

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH.

CRA-S-1310-SB of 2005 (O&M)
Date of Decision: 16.10.2018

MohanAppellant

VERSUS

State of HaryanaRespondent

CORAM:- HON'BLE MR. JUSTICE SURINDER GUPTA

Argued by: Mr. Sachin Kaushik, Advocate
for Mr. Rakesh Nehra, Advocate
for the appellant.

Mr. Deepak Grewal, DAG, Haryana.

SURINDER GUPTA, J.

This is appeal against judgment dated 28.10.2003 passed by Special Judge, Rohtak whereby appellant-Mohan was convicted and sentenced as follows:-

<i>Offence under Section</i>	<i>Punishment</i>
20 (b) (ii) (B) of NDPS Act	To undergo rigorous imprisonment for three years and to pay fine of ₹5000/- and in default of payment of fine, to further undergo rigorous imprisonment for three months.

2. Case of prosecution, in brief, is that on 21.09.2003, ASI Har Narain with his police party was present in connection with patrolling and checking of anti-social elements near Railway Crossing, village Pehrawar, when a secret information was received that appellant-Mohan used to sell 'Charas'. At that time he was present in front of his house and selling 'Charas'. A report under Section 42 of Narcotic Drugs and Psychotropic Substances Act, 1985 (for short 'NDPS Act') was prepared and sent to Police Station through Constable Samunder for recording of DDR and SHO Police

Station was requested to come to the spot. The police party headed towards house of appellant. On the way Surender Singh son of Sumer Singh was joined in the police party as independent witness. The appellant was found present in front of his house and on witnessing the police party he tried to run away but was apprehended. In compliance of provisions of Section 50 NDPS Act, he was apprised of his right to get his search conducted before a Magistrate or a gazetted officer. The appellant opted for his search before a gazetted officer at which Mohammad Ishak Khan, Deputy Superintendent of Police was called to the spot, who on reaching the spot inquired from the appellant as to whether he is willing to get his search conducted before him. On search 'Charas' wrapped in a glaze paper was recovered from the side pocket of shirt of appellant which on weighment came to be 400 gms. Sample of 50 gms. of 'Charas' and remaining 'Charas' were put in separate plastic containers and sealed with seal of ASI Har Narain and DSP Mohammad Ishak Khan. The seal after use was handed over to ASI Ram Kumar while DSP Mohammad Ishak Khan retained his seal with him. On receipt of report of FSL and completion of investigation challan against the appellant was present in Court.

3. In support of its case, prosecution has examined DSP Mohammad Ishak Khan as PW-1, SI Vijender Singh as PW-2, ASI Daya Nand as PW-3, Constable Jitender Singh as PW-4, HC Jai Dev Singh as PW-5, Constable Baljit Singh as PW-6, ASI Ram Kumar as PW-7 and ASI Har Narain as PW-8.

4. On completion of prosecution evidence statement of accused as required under Section 313 Cr.P.C. was recorded wherein he denied the

allegations levelled against him and pleaded his false implication.

5. On perusal of evidence, learned trial Court recorded the finding that offence under Section 20 NDPS Act is duly proved against the appellant and he was convicted and sentenced as mentioned in para 1 above.

6. I have heard learned counsel for the appellant and learned State counsel and perused the lower Court record with their assistance.

7. Learned counsel for the appellant has assailed the conviction of appellant on the grounds as follows:-

- (i) The case of prosecution is based on testimony of official witnesses which find no independent corroboration;
- (ii) Surender Singh, who was joined as independent witness, was given up by the prosecution;
- (iii) CFSL form was not prepared at the spot;
- (iv) In the seizure memo etc. FIR number has been mentioned, which shows that the documents were prepared after the FIR number had already been received.
- (v) *Malkhana* register was not produced and the sample was sent to FSL after ten days of recovery and delay in sending the sample has not been explained;
- (vi) The investigating officer has drawn only one sample while he was required to draw two samples from the contraband.

