

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CRA-S-283-SB-2000 (O&M)

Reserved on: 07.07.2023

Pronounced on: 12.07.2023

Sheopat Ram & another

... Appellant (s)

Versus

State of Haryana

...Respondent (s)

CORAM: **HON'BLE MR. JUSTICE ANOOP CHITKARA**

Present:- Mr. K.S. Godara, Advocate
 for the appellant(s).

Mr. Rajat Gautam, Addl.A.G., Haryana and
Mr. Manish Bansal, D.A.G., Haryana.

ANOOP CHITKARA, J.

FIR No.	Dated	Police Station	Sections
454	4.8.1997	Kalanwali, District Sirsa	15/16 The Narcotic Drugs and Psychotropic Substances Act, 1985

Sessions	196 of 1998, Additional Sessions Judge, District Sirsa
Case No.	Date of decision: 08.02.2000

1. The surviving appellant Sheopat Ram, who was charged for possessing 80 kgs of poppy straw, and along with one of his co-accused was convicted by the trial court for the commission of offence punishable under Section 15 of the Narcotic Drugs and Psychotropic Substances Act, 1985

(NDPS Act) and sentenced to undergo rigorous imprisonment for 10 years and pay fine of Rs. 1,00,000/-, had come up before this Court by filing present appeal. During the pendency of the appeal, convict Raju @ Raj Kumar expired, abating his appeal.

2. As per the prosecution's case, on August 04, 1997, at 6:50 AM, a police party headed by SI/SHO Amar Singh, which comprised ASI Umed Singh, HC Dilbagh Singh, and Constables Raj Kumar, Baldev Singh, Hawa Singh, Hans Raj, and Balwant Singh, had gone on patrolling within the jurisdiction of their Police Station Kallanwali. When they parked their police vehicle, they noticed an SUV of the brand Gypsy and SI Amar Singh (PW-5) signaled it to stop. However, two people ran out of the Gypsy, but the police party chased and caught them immediately. They disclosed their names as Sheopat Ram (A-1) and Raju @ Raj Kumar (A-2). On checking the Gypsy, two gunny bags, duly filled in, were lying in it. On suspicion of these gunny bags having some narcotic substance, the appellant convicts were asked whether they would like to be searched in the presence of a Gazetted Officer or like to appear before a Magistrate, to which they answered that they expressed their desire to be searched by a Gazetted Officer. Consequently, the SHO called PW-1 Om Prakash Sethi, Naib Tehsildar. In his presence, the police checked the two gunny bags, which were lying in the Gypsy, and found poppy husk in both. On weighing, each gunny bag contained 40 kg. of poppy husk, including the weight of the gunny bag, total quantity 80 kg of poppy husk. The investigator took out two samples of 250 grams each from both bags and sealed them in separate parcels. After that the parcels, as well as the gunny bags, were sealed with the seal "ASK," and the specimen impression of the seal was obtained, and the seal was handed over to PW-1 Shri O.P. Sethi, Naib Tehsildar, Kalanwali. After complying with the requirements of NDPS and CrPC, the police officials got FIR, captioned above, registered, and both the accused were arrested. Subsequently, the samples were sent for testing to Forensic Science Laboratory, Madhuban Karnal, Haryana, which tested the contents positive for poppy husk. During the investigation, both convicts disclosed that they had purchased the

poppy husk from Ludhar Singh. Upon this, Ludhar Singh (A-3) was also arrested. After completion of the investigation, the Officer in charge of the police station launched prosecution against three of the accused and filed Challan under Section 173 CrPC and, consequently, framed charges against appellants-convict under section 15 of the NDPS Act and against Ludhar Singh (A3) under Section 29 NDPS Act.

3. During the trial, the prosecution examined Shri O.P. Sethi, Naib Tehsildar, an eyewitness as PW-1, SI Amar Singh, the investigator as PW-5, and other witnesses to link the evidence. In the statement of the accused recorded under section 313 CrPC, they denied all the prosecution charges. However, they did not lead any evidence in defence.

4. The trial Court found *prima facie* evidence against Sheopat Ram (A-1) and Raju @ Raj Kumar (A-2) and convicted them under Section 15 NDPS Act, and sentenced them vide impugned judgment and order of sentence, as mentioned above. However, it did not find sufficient evidence against A-3 Ludhar Singh @ Nachhatar Singh and, giving him the benefit of the doubt, acquitted him of the charge.

5. Feeling aggrieved, both convicts filed a joint appeal before this court. However, the State did not challenge the judgment of acquittal against A-3 Ludhar Singh.

6. During the pendency of appeal, appellant No.2 Raju @ Raj Kumar expired on 11.06.2021 and thus, appeal, *qua* him stands abated.

7. I have heard learned counsel for the appellant and heard Mr. Rajat Gautam, Additional Advocate General, Haryana and Shri Manish Bansal, Senior Deputy Advocate General, Haryana and gone through the record.

