

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

CRA-S-849-SB-2005 (O&M)

Date of Decision: 10.03.2023

Chand Singh	Versus	...Appellant
State of Haryana		... Respondent

CORAM : HON'BLE MR. JUSTICE N.S.SHEKHAWAT

Present : Mr. Aditya Sanghi, Advocate
for the appellant.

Ms. Sheenu Sura, DAG, Haryana.

N.S.SHEKHAWAT, J.

Prayer has been made in the instant case to set-aside the impugned judgment of conviction dated 07.02.2005 and order of sentence dated 09.02.2005 passed by the learned Special Judge, Rohtak, whereby, the appellant was convicted for the commission of offence under Section 20 of the Narcotic Drugs & Psychotropic Substances Act, 1985 (hereinafter to be referred as '**the NDPS Act**') and sentenced to undergo rigorous imprisonment for a period of seven years and to pay a fine of Rs. 50,000/- alongwith default stipulation.

The prosecution story, as it emerges from the report under Section 173 Cr.P.C., is that on 16.07.2004, SI Kamlesh Kumar was present at old Bus Stand Sampla alongwith other police officials and he received a secret information that Chand Singh, accused/appellant was sitting on his tri-cycle and was selling *charas* at Jhajjar by-pass, Sampla. The police team found the information to be genuine and secret information was reduced into writing and vide notice Ex.P6, the same was sent to Police Station Sampla for the purpose of information, as per the requirement of Section 42 of the

NDPS Act. On the basis of said notice, a DDR entry was also made in the police station. The raiding party was formed and the raid was conducted. The accused was found sitting on a tri-cycle. He was interrogated and he disclosed his name and address etc. Since, it was suspected that the accused was carrying a contraband, a notice under Section 50 of the NDPS Act was served upon him and he was informed of his statutory right of getting the search conducted either in the presence of a Magistrate or a gazetted officer. He opted to get his search conducted in the presence of a gazetted officer as per the written reply submitted by him. Consequently, the information was sent and on that, Ashok Kumar, DSP, arrived at the spot with his official staff and introduced himself as gazetted officer. The accused was again given an offer of getting his search conducted before a Magistrate or a gazetted officer. The accused stated that he wanted to get his search conducted in his presence only. After taking the consent of the accused, SI Kamlesh Kumar conducted the search at the instance of Ashok Kumar DSP. The polythene bag, which was held by the accused in his right hand was checked and it was found containing *charas*, which weighed to be 1 kg. Two samples of 20 gms each were separated and were put in separate plastic containers. Remaining *charas* was also put in separate plastic container. Three parcels were prepared and were sealed with the seal impressions “DS” and “AK”. The seal “DS” was entrusted to HC Sant Ram after use. All the parcels were taken into possession by the police vide separate memos, duly attested by the witnesses. A *rukka* was sent to the police station for registration of the FIR and a formal FIR was recorded by

ASI Ajit Singh. Rough site plan of the place of the recovery was also prepared and initial investigation was conducted by the IO at the spot.

On returning to the police station, the accused, case property and the witnesses were produced by the IO before Rajbir Singh SI/SHO. The SI/SHO also verified the facts from the accused as well as the witnesses and had put his seal impression of "RS" on the all three parcels. As per his directions, case property was deposited with the MHC of the Police Station and the accused was formally arrested. A report was prepared separately under Section 57 of the NDPS Act and was sent to the DSP for perusal.

After completion of the necessary investigation, the final report under Section 173 Cr.P.C. was prepared by the police and was submitted to the Court for trial of the accused.

The learned trial Court found a *prima-facie* case under Section 20 of the NDPS Act, on the strength of the evidence collected during the course of investigation and the charge was framed against the accused under Section 20 of the NDPS Act and the accused pleaded not guilty to the charge and claimed trial.

