

IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

CRA-D-957-DB of 2009
and CRM 9260 of 2014

Date of decision : 26.4.2017

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Rajinder @ Raju

.....Appellant

vs.

State of Punjab

.....Respondent

Coram: Hon'ble Mr. Justice T.P.S. Mann
Hon'ble Mr. Justice H. S. Madaan

Present: Mr. Raman Chawla, Advocate for the appellant

Mr. S.S.Dhaliwal, Additional Advocate General, Punjab

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H. S. Madaan, J.

CRA-D-957-DB of 2009

This appeal is directed against judgment and order dated 1.10.2009, passed by the Judge, Special Court, Patiala, vide which she had convicted accused Rajinder @ Raju for offence under Section 15 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as 'the NDPS Act'), sentencing him to undergo rigorous imprisonment for a period of 13 years and to pay a fine of Rs.1 lac and in default of payment of fine to undergo further rigorous imprisonment for a period of 2 years.

The accused – convict, who is appellant before this Court, prays that the appeal be accepted, the impugned judgment of his

conviction and order of sentence be set aside and he be acquitted of the charge framed against him.

Briefly stated, the prosecution story, as it unfolded during the trial is that on 26.5.2005, a police party from Police Station Ghagga, headed by SI Hukam Chand (hereinafter to be referred as 'the Investigating Officer/IO'), was present at Bhakhra bridge in the area of Village Kalwanu having laid a picket there. Then a vehicle make Mohindra was seen coming from the side of Badshahpur and on seeing the police party, the driver of the vehicle applied brakes and then two persons alighted from the vehicle and tried to run away. The Investigating Officer/IO with the help of police party apprehended both those persons. The vehicle was bearing registration No. HR-62-1014. The driver of the said vehicle revealed his name as Rajinder @ Raju, whereas the other person disclosed his name as Vinod Kumar. Both those persons were apprehended at about 1.00 P.M. The Investigating Officer/IO interrogated such persons as to why they ran away and he also found bags of poppy husk lying on the back side of the vehicle. Accused also revealed that since they were carrying the bags of poppy husk, as such they had tried to run away. In the meanwhile, Mohinder Singh son of Bachna Ram, resident of Kalwanu came there on a cycle and he was joined with the police party after disclosing the facts of the case to him. Some of the poppy husk was seen scattered from the bags. The Investigating Officer/IO apprised the accused of their right to get the search of the bags conducted in the presence of a Gazetted Officer or a Magistrate and they could be called to the spot, but the accused reposed

confidence in the Investigating Officer. Consent memo of the accused Exhibit PA was prepared, which was thumb marked by accused Vinod Kumar and signed by Rajinder @ Raju. That memo was attested by Mohinder Singh and HC Mohinder Singh. Then on search of the above said vehicle nine bags of poppy husk were recovered which were unloaded from the vehicle. The bags were marked 1 to 9 and from each bag, two samples of 100 grams each were separated, which were marked 1-1A to 9-9A. On weighment, each bag was found to be weighing 29 kgs 800 grams alongwith bags. All the samples and bags were separately sealed with the seal of the Investigating Officer/IO bearing impressions HC. Sample seal was separately prepared and seal after use was handed over to Mohinder Singh PW. The entire case property was taken into possession vide memo Exhibit PB, attested by HC Mohinder Singh and Mohinder Singh PW. Mohindra vehicle alongwith a challan chit and insurance certificate was also taken into possession vide recovery memo Exhibit PC attested by the above said witnesses. A photographer namely, Narinder Singh was also called at the spot, at the time of proceedings of the case and photographs were clicked by said photographer. Ruqa Exhibit PD was sent to the Police Station through Constable Kulwant Singh, for registration of the case, on the basis of which formal FIR Exhibit PD/1 was registered by SHO Jagseer Singh. Grounds of arrest were conveyed to both the accused vide memo Exhibit PE, which was thumb marked by Vinod Kumar and signed by Rajinder @ Raju and attested by above said witnesses.

From the personal search of Vinod Kumar Rs. 75/- were recovered and from Rajinder @ Raju Rs.150/- were recovered, which were taken into possession vide memo Exhibit PF, which was thumb marked by Vinod Kumar and signed by Rajinder @ Raju and attested by above said witnesses. Rough site plan Exhibit PG was prepared. Statements of witnesses were recorded at the spot.

