

IN THE PUNJAB & HARYANA HIGH COURT AT CHANDIGARH

Date of decision : May 01, 2018

CRR no.2012 of 2011 (O&M)

1.

Rajbir Khushwaha

... Petitioner

Versus

State of Haryana

... Respondent

CORAM: HON'BLE MR. JUSTICE AMOL RATTAN SINGH

Present: Mr. Vishwajeet Singh, Advocate, for the petitioner.

Mr. Karan Sharma, AAG, Haryana

Amol Rattan Singh, J.(Oral)

1. By this revision petition, the petitioner challenges the judgments of the learned Judicial Magistrate, Faridabad (trial court) as also of the learned Additional Sessions Judge, Faridabad (appellate court), convicting him for having contravened the provisions of Section 18(c), Section 18-A, 16, 17, 17-A and 17-B of the Drugs and Cosmetics Act, 1940 (hereinafter to be referred to as “the Act”), the said offences being punishable under Sections 27(b) (ii), 28, 27(a) of the said Act, and thereafter sentencing him to various terms of imprisonment as follows:-

Under Section 28:-

Rigorous imprisonment for nine months and a fine of Rs.1000/- (One Thousand). In default of payment of fine further simple imprisonment for one month.

Under Section 27(a):-

Rigorous imprisonment for six years and a fine of Rs.15000/- (Fifteen Thousand). In default of payment of fine

further simple imprisonment for six month.

Under Section 27(b) (ii):-

Rigorous imprisonment for one year and a fine of Rs.5000/- (Five Thousand). In default of payment of fine further simple imprisonment for three months.

2. Criminal proceedings originated from a raid conducted on 01.03.2002 by Sh. Sunil Chaudhary, District Drugs Inspector (II) (treated to be the complainant), along with G.L. Singhal, Assistant State Drugs Controller, Haryana, N.K. Ahuja, District Drug Inspector (I), Faridabad and Dr. C.Paul, SMO/Incharge of the General Hospital at Ballabgarh, District Faridabad.

The raid was conducted on the premises of the petitioner, Rajbir Kushwaha, situate at Village Gaunchhi, Sector-55, Ballabgarh, District Faridabad.

The petitioners' brother, Rajesh Kushwaha, was found present at the spot, who informed the raiding party that his brother (the present petitioner) was the owner of the house but had gone out of station.

The inspection team is stated to have disclosed their identity and purpose of visit to the aforesaid premises and, as contended in the complaint, requested many people of the locality to join them in the search of the premises, but with no response from such people. The house was then searched by the team itself in the presence of Rajesh Kushwaha, during the course of which it was stated that a huge stock of allopathic drugs was found in the house, with Rajesh Kushwaha not able to produce any license for the stocking or sale of such drugs. As given initially in the judgments impugned, the complainant then seized 9 different types of allopathic drugs

from the search and for the purpose of getting them analyzed, used Form 17. The drugs are stated to have been divided, packed and sealed with the seal of the complainant. Notice under Section 18 of the Act is also stated to have been issued, to which as per the case of the complainant, both the accused also replied.

A sample of each of the 9 drugs were sent to the Government Analyst, Haryana, who thereafter submitted his report to the complainant. 7 of the sampled drugs were stated to be not containing the salts that they were shown to be containing, and as per the complainant, it was proved beyond doubt that both Rajbir Kushwaha and Rajesh Kushwaha had stocked them for sale in the residential premises, without any license obtained for that purpose.

The case of the complainant further was that the drugs were spurious, 'with nil contents; and were also adulterated, substandard and misbranded, as per the report of the Government Analyst.

3. The accused are stated to have been thereafter arrested, before which FIR no.78 dated 04.03.2002 was also registered against them, with the matter having been reported to both, the SSP, Faridabad and the Senior Medical Officer, Ballabgarh.

A report under Section 173 Cr.P.C. was submitted to the learned Magistrate concerned, with a criminal complaint also thereafter initiated by the District Drugs Inspector, Faridabad, upon which both the accused were summoned to face trial, with subsequently the case arising out of the FIR, as also the one based on the criminal complaint, clubbed together by the trial court.

4. Charges, however, had been framed against both the accused

for contravening the provisions of Sections 16, 17, 17A, 17B, 18(c) and 18 A of the Act, at that stage stated to be punishable under Sections 27(a), 27 (b) (ii) and 28 thereof, with such charges framed prior to the filing of the criminal complaint. The accused pleaded not guilty and claimed trial.

