

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

Sr.No.246

CRR No.2723 of 2018(O & M)

Reserved on:28.09.2018

Pronounced on:01.10.2018

Saudagar Ali

....petitioner

Versus

State of Punjab

.....respondent

CORAM: HON'BLE MR.JUSTICE ARVIND SINGH SANGWAN

Present: Mr.Satnam Singh Gill, Advocate
for the petitioner

Mr.Joginder Pal Ratra, DAG Punjab

ARVIND SINGH SANGWAN, J. :

Prayer in this petition is to set aside the order dated 09.07.2018, passed by Judge, Special Court, Patiala, vide which the charge under Section 18 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short, “NDPS Act”), was framed against the petitioner.

Brief facts of the case as set up in the FIR are that on 28.03.2018, ASI Manjit Singh, along with ASI Sukhpal Chand and other police officials were present at the Bhakhra Canal Bridge in the area of village Sidhuwal, on a patrol duty, when they received a secret information that one Saudagar Khan has sown green plants of poppy opium in the field near the residential house to extract opium from the same and to prepare the poppy husk and he is plucking the green plants of poppy opium. On this,

the police party raided the field near the residential house of aforesaid Saudagar Khan, where a clean shaven person was seen carrying a heavy plastic bag on his head and on seeing the police party, he became perplexed and tried to run away. He was over powered by the police officials and then he disclosed his identity. Thereafter, by giving him a notice under Section 50 of the NDPS Act, the subsequent proceedings were initiated.

The accused was arrested and on completing investigations, report under Section 173 Cr.P.C. was submitted along with the FSL report. The trial Court, vide impugned order dated 09.07.2018 framed the charge under Section 18 of the NDPS Act, which is challenged in this petition.

The main argument raised by learned counsel for the petitioner is that the impugned order dated 09.07.2018, framing charge under Section 18 of the NDPS Act is not sustainable and that the case of the petitioner would fall under Section 15 of the NDPS Act.

Learned counsel for the petitioner has argued that as per the own case of the prosecution, the recovery was of 6 kgs.of green plants of poppy opium. Learned counsel for the petitioner has referred to Section 2 (xv to xviii) reproduced as as under:

(xv) "opium" means:-

- (a) *the coagulated juice of the opium poppy; and*
- (b) *any mixture, with or without any neutral material, of the coagulated juice of the opium poppy,*
but does not include any preparation containing not more than 0.2 per cent. of morphine;

(xvi) "opium derivative" means:-

- (a) *medicinal opium, that is, opium which has undergone the processes necessary to adapt it for medicinal use in accordance with the requirements of the Indian Pharmacopoeia or any other pharmacopoeia notified in this*

behalf by the Central Government, whether in powder form or granulated or otherwise or mixed with neutral materials;

(b) prepared opium, that is, any product of opium obtained by any series of operations designed to transform opium into an extract suitable for smoking and the dross or other residue remaining after opium is smoked;

(c) phenanthrene alkaloids, namely, morphine, codeine, thebaine and their salts;

(d) diacetylmorphine, that is, the alkaloid also known as dia-morphine or heroin and its salts; and

(e) all preparations containing more than 0.2 per cent. of morphine or containing any diacetylmorphine;

(xvii) "opium poppy" means:-

(a) the plant of the species Papaver somniferum L.; and

(b) the plant of any other species of Papaver from which opium or any phenanthrene alkaloid can be extracted and which the Central Government may, by notification in the Official Gazette, declare to be opium poppy for the purposes of this Act;

(xviii) *"poppy straw" means all parts (except the seeds) of the opium poppy after harvesting whether in their original form or cut, crushed or powdered and whether or not juice has been extracted therefrom;*

Learned counsel for the petitioner has also referred to the report under Section 173 Cr.P.C.(Annexure P1), which reads as under:

1	Report No.:	1223/2018/TOXI/FSL/PB Dated 17.05.2018
2	Reference No.	Unique Code No.109/18 DPO/PTL dated 02.04.2018 from Senior Supdt.of Police, Patiala.
3	On opening the parcel sealed with one seal of MS, it was found to contain another parcel bearing secret Code No.UID No.9/2018, sealed with one seal of DS. On opening the parcel having secret code No.UID No.9/2018. It was found to contain the following	
3	Subject:-	FIR No.24 dated 28.03.2018 u/s 18/15/61/85 ND & PS Act, PS Bakhshiwala
4	Date of Receipt:-	03/04/18

5	Mode of Receipt:-	Through Const.Varinder Singh, No.1234/PTL
6	Articles Received:-	One parcel sealed with one seal of NG alleged to contain poppy plant seal on the parcel was found intact and tallied with the specimen seal impression.
7	Quantity of sample:-	500 Grams of dried greenish brown coloured plan material having dried twigs, leaves and pods.
8	Purpose of Reference:-	Analysis and report
9	Identification & Test:- Meconic Acid	Found present in the content of the parcel
	Morphine and other Alkaloids of opium:-	-do-
Report The content of the parcel under reference has been analysed by chemical analysis. On the basis of analysis, poppy plant has been found present in the content of the parcel. Sd/- Assistant Director (Toxicology) FSL SAS Nagar.		