On return to the Police Station, the Investigating Officer/IO produced the case property alongwith witnesses before SHO Jagbir Singh, who verified the investigation and sealed the recovered articles with his seal bearing impression 'JS', he also put his seal impression on sample chit Exhibit P-1 and on his direction the Investigating Officer/IO deposited the case property with MHC Hardayal Singh.

On the next day, the Investigating Officer/IO produced the case property before Illaqa Magistrate, Samana on directions of SHO. Inventory memo signed by the Investigating Officer being Exhibit P-2. Case property was seen and signed by the Magistrate.

On return to the Police Station, the Investigating Officer/IO deposited the case property with MHC Hardyial Singh, with seals intact. During investigation, it was revealed that Jagdish, since dead, was owner of the vehicle and accused Rajinder @ Raju was employed as driver by Amar Singh, a real brother of Jagdish deceased.

After completion of investigation and other formalities, challan against accused was prepared and filed in the Court of Judge,

Special Court, Patiala.

On presentation of challan in the Court of Judge, Special Court, Patiala, copies of documents relied upon therein were supplied to the accused free of cost, as provided under Section 207 Cr.P.C. and then finding that prima facie charge for offence under Section 15 of the NDPS Act was disclosed against both the accused, charge for said offence was framed against them, to which they pleaded not guilty and claimed trial and the case was fixed for evidence of the prosecution.

During the course of its evidence, the prosecution examined, as many as nine PWs, i.e. PW-1 Constable Narinder Singh, Office of DSP, Samana, PW-2 Jagdish Singh, SP (D), Patiala, PW-3, SI Hukam Chand, Investigating Officer/IO, PW-4 MHC Hardy Singh, PW-5 HC Mahadev Singh, PW-6 SI Jagbir Singh, PW-7 Harish Chander, Clerk, Office of DTO, Fathiabad, PW-8 ASI Mohinder Singh and PW-9 Amar Singh. It may be mentioned here that accused Vinod Kumar had died during the trial, as such, proceedings against him had abated.

The Additional Public Prosecutor tendered in evidence, report of Chemical Examiner Exhibit PX and thereafter closed the evidence of the prosecution.

The statement of accused – Rajinder @ Raju was recorded under Section 313 Cr.P.C., in which all the incriminating circumstances appearing against the accused were put to him but he denied the same stating that he was innocent and had been falsely involved in this case. He has taken up the plea that he never

committed any crime against the society; that he was picked up illegally from his house and this false has been planted upon him; that nothing has been recovered from him. The accused did not lead any evidence in defence.

After hearing arguments, the trial Court convicted and sentenced the accused as mentioned above, which left him aggrieved and he has filed the present appeal praying that the impugned judgment of his conviction and sentence be set aside by way of acceptance of appeal and he be acquitted of the charge framed against him.

We have heard learned counsel for the appellant-accused, learned Additional Advocate General, Punjab for the State, besides going through the record and we find that there is no merit in the appeal.

From the statement of PW-3 SI Hukam Chand, PW-6 SI Jagbir Singh and PW-8 ASI Mohinder Singh, it stands established that the accused was found in possession of the contraband on 26.5.2005, near Bhakhra bridge in the area of Village Kalwanu. The accused was apprehended at the spot, which is evident from the fact that in the photographs Exhibits P-1 and P-2, which had been clicked by PW-1 Constable Narinder Singh, at the place of recovery on 26.5.2005, he and other accused Vinod Kumar are shown to be there. Accused Vinod Kumar has since expired, as such proceedings against him have abated. It further stands established on the record that Rajinder @ Raju accused-convict was in conscious possession of the contraband. He was driving the vehicle, from which the contraband

had been recovered. When during the *nakabandi*, the police party had signaled the vehicle to stop, the accused – driver had applied the brakes abruptly and then alongwith his co-accused Vinod Kumar, had tried to run away. If the accused was not having any guilty intention, then there was no reason for him to run away on spotting the police party. There is nothing on the record to show that any mandatory provision of law was flouted while apprehending the accused and getting the recovery effected, what to talk of any prejudice having been caused to the accused. Keeping in view the huge quantity of recovery involved there are little chances of the same being planted upon the accused, more particularly, when no reason has been alleged or proved, prompted by which the Investigating Officer alongwith other police officials might have done so.

