

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

**CRA-S-2329-SB-2004
Date of Decision: 12.07.2018**

Darshan Singh

...Appellant

Versus

State of Haryana

...Respondent

CORAM:- HON'BLE MR. JUSTICE ARVIND SINGH SANGWAN

Present:- Ms. Swati Batra, Advocate as amicus-curiae
for the appellant.

Mr.Nishchal Mann, DAG, Haryana.

ARVIND SINGH SANGWAN , J.

Challenge in this appeal is to the judgment dated 16.11.2004 vide which the appellant was held guilty for commission of offence punishable under Section 15 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (*for short 'NDPS Act'*) and order on sentence dated 18.11.2004 vide which the appellant was awarded rigorous imprisonment for a period of 18 months and to pay a fine of ₹5,000/-; in default of payment of fine, the appellant was further directed to undergo rigorous imprisonment for a period of 06 months and the period of custody during investigation/trial w.e.f. 21.06.2002 to 22.07.2002 was set off against the substantive sentence awarded to him.

This appeal is on regular board and is being prosecuted by a legal aid counsel who was appointed by this Court to assist the Court on behalf of the appellant.

Brief facts of the case are that on 21.06.2002, SI Shiv Kumar, while on patrol duty along with his co-officials, was going towards village Rori. While reaching near the cremation ground in the village, a person was found sitting on a gunny bag on the bank of a minor canal. On suspicion, he was apprehended and he was given a notice under Section 50 of the NDPS Act. In reply to the notice for being searched either before a Gazetted Officer or a Magistrate, the appellant-accused reposed his confidence on SI Shiv Kumar and thereafter, on search of the bag, 26.2 Kgs of the poppy husk were recovered. Thereafter, two samples of 100 grams each were taken out and were sealed separately. The sample parcels as well as residue were taken in possession, vide recovery memo Ex. PE. One witness Nazar Singh was also joined at the spot.

The prosecution in support of his case, examined PW-1 Constable Dharam Pal who tendered his affidavit Ex. PA. In the affidavit, it was stated that on 21.06.2002, he was posted as a General Duty Constable and MHC, PS-Rori gave him a sample parcel carrying 100 grams of poppy husk sealed with 'KS' and 'SS' for depositing the same with the FSL, Madhuban and he deposited the said parcel with FSL, Madhuban on the same date and handed over the receipt to MHC.

PW-2 HC Nafe Singh stated that on receiving a *ruqa* Ex. PB, he recorded the formal FIR Ex. PB/1 and also tendered his affidavit Ex. PC. In cross-examination, this witness stated that the case property was deposited with him at 05:00 PM. In his affidavit Ex. PC, this witness has also deposed about depositing the case property with him and further handing over the same to Constable Dharam Pal for further depositing the same with FSL, Madhuban. PW-3 ASI Kamal Singh deposed on the line of the version

given in the FIR and proved the notice under Section 50 of the NDPS Act as Ex. PD and its reply as Ex. PD/1. This witness further deposed about sealing of sample parcels with seal 'KS' and the recovery memo Ex. PE. This witness further stated that independent witness Nazar Singh was also joined and he has also signed the same as a witness. In cross-examination, this witness stated that the police party reached at the spot at 12:00 noon and the place of recovery is about 45 KMs away from Sirsa city and about 1 KM away from Police Station Rori. He further stated that the accused was apprehended at 12:00 noon and the writing work was completed by 4:00 PM and thereafter, a *ruqa* was sent to the police station.

PW-4 SI Shiv Kumar has also deposed on the similar line and submitted that after effecting the recovery, he had sent *ruqa* to police station. Thereafter, he prepared site plan Ex. PF, report under Section 57 of the NDPS Act as Ex. PG which was submitted before the SHO whose endorsement is Ex. PG/1 and it was also attested by DSP Sirsa Rai Singh and he also proved the residue parcel as Ex. P-1. In cross-examination, this witness stated that he has handed over the seal to ASI Kamal Singh after 10 days of the recovery.