8. Learned counsel for the appellant has referred to observations of Hon'ble Apex Court in case ***Mohan Lal vs. State of Punjab, (Criminal Appeal No. 1880 of 2011) decided on 16.08.2018*** and has argued that investigation was conducted in this case by ASI Har Narain on whose

complaint the FIR was registered, as such, complainant and the investigating

officer are the same.

9. Hon'ble Apex Court in case of ***Mohan Lal (supra)***, has observed that when complainant and investigator are one person, the investigation is not fair.

10. The police party on receipt of secret information had joined Surender Singh as independent witness. However, he was given up by the public prosecutor as having been won over by the accused. The prosecution version has been supported by DSP Mohammad Ishak Khan, who while appearing as PW-1, has stated that on search of accused 400 gms. 'Charas' was recovered from right side pocket of his *kurti*. He is a gazetted officer and had no reason to falsely depose against the appellant. In cross-examination he has not been suggested that he had got any reason or enmity with the accused to depose falsely against him.

11. PW-7 ASI Ram Kumar and PW-8 ASI Har Narain have also supported the prosecution case. The fact that prosecution has given up the independent witness being won over by the accused gives no reason to discard the testimony of above official witnesses particularly when the same is without any blemish and material contradiction.

12. Hon'ble 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. Hon'ble Division Bench in para 21 of the judgment observed 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).”

13. In case of *Sumit Tomar versus State of Punjab, 2013(1) SCC 395*, Hon'ble Supreme Court on the point of non-examination of independent witness joined by the police, has observed as follows:

“In view of the above discussion, we hold that though it is desirable to examine independent witness, however, in the absence of any such witness, if the statements of police officers are reliable and when there is no animosity established against them by the accused, conviction based on their statement cannot be faulted with. On the other hand, the procedure adopted by the prosecution is acceptable and permissible, particularly, in respect of the offences under the Narcotic Drugs and Psychotropic Substances Act.”

14. In view of what has been discussed above, non-joining of

independent witness is not a circumstances, which can be given weightage in the facts and circumstances of this case.

15. It has been argued that PW-8 ASI Har Narain being complainant and investigator could not conduct fair investigation as per observations of Hon'ble Apex Court in case of ***Mohan Lal (supra)***.

16. In above referred cases, Hon'ble Apex Court has emphasized on importance of fair investigation from the point of view of accused and it was observed that informant and investigator must not be the same person.

17. A question, which arises for consideration, is as to whether authorized person as per provisions of NDPS Act could conduct the investigation particularly when the senior officer like DSP, SHO of the Police Station were also joined in the same. To find answer to this query, reference can be made to observations of Hon'ble Apex Court in case of ***State of Punjab vs. Baldev Singh, 1999 (3) RCR (Criminal) 533***, wherein it has been observed in para 13 as follows:-

“13. The provisions of Sections 100 and 165 Cr.P.C. are not inconsistent with the provisions of the NDPS Act and are applicable for affecting search, seizure or arrest under the NDPS Act also. However, when an empowered officer carrying on the investigation including search, seizure or arrest under the provisions of the Code of Criminal Procedure, comes across a person being in possession of the narcotic drugs or the psychotropic substance, then he must follow from that stage onwards the provisions of the NDPS Act and continue the investigation as provided thereunder. If the investigating officer is not an empowered officer then it is expected of him that he must inform the empowered officer under the NDPS Act, who should thereafter proceed from that

stage in accordance with the provisions of the NDPS Act. In Balbir Singhs case after referring to a number of judgments, the Bench opined that failure to comply with the provisions of Cr.P.C. in respect of search and seizure and particularly those of Sections 100, 102, 103 and 165 per se does not vitiate the prosecution case. If there is such a violation, what the courts have to see is whether any prejudice was caused to the accused. While appreciating the evidence and other relevant factors, the courts should bear in mind that there was such a violation and evaluate the evidence on record keeping that in view.”