Learned counsel for the accused, referring to the testimony of PW-1 Constable Narinder Singh, photographer, has contended that he has admitted that photographs do not show the official vehicle and only one bag is visible in each photograph and that canal is not visible in any snap. According to learned counsel for the appellant, it goes to show that prosecution story is not truthful. We are not in agreement with him. The photographs taken depict the accused and the vehicle in which the contraband was being carried. Merely because the official vehicle in which the police party was travelling and canal nearby are not depicted in the photographs, do not render the prosecution story doubtful. As regards only one bag being visible in the photographs, the explanation regarding the same was offered by PW-3 SI Hukam Chand, who explained that photographer had

arrived at the spot at the end, when they had already weighed the bags and kept them in the trolley of the jeep. Therefore, this argument does not cut any ice.

Another argument put forth by learned counsel for the appellant – accused was that PW-2 Jagdish Singh SP (D), Patiala, who had conducted enquiry in the matter, had found that Vinod Kumar was innocent, as such he be got discharged. Therefore, a dent is caused in the prosecution story qua the appellant – accused also and he deserves to be acquitted for the said reason. Again we do not find any merit in this contention. A perusal of the statement of PW-2 Jagdish Singh, SP (D), Patiala, goes to show that though he stated that he had conducted an enquiry in the matter and found Vinod Kumar to be innocent, but then he stated in no uncertain words that Rajinder @ Raju was main accused from whom recovery was effected, rather he endorsed the prosecution story against the accused and accused cannot derive any benefit from his report. Nevertheless the manner in which he conducted the enquiry and reached the conclusion, does not appear to be found proper, in as much as in his cross examination, he admitted that he had not joined Amar Singh brother of Jagdish (deceased), owner of the vehicle, from which poppy husk was recovered. He stated that he had not called owners of the nearby fields at the alleged place of recovery, that he had not called any house owner. He admitted that photographs of place of recovery are on the file alongwith the accused and police party. The enquiry conducted and report submitted by this Officer do not come out to be credit worthy. Nevertheless, appellant accused-convict

cannot derive any benefit from the same.

One more argument advanced by learned counsel for the appellant was that PW-3 SI Hukam Chand in his cross examination admitted that in this case Sh. J.S. Kahlon SP (D), had conducted an enquiry finding Vinod Kumar to be innocent, recommending that he be got discharged in the case. He had admitted that he had joined the enquiry. Learned counsel referred to statement of Hukam Chand, stated to have been recorded in the enquiry Exhibit D-1, in which he is shown to have been stated that “earlier, I have been posted as Investigating Officer in Police Station Ghagga. On 26.5.2005, I was present in Police Station Ghagga. On that day, SHO Jagbir Singh PS Ghagga have handed over to me 09 bags of poppy chura husk alongwith one Mohindra jeep alongwith two persons namely, Rajinder @ Raju son of Hanuman Singh resident of Bachhowal, PS and District Fathiabad and Vinod Kumar son of Mani Ram resident of Kajalheri, PS and District Fathiabad and stated that poppy chura husk was got recovered from them. I registered the case bearing FIR No. 57 dated 26.5.2005, under Section 15/61/85 of NDPS Act, PS Ghagga, against them by obeying the order of my senior. I produced these both persons in court after arresting them. I did not recover any poppy chura from these persons. Order of officer has been carried out. Statement has been recorded, have read and same is correct.” However, PW-3 SI Hukam Chand had explained this statement in his cross-examination saying that though his statement in the enquiry was recorded, but he was not a consenting party. The SP (D) himself did not record his statement, rather he took his signatures on blank paper;

that SP (D) had given threats to sign on blank papers. Therefore, such type of statement does not make any sense and does not help the accused in any manner.

