

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CRA-S-2004-SB of 2004 (O&M)

Date of Decision: 25.11.2019

Gella

...Appellant

VERSUS

State of Haryana

...Respondent

CORAM:- HON'BLE MR. JUSTICE SURINDER GUPTA

Present: Mr. Arav Gupta, Advocate
Amicus Curiae for the appellant.

Mr. Raj Kumar Makkar, Sr. DAG, Haryana.

SURINDER GUPTA, J.

This is appeal filed by the appellant against judgment of conviction dated 17.09.2004 and order of sentence dated 18.09.2004 passed by Additional Sessions Judge, Fatehabad, whereby he was convicted and sentenced to undergo rigorous imprisonment for two years and to pay a fine of ₹10000/- and in default of payment of fine to further undergo rigorous imprisonment for three month, for offence punishable under Section 15 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (later referred to as 'the NDPS Act').

2. Case of the prosecution, in brief, is that on 22.08.2001, ASI Subhash Chander, Incharge, Police Post Bahamanwala alongwith his police party was present at bridge of 'Sem Nala' on Ratia-Budhlada road, when the appellant was seen coming from the side of Bhakra canal carrying a plastic bag on his head. On witnessing the police party, he turned back and was apprehended on the basis of suspicion. He disclosed his name as 'Gella' son of Kartara. ASI Subhash Chander apprised him of his suspicion that the plastic bag carried by him on his head may be containing some narcotic and gave him option to get his search conducted before a Magistrate or a gazetted officer. The appellant did not opt for

the search to be conducted before a Magistrate or a gazetted officer and asked ASI Subhash Chander to conduct the search himself. After preparing his consent memo, search of plastic bag was conducted and the same was found containing poppy-husk out of which two samples of 100 gms. each were separated and the remaining poppy-husk on weighment came to be 16 kgs. 800 gms. Separate parcels of samples and remaining poppy-husk were prepared and were sealed with seal impression 'SS' and the case property was taken into possession vide recovery memo prepared at the spot. Samples were later sent to Forensic Science Laboratory (FSL), Madhuban and vide report (Ex. P-14) was found to be that of poppy-husk. After completion of investigation, challan against the appellant was presented in Court.

3. In support of its case, the prosecution examined SI Shamsheer Singh as PW-1, SI Anand Singh as PW-2, HC Sham Lal as PW-3, C. Ram Murti as PW-4, HC Gopal Ram as PW-5, HC Fauja Singh as PW-6 and SI Subhash Chander as PW-7.

4. After completion of prosecution evidence, statement of appellant under Section 313 Cr.P.C. was recorded in which he denied the allegations against him and pleaded his false implication.

5. Relying on the evidence produced by the prosecution, learned trial Court held the appellant guilty of offence punishable under Section 15 of the NDPS Act and sentenced him to undergo rigorous imprisonment as mentioned in para 1 above.

6. Mr. Arav Gupta, Advocate was appointed as Amicus Curiae to assist this Court in deciding the appeal. I have heard learned Amicus Curiae and learned State counsel and have perused the lower Court record with their assistance.

7. Learned Amicus Curiae has argued that the case of prosecution is bad for non-compliance of provisions of Section 50 of the NDPS Act. The prosecution version find no independent corroboration and he has relied upon the observations of Himachal Pradesh High Court in case of **Changa Ram vs. State of H.P.**, MANU/HP/0823-2015. He has argued that the recovery was effected on the bridge of 'Sem Nala' on Ratia-Budhlada road. The police party could associate some independent witness from nearby village but no attempt was made in this regard.

8. Learned State counsel has argued that it was a chance recovery. The police party did not have any secret information against the appellant. The place of recovery did not have any locality, houses or shops located nearby. Statements of investigating officer, the recovery witness are un-shattered, without any material contradiction and non-joining of witness is not material or impact case of prosecution.

9. I have given a careful thought to submission of learned Amicus Curiae and learned State counsel and have examined lower Court record with their assistance.

10. Learned trial Court has considered the issue of non-joining of independent witness and observed that joining of independent witness is not a rule of law but of prudence as it lends authenticity to the search and recovery. It is a settled proposition of law that testimony of an official witness is not to be doubted or discarded merely on the ground that he happens to be an official. A Division Bench of this Court in the case of **Ramesh Kumar vs 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 has 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).”*

11. In the case of **Sumit Tomar vs State of Punjab, 2013(1) SCC 395**, Hon'ble Supreme Court on the point of non-examination of independence 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. ”

12. In case of ***Changa Ram (supra)***, the appellant was nabbed at a place where houses and shops were nearby but no attempt was made to join the independent witness. The Himachal Pradesh High Court took the view that non-joining of independent witness despite their availability from nearby market, village or project site made the case of prosecution doubtful.

13. The above observations are not applicable to present case as in this case there was no market or village near the place of recovery. SI Subhash Chander (PW-7) and recovery witness HC Fauja Singh have fully supported the case of prosecution and their testimonies are without any material contradiction and were rightly found as reliable by the learned trial Court. I find no reason to discard their testimonies for the reason that it is not supported by any independent corroboration.

14. The recovery of poppy-husk was effected from plastic bag carried by the appellant on his head and not on his personal search, as such, provisions of Section 50 of the NPDS Act are not attracted in this case. Reference in this regard can be made to observations of the Apex Court in case of ***State of Punjab vs. Balbir Singh, (1994) 3 SCC 299***, wherein it has been observed as follows:-

“25. The question considered above arise frequently before the trial courts. Therefore we find it necessary to set out our conclusions which are as follows :-

“(1) If a police officer without any prior information as contemplated under the provisions of the NDPS Act makes a search or arrests a person in the normal course of investigation into an offence or suspected

offences as provided under the provisions of CrPC and when such search is completed at that stage Section 50 of the NDPS Act would not be attracted and the question of complying with the requirements thereunder would not arise. If during such search or arrest there is a chance recovery of any narcotic drug or psychotropic substance then the police officer, who is not empowered, should inform the empowered officer who should thereafter proceed in accordance with the provisions of the NDPS Act. If he happens to be an empowered officer also, then from that stage onwards, he should carry out the investigation in accordance with the other provisions of the NDPS Act.”

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15. As a sequel of my above discussion, I am of the considered opinion that learned trial Court has committed no error of law and fact while convicting and sentencing the appellant for the offence punishable under Section 15 of the NDPS Act and I find no reason to interfere with its well reasoned judgment.

16. Recovery of 17 kgs. of poppy-husk was effected from the appellant on 12.08.2001. Custody certificate produced on file shows that at the time of suspension of sentence of appellant, he had undergone 07 months and 29 days of imprisonment and has not been found involved in any other case thereafter. Keeping in view above fact and that after suspension of sentence, the appellant is living a peaceful life for the last about 15 years and that he is not a previous convict, I am of the considered opinion that it will be in the interest of justice to

curtail the sentence awarded to him to the period of imprisonment already undergone by him.

17. Consequently, this appeal is partly accepted. The conviction of appellant as recorded by learned trial Court for the offence punishable under Section 15 of the NDPS Act is maintained. However, the sentence awarded to him is reduced from two years rigorous imprisonment to the period of sentence already undergone by him. However, the sentence of fine shall remain intact alongwith default clause.

18. Copy of this order be conveyed to Chief Judicial Magistrate, Fatehabad to initiate proceedings for recovery of fine from the appellant.

November 25, 2019
jk

(SURINDER GUPTA)
JUDGE

Whether speaking/reasoned:
Whether Reportable:

Yes/No
Yes/No