18. In view of observations of Constitution Bench of Hon'ble Apex Court, authorized person on recovery of contraband can proceed with the investigation of the case. In this case DSP, who is a gazetted officer, was called to the spot and recovery was effected in his presence and immediately thereafter, the case property alongwith accused was produced before the SHO, as such, it cannot be held that ASI Har Narain was having the final say while investigating the case and the same was not fair.

19. It has been argued that in the recovery memo, site plan, arrest memo etc. FIR number of this case find mentioned. I have perused the above mentioned documents and find that FIR number has been mentioned in these documents but the same has been incorporated in the blank space, which indicates that the same has been filled up later on. This fact could be got clarified from the investigating officer of the case but no question was put to him in this regard, as such, filling of FIR number in the memos prepared at the spot by mentioning FIR does not indicate that these were prepared at later stage. Reference has been made to the observations of this Bench in

case of **Paramjit Singh Vs. State of Punjab (CRA-S-865-SB-2017 decided on 02.06.2017)**, wherein a note was taken of the fact that section of offence was mentioned in the consent memo despite the fact that the Investigating Officer and Gazetted Officer could not have remotest idea that which type of contraband could be recovered from the possession of appellant. In this case, consent memo prepared at the spot do not bear any FIR number or Section of the offence, as such, the observations in that case are not applicable to the facts of the present case.

20. Learned counsel for the appellant has raised the issue of non-preparation of CFSL Form (Form-29) at the spot. Learned counsel for the appellant while referring to the statement of ASI Har Narain could not point out that any suggestion given to him that CFSL form was not prepared at the spot. He was the best person to tell as to whether CFSL Form was prepared at the spot, as such, this argument of learned counsel for the appellant has no merits.

21. While dealing with issue of non-preparation of CFSL Form at the spot, it was observed by Hon'ble Apex Court in case of **State Vs. Dilbagh 2004(13) SCC 99**, as follows:-

“..... Merely because no such form was prepared or sent, does not in any way reflect on the fact that the sample which was extracted, was the sample which reached the Chemical Analyser with the seal intact. In this case, the prosecution has been careful enough to prove that the same sample was sent to the Chemical Analyser with the seal intact.”

22. Similar point was also dealt with in case of **Gurbachan Singh Vs. State of Punjab (CRA-S-1033-SB-2007 decided on 29.08.2014)** and it

was observed in para 20 and 21 as follows:-

“20. The fact that form No.29 was not filled at the spot, do not affect the case of the prosecution in any manner. There is no rule of evidence or procedure that every document must be prepared at the spot of recovery. In case of **Wazir Singh versus State of Haryana, 2010(1) RCR (Criminal) 480 (P&H) (SB)**, it was observed that non-filling up of the CFSL form at the time of recovery does not create any doubt about the recovery of contraband from the accused. In para 17 of the aforesaid judgment it was observed as follows:

“17. Of course, it does not surface in the testimony of Maha Singh (sic) that the CFSL form was filled at the spot. It is pertinent to point out here that the CFSL form is to be prepared for sending the same to the Laboratory along with the sample so that the laboratory can test the sample and give its result. Such document contains the details of the seals affixed on the samples, FIR number, date and place of seizure, date of deposit of samples and the date of withdrawal of sample from the Malkaha. True that, as revealed by the FSL report, CFSL form was filled up on 10.12.2001 though the recovery was made on 02.12.2001, but its preparation on the said date in no manner evidences the prejudice, if any, caused to the appellant particularly when the certification on Exh.PK tends to show that the seals were intact and tallied with the specimen seal as per forwarding authority's letter. The filling up of this form on the aforesaid date in itself does not create any doubt about the recovery of Charas from the appellant.”

21. In view of the above observation, the argument of

learned counsel for the appellants on this point is also rejected.”

