due to his tiff with HC Khyaliram, a suggestion might have been given to DSP Ashok Kumar to this effect. This shows that the defence created by the appellant is just an after-thought.

Firstly, I take note of discrepancies in statements of prosecution witnesses, as pointed by learned counsel for appellant. PW4 DSP Ashok Kumar has stated that farmers were working in their respective fields but he did not notice any farmer working in the close proximity to the place of recovery and no farmer was summoned from the nearby fields. The small iron tin box were already with the police. Samples were taken out turn by turn and sealed in that sequence. Inspector Jaipal Singh PW6 has stated that

no person was seen by them working in the fields nearby and the tin boxes/*dabba* plastic were requisitioned from the village through Constable Nirmal Singh and he was also asked to bring some independent witness but he could not bring any. He also stated that the samples were sealed when all the samples were weighed and last of all plastic container (*dabba plastic*) containing remaining opium was sealed. Inspector Sukhraj Singh, who appeared as PW7, has stated that small tin boxes in which samples were taken and the cloth in which parcels were wrapped, were already with him. He has also stated that firstly samples were sealed, then the residue was put in plastic container and sealed. At that time, no person was working in the fields up to visible distance or was summoned to witness the recovery. Regarding Vikram, who signed the arrest memo, he stated that he came to the spot after recovery of the opium.

On giving a careful thought to the discrepancies that have occurred in the statements of the prosecution witnesses, I find that these are minor in nature and not relevant to discard the prosecution version. The witnesses have deposed after a period of more than 15 months after the occurrence and such type of discrepancies do occur with passage of time. DSP Ashok Kumar and Investigating Officer Inspector Sukhraj Singh are in unison on the point that tin boxes in which samples were sealed, were with the investigating officer. DSP Ashok Kumar stated that there was no person present in the nearby fields and he had reached the spot after the appellant had been apprehended and request was made to him to come to the spot. If he had noticed some persons working in the fields at a far away distance while reaching the spot, it is quite possible that the Investigating Officer and

the other members of the party may not have noticed those persons. Even otherwise, it is a chance recovery. The police party was having no information about the appellant, as such, there was no occasion to join the independent witness in the police party before apprehending the appellant. A Division Bench of this Court in the case of ***Ramesh Kumar Versus State of Punjab, 2013(4) RCR (Criminal) 320***, has observed that the testimony of official witnesses cannot be discarded until it is proved that they have any animus or hostility against the accused for his false implication. While discussing the question of non-joining of the independent witnesses, it was observed that they are averse to join the police and depose in favour of prosecution as they are afraid of the fact that joining the police and deposing in favour of the prosecution may expose them to serious consequences. Observations in para 21 of the judgment are reproduced as follows:

“21. It was held by the Hon’ble Supreme Court of India in ***Ajmer Singh v. State of Haryana, 2012(2) RCR (Criminl) 132: 2010(2) Recent Apex Judgments (R.A.J.) 13: 2010(2) JT 175***; though in cases like the case in hand, independent evidence is required, but accused cannot be acquitted merely because no independent witness produced. Hence conviction was upheld inter alia on said ground. So, the contention raised by the learned counsel for the appellant to the effect that evidence of PW-5 (HC Sham Lal) and PW-7 (ASI Jai Kishan) cannot be relied upon for want of corroboration by the evidence of independent witness, is repelled, in view of the judgment (supra).”

Much stress has been laid by learned counsel for the appellant

on the point that Vikram, who had signed the arrest memo, was not joined as independent witness. This fact has been explained by Investigating Officer Inspector Sukhraj Singh that Vikram came to the spot after recovery and was not a recovery witness, as such, he was not the independent witness present at the time of recovery. Intimation regarding arrest of the appellant was given to him as he is relative of appellant.

The defence taken by the appellant that he had a tiff with Head Constable Khyali Ram, who got him implicated in this case, is not supported or corroborated by any evidence on record. DSP Ashok Kumar had come to the spot being a Gazetted Officer and recovery of opium was effected in his presence. He appeared in this case to depose as PW4 and no suggestion was put to him that the appellant had an altercation with Khyaliram and for this reason, he has been falsely implicated. Had it been so, the appellant must have represented before DSP Ashok Kumar when he came to the spot or would have made some representation to higher police officers putting forth his grievance to this effect. His silence for a period of about 15 months till he took this defence for the first time when SI Jaipal Singh and Inspector Sukhraj Singh were examined on 07.05.2002 shows that the defence plea taken by the appellant is just an after-thought.