The complete charges in the case of the co-accused of the present petitioner (who was acquitted), i.e. his brother Rajesh Kushwaha, read as follows:-

“That you Rajesh Khuhwaha son of Sh. Jas Raj Singh R/o VPO Gaunchhi near Sector 55 Tehsil Ballabgarh were found stocking twelve (12) types of Allopathic drugs in your residence at VPO Gaunchhi near Sector 55 Teh. Ballbgarh without any valid drug licence or registration certificate as RMP thereby contravening section 18(c) of Drugs Act which is punishable u/s 27(b) (ii) of Act and also you could not disclose name/names of persons from whom you have acquired these seized drugs which were seized vide Form 16 by Drug Inspector thereby contravening Section 18-A of Drug Act which is punishable under Section 28 of Drug Act. Out of these allopathic drugs found, stocked at your residence in your possession. Sample of nine (9) types of drugs for analysis vide sample No.SKC-23 to SKC-31 out of which six (6) samples No.SKC-23, 24, 25, 26, 27 & 28 declared 'Not of Standard Quality by Government Analyst Haryana having NIL contents thus spurious thereby contravening Section 16, 17, 17A and 17B which is punishable under Section 27(a) of the Drug Act and within my cognizance.”

Though this is the only chargesheet available presently on the record of the trial Court, however, neither counsel for the petitioner, nor the State, have doubted that the present petitioner, Rajbir Kushwaha was also identically charged.

As already stated earlier, the criminal complaint also having been subsequently clubbed with the 'FIR case', the prosecution examined 6 witnesses as follows:-

1. Shiv Lal, PW1;
2. Sunil Chaudhary, PW2;
3. G.L. Sehgal, PW3;
4. Narnder Ahuja, PW4;
5. Dr. Chander Pal, PW5 and
6. Suresh Kumar, PW6.

Of the above, PW1 is stated to have been a formal witness, with PW2 being the complainant and the others being a part of the raiding party.

The accused examined one Ram Avtar as DW1 and Daya Ram, Clerk, as DW2, tendering 4 documents in their defence by way of evidence.

5. PWs2 to 5 having testified in terms of the complaint made, eventually on the basis of the evidence led on behalf of the co-accused of the petitioner (his brother Rajesh Kushwaha), the trial court came to the conclusion that he was only a visitor at the house of the present petitioner and was actually residing in Rajiv Colony, Samaypur and he was therefore not guilty of the charge framed against him. Consequently, he was acquitted.

As regards the petitioner, Rajesh Kushwaha, he was found to be the owner of the house from which the spurious drugs were recovered and

consequently he was found guilty of the commission of the offences as already detailed hereinabove, and sentenced also as aforesaid.

6. The learned Appellate Court after discussing the facts of the case and the evidence led on both sides, also came to the same conclusion as regards the guilt of the present petitioner, and dismissed the appeal, upholding both, the conviction for various offences, as also the sentences imposed by the learned trial court.

7. Before this Court, Mr. Vishwajeet Singh, learned counsel for the petitioner, submitted that the petitioner admittedly not being present on the spot, with the endorsement on the recovery memo signed only by his brother, there was an irregularity, due to which the entire proceedings stand vitiated.

8. He further submitted that the sentence of 6 years imposed for the commission of an offence punishable under Section 27(a) of the Act is highly excessive, the petitioner being a first time offender and therefore, even if this Court finally comes to a conclusion that the conviction is not to be interfered with, the sentence may be reduced.

No other point has been argued.

9. On the other hand, Mr. Karan Sharma, learned AAG, Haryana, reiterated the reasoning given in the judgments of the Courts below and submitted that no interference was required in either the conviction of the petitioner, nor on the quantum of sentences imposed upon him.

10. Having considered the aforesaid, it is seen that though in the initial part of the judgments impugned, 9 drugs are stated to have been recovered from the premises of the petitioner, actually 12 types of drugs were seized; as seen later in the judgment of the trial Court, but eventually 9

reports from the Public Analyst (as per Form 13 referable to Rule 46 of the Drugs and Cosmetics Rules, 1945) were received by the complainant, i.e. Exhibits P-2/1 to P-2/7, P-2/13 and P-2/15.

Of these, Exhibits P-2/1 to P-2/4, P-2/13 and P-2/15 pertain to to the following drugs respectively:-

Ex. P-2/1 : Cotrimoxazole Tablet IP Magaprim D.S.

Ex. P-2/2 : Amoxycillin Capsules IP

Ex. P-2/3 : Ampicillin Capsules IP (Adicillin)

Ex. P-2/4 : Oxyteracycline Hcl I.P.