Thereafter, PW-1 Nazar Singh was given up and the statement of accused, under Section 313 Cr.P.C., was recorded in which he denied all the incriminating evidence put to him and pleaded false implication.

After hearing both the parties, the trial Court, vide judgment dated 16.11.2004 and order on sentence dated 18.1.2004, held the appellant guilty and convicted him under Section 15 of the NDPS Act as mentioned above.

Learned counsel for the appellant has argued that the

independent witness has not been examined and, therefore, the prosecution has failed to discharge its onus. It was further submitted that recovery was of 26.2 Kgs of poppy husk which falls in the non-commercial quantity. Learned counsel for the appellant has further argued that it is a case of chance recovery and no specific question was asked to the appellant in the statement recorded under Section 313 Cr.P.C. that if he was in conscious possession of the contraband and Question No. 3, in the statement under Section 313 Cr.P.C., only suggests that on search, the bag was found containing 26 KGs of poppy husk and it was not put to the appellant that if he was in the conscious possession of the same.

Learned counsel for the appellant has further submitted that recovery was effected from an open space and, therefore, non-examination of the independent witness Nazar Singh regarding recovery from the appellant is fatal to the prosecution version as it is not proved that the appellant was found in conscious possession of the contraband. Learned counsel for the appellant has further argued that the link evidence to prove that the seal used by SI Shiv Kumar was not handed over to ASI Kamal Singh for a period of 10 days, hence, there is strong possibility of the seal of the sample parcels having been tampered with.

Lastly, learned counsel for the appellant has argued that the appellant is a first offender and was a young person at the time of commission of offence and has not repeated any such offence since the time of registration of the present FIR in the year 2002. Learned counsel for the appellant has further submitted that the appellant has four children, out of whom, three are the daughters and one is the son and the appellant is the only earning member in the family. Learned counsel for the appellant has

further submitted that the appellant was on bail during the course of trial and was granted bail in the present appeal in the year 2004 itself and for the last 14 years, he has not repeated any such offence and has shown substantive improvement.

Learned State counsel has filed custody certificate of the appellant dated 29.06.2017 which is taken on record. As per the custody certificate, the appellant is not found involved in any other case and he has undergone 01 month and 25 days out of 18 months' rigorous imprisonment awarded by the trial Court.

Learned State counsel has argued that mere non-examination of independent witness cannot impeach the testimonies of the official witnesses who had no enmity against the accused-appellant.

After hearing learned counsel for the parties, I found that so far the statements of PW-3 and PW-4, as scrutinized by the trial Court, are concerned, it is proved on record that on the said date and time, the recovery was effected from the appellant after giving him a notice under Section 50 of the NDPS Act. However, the prosecution has failed to prove the conscious possession of the appellant as recovery was effected from an open space and no such question has been put to him while his statement was recorded under Section 313 Cr.P.C. that he was found in the conscious possession of the contraband.

Therefore, I deem it appropriate to reduce the sentence of the appellant from rigorous imprisonment of 18 months with a fine of ₹5,000/- to the sentence of 01 month and 25 days, i.e. the period already undergone by him, considering the mitigating circumstances that he is the only bread earner of the family of four minor children; after registration of the present

FIR in 2002, he has not repeated any such offence; he was on bail during trial and during the pendency of the present appeal and has not misused the same and also considering the recovery of non-commercial quantity, conscious possession of which could not be proved by putting such evidence to the appellant in his statement under Section 313 Cr.P.C.

In view of the above, this appeal is disposed of. The sentence awarded to the appellant is reduced to the sentence already undergone by him. However, the imposition of fine is upheld. The appellant is directed to deposit the amount of fine on or before 10.10.2018, in case the same has not been deposited so far.

July 12, 2018

Waseem Ansari

(ARVIND SINGH SANGWAN)

JUDGE

Whether speaking/reasoned

Yes/No

Whether reportable

Yes/No