In view of the detailed discussion above, recovery of contraband from the possession of the accused Rajinder @ Raju stands established and it also comes out that necessary procedure was adopted, while effecting the recovery. Independent witness Mohinder Singh son of Bachna Ram was joined with the police party at that time. Accused was informed about his right to be searched by a Gazetted Officer or Magistrate, though the accused reposed confidence in the Investigating Officer/IO. Consent memos in that regard are available on the file. After recovery, case property alongwith accused were produced before SHO of the police station concerned, as deposed by PW-6 SI Jagbir Singh, SHO of Police Station Ghagga, at relevant time, who stated that he had sealed the case property after satisfying himself and had put his seal on the case property.

From affidavit of PW-4 MHC Hardy Singh, Exhibit PE, application moved by SI Hukam Chand in the Court of Illaqa Magistrate, for producing the case property, Exhibit PY and orders passed by Magistrate Exhibit PY/1, it comes out that no tampering with the samples had taken place till those reached office of Chemical Examiner. From the report of Chemical Examiner Exhibit PX, it comes out that samples sent there were of poppy husk. The judgment passed by the trial Court is well reasoned one, based upon proper appraisal and appreciation of evidence and correct interpretation of

law and there is no illegality or infirmity therein. Therefore the judgment is upheld as regard the conviction part.

However, regarding sentence part, keeping in view the facts and circumstances of the case, young age of the accused, his financial position, he having a family comprising three minor children and being stated to be the sole bread winner of his family, we find that there is some scope of reduction in the sentence. Accordingly, the order of sentence passed by the trial Court is modified and accused is sentenced to undergo rigorous imprisonment for 10 years instead of 13 years earlier awarded. The sentence of fine alongwith its default clause is maintained.

The appeal is partly allowed to the extent indicated above.

CRM 9260 of 2014

During the pendency of the appeal, the appellant filed miscellaneous application i.e. CRM 9260 of 2014 under Section 427 read with Section 482 Cr.P.C. with the prayer that the sentence imposed upon him in the present case be ordered to run concurrently with the sentence imposed upon him in FIR No.69 dated 28.2.2008 under Sections 332, 353, 307, 186 IPC, Section 15 of the NDPS Act and Section 25 of the Arms Act registered at Police Station Agroha, District Hisar.

The present case arises out of FIR No.57 dated 26.5.2005 under Section 15 of the NDPS Act registered at Police Station Ghagga. After convicting the appellant in the said case, the trial Court sentenced the appellant to undergo imprisonment for 13 years. As mentioned above, his conviction has been upheld in appeal though

his sentence of imprisonment has been reduced to 10 years. The other case involving the appellant arises out of FIR No.69 dated 28.2.2008 under Sections 332, 353, 307, 186 IPC, Sections 15/25 of the NDPS Act and section 25 of the Arms Act. He was charge sheeted under Sections 186, 353 and 307 IPC and Section 15 of the NDPS Act. The trial ended with his conviction for the aforementioned offences for which he stood charged and directed to undergo imprisonment for two months under Section 186 IPC, imprisonment for one year under Section 353 IPC, imprisonment for five years under Section 307 IPC and imprisonment for 12 years under Section 15 of the NDPS Act. All the sentences of imprisonment were ordered to run concurrently. Meaning thereby that he was to undergo imprisonment for 12 years which was the sentence of imprisonment imposed upon him for the main charge, i.e. under Section 15 of the NDPS Act. Appeal filed by him against his conviction and sentence in the said case has been disposed of by this Court vide an order of even date by maintaining his conviction for the various offences for which he stood charged and convicted. His sentences of imprisonment for the offences under Sections 186, 353 and 307 IPC have been upheld. However, sentence of imprisonment for 12 years under Section 15 of the NDPS Act has been reduced to 10 years and all the substantive sentences of imprisonment have been ordered to run concurrently. Meaning thereby that in the said case the appellant would now be required to undergo substantive imprisonment of 10 years.

The appellant has prayed for concurrent running of his sentences of imprisonment in the aforementioned two cases.

As mentioned above, the appellant is required to undergo imprisonment of 10 years in the case arising out of FIR 57 dated 26.5.2005 and another term of imprisonment of 10 years in the case arising out of FIR No.69 dated 28.2.2008. Both the cases pertain to the conviction of the appellant under the provisions of NDPS Act. Section 31 of the NDPS Act requires enhanced punishment for offences after previous conviction. Therefore, the appellant is disentitled to seek benefit of Section 427 Cr.P.C., more so, when it would amount to reduction in the sentence, which was not the intent of the legislature while providing for enhanced punishment for offence after previous conviction.