Ex. P-2/13 : Dexamethasone Tablets IP

Ex. P-2/15 : Tetracycline Capsules IP

In all these reports it is stated that the drugs are not of standard quality as per the Act and that actually the essential salts as were required to be contained in them were actually not present (nil).

Only three drugs, as per Exhibits P-2/5, P-2/6, P-2/7, i.e. Paracetamol Tablets, Diclozoom Tablets and Diclocure Tablets, were found to be of standard quality.

11. That being so, very obviously what were shown to be allopathic drugs, were stocked by the petitioner, for which he possessed no license. Therefore, they were not only illegally stocked by him but they were also spurious drugs in terms of Section 17-B (d) of the Act, which reads as follows:-

“Section 17(B). Spurious drugs.-For the purpose of this Chapter, a drug shall be deemed to be spurious:-

(a) If it is manufactured under a name which belongs to another drug; or

(b) If it is an imitation of, or is a substitute for, another drug or resembles another drug in a manner likely to

deceive or bears upon it or upon its label or container the name of another drug unless it is plainly and conspicuously marked so as to reveal its true character and its lack of identity with such other drug; or

(c) If the label or container bears the name of an individual or company purporting to be the manufacturer of the drug, which individual or company is fictitious or does not exist; or

(d) If it has been substituted wholly or in part by another drug or substance; or

(e) If it purports to be the product of a manufacturer of whom it is not truly a product.”

It would also be a drug which was misbranded in terms of Section 17 thereof. In the opinion of this court, the drug being a spurious drug in terms of Section 17-B (d), it would also attract the provisions of being an adulterated drug, as defined in Section 17-A, as clause (f) of the said provision reads to say that an adulterated drug would be one that has been mixed so as to reduce its quality or strength. Thus, the essential salts as were required to be present in the drugs that were seized, as per the 'branding' on the drug, were found to be in fact 'nil', and therefore though there possibly may be no mixture with the essential salt, yet, the salt/powder in the substances seized, reduced the quality of what was shown on the packing to be an allopathic drug.

12. Thus, even as per the arguments raised, nothing having been pointed out to this court either from the judgments of the learned Courts below or from the records of those Courts as have been summoned by this Court, that there is any perversity in those judgments as regards conviction of the petitioner for contravention of the provisions of Sections 16, 17, 17-A, 17-B, 18-A and 18(c), I see no ground to interfere with the same.

and cosmetics in terms of the Act, Section 17 defining a Misbranded Drug, Section 18(c) being related to manufacturing, sale, stocking, exhibiting etc. the drugs without a licence obtained for the purpose, and Section 18-A mandating that every person who is not a manufacturer of a drug, or his agent, shall disclose to the Inspector, the name, address and particulars of the person from whom he acquired the drug).

13. As regards the argument of learned counsel for the petitioner that the petitioner admittedly not being present at home at the time when drugs are stated to have been seized by the complainant, and therefore the entire proceedings stand vitiated, I find no strength in that argument, in view of the fact that it has not been pointed out at any stage that the premises from which the drugs were seized, belong to the petitioner, and that his brother, Rajesh Kushwaha, was actually present there at the time of the raid and was duly served with notices in terms of Section 23 of the Act, to which even the petitioner, as also his brother, duly replied. In fact, his brother was found by the trial Court to be only a visitor at the spot and therefore was acquitted, as already noticed.

Hence, as regards the petitioner being guilty of the contravention of the provision of Sections 16, 17, 17-A, 17-B, 18-A and 18 (c), I see no error in the judgments of the Courts below, convicting him for the contravention of these provisions.

14. Coming to the punishment imposed by those Courts, in the opinion of this Court, Section 27(a) of the Act would not be applicable, in view of the fact that the penalty provided therein is only if the adulterated or spurious drug, when used by any person, is likely to cause death or such harm to his body as would amount to a grievous hurt (as defined in Section

320 of the IPC).

Nothing is discernible from the judgments of the Courts below to show that any evidence was led to prove that the spurious drugs seized from the premises of the petitioner, were actually used by any person and further, that by such usage death or grievous hurt was caused, or was likely to be caused, to such person.

Hence, the unamended Section 27(a) (as applicable in the year 2002, at the time when the drugs were seized), providing a punishment of not less than 5 years, leading to a punishment of rigorous imprisonment for 6 years being imposed upon the petitioner, is found to be wholly erroneous and consequently, the said punishment of 6 years imprisonment, as imposed by invoking Section 27(a), is hereby set aside.

