

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

**CRA-S-323-SB-2015 (O & M)
Date of Decision: 23 .06.2020**

Munish Kumar Appellant

Versus

State of PunjabRespondent

CORAM: HON'BLE MR. JUSTICE HARNARESH SINGH GILL

Present: Mr. A.P.S.Deol, Senior Advocate with
Mr. Vishal R. Lamba, Advocate and
Mr. Arshdeep Singh Brar, Advocate,
for the appellant.

Mr. Dhruv Dayal, Sr. DAG, Punjab.

HARNARESH SINGH GILL, J.

This appeal has been preferred by the appellant being aggrieved of the judgment and order dated 09.01.2015 passed by Judge, Special Court, Bathinda, vide which he was convicted under Section 22 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as ' the Act') and sentenced to undergo rigorous imprisonment for a period of 10 years and to pay a fine of Rs.1,00,000/- and, in default of payment thereof, to further undergo rigorous imprisonment for two months.

As per prosecution case, on 18.12.2009, SI/IO Balwinder Singh alongwith the police party, was present on Santpura Road in connection with Nakabandi. They saw

one clean shaven person coming from the side of Janta Nagar. On seeing the police party, he became nervous and fell down and two vials came out of the satchel held in his right hand. He was apprehended with the help of police officials. On search, 15 vials of Recodex, 100 Mls each, were recovered from his possession. One sealed parcel was separated and the sample parcel as well as bulk parcel were sealed by the Investigating Officer with his seal bearing impression 'BS'. The seal after use was handed over to HC Surjit Singh. On personal search of the accused-appellant, currency notes of Rs.120/- were recovered and the same were taken into possession vide memo Ex.P-3. Ruqa Ex.P-4 was sent on the basis of which FIR Ex.P-5 was registered.

After receipt of report of Chemical Examiner Ex. P-10 and after completion of investigation and necessary formalities, challan was presented against the appellant.

Charge was framed against the appellant under Section 22 of the Act, to which he pleaded not guilty and claimed trial.

In order to prove its case, the prosecution had examined as many as five witnesses.

In the statement recorded under Section 313 Cr.P.C., the accused denied the prosecution case and pleaded false implication.

After taking into consideration evidence on record, the Judge, Special Court, Bathinda, vide judgment

and order dated 09.01.2015, convicted the appellant under Section 22 of the NDPS Act and sentenced him accordingly, as noticed above.

The trial Court has carved the following point for determination:

“(i) Whether on dated 18.12.2009 at about 6.10 P.M., in the area of Bathinda, accused Munish Kumar was found in conscious possession of 15 vials of Rexcof without any valid permit or licence and he was apprehended by police party headed by SI Balwinder Singh and whether the prosecution has been successful in bringing home the guilt of accused and as such he is liable to be convicted u/S 22 of ND&PS Act?”

Learned senior counsel for the appellant has argued that report under Section 173 Cr.P.C. was filed on 17.08.2010 in the Court of Chief Judicial Magistrate, Bathinda, under Section 22 of the Act and the trial commenced, but in view of the notification dated 18.11.2009, the matter was placed before Special Judge under the Act. Charge was framed on 08.01.2013 under Section 22 of the Act for conscious possession of 15 vials of Rexcof. He further submitted that the alleged recovery of Codeine does not fall within the definition of either Narcotic Drugs Section 2 (xiv) or Psychotropic Substance Section 2 (xxiii) as Codeine i.e. Methyl Morphine is not a psychotropic substance and conviction can only be there if the accused

was found in possession of Narcotic Drugs and Psychotropic Substance and the alleged recovery effected from the appellant does not fall within the definition of Section 2 (xiv) and Section 2(xxiii) of the Act.

