

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

**CRM No.3925 of 2014 in/and
Crl. Appeal No.S-516-SB of 2014(O&M)
Date of Decision: August 28, 2017**

Himanshu Mittal

...Appellant

VERSUS

State of Punjab

...Respondent

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.

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

INDERJIT SINGH, J.

CRA No.S-516-SB of 2014

Accused-appellant Himanshu Mittal has filed this appeal against the judgment of conviction and order of sentence dated 14.01.2014 passed by learned Judge, Special Court, Moga, whereby he was 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 under Section 22 (c) 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, In brief, version of prosecution, is that on 04.12.2009 ASI

Amar Singh, In charge, Narcotic & Drug Cell, Moga along with HC Daljit Singh, HC Jagsir Singh and other police officials were returning on government Mini Bus No. PB 29 D 9040 from Dosanjh to Moga after patrolling and search of suspected persons. It was about 5.45 p.m., when police party had reached at Model triangular road, when one person was seen coming on foot having Jhola plastic in his right hand. On seeing police party, he had got perplexed and turned to his right hand side towards Model Colony. On basis of suspicion, he was apprehended. In the mean time, another person had come there on scooter from side of city Moga. On inquiry, he had disclosed his name as Jagtar Singh son of Pardaman Singh, resident of Jalalabad, who was joined in police party after disclosing him facts. On interrogation, earlier apprehended person had disclosed his name as Himanshu Mittal alias Noti son of Satish Kumar r/o House No. 175 B, Street, No.3, New Town, Moga. Investigating officer had told accused that there is some intoxicant substance in Jhola plastic being carried by him and that he has legal right to get it searched in presence of some Magistrate or Gazetted officer or from him. Accused had reposed confidence in him. On search of Jhola plastic, 50 packets each containing 100 tablets of Microlit, total 5000 tablets were recovered, out of which one packet containing 100 tablets of Microlit was taken out as sample and made into parcel. Remaining 49 packets were put in same Jhola plastic and made into parcel. Sample parcel and bulk parcel were sealed by investigating officer with his seal bearing impressions "AS". Sample seal impression on form M 29 was prepared separately. After use, investigating officer had handed over his seal to HC Jagsir Singh. Investigating officer had prepared ruqa and sent the same to Police Station City, Moga on basis of which, formal FIR was registered against accused. Rough site plan of place of recovery was prepared at the spot. Statements of witnesses under Section 161 of Code of Criminal Procedure were recorded. On return to Police Station City, Moga, investigating officer had produced accused along with case property before SI/SHO Kikar Singh, who had verified facts of case, put his seal on each article of case property bearing impressions "KS" and kept the case property in his safe custody. On next day, SI Kikkar Singh had produced accused along with case property before Ilaqa Magistrate, for inventory proceedings. Sample parcel was sent to office of Chemical Examiner, Punjab, Chandigarh for analysis. On receipt of report of Chemical Examiner and completion of investigation, challan against accused was presented in court"

On presentation of challan against accused-appellant, copies of

Cr.P.C. Finding prima facie case, the accused-appellant was charge-sheeted under Section 22 of the NDPS Act, to which he pleaded not guilty and claimed trial.

In support of its case, prosecution examined PW-1 Head Constable Jarnail Singh, PW-2 Head Constable Nahar Singh, PW-3 Nirbhai Singh, Photographer, PW-4 Head Constable Jagsir Singh, recovery witness, PW-5 SI Amar Singh, Investigating Officer and PW-6 SI Kikar Singh.

At the close of prosecution evidence, the accused-appellant was examined under Section 313 Cr.P.C. He was confronted with the evidence of the prosecution and he denied the correctness of the evidence and pleaded himself as innocent. He pleaded that he was picked up from his Mobile phone shop situated in Main Bazar, Moga in presence of respectable and later on false recovery was foisted upon him. In defence, accused-appellant examined DW-1 Gurmeet Singh.

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

At the time of arguments, learned counsel for the appellant argued that no proceedings can be initiated under NDPS Act, rather, at the most, this case falls under Drugs and Cosmetics Act. He further argued that the appellant has been falsely implicated in the present case and has been picked up from his shop. Learned counsel for the appellant, therefore, argued that accused-appellant 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 defence of the accused that he has been falsely implicated and picked up from the shop has also not been proved as there is no document on the record to support this version nor any representation has been filed to the higher authorities regarding false implication. He also contended that oral statement of DW-1 Gurmeet Singh cannot be believed. Learned State counsel, therefore, argued that there being no merit in the appeal, the same should be dismissed.

After hearing learned counsel for the appellant 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. Further, from the record, I find that in the present case, the Investigating Officer and recovery witnesses have consistently deposed regarding prosecution version. The witnesses are trustworthy and reliable witnesses and have no motive or enmity against the accused to falsely implicate him. 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 accused-appellant stated that he has been picked up from his shop but there is no explanation as to why he has been picked up and what was the motive. The statement of DW-1 Gurmeet Singh that he was purchasing mobile phone from the accused when the police party picked the

accused but statement of this witness cannot be relied upon as he has not produced any bill regarding the purchase of mobile phone as stated by him. Secondly, if this witness was present and accused has been falsely implicated in the present case, then why he has not taken steps by filing representation. Neither, father of the accused nor accused filed any representation to the higher authorities for falsely implicating the accused. This defence witness has come after a long period to depose and no such statement has been given to the Investigating Officer or anywhere that accused has been falsely implicated. The defence version given by DW-1 cannot be believed and looks afterthought. The recovery from the accused-appellant has been duly proved.

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."*

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 (xxiiia) 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. Learned trial Court has appreciated the evidence in right perspective. No illegality has been committed by the Court below. Therefore, the judgment of conviction and order of sentence dated 14.01.2014 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 the present appeal, the same is dismissed.

CRM No.3925 of 2014

Applicant-appellant has filed this application under Section 427 Cr.P.C. for ordering the sentence awarded in the present case to run concurrently with the sentence awarded in case FIR No.211 dated 09.12.2010 under Section 22 of the NDPS Act registered at Police Station City Moga by learned Judge, Special Court, Moga, vide judgment dated 14.12.2012.

Learned counsel for the applicant-appellant cited judgment passed by Hon'ble Division Bench of this Court in ***Pritam Singh vs. State***

of Punjab, 2007(4) RCR (Criminal) 712, in which it is held that if High

Court finds that the sentence awarded against the accused was harsh and did not commensurate with the offence, or for any other reasonable cause as shown by the convict, it may direct the sentence to run concurrently. For this purpose, the Court would deal the merits of each case independently and no hard and fast rule could be struck vide which the Court could direct it to run concurrently.

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-cited judgment, I find merit in the present application and the same is allowed. The sentence awarded to the applicant-appellant in the present case i.e. FIR No.199 dated 04.12.2009 under Section 22 of the NDPS Act, registered at Police Station City Moga, is ordered to run concurrently with the sentence awarded in case FIR No.211 dated 09.12.2010 under Section 22 of the NDPS Act registered at Police Station City Moga.

August 28, 2017
Vgulati

(INDERJIT SINGH)
JUDGE

Whether speaking/reasoned
Whether reportable

Yes
No