15. The punishment that would be imposable on the petitioner for the contravention of Section 17-B, is as provided in the unamended Section 27(c) of the Act, by which (at the relevant time), a punishment of not less than 3 years but extendable to 5 years, was stipulated, with a fine of not less than Rs.5000/-.

The proviso to the said clause (c) provides for adequate and special reasons to be recorded in the judgment, if a sentence of less than 3 years (but not less than one year) is to be imposed by the Court. (The said proviso again being read as per its unamended version before the amendment vide Act no.26 of 2008).

16. Thus, though on merits I see no special reasons to not award a sentence of 3 years to the petitioner in terms of Section 27(c), for the offence of having stocked spurious drugs, however the petitioner having already undergone criminal proceedings since 2002 till today, i.e. for about

16 years, in the opinion of this Court that would be adequate reason to reduce the term of sentence imposed upon him, in terms of the proviso to clause (c) of Section 27, to the minimum of one year provided therein, in addition to imposition of a fine of Rs.5,000/-, also as per the said provision, in default of payment of which he would further undergo simple imprisonment for 2 months.

As regards the punishment to be imposed upon him for contravention of Section 17-A of the Act, he shall undergo rigorous imprisonment of one year and also pay a fine of Rs.2000/-, in default of payment of which he would undergo simple imprisonment of one month; the said punishment being imposable in terms of Section 27(b) (i) (before amendment in the year 2008).

As regards the sentence imposed by the Courts below in terms of Section 28 of the Act, for contravention of the provisions of Section 18-A, i.e. rigorous imprisonment of 9 months and a fine of Rs.1000/-, in default of payment of which he is to undergo simple imprisonment of one month, I see no reason to interfere with that sentence.

Similarly, as regards the imprisonment imposed in terms of Section 27(b) (ii) for contravention of Section 18(c), I also see no reason to interfere with that punishment, it being rigorous imprisonment for one year in addition to a fine of Rs.5000/- to be paid by the petitioner, in default of payment of which he is to further undergo simple imprisonment of 3 months.

All the sentences of imprisonment imposed upon the petitioner would run concurrently, with the sentence already undergone by him, whether as an under trial or after his conviction, to be set off against the

remaining sentence to be served by him.

[It is to be however noticed, that no punishments have been imposed by the learned Courts below for the contravention of Sections 16, 17 and 18-B of the Act (seemingly being covered by the punishments imposed for the contravention of Sections 17-A, 17-B and 18(c))].

17. Thus, the petition is allowed to the extent that the sentence of rigorous imprisonment of 6 years and a fine of Rs.15,000/-, as were imposed upon the petitioner by the Courts below in terms of Section 27 (a) of the Act, are set aside; with instead an imprisonment of 1 year each, imposed in terms of Sections 27(c) and Section 27 (b) (i) of the Act, for possession of spurious and adulterated drugs, in terms of Sections 17-B and 17-A respectively, alongwith a fine of Rs.5,000/- under Section 17-B, and of Rs.2000/- under Section 17-A, in default of payment of which he would undergo simple imprisonment of 2 months in the former case (Section 17-B) and of one month in the latter case (Section 17-A).

The other sentences imposed by the Courts below, in terms of Section 27(b)(ii) and Section 28, are maintained.

A chart of the sentences thus imposed, is given below:-

Sr.No.	Under Sections	Sentence awarded
1	Sections 27 (c)	Rigorous imprisonment for 1 year and a fine of Rs.5000/- (Five Thousand), in default of payment of which he would undergo simple imprisonment of 2 months.
2.	Section 27(b)(i)	Rigorous imprisonment for one year and a fine of Rs.2000/- (Two Thousand), in default of payment of which he would undergo simple imprisonment of one month.
3.	Section 27 (b) (ii)	Rigorous imprisonment for one year and a fine of Rs.5000/- (Five Thousand). In default of payment of fine further simple imprisonment for three months.
4.	Section 28 of Drug Act	Rigorous imprisonment for nine months and a fine of Rs.1000/- (One Thousand). In default of payment of fine further simple imprisonment for one month.

The petitioner having, at the time when his sentence was suspended vide an order of this Court dated 19.01.2012, undergone slightly over 6 months of imprisonment as per the custody certificate on record, dated 18.01.2018, he shall now be taken into custody forthwith, to serve out the remaining part of his sentence.

(AMOL RATTAN SINGH)
JUDGE

01.05.2018
vcgarg/dinesh

Whether speaking / reasoned	Yes
Whether reportable	Yes