Learned Senior Counsel has further argued that recovery from the appellant is 15 vials of Recodex i.e. 100 Ml. each containing Codeine and it is a manufactured drug and the person can only be convicted under the Act if he is found in possession of Narcotic Drugs or Psychotropic Substance and Notification S.O.826(E), 1985 and Notification S.O.2941(E), 2009, under Act will come into play at different stages of trial i.e. when the recovered drug falls within the definition of manufactured drug as per notification of 1985 but if the recovered percentage of the drug is lower as mentioned in the 1985 Notification, then the recovered drug does not come within the definition of manufactured drug and if it is not within the definition of manufactured drug, and also does not come under any other Narcotic Drugs or Psychotropic Substance, then the provisions of Act are not applicable. Reliance has been placed on the judgment passed by this Court in 'Gurjant Singh Versus State of Punjab, 2007(4) R.C.R.(Criminal) 226', wherein it has been held that samples and case property were sealed but seal was not handed over to independent witness who was joined but was retained by official witness and chances of tampering could not be ruled

out and further it was incumbent upon the investigating agency to fill up Form No.29 at the spot and the accused was acquitted by giving him the benefit of doubt.

Learned Senior Counsel has also placed reliance on Baldev Singh Versus State of Punjab, 2005(1) R.C.R.(Criminal) 823, wherein it has been held that the accused sitting on two bags of poppy husk cannot be inferred to be in conscious possession. Till the case property has not been dispatched to the office of the Forensic Science Laboratory, the seal should not be available to the prosecuting agency and in the absence of such safeguard, the possibility of the seal being tampered with, substance being changed and the containers being re-sealed cannot be ruled out.

Further reliance was placed on the judgment of Apex Court in Gaunter Edwin Kircher Versus State of Gao, Secretariat Panji, Goa, (1993)3 SCC 145, wherein upon the accused showing that narcotic drug was meant for his personal consumption and the circumstances under which it was seized also confirmed the same, conviction under Section 20(b) (ii) of the Act was set aside and the accused was convicted under Section 27 of the Act.

Per contra, the learned State counsel has argued that Recodex 15 vials, even as per FSL report, contained Codeine, which falls under commercial quantity and Codeine mentioned at Serial No.28 of the table is included

in the Narcotic Drugs and Psychotropic Substance as per Notification dated 19.10.2001. In terms of clause (b) of Section 2 (xi) of the Act relating to the manufactured drug and as per Notification dated 14.11.1985, the Central Government has declared the narcotic substance and preparation mentioned therein 88 'manufactured drugs' have been notified and 10 drugs provide for some kind of exceptions. He further submitted that again vide Notification dated 29.01.1993, 17 more drugs have been notified as 'manufactured drugs' and small quantity/commercial quantity drugs have been specified, vide Notification dated 19.10.2001 and Codeine i.e. Methyl Morphine is included therein. Reliance has been placed on the judgment of this Court in Inderjeet Singh @ Laddi and others Versus State of Punjab, 2014 (3) R.C.R. (Criminal) 953.

I have heard the learned senior counsel for the appellant and the learned State counsel and with their able assistance, have gone through the lower court record.

In the present case, recovery is 15 vials of Recodex 100 Ml. each and as per FSL report, it contains Codeine i.e. Methyl Morphine. As per Notification dated 14.11.1985, the Central Government has declared narcotic substance and preparation mentioned therein to be manufactured drug and in terms of Notification dated 14.11.1985, 88 drugs have been notified. Moreover, vide

notification dated 19.10.2001, small quantity/commercial quantity of drugs have been notified. Another notification dated 18.11.2009 has been issued by the Central Government, which mentions that the quantities shown in column 5 that relates to 'small quantity' and column 6 relates to 'commercial quantity', table relating to respective drugs, shown in column 2 relates to the name of narcotic drug and psychotropic substance, is to apply to the entire mixture or any solution or anyone or more of narcotic drugs or psychotropic substance of that particular drug in dosage form and as per this notification, the quantity where it is small quantity or commercial quantity relating to the drugs shown in column 2 is to apply to the entire mixture or any solution or one or more narcotic drug or psychotropic substance of that particular drug. Therefore, considering the facts and circumstances of the present case, notification dated 18.11.2009 would apply as Codeine (Methly Morphine) is used for other than medicinal or therapeutic uses and are mentioned in Schedule 'H' of 1945 Rules and these substances are to be sold against prescription of a registered medical practitioner and its salt is at serial No.132 of Schedule 'H' and falls in the ambit of manufactured drugs as have been notified by the Central Government in terms of Notification dated 14.11.1985.