To prove the charge against the accused, nine witnesses were examined by the prosecution. Constable Balwan Singh was examined as PW1, who tendered his affidavit Ex.P1 in evidence. Ashok Kumar, DSP, was examined as PW2, who had reached Sampla by-pass on 16.07.2004 on getting the wireless message and had introduced himself as gazetted officer at the spot. Even, he had given the offer to the accused to get his search conducted either in the presence of a gazetted officer or a Magistrate. Since the accused had

reposed confidence in him, he got the search conducted through SI Kamlesh Kumar. He was also a witness to the entire search and seizure procedure and had signed various memos as well. The prosecution further examined PW3 Head Constable Sant Ram, who was part of the raiding team. He had supported the case of the prosecution and narrated the case of the prosecution as mentioned in the FIR. Apart from that, SI Kamlesh Kumar, the main witness of the prosecution was examined as PW4. PW3 HC Sant Ram and PW4 SI Kamlesh Kumar deposed on similar lines. Even initial investigation was conducted by SI Kamlesh Kumar at the spot. He had also submitted a report under Section 42 of the NDPS Act even before conducting the raid. He also signed various memos and had also submitted a report under Section 57 of the NDPS Act to the higher police officers. PW5 Constable Rajesh Kumar tendered his affidavit Ex.P15 in the present case, whereas PW6 ASI Dayand had partly investigated the case. He recorded the statements of Mohrir Malkhana, Constable Balwan Singh and Constable Rajesh during the course of his investigation. The prosecution further examined SI Rajbir Singh as PW7, who was posted as SI/SHO Police Station Sampla on 16.07.2004. The accused, witnesses and the case property were produced before him and he had verified the facts and affixed his seal "RS" on all the parcels. He also forwarded the report under Section 57 of the NDPS Act to the DSP. He directed the deposit of the case property and the seal impression in the Malkhana and also ordered the formal arrest of the accused. He also prepared a report under Section 173 Cr.P.C., which was presented in the Court for trial

against the accused. PW8 HC Ram Parkash tendered his affidavit Ex.P16 in evidence and his testimony is formal in nature. Further ASI Mahender Singh had brought the Daily Diary Register pertaining to DDR No. 23 dated 16.07.2004. On receipt of notice Ex.P6 under Section 42 of the NDPS Act, a DDR entry was made in the police station, which was exhibited as Ex.P17. He further stated that the copy of the DDR was sent to the senior officers and it was mentioned in the DDR itself.

After the closure of the prosecution evidence, the statement of the accused was recorded under Section 313 Cr.P.C. and he pleaded his false implication. He stated that he never indulged in any kind of illegal activity including selling the narcotic substance. He had been falsely implicated in the present case at the instance of police of Police Station Sampla with whom he had exchanged hot words, when they pushed his tri-cycle from the road to give way to a certain VIP vehicle. He was physically handicapped and had been falsely involved in the present case.

I have heard learned counsel for the parties and with their able assistance, I have gone through the trial Court record carefully.

Learned counsel for the appellant vehemently argued that in the instant case, while SI Kamlesh Kumar was present at old Bus Stand Sampla alongwith other police officials, he had received a secret information regarding selling of *charas* by the present appellant/accused at Jhajjar By-pass Sampla. However, Kamlesh Kumar SI sent the information to an officer holding the same rank and

there was non-compliance of mandatory provisions of Section 42 of the NDPS Act. Learned counsel for the appellant further contended that as per the Section 42(i) of the NDPS Act, if the empowered officer has a prior information, he should necessarily take down the same in writing and should forward the same to his immediate official superior. If there is total non-compliance of this provision, the same is fatal for the prosecution case. Further, the provisions of the NDPS Act have been made stringent for the control and regulation of operations relating to the drugs and narcotic substance. Consequently, the provisions of Section 42 of the NDPS Act have to be construed and complied with strictly. However, in the instant case, while referring to the testimony of PW7 SI Rajbir Singh, the learned counsel contended that the report under Section 42 of the NDPS Act was sent to him by SI Kamlesh Kumar and both of them were of equal ranks. Learned counsel further contended that since the mandatory provisions of Section 42 of the Act were not strictly complied with, by the prosecution, the appellant was liable to be acquitted on this score alone. Learned State counsel, while referring the arguments made by the learned defence counsel, submitted that the provisions of Section 42 of the NDPS Act had been strictly complied with, by the prosecution.

