

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

(1) Crl. Appeal No.S-7-SB of 2013 (O&M)

Himanshu Mittal

...Appellant

VERSUS

State of Punjab

...Respondent

(2) Crl. Appeal No.S-114-SB of 2013 (O&M)

Raj Kumar and another

...Appellants

VERSUS

State of Punjab

...Respondent

Date of Decision: August 28, 2017

CORAM: HON'BLE MR. JUSTICE INDERJIT SINGH

Present: Mr.A.P.S.Deol, Senior Advocate with
 Mr.A.P.S.Brar and Mr.H.S.Deol, Advocate
 for the appellant (in CRA No.S-7-SB of 2013).

 Mr.Vishal Rattan Lamba, Legal Aid counsel
 for the appellants (in CRA No.S-114-SB of 2013).

 Mr.Gaurav Garg Dhuriwala, Sr.DAG, Punjab
 for the respondent-State.

INDERJIT SINGH, J.

By this common judgment, two connected cases i.e. CRA No.S-7-SB of 2013 and CRA No.S-114-SB of 2013 arising out of the same judgment, are being decided.

Kumar have filed above appeals against the judgment of conviction and order of sentence dated 14.12.2012 passed by learned Judge, Special Court, Moga, whereby they were held guilty and convicted and sentenced to undergo rigorous imprisonment for a period of ten years and to pay a fine of ₹1,00,000/- and in default of payment of fine to further undergo rigorous imprisonment for a period of two years each under Section 22 of the NDPS Act.

The brief facts of the prosecution case as noted down in the judgment passed by learned Judge, Special Court, Moga, are as under:-

“2. Briefly stated, it is the prosecution case that on 9.12.2010 ASI Swaran Singh along with HC Surjit Singh, HC Jagsir Singh and other police officials were present on Government vehicle bearing No.PB 29G 8307 on main Road Moga Ludhiana road near Power Grid PSEB in connection with checking of suspected vehicles and Nakabandi. It was about 6.15 a.m., when one Santro Car bearing registration No.HR 24E 3162 in which two persons were sitting came from the side of Ludhiana which was signalled to stop. Two plastic guttas containing some thing were found placed on the rear seat of the car. One person was sitting on the rear seat. In the mean time one Indica car bearing registration No.DL 4CU 0891 also came from Ludhiana side which was also signalled to stop. There was one card board box lying in the said car containing some thing. The investigating officer suspected that there was some intoxicant substance in both the vehicles. On interrogation, driver of Santro car bearing registration No.HR 24E 3162 disclosed his name as Raj Kumar accused and the person who was sitting on the rear seat disclosed his name as Naresh Kumar accused. The investigating officer told both the accused that he had suspicion that there was some intoxicant substance in both the guttas plastic and that they had the legal right to get these plastic bags searched in the presence of a Gazetted Officer or a Magistrate. But both the accused reposed confidence in him. In this regard, consent memo was prepared. Then the investigating officer inquired the name of the person who was driving Indica car bearing registration No. DL 4CU 0891, who disclosed his name as Himanshu Mittal accused. The investigating officer told him that he had suspicion that there was some intoxicant substance in the card board box lying in the car and that he had the legal right to get it searched in the presence of a Gazetted officer or a Magistrate. But the accused reposed confidence in him. In this

regard separate consent memo of the accused was prepared. On search of the plastic bags lying in the Santro car, 118000 tablets of lomotil, 119000 tablets of phenotil, 170000 tablets of momolit, 270000 tablets of microlit, 15000 capsules of Parvon spas, 5760 capsules of Spasmo proxyvon were recovered, out of which one packet containing 100 tablets of lomotil, one pack containing 100 tablets of phenotil, one packet containing 100 tablets of momotil, one packet containing 100 tablets of microlit, one strip containing ten capsules of parvon spas and one strip containing eight capsules of Spasmo proxyvon were taken out as sample and these were made into separate parcel. The remaining bulk was also put in the same plastic bags and made into parcels. All the parcels were sealed with the seal bearing impression SS. Sample seal impression was prepared separately. Seal after use was handed over to HC Surjit Singh. On further search of Santro car, Registration certificate of Santro car along with one affidavit executed by Roop Singh in favour of Raj Kumar accused was recovered. The entire case property, along with sample seal impression, Santro car, RC and affidavit were taken into police possession vide separate memo. On personal search of accused Raj Kumar currency notes of Rs.400/- along with one Nokia Mobile phone and on personal search of accused Naresh Kumar, currency notes of Rs.1800/- along with one Nokia Mobile phone were recovered and these were taken into police possession vide separate memos. On search of the card box lying in Indica car, 7800 capsules of Dexovon and 11250 tablets of Carisoma were recovered, out of which one strip containing 10 capsules of Dexovon and one strip containing 10 tablets of Carisoma were taken out as sample and was made into separate parcels. Remaining capsules and tablets were put in the same card board box and was made into separate parcel. The sample parcel and the parcel containing the bulk case property were sealed with the seal bearing SS by the IO after taking the same from HC Surjit Singh. Seal after use was again handed over to HC Surjit Singh. On further search of the car, no document regarding ownership of car was recovered from it. The entire case property and the car were taken into police possession vide separate memo. On personal search of accused Himanshu Mittal, currency notes of Rs.11,000/- along with two mobile phones were recovered and these were also taken into police possession. Statements of the witnesses concerning the case were recorded. The investigating officer prepared ruqa and sent the same to the police station for registration of case. On its basis formal FIR was registered. Rough site plan of the place of recovery was prepared. Accused were formally arrested by disclosing them the grounds of arrest.