In Inderjeet Singh @ Laddi's case (supra), it has been held as under:-

“23. In terms of the afore-referred notification dated 14.11.1985, 88 drugs have been notified and 10 of the drugs provide for some kind of exceptions which are mentioned at serial No.16, 35, 36, 37, 48, 58, 70, 76, 83 and 87 which read as under:-

“(16) Preparations made from the extract or tincture of Indian Hemp, except those which are capable only of external use.

(35) Methyl morphine (commonly known as 'Codeine') and Ethyl morphine and their salts (including Dionine), all dilutions and preparations, except those which are compounded with one or more other ingredients and containing not more than 100 milligrams of the drug/per dosage unit and with concentration of not more than 2.5 per cent in undivided preparations and which have been established in therapeutic practice.

(36) Dihydrocodine and Acetyldihydrocodeine, other derivatives of Dihydrocodeine and their salts such as, Paracodine and Acetyl Codone and the like, all dilutions and preparations, except those which are compounded with one or more other ingredients and containing not more than 100 miligrames of the drug per dosage unit and with a concentration of not more than 2.5 per cent in undivided preparations and which have been established in therapeutic practice.

(37) Beta-4 – Merphylinylethylmorphine (also known as Homocodeine, Hybernol, Pholcodine and the like) and its salts; and dilutions and preparations, except those which are compounded with one or more other ingredients and containing not more than 100 milligrams of the drug per dosage unit and with a concentration of not more than 2.5 per cent in undivided preparations and which have been established in therapeutic practice.

(48) Norcodeine and its salts; all dilutions and preparations, except those which are compounded with one or more other ingredients and containing not more than 100 milligrams of the drug per dosage unit and a concentration of not more than 2.5 per cent in undivided preparations and which have been

established in therapeutic practice.

(58) *Ethyl 1-(3.Cyano-3, 3-diphenylpropyl)-4-phenylpiperidine -4- carboxylic acid ethyl ester (the international non-proprietary name of which is Diphenoxylate), and its salts, preparations, admixtures, extracts and other substances containing any of these drugs, except preparations of diphenoxylate containing, per dosage unit, not more than 25 mg. of diphenoxylate calculated as base, and a quantity of atrophine sulphate equivalent to at least one per cent of the dose of diphenoxylate.*

(70) *6- nicotinylcodeine (the international nonproprietary name of which is Nicocodine) and its salts, all dilutions and preparations, except those which are compounded with one or more other ingredients and containing not more than 100 milligrams of the drug per dosage unit and with a concentration of not more than 2.5 per cent in undivided preparation and which have been established in therapeutic practice.*

(76) *6- nicotinylcodeine (the international nonproprietary name of which is Nicocodine) and its salts, all dilutions and preparations, except those which are compounded with one or more than ingredients and containing not more than 100 milligrams of the drug per dosage unit and with a concentration of not more than 2.5 per cent in undivided preparation and which have been established in therapeutic practice.*

(83) *1-(3-cyano-3, 3-diphenylpropyl) 4-phenylisonin pecotic acid (otherwise known as Defenoxine or Diphenoxyllic acid) and its salts, preparations, admixtures, extracts and other substances containing any of these drugs, except any preparation of Difenoxine containing, perdosage unit, a maximum of 0.5 milligrams of difenoxine calculated as base and a quantity of atropine sulphate equal to at least 5 per cent of the quantity of difenoxine, calculated as base, which is present in the mixture.*

(87) *(+)- 4 – dimethylamino -1, 2-diphenyl-3-methyl-2-butanol propionate, (the international*

nonproprietary name of which is Dextropropoxyphene), and its salts, preparations, admixtures, extracts and other substances containing any of these drugs, except preparations for oral use containing not more than 135 milligrams of Dextropropoxyphene base per dosage unit or with a concentration of not more than 2.5 per cent in undivided unit or with a concentration of not more than 2.5 per cent in undivided preparations, provided that such preparations do not contain any substances controlled under the Convention on Psychotropic Substances, 1971.