I have heard learned counsel for the parties and find sufficient force in the submissions made by the learned State counsel. In the instant case, SI Kamlesh Kumar was examined by the prosecution as PW4. He clearly stated that secret information was reduced into writing and a notice/information in writing was sent to

the police station vide Ex.P6. Similarly, PW9 ASI Mahender Singh clearly deposed that on receipt of the information under Section 42 of the NDPS Act, he recorded a DDR No. 23 dated 16.07.2004 in the police station. ASI Mahender Singh further stated that the copy of this DDR No. 23 was sent to the senior officers and it was so mentioned in the DDR itself. Thus, it is apparent that on receipt of the secret information, the same was reduced into writing by SI Kamlesh Kumar PW4 and the same was forwarded to the police station to the SI/SHO, who was the head of the police station. Still further, even though, PW4 SI Kamlesh Kumar and PW7 SI Rabir Singh were having equal ranks, but SI Rajbir Singh was also posted as SHO of Police Station Sampla. Consequently, it is apparent that PW7 SI Rajbir Singh was superior officer of PW4 SI Kamlesh Kumar, being the SHO of the police station. It is a matter of common knowledge that SHO is the head of a police station and all the police officials work under his administrative control. It further requires mention that even PW9 ASI Mahender Singh clearly stated that the copy of the DDR No. 23 dated 16.07.2004 were already sent to the senior police officers. Consequently, it is apparent that the mandatory provisions of Section 42 of the NDPS Act have been complied with in the instant case. Apart from that, it is apparent that the recovery in the instant case had taken place at a public place, i.e. Jhajjar by pass Sampla and consequently the facts of the case clearly suggest that Section 43 of the NDPS Act would apply and not the provisions of Section 42 of the NDPS Act as the recovery had taken place at a public place.

Learned counsel for the appellant vehemently argued that there was total non-compliance of Section 52-A of the NDPS Act as no inventory was prepared before the learned Magistrate. The SHO only directed the contraband to be kept in the Malkhana of the police station and the same was never produced before the Magistrate for verification. Further, the said submission has been opposed by the learned State counsel that the provisions of Section 52-A of the Act are directory in nature and the accused cannot be acquitted on this ground alone. I find sufficient force in the submissions made by the learned State counsel. From a bare perusal of Section 52-A of the NDPS Act, it is clear that it is related to the disposal of seized narcotic drugs and there can never be any doubt with regard to the same. From a careful perusal of Section 52-A of the NDPS Act, it is amply clear that the provisions will come into play and the procedure enunciated therein will be required to be followed, if the recovered article is to be disposed off, as required, before the conclusion of the trial. If the recovered article is required to be preserved or is not required to be disposed off before the conclusion of the trial, then the procedure laid down in Section 52-A of the NDPS Act is not required to be followed. Consequently, it can never be stated that the prosecution had committed a serious lapse by not following the procedure as prescribed under Section 52-A of the NDPS Act. Further, the said provision is only directory in nature and not mandatory. Consequently, the respondent/accused cannot take advantage of the same and the said submission is liable to be rejected.

Apart from that, it is apparent that the Investigating Agency had taken all necessary steps and all the mandatory provisions of the NDPS Act had been strictly adhered to by the Investigating Officer of the present case.

Learned counsel for the appellant further contended that in the instant case, no independent witness was joined by the prosecution and the prosecution case is liable to be discarded only on this ground. The submission has been rebutted by the learned State counsel by contending that in the instant case, the efforts were made to join the independent witnesses but nobody joined the search and seizure proceedings and it will not affect the case of the prosecution in any manner. I have considered the rival submissions made by the learned counsel for the parties. It is apparent from the testimonies of PW3 HC Sant Ram that efforts were made to join the passersby in the police party, but they had shown their helplessness. Even PW4 SI Kamlesh Kumar also stated that they tried to join the independent witnesses, but nobody was ready to join. It is a matter of common experience that no independent person normally comes forward to depose against a drug peddler and the general public hesitates in joining the police proceedings. Further, the prosecution examined nine prosecution witnesses and I have carefully perused their respective testimonies. The official witnesses have been searchingly cross-examined by the learned defence counsel and they all withstood the test of cross-examination. The defence could not shatter their testimonies in any manner and their official status is no ground to discard their testimonies. The accused could not attribute any motive

or reason for falsely implicating him in such a serious offence. Furthermore, 1 kg of *charas* had been recovered from the present appellant and it was impossible for the police to plant such a huge recovery on the accused. Thus, the statement made by the learned defence counsel is rejected.