8. The prosecution examined the SI/SHO Amar Singh as PW-5 to prove its case. He testified that on 04.08.1997, the police party had left the police station at 6:50 AM and returned after approximately four hours, which

were consumed to apprehend and catch the accused and perform other procedures. This statement found corroboration by PW-2 Chander Singh, who testified similarly. The prosecution also examined Om Prakash Sethi, Naib Tehsildar, as PW-1. He testified that the SHO called him, and he had reached the spot in the jeep sent by the concerned SHO. On reaching the spot, he noticed that both the accused were present, and two gunny bags containing poppy husk were also there. He further testified that in his presence, the investigator took out one sample each of 250 grams from both the bags containing poppy husk. The gunny bag samples were sealed with the seal 'ASK.' Five seals of 'ASK' were affixed on each sample and each gunny bag. In his cross-examination, PW-1 denied false implication and denied that the police had stage-managed the recovery. The FSL report was tendered in evidence as Ex. PG, and as per the report, the laboratory found that both samples were identified as poppy husks. The said report was, *per se*, permissible under section 293 CrPC. Thus, an analysis of evidence revealed that the prosecution has been able to prove the search and seizure, and two samples of 250 grams each, in total containing 500 grams of poppy husk, were sent to FSL and tested as containing poppy husk.

9. Prosecution has miserably failed to prove the remaining case property, other than the samples tendered in evidence or recovered from any accused, for the following reasons.

(a). The prosecution tendered in the evidence the case property as Ex.P1 and Ex. P2. The main issue is whether the case property, i.e., Ex. P1 and Ex. P2, was the same, which was recovered from the accused, and is it related to the case mentioned above or not? In examination-in-chief, the prosecution tendered in evidence gunny bags through PW-1 Om Prakash Sethi, Naib Tehsildar, and affixed Ex. P1 and Ex. P2 on both the bags (case property). During cross-examination, the defence highlighted the contradiction that one empty gunny bag was tied with the bag containing the alleged poppy husk, but no particulars of the case mentioned on the

gunny bag containing *choora post*. The explanation offered by the Investigating Officer for these contradictions is that over the time, the gunny bags got rotten, and from one of such bags, the poppy husk had to be shifted to a new bag. Even if it is true at face value, there is no reference to what happened to the writings on the other gunny bag. This assumes significance because at the time of the seizure of the gunny bags PW-1 Om Prakash Sethi, Naib Tehsildar had explicitly stated that five impressions of the seal 'ASK' were affixed on each of the gunny bags. In cross-examination of PW-5, Amar Singh, the investigator, stated that there were three seal impressions on the other bag, but those were not legible. He further admitted that none of the bags (*Bori*) had any number of the *Malkhana*. He further stated that the signatures of PWs were not on any of the bags, and other details were also not mentioned.

(b). In the first bag, the name of the police station, the name of the accused, the number of the FIR, etc., were not mentioned. Although there were some traces of seals, those were in broken condition and were not legible. Even on this bag, no number of *Malkhana*, no FIR number was mentioned, and no signatures of PWs were put.

(c). Regarding the second bag, the prosecution explained that since the bag containing poppy husk got torn, its contents were put in another bag, and the empty bag was tagged. However, the transfer of the contraband from the original bag to a new bag has yet to be brought on record. It is admitted that no permission was sought to change the damaged bag, and no photographs were taken at that time. There is nothing to believe that once the bag was torn, why the bag was not put in a larger plastic bag to secure the contents? No permission was sought from any Court to do the needful, and the procedure under Section 52A NDPS Act needed to be followed. In case permission was sought, the concerned Court would have options to exercise the provisions of Section 52A NDPS Act or at least inspect the case property, which still needs to be done. Further, if the bag

had become rotten, there is no explanation why the poppy husk was saved in the same environmental conditions. All these raise grave doubts about its being tampered with.

(d). PW-5 Amar Singh, SI/SHO, should have explained these omissions or substitutions in the examination-in-chief. In his cross-examination (Page-4), he admitted that although two bags were purportedly containing poppy husk, there was no FIR number, name of the Police Station, or Malkhana mentioned in one of those two bags and at that stage, had offered the explanation that the bag had been torn, which was put in another bag. At this stage, it would be appropriate to reproduce the cross-examination of PW-1 Shri Om Parkash Sethi, Naib Tehsildar, as follows: -

“..... It is correct that one empty gunny bag is tagged with the other bag on which case particulars are written. It is also correct that on the other gunny bag containing choora post no particular of this case are mentioned. The tagged gunny bag can be detached from the bori. It is correct that no note is given on the gunny bag that the bori has been torn out.”

(e). Thus, when the case property was produced in Court for the first time, at that point in time, the explanation was that one gunny bag had no mark. However, an empty gunny bag was tied with it, which had particulars of the present case, and the other gunny bag, which had poppy husk, no particulars of the present case, were mentioned. PW-5 Amar Singh, the investigator, explains that in the Police Malkhana, since the gunny bag had been torn, that is why the poppy husk was put in a new bag. When confronted by the defence lawyer, he admitted that no permission was sought to shift the contraband into the gunny bag.