x x x x

36. *The manufactured drugs of which there has been a contravention in the present cases have been sold, purchased, distributed, stored, transported, carried etc. in a bulk form and mostly these are without proper licences or authorizations. In respect of such drugs which are carried in bulk form, the notification dated 18.11.2009 would apply and the question that these drugs contain an exception would not be applicable as the exceptions would apply when the drugs are for medicinal or therapeutic use. Besides, the quantity of manufactured drugs is not to be determined on per capsule basis when these are carried without proper licence or authorization. In other words, the mere dosage of the manufactured drug in one capsule is not to be considered but the dosage in the number of capsules together is to be considered for the purpose of determining as to whether the exceptions provided in the notification dated 14.11.1985 declaring the narcotic substances and preparations as mentioned therein to be manufactured drugs. Moreover, in case of contravention of Section 21 NDPS Act relating to manufactured drugs, Note 4 of the notification 18.11.2009 would apply that is to say that the quantity in respect of which there is a contravention is 'small quantity', 'lesser than commercial quantity but greater than small quantity' or 'commercial quantity' is to apply to the entire mixture or any solution or any one or more narcotic drugs or psychotropic substances of that particular drug in dosage form etc. wherever existence of such substance is possible and not just its*

pure drug content. Therefore, the question of exceptions being provided in respect of drugs at serial No.16, 35, 36, 37, 48, 58, 70, 76, 83 and 87 of the notification dated 14.11.1985 is inconsequential when these drugs are carried in a bulk form and the entire quantity of the bulk is to be taken into consideration and not per dosage specially when these are carried in violation of the D&C Act and the 1945 Rules that is to say are sold, purchased, distributed, stored, transported, carried etc. without a valid licence or kept without a valid authorization.”

In the case of Hira Singh and another Vs. Union of India and another, 2020(2) RCR (Criminal) 523, the Hon'ble Supreme Court while answering the reference made to the larger Bench against the view taken in E. Micheal Raj Vs. Intelligence Officer, Narcotic Control Bureau, (2008)5 SCC 161, has held as under:

“10. In view of the above and for the reasons stated above, Reference is answered as under:

(I). The decision of this Court in the case of E. Micheal Raj (Supra) taking the view that in the mixture of narcotic drugs or psychotropic substance with one or more neutral substance(s), the quantity of the neutral substance(s) is not to be taken into consideration while determining the small quantity or commercial quantity of a narcotic drug or psychotropic substance and only the actual content by weight of the offending narcotic drug which is relevant for the purpose of determining whether it would constitute small quantity or commercial quantity, is not a good law;

(II). In case of seizure of mixture of Narcotic Drugs or Psychotropic Substances with one or more neutral substance(s), the quantity of neutral substance(s) is not to be excluded and to be taken into consideration along with actual content by weight of the offending drug, while

determining the “small or commercial quantity” of the Narcotic Drugs or Psychotropic Substances;

(III). [Section 21](#) of the NDPS Act is not stand-alone provision and must be construed along with other provisions in the statute including provisions in the [NDPS Act](#) including Notification No.S.O.2942(E) dated 18.11.2009 and Notification S.O 1055(E) dated 19.10.2001;

(IV). Challenge to Notification dated 18.11.2009 adding “Note 4” to the Notification dated 19.10.2001, fails and it is observed and held that the same is not ultra vires to the Scheme and the relevant provisions of the [NDPS Act](#). Consequently, writ petitions and Civil Appeal No. 5218/2017 challenging the aforesaid notification stand dismissed.”

Thus, as per the law laid down in the aforesaid two judgments i.e. Inderjeet Singh @ Laddi’s case (supra) and Hira Singh’s case (supra), on the seizure of Narcotic Drugs and Psychotropic Substance with one or more neutral substance, actual contents by weight of the drug is to be taken into consideration.

In view of the above, I do not find any merit in the present appeal. Hence, the same is hereby dismissed.

(HARNARESH SINGH GILL)
JUDGE

June 23, 2020
parveen/ds

Note: Whether speaking/reasoned : Yes/No
Whether reportable : Yes/No