Learned counsel for the petitioner has argued that the aforesaid report is silent about the percentage of morphine as per column No.9 of the report and therefore it cannot be held that morphine, which is containing above 0.2 percent, as per Section (xvi)(e), would bring it in the definition of “*opium derivative*”. Therefore, the charge under Section 18 is not sustainable.

Learned counsel for the petitioner has relied upon judgement of the Hon'ble Supreme court in **2000(2) RCR (Criminal) 633, Ajaib Singh vs. State of Punjab**, wherein the Hon'ble Supreme Court has held as under:

11. “We are unable to accept the arguments of Mr. Sharma and Mr. Rao. Under Section 15 the offence is in respect of “*poppy straw*”. Even though the term “*poppy husk*” has not been defined in NDPS Act, the term “*poppy straw*” has been defined. The term “*poppy straw*” includes all parts (except the seeds) of the “*opium poppy*”. “*Opium poppy*” means the plant of the species *Papaver*. Thus except for the seed all other parts of the plant of the species *Papaver* would fall in the term “*poppy straw*”. To be noted

that parts of the plant Papaver would fall within the term "poppy straw" even though no juice has been extracted therefrom. For an offence under Section 15 it is not at all necessary that "poppy straw" should have been used or made into "opium". For cultivation, producing, manufacturing, possessing, selling, purchasing, transporting, importing or exporting inter-State or using opium there is a separate offence provided for under Section 18. If the alleged offence is under Section 18, then the question may arise whether the preparation contained more than 0.2 per cent of morphine. For an offence under Section 15, question of considering whether the preparation contains more than 0.2 per cent of morphine does not arise. As seen above even though no juice may have been extracted, so long as it is a Papaver, it would still be "poppy straw" if it is a part of the plant Papaver.

12. The Modi's Text Book of Medical Jurisprudence & Toxicology says that a poppy seed is used in foods, sprinkled over sweets and also yields a bland oil, which is used for culinary and lighting purposes. It is because of this that a seed has been excluded from the definition of poppy straw. Poppy seed could be used in food or Indian sweets or made into oil, which is largely used for culinary and lighting purposes only after it is de-husked. Thus the seed would be separated from the husk. The definition of husk as given in Webster's Dictionary, shows that the husk is any covering, especially when it is comparatively worth less. The husk whether it is on the seed or is removed from the seed remains a part of the plant Papaver. In the commentaries on NDPS Act by Mr. P.K. Jain it is set out that crushed capsules of poppy of commonly called "poppy husk" or "bhuki" whether extracted or not and that they contain a certain percentage of morphine and are often used as addiction producing intoxicants. Thus it would fall within the definition of the

term "poppy straw", which includes all parts of the plant Papaver. While seed has been specifically excluded husk has not been excluded, from the definition of the term "poppy straw". Therefore, in our view the producing, possessing, transporting, importing, exporting inter- State, selling, purchasing, using or omitting to warehouse poppy husk would be an offence under Section 15 inasmuch as poppy husk would fall within the term poppy straw as used in that Section.

Learned counsel for the petitioner has further relied upon an order dated 11.03.2015 passed in ***Criminal Revision No.373 of 2015, "Vinay Kumar and another vs. State of Punjab"***, wherein this Court has quashed the charge sheet under Section 18/21 of the NDPS Act, on the ground that as per the FSL report, morphine contents were less than 0.2%. The operative part of the order reads as under:

"I have heard learned counsel for the parties and gone through all the three files.

It is an admitted position that the Hon'ble Supreme Court vide order dated 16.12.2013 directed that no reliance is to be placed on the second report of the Chemical Examiner which was ordered to be provided without any valid ground. In this view of the matter, the fact situation is that the morphine content detected in the recovered opium is less than the stipulated 0.2% under the NDPS Act.

The definition of 'opium' as per the NDPS Act, reads as under:-

"2.(xv) "opium means"

- (a) the coagulated juice of the opium poppy; and*
- (b) any mixture, with or without any neutral material, of the coagulated juice of the opium poppy, but does not include any preparation containing not*

more than 0.2 per cent of morphine”

Therefore, the charge in respect to illegal possession of opium is clearly unsustainable.