In *Nand Kishore Vs. State of Haryana, 2014(1) DC (Narcotics) 405*, the Hon'ble Supreme Court while dealing with a similar situation wherein the accused was seeking concurrent running of sentences of imprisonment in two cases under the provisions of the NDPS Act and after making reference to Section 31 of the NDPS Act held that the benefit of Section 427 Cr.P.C. could not be extended to a second conviction under the provisions of the NDPS Act for the reason that Section 31 of the NDPS Act, left no room for any doubt that the intent of the legislature for a second conviction under the NDPS Act was to provide enhanced punishment and in case an accused was allowed the benefit of Section 427 of Cr.P.C., there would be factually a reduction in the sentence and since it was not the intent of the legislature to reduce the punishment for a second conviction under the NDPS Act but to enhance the same, the benefit of Section 427 Cr.P.C. could not be extended to a second conviction

under the provisions of NDPS Act. While holding so, the Hon'ble Supreme Court observed as under :-

"A perusal of Section 31 leaves no room for any doubt, that the intent of the legislature for a second conviction under the NDPS Act is, to an enhanced punishment. In case, the appellant is allowed the benefit of Section 427 of the Cr.P.C., there would be factually, a reduction in the sentence, which will have to be undergone by the appellant (consequent upon the two convictions, referred to here-in-above). Since it is not the intent of the legislature, to reduce the punishment for a second conviction under the NDPS Act, but to enhance the same, we are satisfied that the benefit of Section 427 of the Cr.P.C. cannot be extended to a second conviction under the provisions of the NDPS Act. For the above reasons, the prayer made by the appellant, to extend the benefit of Section 427 of the Cr.P.C., by directing that the sentence inflicted upon the appellant by virtue of his second conviction, be ordered to run concurrently with the sentence imposed upon him in the first conviction, is rejected."

The present appeal pertains to recovery of 270 kgs. of poppy husk from the possession of the appellant on 26.5.2005. The

subsequent case pertains to recovery of 1000 kgs. of poppy husk from the appellants on 28.2.2008. In both the cases, while deciding the appeals, this Court has imposed imprisonment for 10 years in each case. As in both the cases the appellant stands convicted and sentenced under Section 15 of the NDPS Act, therefore, benefit of Section 427 Cr.P.C. cannot be extended to him.

Learned counsel for the appellant has placed reliance upon a Full Bench judgment of this Court in *Jang Singh Vs. State of Punjab, 2008(1) RCR (Criminal) 323*, wherein it was held that if an accused undergoing sentence of imprisonment is sentenced on a subsequent conviction to an imprisonment for life, the Court would have discretion to make the sentences run concurrently, though while doing so, nature of gravity of the offence would certainly be a relevant factor and so also the record of the offender, including his age, sex, etc. However, in the case of *Jang Singh (supra)*, the accused was not convicted in a case under the provisions of the NDPS Act. Rather, he stood convicted under Sections 302 and 201 IPC and subsequently, he was convicted in two more cases, one under Sections 399, 402, 379, 411, 467, 468 IPC and Section 25 of the Arms Act, while the other under Sections 302, 201 and 34 IPC. In the said case, the applicability of the provision of Section 31 of the NDPS Act was not there and, therefore, there was no bar in granting relief to the accused under Section 427 Cr.P.C. by making his substantive sentence of imprisonment in the subsequent two cases to run concurrently with the earlier case. On the other hand, the present appellant stands convicted and sentenced in two cases, both of which

are under the provisions of Section 15 of the NDPS Act, which makes the appellant disentitled to seek the benefit of the provisions of Section 427 Cr.P.C.

In view of the above, this miscellaneous application (CRM 9260 of 2014) is without any merit and, therefore, dismissed.

(T.P.S. Mann)
Judge

(H.S. Madaan)
Judge

26.4.2017

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Whether speaking / reasoned

Yes / No

Whether reportable

Yes / No