3. On return to the police station entire contraband, sample seal impressions along with accused were produced before Inspector Sarbjit Singh SHO P.S. City Moga who verified the facts of the case and affixed his seal bearing impressions SS on

two sample parcels and three bulk parcels and on CFSL form and took the case property in his possession vide entrustment memo in an intact condition. On 11.12.2010, he prepared inventory and sent the case property before the area Magistrate along with inventory. Learned Magistrate found each article of the case property in intact condition and passed detailed order. In the court of Area Magistrate, representative sample was drawn and photographs of the case property were snapped. The sample parcels were sent to the Assistance Director (Toxicology) Forensic Science Laboratory, Punjab, Chandigarh in an intact condition through constable Sukhmander Singh who deposited the same in an intact condition with Assistant Director (Toxicology) Forensic Science Laboratory, Punjab, Chandigarh.

4. The Assistant Director (Toxicology) Forensic Science Laboratory, Punjab, Chandigarh analyzed the sample parcels and opined that the contents of the samples were found to contain diphenoxylate hydrochloride, Atrophine sulphate, Dextropropoxyphene hydrochloride, Dicyclomine hydrochloride, paracetamol, Dextropropoxyphene Napsylate and Carisoprodol. After completion of investigation, the challan was submitted before this Court.”

On presentation of challan against accused-appellants, copies of challan and other documents were supplied to them under Section 207 Cr.P.C. Finding prima facie case, the accused-appellants were charge-sheeted under Section 22 of the NDPS Act, to which they pleaded not guilty and claimed trial.

In support of its case, prosecution examined PW-1 Head Constable Jarnail Singh, who tendered into evidence his affidavit Ex.P1, PW-2 Head Constable Sukhmander Singh, who also tendered into evidence his affidavit Ex.P2. PW-3 Pardeep Kumar, Clerk, office of SDM, Zira mainly brought the record of vehicle No.DL-4CU-0891, which stood transferred in the name of Baldev Raj. PW-4 Sanjeev Kumar Notary Public proved the attestation of affidavit executed by Roop Singh. PW-5 Ajay Kumar Malhotra deposited regarding the inventory proceedings and photographs. PW-6 ASI (Retd.) Swaran Singh, deposited regarding the

investigation conducted by him in the present case. PW-7 Sahil Bagga, Clerk, office of DTO, mainly deposed regarding registration of Santro car. PW-8 ASI Surjit Singh, who is recovery witness, also deposed as per prosecution version. PW-9 Inspector Sarbjit Singh, who was posted as SHO at that time, deposed that ASI Swaran Singh produced before him three accused along with CFSL form duly sealed with seal bearing impression "SS". He also deposed regarding producing the case property etc. before learned CJM on the next date. He also deposed regarding Special Report and inventory proceedings.

At the close of prosecution evidence, the accused-appellants were examined under Section 313 Cr.P.C. They were confronted with the evidence of the prosecution and they denied the correctness of the evidence and pleaded themselves as innocent.

Accused Raj Kumar took the plea that he was plying Santro car as Taxi and he had purchased the car from one Roop Singh. Naresh Kumar is son of his wife's sister, who was working in the chemist shop of Surinder Pal known as Ganga Medicos, Moga. He had asked him to bring a car on rent to bring certain articles from Ludhiana and on the asking of Surinder Pal chemist they had brought those articles from Ludhiana. He had no knowledge about contents of the boxes. He was apprehended from the shop of Surinder Pal chemist. Similar plea was taken by accused Naresh. Accused Himanshu Mittal took the plea that he was working as helper at Ganga Medicos and on 08.12.2010, he was picked up from there and he was falsely implicated in this case. He further stated that Surinder Pal is the sole proprietor of Ganga Medicos, Moga who is having valid drugs licence

issued by Drug Licensing Authority, Punjab, Chandigarh.