Learned counsel for the State is unable to deny the stand of the State as reflected in the affidavit dated 12.11.2013 of Ms. V.Neeraja IPS, Director General, Vigilance Bureau. There is no explanation as to why and on what basis the amended charge has been framed. Once the State itself has taken a stand that 100 grams of smack alongwith 5 Kg. opium has been recovered from co-accused Randhir Singh, who is not petitioner before this Court, there is no plausible reason forthcoming to justify this volte-face. It appears to be a clumsy attempt on the part of the prosecution to circumvent decision dated 16.12.2013 by the Hon'ble Supreme Court.

Keeping in view the facts and circumstances of the case, impugned charge-sheet dated 03.06.2014 is quashed qua the petitioners.

Crl. Revision No.373 of 2015 is consequently allowed.

Crl. Revision No.305 of 2014 and Crl. Revision No.419 of 2014 have been rendered infructuous as the earlier charge-sheet dated 11.11.2013 merged with the subsequent amended charge-sheet dated 03.06.2014. They are disposed of accordingly.”

Learned counsel for the petitioner has also relied upon a Division Bench judgment of Himachal Pradesh High Court, **2011(9) RCR (Criminal) 92, “State of H.P. Versus Sucha Singh and another”** wherein it has been held as under:

5. *“The above position apart, we also find that the prosecution has failed to prove that the recovered stuff fall within the definition of “Poppy Straw”.*

6. “Section 2(xviii), defines “poppy straw” which means all parts (except the seeds) of the opium poppy after harvesting whether in their original form or cut, crushed or powdered and whether or not juice has been extracted therefrom.

Section 2(xvii), “opium poppy” means

- (a) the plant of the species *Papaver somniferum* L.; and
- (b) the plant of any other species of *Papaver* from which opium or any phenanthrene alkaloid can be extracted and which the Central Government may, by notification in the Official Gazette, declare to be opium poppy for the purposes of this Act.

7. From the definition of “Poppy Straw” reproduced hereinabove, it is clear that to understand the meaning of “Poppy Straw”, it is essential to refer to the meaning of “Opium Poppy”. The “Poppy Straw” when read alongwith the definition of opium poppy means (a) all parts (except seeds) of the plant of the species of *papaver somniferum-L* and all parts (except seeds) of the plant of any other species of *papaver* from which opium or any other phenanthrene alkaloid can be extracted and which the Central Government may by notification in the official Gazetted declare to be opium poppy for the purposes of this Act.

8. “Further the Apex Court in *Ajaib Singh v. State of Punjab* [2000 Cri.L.J. (SC) 2270], held that even though the term “Poppy Husk” has not been defined in the Act, but the term “Poppy Straw” has been defined. The term “Poppy Straw” includes all parts (except the seeds) of “Opium Poppy”. “Opium Poppy” means the plant of the species *papaver*. Thus, except for the seed all other parts of the plant of the species *Papaver* would fall within the term *Poppy Straw*”.

9. “In the present case, it is clear from the report of analysis referred to above that three tests were conducted

by the Chemical Examiner to ascertain whether the stuff contained meconic acid and morphine and also by physical appearance, do not indicate that the stuff examined consisted of the parts of either the plant of the species of papaver somniferum -L or a plant of any other species of papaver from which opium or any other phenanthrene alkaloid can be extracted and which the Central Government may have notified to be the opium poppy for the purposes of the Act. Therefore, the report aforesaid cannot be used as a sufficient evidence to hold that the stuff recovered from the respondents falls within the definition of "Poppy Straw".

It is, thus, argued that the case of petitioner would fall under Section 15 of NDPS Act, as recovery is of poppy straw.

In reply, learned State counsel has submitted that the recovery is of 6 kgs. of green poppy plants, therefore, as per the FSL report, once it has been found that the sample contained meconic acid, the trial court has rightly framed the charge under Section 18 of the NDPS Act.

After hearing learned counsel for the parties, I find merit in the present petition.

A perusal of the FSL report shows that it is silent about the percentage of the morphine content/meconic acid, and, therefore, it cannot be held that percentage of morphine is above 0.2 % and therefore, being opium as per Section (xv) (b) or opium poppy as per Section (xvii) or being opium derivative as per Section (xvi)(e), having contents less than 0.2 per cent of morphine, the charge under Section 18 of the NDPS Act is not sustainable.

In view of the judgment of the Hon'ble Supreme Court in *Ajaib Singh's case (supra)* and of this Court in *Vinay Kumar's case (supra)*,

the recovery is of the green poppy straw from the petitioner and it would be an offence under Section 15 of the NDPS Act.

Therefore, the present petition is allowed. The impugned order dated 09.07.2018 is set aside. The trial Court is directed to frame the charge under Section 15 of the NDPS Act.

The petition stands disposed of.

(ARVIND SINGH SANGWAN)
JUDGE

01.10.2018

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Whether speaking/reasoned
Whether reportable-

Yes/No.
Yes/No