(f). In addition to this material contradiction, the case property certainly was not throughout in the custody of PW-5 SI Amar Singh, and it was stored and deposited in the police Strong Room (Malkhana). The prosecution did not examine the Malkhana-in-charge, who had put the poppy husk from

the alleged torn bag into a new bag, nor any application to that effect was filed to examine *Malkhana* Incharge under Section 311 CrPC. Even if the bag had been torn, they should have placed the torn bag in a slightly bigger bag. There was no reason to take out the poppy husk and put it in a different bag without permission from the Court. Furthermore, out of the two bags, one empty bag was tagged, and there is no explanation for the second empty bag not containing the details of case particulars.

(g). The substantive evidence was the entire poppy husk, and the laboratory tested its representative sample; thus, the prosecution was under an obligation that the sample they tested represented the entire poppy husk. In the present case, the SHO had also not produced the case property before the concerned Judicial Magistrate in compliance with Section 52A NDPS Act to draw an inventory. The prosecution needed to produce the case property before the Court. However, they did produce the case property in a tempered condition at the trial stage. There is no evidence to prove that the contraband produced and proved before the trial Court was the same poppy husk allegedly recovered from the accused.

(h). In addition to the above, the person who had shifted the contraband from one bag to another was the material witness, but he was not examined nor summoned under Section 311 CrPC, which was crucial. Nothing was explained about who dealt with this bag, what were their names, from when were they posted in the *Malkhana* and on which date they did it,

(i). In the trial, the prosecution needed to establish by cogent evidence that the alleged contraband and its quantity produced before the court was the same that had been seized from the accused's possession. The best evidence would have been the seized materials which ought to have been produced during the trial and marked as material objects, or a report under section 52-A of the NDPS Act. There is no explanation for this failure to

produce them. Mere oral evidence as to their features and production of *panchanama* does not discharge the heavy burden on the prosecution, mainly where the offence is punishable with a stringent sentence under the NDPS Act.

(j). The case property was not weighed in Court to prove the exact weight of each bag to establish that the weight corresponded with the weight of allegedly seized bags, and it was required because none of bags was produced in court during trial in their original condition. The contradictions are so significant that it would be unsafe to believe that the contraband which were exhibited in Court was either poppy husk or the same poppy husk which were allegedly recovered from the convicts. Thus, to sum up, based on an analysis of these contradictions, it can be said that there is no convincing evidence to conclude beyond reasonable doubt that any of these two bags remained untampered and the alleged poppy husk in any of these two bags was the same which had been seized at the time of search at the initial stage. Thus, the prosecution has failed to link and connect the recovery of the entire poppy husk recovered from the accused and was able to prove only 500 grams of poppy husk which were sent to the FSL laboratory, which had given its report under Section 293 CrPC as Ex.P-G.

10. In ***Jitender vs State of M.P.***, 2004 (10) SCC 562, Supreme Court holds,

"Though it was the case of the prosecution that the recovered articles of drugs were keep in the Malkhana, neither were the material objects produced in the trial, nor was the Malkhana Moharir examined during the trial to prove that the packets in which the samples were sealed had remained in Malkhana from the time of their receipt to the time of their despatch to the Forensic Science Laboratory. "

11. In view of the aforesaid discussion, this Court finds that the view taken by the trial Court is not unsustainable to the extent mentioned above.

12. Given above, the prosecution has been able to prove recovery of only 500 grams of poppy husk and not the entire quantity of 80 kgs. As per the Schedule of the NDPS Act, which applies retrospectively, since the quantity of poppy husk recovered from the appellant is less than 1 kg., which falls under ‘small quantity,’ the appellant could have been sentenced to a maximum sentence of one year. Thus, this Court has no other option but to reduce the sentence awarded to the appellant, as prescribed for a ‘small quantity.’

13. To conclude, although the prosecution has been able to prove possession of 500 grams of poppy husk, for which the maximum sentence is one year, and has failed to prove recovery of 79.500 kgs. of poppy husk, for which the appellant-convict is entitled to the benefit of doubt.

14. Consequently, the appeal is partly allowed, and the judgment mentioned above of conviction and sentence is modified to the extent that the appellant-convict is convicted for possession of poppy husk of ‘small quantity’ and is sentenced to undergo simple imprisonment for six months and shall pay a fine of Rs.10,000/- and in default for payment of fine, to undergo further simple imprisonment for one month. As per the custody certificate, since the appellant-convict had already undergone a sentence of 2 years, 11 months, and 18 days before his sentence was suspended on 20.02.2003, as such, no further order is required to be passed *qua* imposition of sentence. Since the appellant already spent more period in jail, as imposed for default of payment of fine, therefore, no order is required for recovery of fine and the same be treated as written off. Bail bonds furnished by the appellant-accused are discharged.

(ANOOP CHITKARA)
JUDGE

July 12, 2023
AK

Whether speaking/reasoned	:	Yes
Whether reportable	:	No