In defence, accused examined DW-1 Sukhdev Singh, Computer operator-cum-Clerk office of Director Health and Family Welfare, Punjab and DW-2 Surinder Pal, who supported the defence version of accused Himanshu Mittal.

The learned trial Court, after appreciation of the evidence, convicted and sentenced the accused-appellants as stated above.

At the time of arguments, learned counsel for the appellants has not pointed out any discrepancy in the statements of the PWs nor pointed out any violation of the mandatory provisions of NDPS Act. Learned counsel for the appellants argued that recovery from the accused is of drug which do not fall under the definition of manufactured drugs. He next argued that appellants Naresh Kumar and Himanshu Mittal are the employees of Gagan Medicos, which concern has valid licence and the fact regarding validity of the licence and running of chemist shop has been proved by the DWs. Further, DW-2 Surinder Pal, who is owner of Ganga Medicoes, also came to the witness box to support the version of the accused. Learned counsel for the appellants further argued that appellant Raj Kumar was a taxi driver and he was engaged by his close relative Naresh Kumar only to bring the medicines from Ludhiana. He argued that at the most proceedings can be held under Drugs and Cosmetics Act and the accused cannot be convicted under Section 22 of the NDPS Act. He also contended that a false case has been planted upon the accused. Learned counsel for the appellants, therefore, argued that accused should be acquitted of the charges.

On the other hand, learned State counsel argued that prosecution has duly proved its case by leading cogent evidence. There are

no material contradictions or improvements in the statements of the witnesses. Nothing is there in the cross-examination of the PWs to disbelieve their statements. PWs have deposed consistently regarding the prosecution version. All the mandatory provisions of the NDPS Act have been complied with. He also argued that link evidence is complete. Learned State counsel next argued that there is no cogent evidence on record to prove the defence version. No record has been produced on the file to show that appellant Raj Kumar is a taxi driver or Naresh Kumar and Himanshu Mittal are the employees of Ganga Medicos or the recovery is effected from the front of the shop. He also relied upon the law laid down by this Court in ***Inderjeet Singh @ Laddi and others vs. State of Punjab, 2014(3) RCR (Criminal) 953***. Learned State counsel, therefore, argued that there being no merit in both the appeals, the same should be dismissed.

After hearing learned counsel for the appellants as well as learned State counsel and after going through the record, I find that the findings given by learned Judge, Special Court, Moga, are correct, as per evidence and law. PWs have consistently deposed regarding prosecution version. No material contradictions or improvements in the statements of the PWs have been pointed out at the time of arguments. There is nothing in the cross-examination, which may make the statements of the PWs unreliable. Mandatory provisions of the NDPS Act have been complied with. Link evidence is also complete. The Investigating Officer, recovery witness and SHO of the concerned police station have duly proved the prosecution version beyond any reasonable doubt.

To prove the defence version, first of all, there is nothing on the record to show that Raj Kumar is a taxi driver. Though in the statement

under Section 313 Cr.P.C., he stated that he is a taxi driver but no evidence of any type has been produced to prove this fact. There is no evidence on the record to show that recovery was effected from Ganga Medicos or in front of Ganga Medicos. DW-2 Surinder Pal himself stated in this statement that on that day, he was at Chandigarh, which means that his evidence is hearsay evidence. He was not present at the spot, therefore, there is nothing on the record to show that recovery was not effected from the car on the road but in front of Ganga Medicos. There is huge recovery in this case and there is no explanation regarding such a huge recovery. DW-1 Sukhdev Singh has only proved the chemist licence of Ganga Medicos owned by Surinder Pal but this fact, itself does not prove that Himanshu Mittal and Naresh Kumar are employees of Ganga Medicos or the tablets etc. recovered from them, belong to Ganga Medicos. Neither any bill has been produced on the file nor any employment record of Naresh Kumar and Himanshu Mittal has been produced on record. Rather, DW-2 Surinder Pal nowhere stated that Naresh Kumar is his employee. Even qua Himanshu Mittal, no record of any type has been produced and proved on record. If Himanshu Mittal was employed by Ganga Medicos, then, there might be attendance register or labour inspector record or other official record including the record maintained by the owner of the Medicos but no such cogent record regarding employment has been produced on the file. Therefore, the defence version of the accused cannot be believed.