23. It has been argued that Malkaha register was not produced by the prosecution and the case property was sent to the FSL after 10 days of recovery. The prosecution has placed on file affidavit of HC Jaidev Singh Ex.P7. He was posted as MMHC at the police station and had stated that on 21.09.2003 ASI Har Narain had deposited the parcel of *charas* and sample with him which was duly sealed with seal HN, MIK and VS. On 01.10.2003, he handed over the samples duly sealed alongwith CFSL Form to Constable Baljit Singh for deposit in the Forensic Science Laboratory. At the time of handing over the samples, it was having seals of HN, MIK and VS. He had also certified that during the period the sample remained in his possession neither he tampered with it nor allowed anybody to tamper the same. In his cross-examination, no question was put to this witness regarding entry of the case property and sample in Malkhana Register. He was not asked to produce the same which reflect that the appellant had accepted the statement of this witness and the same was not rebutted in cross-examination. Constable Baljit Singh, in his affidavit Ex.P8, has stated that after taking the sealed sample and CFSL Form from MMHC Jaidev Singh, he deposited the same with Director, Forensic Science Laboratory, Madhuban and did not tamper with the sample during the period it remained in his possession or allowed anybody to do so. FSL Report Ex.P12 recites that the sample was having seal of HN, MIK and VS, which was received in the office of Forensic Science Laboratory. The seals were intact and tallied with specimen seals. Though, there is delay of about 10 days in sending the samples to the Forensic Science Laboratory but the same is not material.

The material fact for the prosecution to prove is the proper and safe custody of seized articles and sample. In this case, the prosecution has led the evidence to show that the remaining contraband and sample were in proper custody and were not tempered till the sample reached the Forensic Science Laboratory. Reference in this regard, can be made to the observations of Hon'ble Apex Court in case of ***State of Orissa Vs. Kanduri Sahoo 2004 (1) RCR (Criminal) 196.***

24. Learned counsel for the appellant has also argued that the provisions of Section 52A of NDPS Act were not complied in this case and in support of his contention, he has relied on the observation of a Coordinate Bench of this Court in case of ***Gannu and another Vs. State of Punjab (CRA-S-1688-SB-2004 decided on 26.05.2017).***

25. The above argument of learned counsel for the appellant is having no merits. Section 52A NDPS Act relates to destruction of the case property and has no relevance so far as the recovery and taking of sample at the spot is concerned.

26. Prosecution case is duly supported by testimony of Investigating Officer ASI Har Narain PW8, recovery witness ASI Ram Kumar PW7. In the cross-examination of these witnesses, learned defence counsel could not shatter their testimony, which is further supported by Mohammad Ishak Khan PW1, who at the relevant time was posted as Dy. Superintendent of Police, Rohtak. The requisite provisions of Section 50 NDPS Act were duly complied. The case property after recovery was also produced before the SHO of the Police Station. Learned Trial Court has committed no error while relying on the prosecution version while

convicting the appellant for the offence punishable under Section 20 NDPS

Act. I find no reason to interfere with the judgement of Trial Court so far as the conviction of the appellant is concerned.

27. Learned counsel for the appellant has requested for lenient view on the quantum of sentence. He has submitted that appellant was 56 years of age at the time of commission of offence. Now, he is more than 70 years of age. Keeping in view his age and quantity of contraband recovered, a lenient view regarding quantum of sentence be taken.

28. Recovery from appellant is of 400 gms of *charas* which falls in non-commercial quantity. Perusal of custody certificate dated 07.09.2018 produced by learned State counsel shows that appellant is not a previous convict and has undergone 2 months 5 days of imprisonment. Even after his release on his suspension of sentence in the year 2005, he was not found involved in any other case.

29. Keeping in view the above facts and that the appellant is old man of 70 years by now, I am of the opinion that no purpose would be served if the appellant is sent to jail to undergo remaining sentence as awarded to him by the trial Court. The sentence awarded to the appellant is reduced to the period of imprisonment already undergone (2 months 5 days) by him. However, the sentence of fine imposed upon the appellant is enhanced to ₹25,000/- and in default of payment of fine, he shall further undergo rigorous imprisonment for 3 months. The reduction of sentence has been ordered keeping in view the old-age of the appellant and shall not be a precedent for other cases. Copy of this judgment be sent to the Court concerned for necessary action.

October 16, 2018

jk/Sachin M.

(SURINDER GUPTA)

JUDGE