DSP Ashok Kumar had signed the recovery memo but had not signed the arrest memo or the personal search memo of the appellant. It had been stated by DSP Ashok Kumar that on personal search of the appellant, a watch and about ₹200/- were recovered which shows that personal search of the appellant was also conducted in the presence of DSP Ashok Kumar. It was not mandatory for the Investigating officer to obtain signatures of

Gazetted Officer on personal search memo Ex.D10.

The difference of carbon print of signatures of SI Jaipal Singh and HC Khyaliram have also been explained by Inspector Sukhraj Singh, who stated that different carbons were used while obtaining the signatures of witnesses. The original recovery memo on file Ex.P5 shows that there is no difference of ink or writing or pen used while scribing name of SI Jaipal Singh and HC Khyaliram on these memos Ex.P8 and P9.

On perusal of the judgment of learned trial Court, I find that all the arguments based on facts were addressed before the trial Court and were looked into, discussed and discarded. However, while recording the conviction, the trial Court recorded it under Section 18(c) instead of 18(b) of NDPS Act with the observation as follows:-

“FINAL ORDER.

As a sequel to above discussion, it is held that the prosecution has established with cogent and reliable evidence that on 10.3.2001 in the area of village Jandli Khurd, 3 Kg. opium was recovered from the conscious possession of the accused, for which he could not produced any permit or licence. Accordingly, the accused namely Chhotu Ram is held guilty and convicted under Section 18(c) of the Act. Let the accused be called upon to lead evidence, if any and to put forward his case on the quantum of sentence, as envisaged under Section 235(2) of Code of Criminal Procedure.”

Before proceeding further, it will be relevant to have a look on the provisions of Section 18 of NDPS Act, which provides as follows:-

“18. Punishment for contravention in relation to opium poppy and opium

Whoever, in contravention of any provision of this Act

or any rule or order made or condition of licence granted thereunder, cultivates the opium poppy or produces, manufactures, possesses, sells, purchases, transports, imports inter-State, exports inter-State or uses opium shall be punishable,-

(a) Where the contravention involves small quantity, with rigorous imprisonment for a term which may extend to six months, or with fine which may extend to ten thousand rupees, or with both;

(b) Where the contravention involves commercial quantity, with rigorous imprisonment for a term which shall not be less than ten years but which may extend to twenty years, and shall also be liable to fine which shall not be less than one lakh rupees which may extend to two lakh rupees: Provided that the court may, for reasons to be recorded in the judgment, impose a fine exceeding two lakh rupees;

(c) In any other case, with rigorous imprisonment which may extend to ten years and with fine which may extend to one lakh rupees.”

As per the table defining commercial quantity and small quantity under Section 2 Sub-section VIII(a) and Sub-section XXIII (a) of Section 2 of NDPS Act. 2 Kgms 500 gms of opium falls within the category of commercial quantity (serial No.92 of the table). As per Section 18 of NDPS Act, the sentence for the recovery of commercial quantity is prescribed in Section 18(b) and not in Section 18(c). It appears that the trial Court by mistake mentioned the conviction and sentence under Section 18 (c) of NDPS Act but awarded the sentence as provided under Section 18(b) NDPS Act. Even while recording conviction in concluding para, this fact was specifically mentioned that 3 kgs opium was recovered from the

conscious possession of the accused (appellant). As the quantum of sentence awarded commensurate the punishment provided under Section 18 (b) of NDPS Act, I do not find any reason to refer the case to trial Court for reconsideration on the quantum of sentence. Same can be maintained for the offence punishable under Section 18 (b) of NDPS Act.

As a sequel of my above discussion, I find no merits in this appeal. The same is dismissed with observation that the sentence awarded to the appellant shall be for offence punishable under Section 18(b) and not for the offence under Section 18(c) of NDPS Act.

Appellant, whose sentence was suspended during the pendency of this appeal vide order dated 24.01.2005, be taken into custody and sent to jail to undergo the remaining sentence awarded to him.

March 23, 2017
Sachin M.

(SURINDER GUPTA)
JUDGE

Whether speaking/reasoned: ***Yes/No***

Whether Reportable: ***Yes/No***

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CORAM:- HON'BLE MR. JUSTICE SURINDER GUPTA

Present: Mr. Surender Dhull, Advocate
for the appellant (s).

Ms. Harpreet Kaur, AAG Haryana.

SURINDER GUPTA, J.

Reserved on 21.02.2017.

March , 2017
Sachin M.

**(SURINDER GUPTA)
JUDGE**