

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

CRA-S-776-SB-2005
Date of decision:-27.4.2022

Kailash

...Appellant

Versus

State of Haryana

...Respondent

CORAM: HON'BLE MR.JUSTICE H.S.MADAAN

Present: Mr. N.C. Kinra, Advocate
for the appellant.

Mr.S.S. Pannu, DAG, Haryana.

H.S. MADAAN, J.

This appeal has been preferred against judgment dated 1.4.2005 passed by Judge, Special Court, Panipat vide which on conclusion of trial, he had convicted the appellant/accused Kailash for an offence under Section 18 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as '**the Act**') as well as order dated 4.4.2005 vide which the accused was sentenced to undergo rigorous imprisonment for 10 years and to pay a fine of ₹1,00,000/- and in default thereof to further undergo rigorous imprisonment for two years.

The accused - convict – Kailash, who is appellant before this

Court prays that the appeal be accepted, the impugned judgment of his conviction and order of sentence be set aside and he be acquitted of the charge framed against him.

Briefly stated, the facts of the case as per the prosecution story are that on 24.5.2022, a police party from Police Post bus stand, Panipat, Police Station City, Panipat led by SI Gurmail Singh was present near outer gate of bus stand Panipat in connection with patrolling and checking of crime, when accused Kailash came from inside the bus stand on foot and he was walking by widening his legs; on seeing the police party accused turned to his left hand side; he was apprehended on the basis of suspicion; his name and address were inquired into; one *POTLI* (piece of cloth having contents closed with a string) was found to be tied on thigh of the accused with white straps; suspecting that the *POTLI* contained some narcotic substance, SI Gurmail Singh served notice under Section 50 of the Act upon the accused inquiring from him whether he desired his search to be conducted from some gazetted officer or Magistrate; the accused opted to get the search conducted before a Magistrate. Accordingly, Sh.Rajinder Singh Gehlot, Tehsildar – cum – Executive Magistrate, Panipat was requested to arrive at the spot. He accordingly did so. In his presence SI Gurmail Singh searched *POTLI* of the accused, which was found to contain opium; 50 gms. of opium was separated as sample and the residue came out to be 2 kgs. 500 gms.; the sample and the residue were converted into sealed parcels; the seal after use was handed over by SI Gurmail Singh to HC Wazir Singh; the parcel was then taken into possession vide recovery memo attested by witnesses

including Sh.Rajinder Singh Gehlot, Tehsildar; a ruqa was sent to the police, on the basis of which formal FIR was recorded. Accused was arrested in this case. The investigation in the case started.

On reaching the police station, SI Gurmail Singh produced the accused along with the case property before Inspector Randhir Singh, SHO of the police station, who verified the facts from the accused and the witnesses and sealed the sample parcel and remainder parcel with his own seal; thereafter on his instructions SI Gurmail Singh deposited the case property and sample parcel with MHC of the police station. The accused was put in the lockup. The sample was sent to FSL, Madhuban and as per the report received therefrom, it was found to be that of opium. On completion of investigation and other formalities, challan against the accused was prepared and the accused was forwarded to face trial in the Court.

Learned Additional Sessions Judge, Panipat finding that charge for offence under Section 18 of the Act was disclosed against the accused, charge-sheeted the accused for the said offence, to which, accused pleaded not guilty and claimed trial. The case was then fixed for evidence of the prosecution.

During the course of prosecution evidence, the prosecution examined Sh.Rajinder Singh Gehlot, Tehsildar as PW1, SI Karan Singh as PW2, Constable Jasmer Singh as PW3, Constable Sat Narain as PW4, HC Dharam Pal as PW5, SI Gurmail Singh as PW6, NHC Sewa Ram as PW7 and Inspector Randhir Singh as PW8. The documents relied upon by the prosecution happened to be Ex.PA – Search order, Ex.PB – recovery

memo, Ex.PC – ruqa, Ex.PC/1 – copy of FIR, Ex.C/2 – endorsement on ruqa, Ex.PD – affidavit of Constable Jasmer, Ex.PE – affidavit of Constable Sat Narain, Ex.PF – FSL report, Ex.PG – affidavit of HC Dharam Pal, Ex.PG – notice under Section 50 of the Act, Ex.PG/1 – reply, Ex.PH – rough site plan.

On conclusion of the prosecution evidence, statement of accused was recorded under Section 313 Cr.P.C., in which all the incriminating circumstances appearing against such accused were put to him but accused denied the allegations contending that he is innocent and had been falsely involved in this case.

During the course of defence evidence, the accused tendered copy of statement under Section 161 Cr.P.C. as Ex.DA.

With that the defence evidence got concluded.

After hearing arguments, learned Judge, Special Court, Panipat convicted and sentenced the accused as mentioned above, which left him aggrieved and he has filed the present appeal.

I have heard learned counsel for the appellant-accused-convict and learned Deputy Advocate General, Haryana, besides going through the record.