The learned counsel for the appellant further stated that as per the standing order, sample of 24 gms should have been taken, whereas the quantity of 20 gms of *charas* was taken as sample. However, the said submission has been opposed by the learned State counsel on the ground that the FSL found the quantity of 20 gms of *charas* to be sufficient for conducting the analysis of the contraband. I have perused the FSL report Ex.P14, which clearly shows that the samples were received in an intact condition and the seals tallied with the specimen seals as per the Forwarding Authorities letter. Further, two samples of 20 gms each of *charas* were received by the FSL and the FSL was able to conduct the test from the said quantity. No objection was raised by the FSL authorities. Thus, it is apparent that no prejudice has been caused to the present appellant.

Apart from that, the learned counsel has referred to certain minor discrepancies appearing in the statements of various witnesses. However, I have perused the findings recorded by the learned trial Court in this regard. The learned trial Court has recorded the detailed findings to reject the said minor variations appearing in the statements of various prosecution witnesses and the findings in this regard are upheld. The law is well settled that minor variations/contradictions are bound to creep in the testimonies of

various prosecution witnesses, who got a chance to appear as a witness after a long gap and such minor contradictions are liable to be ignored. No other submission has been raised.

Learned counsel for the appellant vehemently argued that one of the legs of the appellant was amputated below ankle and three fingers and one thumb of another leg were also amputated. He was a physically handicapped person and was looking after his family with great difficulty. He was to support his wife and three children and was the sole bread earner of the family. Consequently, a lenient view may be taken while awarding the sentence. However, the said submission has been opposed by the learned State counsel by contending that another FIR No. 159 dated 23.04.2010 was registered at Police Station Sampla, Rohtak, against the present appellant and he was convicted under Section 20 of the NDPS Act and was sentenced to undergo rigorous imprisonment for period of 12 years in the said case. Consequently, it is apparent that the present appellant is habitual offender and does not deserve any leniency in the matter of sentence. I have considered the rival submissions made by the learned counsel for the parties and find that there is merit in the submissions made by the learned counsel for the appellant. It is the duty of every Court to award proper sentence having regard to the nature of the offence and the manner, in which, it was executed or committed. The sentencing Courts are expected to consider all relevant facts and circumstances appearing on the question of sentence and proceed to impose a sentence commensurate with the gravity of the offence. In the instant case, the present appellant was found carrying 1 kgs of *charas* and

any quantity just above 1 kg is a commercial quantity as per the schedule appended with the NDPS Act. Apart from that, the appellant has already been convicted under Section 20 of the NDPS Act in another case and was sentenced to undergo rigorous imprisonment for a period of 12 years. Thus, the appellant does not deserve any leniency and the learned trial Court has rightly awarded rigorous imprisonment for seven years and a fine of Rs. 50,000/- alongwith default stipulation.

In view of above discussion, the appeal fails and the impugned judgment of conviction dated 07.02.2005 and order of sentence dated 09.02.2005 passed by the learned Special Judge, Rohtak, are upheld and affirmed.

The appellant/accused, if on bail, is directed to surrender within 15 days from today, failing which, the CJM concerned shall issue non bailable warrants against the present appellant/accused and shall commit him to custody to serve the remaining sentence of imprisonment.

All pending applications, if any, are disposed off, accordingly.

The case property, if any, may be dealt with as per the rules after expiry of period of limitation for filing the appeal.

Records of the Court below be sent back.

10.03.2023
amit rana

(N.S.SHEKHAWAT)
JUDGE

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