Furthermore, if the recovery would have been effected as deposed by DW-2, then there should have been some representation or complaint to the higher police officials regarding false implication. Even, no

independent witness had come in support of the defence to deposed that

accused have been falsely implicated in this case.

As regarding legal argument that the case should have been registered under the Drugs and Cosmetics Act, I find that the Hon'ble Division Bench of this Court in ***Inderjeet Singh's case (supra)*** has held as under:-

“45. A perusal of the above Rule 65 (9) (a) and (b) mandates that the substances specified in Schedule 'H' or Schedule 'X' are to be sold in accordance with the prescription of a registered medical practitioner and in case of substances in Schedule 'X' the prescription is to be in duplicate and one copy of the same is to be retained by the licensee for two years. Insofar as the supply of drugs specified in the said Schedule 'H' or Schedule 'X' to registered medical practitioners, hospitals, dispensaries and nursing homes are concerned, the same are to be made only against the signed order in writing which are to be preserved by the licensee for two years. Therefore, it is not as if the drugs mentioned in Schedule 'X' can be carried by any licensee in any manner that he likes or can be received by him without adherence to the D&C Act and the 1945 Rules. The drugs which are mostly misused in Schedule 'H' as already noticed are Codenie, Dextropropoxyphene, Diphenoxylate, its salts at serial Nos.132, 146 and 156 of Schedule 'H'. These drugs fall within the ambit of 'manufactured drugs' as have been notified by the Central Government in terms of notification dated 14.11.1985 at serial Nos.35, 87 and 58 respectively and contravention of the same is punishable under Section 21 NDPS Act which envisages that whoever, in contravention of any provisions of this Act i.e. the NDPS Act or any Rule or order made or condition of licence granted thereunder, manufactures, possesses, sells, purchases, transports, imports interState, exports inter-State or uses any manufactured drug or any preparation containing any manufactured drug shall be punishable according to the quantity of the manufactured drug of which there has been a contravention and is specified therein.

46. For the purpose of regulation and carriage of various drugs which fall under the category of narcotic drugs, manufactured drugs and psychotropic substances, the Government of Punjab has framed the Punjab Narcotic Drugs and Psychotropic Substances Rules 2012 (hereinafter referred to “Punjab NDPS Rules 2012”) vide notification dated 13.12.2012 in exercise of the powers conferred by Section 78 read with Sections 10 and 71 of the NDPS Act and other powers enabling it in this behalf. Rule 8 provides for transport of opium. Rule 9 provides for prohibition for opening of

packets during transport. Chapter II of the Punjab NDPS Rules 2012 relates to possession, transport, purchase, sale, import inter-State, export inter-State use, consumption of manufactured drugs except prepared opium and coca leaf. Rules 17, 18 and 19 of the Punjab NDPS Rules 2012 read as under:-

*“17. **Possession of manufactured drugs.**- Subject to the provisions of these rules, no person shall be allowed to possess any manufactured drugs unless the person is lawfully authorized to possess the same under these rules.*

*18. **Transport, import inter-state or export inter-state of manufactured drugs.** - Save as otherwise provided in these rules, a person referred to in rule 17 may transport, import inter-state and export interstate manufactured drugs other than prepared opium and coca leaf in such quantity and in such manner, as may be specified in the permit issued by the Drugs Controller or the Director Ayurveda, Punjab, (for Ayurvedic, Unani & Sidha drugs), as the case may be, or any other officer authorized by the Government in this behalf in accordance with the provisions of these rules.*

*19. **Prohibition of transport, import interstate or export inter-state by post.**- Save as otherwise provided nothing in these rules shall be deemed to permit the transport, import inter-state or export interstate of manufactured drugs by means of post.”*

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54. Therefore, the presiding officer of a Special Court dealing with NDPS cases wherever the need is felt and where the matter is being unnecessarily delayed may grant interim bail till the receipt of the FSL report and thereafter considered the case after the receipt of the report.

As a consequence of the above, it may be noticed that:-

(i) Manufactured drugs are those drugs which are defined in Section 2 (xi) of the NDPS Act and have been notified by the Central Government vide notification dated 14.11.1985 and subsequent notification dated 29.1.1993. The possession of such drugs in contravention of the NDPS Act and the NDPS Rules would entail criminal prosecution of the offender under Section 21 of the NDPS Act.