Learned counsel for the appellant/accused has contended that there is violation of mandatory provision of Section 50 inasmuch as while issuing notice Ex.PG to the accused, he was not properly informed of his right to get his search conducted before a gazetted officer or Magistrate and search conducted in presence of Tehsildar cannot be said to be due compliance of the provision. Therefore, the accused deserves to be

acquitted on that score.

Whereas learned State counsel has countered the argument contending that there is due compliance of Section 50 of the Act because the Tehsildar in his capacity as Executive Magistrate is to be taken as Magistrate as per requirement of the provision.

After hearing the rival contentions, I find that the search of the accused had been carried out in presence of Sh.Rajinder Singh Gahlot, Tehsildar-cum-Executive Magistrate. Notice Ex.PG cannot be faulted on any ground. Sh.Rajinder Singh Gehlot appearing as PW1 had supported the prosecution case on material points. Therefore, the appellant/accused cannot come up with a plea that the mandatory provision of Section 50 had been violated. The trial Court has dealt with this aspect in para Nos.18 and 19 of the impugned judgment in detail in light of the case law on the subject. I do not see any reason to disagree with the trial Court on that point. Therefore, this objection of learned counsel for the appellant is rejected.

As regards the next objection raised by learned counsel for the appellant with regard to non-joining of independent witness, it has to be taken note of that there is nothing on record to show that the official witnesses had any previous enmity with the accused putting a question mark over their impartiality on making their depositions doubtful. It being so, their depositions are to be taken at par with independent witnesses. Furthermore, it is a matter of common knowledge that people generally hesitate to get associated with the investigation of the criminal case, may be to avoid the animosity of the criminals and to avoid hassles of going to

the police stations or to the Courts. Therefore, non-joining of independent witnesses in this case does not make any difference.

Another argument advanced by learned counsel for the appellant/accused was that in the consent memo Ex.PG name of Sh.Rajinder Singh was originally written but an attempt had been made to hide it by applying white fluid and Sh.Rajinder Singh appearing as PW1 in his cross-examination has admitted this fact. However, I find that from the statement of PW1, it cannot be inferred that he had categorically admitted having signed document Ex.PG. Even otherwise, at the most it may be taken as suspicious circumstance with regard to authenticity of the prosecution version but that by itself is not sufficient to demolish the prosecution case.

Another argument put forward by learned counsel for the appellant was that the seal after use was not handed over to any independent witness, thus possibility of tampering of seal is not ruled out.

Again this argument has been dealt in detail in Para No.20 of the judgment of the trial Court with which I find myself in agreement. With official witnesses having no malice towards the accused, there is little possibility of such official witnesses handing over seal to the Investigating Officer so as to misuse it by reusing it on sample parcel or residue parcel and furthermore since no independent witness had been joined in this case, there was no occasion for handing over the seal to independent witness. From the evidence adduced by the prosecution, it can safely be concluded that no tampering of seals had taken place.

Learned counsel referring to statements of PW1 Sh.Rajinder

Singh Gehlot, PW6 SI Gurmail Singh and PW7 NHC Sewa Ram has contended that there are several contradictions and variations between their depositions as regards apprehension of accused, time of recovery, time of sending ruqa, time of returning to the police station, distance of place of recovery from police station, the type of weighing machine used, to whom the seal handed over after use etc. However, I find that a few minor variations in their statements, do not go to the root of the matter since those are bound to occur due to difference in power of perception, observation and retention of events in various persons and so also due to lapse of memory due to passage of time etc.

I find that the prosecution had successfully proved its case against the accused beyond a shadow of reasonable doubt.

There is nothing on record to point out that a considerable quantity of more than 2.5 kgs of opium could be planted upon the accused by the prosecution without any rhyme or reason. The accused has been unable to render any reasonable or plausible explanation for the same. He was rightly convicted for offence under Section 18 of the Act.

The judgment passed by the trial Court is well reasoned one, based upon proper appraisal and appreciation of evidence and correct interpretation of law. There is no illegality or infirmity in the judgment, as such, the same is upheld.

As regards the sentence awarded to the accused/appellant of 10 years of rigorous imprisonment and Rs.1,00,000/- as fine i.e. the minimum prescribed for the offence. Thus, there is no scope for interference with the judgment of conviction passed against the

accused/appellant or to reduce the sentence of imprisonment or fine awarded to the appellant/accused since the contraband recovered from the appellant/accused falls within commercial quantity.

The appeal is found to be without merit, hence it stands dismissed.

Appellant – Kailash is stated to be on bail granted to him by this Court vide order dated 14.3.2007 while suspending his remaining sentence during the pendency of the appeal. His bail is cancelled. Chief Judicial Magistrate, Panipat is directed to issue arrest warrant to get him arrested so as to make him undergo the remaining sentence.

27.4.2022
Brij

(H.S.MADAAN)
JUDGE

Whether reasoned/speaking : No / Yes

Whether reportable : No / Yes