(ii) The mere fact that the drugs which are covered under 'manufactured drugs' under the NDPS Act and the NDPS Rules and psychotropic substances as mentioned in Schedule of the

NDPS Act and Schedule I of the NDPS Rules and are also covered by the D&C Act and the 1945 Rules thereunder would not mean that the offender can be penalised only under the D&C Act and the 1945 Rules and not proceeded against the NDPS Act and the NDPS Rules. In case there is a contravention of the NDPS Act and the NDPS Rules, the stringent provisions of the latter can be resorted to.

(iii) A person possessing manufactured drugs in terms of the NDPS Act and the NDPS Rules is to strictly adhere to the provisions relating to sale, purchase, transport, carrying, storage, distribution etc. in accordance with the provisions of the D&C Act and the 1945 Rules as also the provisions of the Punjab NDPS Rules 2012.

(iv) For transportation of the 'manufactured drugs' a pass or permit in terms of Rule 18 of the Punjab NDPS Rules 2012 is to be possessed.

(v) It is to be ascertained in each case whether the manufactured drug, the contravention of which is alleged by a person falls within the permissible limits of the percentage of dosage provided for the drug by the notification dated 14.11.1985 and subsequent notification dated 29.01.1993 issued in exercise of power conferred by Section 2 (xi) (b) NDPS Act. However, the contravention of manufactured drug or possession of quantity in bulk is to be taken into consideration and not per dosage specially when there is a violation of the D&C Act and the 1945 Rules that is to say they are sold, purchased, distributed, stored, transported, carried etc. without a valid licence or kept without a valid authorization. The possession of quantity in bulk would be an indication that it is not for medicinal or therapeutic use but is sought to be misused by drug addicts and drug traffickers and would be treated as applicable to the entire quantity recovered of anyone or more narcotic drug or psychotropic substance of that particular drug in dosage forms and not just its pure drug content.

(vi) When a manufactured drugs are sold, purchased, distributed, stored, transported, carried etc. in bulk form, the notification dated 18.11.2009 issued by the Central Government in exercise of powers under Section 2 (viiia) and (xxiia) NDPS Act would apply and the question that these drugs contain an exception in terms of notification dated 14.11.1985 would not apply as the exceptions would apply when the manufactured drugs are for medicinal or therapeutic use.

(vii) The quantity of manufactured drugs is not to be determined on per capsule basis when these are carried

without proper licence or authorization. In other words the mere dosage of the manufactured drug in one capsule is not to be considered but the dosage in the number of capsule together is to be considered for determining as to whether the exceptions provided in the notification dated 14.11.1985 declaring the narcotic substance and preparations as mentioned therein to be manufactured drugs.

(viii) It is suggested that the State authorities should get the drugs in respect of which there is a contravention and that are recovered examined by the Chemical Analysts at the earliest and a report provided to the offender at the earliest so that the position can be ascertained as to whether the alleged offender was in possession of permissible quantity of the drug or otherwise. In case there is delay this would entitle the offender to at least interim bail till the report is finally received.

(ix) In relation to the search and seizure, the provisions of the Code of Criminal Procedure are to be followed. The instruction issued by the NCB should be circulated so these are followed as guidelines. The violation of the guidelines would not per se entail illegality or an irregularity unless it is shown the same has occasioned a failure of justice or resulted in prejudice.

*(x) The guidelines laid down and directions issued by the Hon'ble Supreme Court in the case of **Thana Singh v. Central Bureau of Narcotics** (supra) should be meticulously and strictly followed and steps should be taken to ensure their due compliance.*

(xi) For the sale, purchase, storage, carriage, transportation and use etc. of manufactured drugs, the provisions of the NDPS Act, the D&C Act, the 1945 Rules and the Punjab NDPS Rules, 2012 should be strictly adhered to and followed and violation of the same would necessarily entail its consequences including penal consequences.”

I have gone through the above-cited judgment and the same fully applies to the facts of the present case.

In view of the above discussion, I find that prosecution has duly proved its case by leading cogent evidence beyond any reasonable doubt. Therefore, the judgment of conviction and order of sentence dated 14.12.2012 passed by learned Judge, Special Court, Moga is correct, as per

law and does not require any interference from this Court and the same is upheld.

Therefore, finding no merit in both the appeals, the same are dismissed.

As appellants Raj Kumar and Naresh Kumar are on bail, their bail bonds stand cancelled and they are directed to surrender themselves before the jail authorities immediately for completing remainder of sentence, failing which the concerned authority shall proceed against them in accordance with law.

August 28, 2017
Vgulati

(INDERJIT SINGH)
JUDGE

Whether speaking/reasoned
Whether reportable

Yes
No