

(2011) 01 P&H CK 0428

High Court Of Punjab And Haryana At Chandigarh**Case No:** Criminal Appeal No. 360-SB of 2001

Ganga Dhar

APPELLANT

Vs

State of Haryana

RESPONDENT

Date of Decision: Jan. 10, 2011**Acts Referred:**

- Criminal Procedure Code, 1973 (CrPC) - Section 173
- Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) - Section 15, 52(2)

Citation: (2011) 1 RCR(Criminal) 624**Hon'ble Judges:** Kanwaljit Singh Ahluwalia, J**Bench:** Single Bench**Advocate:** Rahul Vats, for the Appellant; Sandeep Singh Mann, D.A.G., Haryana, for the Respondent**Final Decision:** Allowed

Judgement

Kanwaljit Singh Ahluwalia, J.

Present appeal has been preferred by Ganga Dhar son of Hukam Chand, aged 40 years. He was named as an accused in case FIR No. 7 dated 31.01.2000 registered at Police Station Loharu u/s 15 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as, the Act).

2. The Additional Sessions Judge, Bhiwani, vide his judgment dated 4th February, 2001 held the Appellant guilty of the offence punishable u/s 15 of the Act and vide a separate order of even date, sentenced him to undergo rigorous imprisonment for a period of ten years and to pay a fine of Rs. 1.00 lakh, in default of payment of fine to further undergo rigorous imprisonment for one year.

3. As per the prosecution case, on 30th January, 2000, 24 kilograms of poppy straw was recovered from the possession of the Appellant.

4. Briefly stated, case of the prosecution is found in the FIR Ex.PG. SI Sampat Ram, SHO of Police Station Loharu, on 31st January, 2000 accompanied by his companion police officials, was going to village Dhani Rahimpur in connection with patrol duty and nakabandi in a Government vehicle, which was being driven by Constable Ved Parkash. ASI Sajjan Singh, HC Bhoop Singh and Constable Abhey Singh were also members of the police party. When the police party reached near the bus stand of Loharu, one Partap Singh son of Sheo Karan met them and when he was having conversation with the police officials, at that time, accused was spotted coming from the side of bus stand. He was carrying one gunny bag on his head. On suspicion, the said person was apprehended and on interrogation, he disclosed his name as Ganga Dhar son of Hukam Singh. The police officer suspected some contraband article in the gunny bag, and therefore, a notice Ex.PD was served upon the accused. The notice stated that in case the accused desired, he could get himself searched before a Gazetted Officer or a Magistrate. Vide Ex.PA, the accused replied to the notice and stated that he wanted to get himself searched in the presence of a gazetted officer. An information was sent to the Police Station on wireless and services of the Deputy Superintendent of Police were requisitioned.

5. Parveen Kumar DSP PW-1 arrived at the spot. In his presence, search was conducted and the accused was found in possession of poppy straw. On weighment, the poppy straw was found to be 24 kilograms, out of which 200 grams was separated as a sample and it was sealed separately. The sample was sent to the Forensic Science Laboratory, Madhuban, which vide its report Ex.PN, held the same to be poppy straw. After receipt of the report from the Laboratory, a report u/s 173 Code of Criminal Procedure was submitted against the accused.

6. Additional Sessions Judge-II, Bhiwani on 16th August, 2000, charged the Appellant for an offence punishable u/s 15 of the Act. The charge stated that on 31st January, 2000, at about 7.15 p.m., the Appellant was found in a conscious possession of 24 kilograms of Chura Post without any permit or licence and thus, he committed an offence u/s 15 of the Act.

7. Prosecution examined DSP Parveen Kumar as PW-1. He stated that on receipt of a wireless message, he arrived at the spot. A sample was drawn and the case property along with the sample was sealed by him with his seal PK. He further stated that the seal after use was handed over to ASI Sajjan Singh. He proved the case property as Ex.P1.

8. Partap Singh independent witness appeared as PW-2. The following lines of his cross-examination are required to be noticed:

I know Sajjan Singh ASI from when he was a constable from last 5/6 years.

xxxx xxxx xxxx xxxx

I had met Sajjan Singh ASI earlier as there was litigation amongst our brothers. I had gone 5/6 years back to the police station. Sajjan Singh remained posted at PS Loharu number of times. He helped us and the matter was compromised.

9. Partap Singh PW-2 had stated that he was not cited as a witness in any other case to demolish the suggestion of the prosecution that he was a stock witness.

SI Sampat Ram PW-3 deposed regarding the search, seizure and recovery. In cross-examination, he stated that they had started from the Police Station at 5.30 p.m. and within ten minutes they arrived at the spot. This witness further stated that he had not called Partap Singh, rather Partap Singh stopped the vehicle on seeing Sajjan Singh. He further stated that the seal was handed over to ASI Sajjan Singh and the same was received back after 10-15 days.

10. HC Ram Niwas, who was then posted as Moharrir Head Constable, appeared as PW-4 and had tendered his affidavit Ex.PJ, wherein he stated that on 31st January, 2000 he was posted as MHC. The case property and sample were deposited with him. On 7th February, 2000, he had proceeded on leave.

11. HC Bhoop Singh PW-6 stated in his affidavit Ex.PM that he was posted as an officiating MHC, when HC Ram Niwas PW-4 had proceeded on leave and on 7th February, 2000 and he had handed over the sample for deposit to Constable Harish Kumar PW-5 on 8th February, 2000.

12. Constable Harish Kumar PW-5 tendered his affidavit Ex.PK stating that he had deposited the sample in Forensic Science Laboratory, Madhuban on 8th February, 2000. He further stated that till the sample remained in his possession, the same was not tampered with.

13. HC Bhoop Singh PW-6, in his cross-examination, stated as under:

It is correct that in rapat No. 10 dt. 8.2.2000 there is no mention of sample seal.

I have heard counsel for the parties. In the present case, the recovery is only 24 kilograms of poppy straw. Where such a small recovery is effected, the Court is put on guard to assess the evidence meticulously so that the accused is not falsely implicated. It is required to be noticed that after the amendment was introduced to the Act on 2nd October, 2001, poppy husk upto 50 kilograms is considered as a noncommercial quantity. It is in this context that the Court shall examine the evidence of witnesses.

14. It has come in the evidence that the independent witness Partap Singh PW-2 was known to ASI Sajjan Singh. It has been further admitted by Partap Singh PW-2 that he was having a litigation with his brothers and ASI Sajjan Singh, who was posted at Police Station Loharu, had helped him, and the matter was compromised. Therefore, it can be safely inferred that Partap Singh PW-2 was under the influence of ASI Sajjan Singh. The mere fact that the independent witness was under the influence of

ASI Sajjan Singh, may not be sufficient to record acquittal of the accused Appellant, but this fact is to be considered along with various other circumstances, which are being spelt out as under.

(a) After the sample was drawn, case property and the sample were sealed by DSP Parveen Kumar with his seal P Kand the seal after use was handed over to ASI Sajjan Singh and not to the independent witness Partap Singh PW-2.

(b) ASI Sajjan Singh had not stepped into the witness box. SI Sampat Ram PW-3 stated that the seal was returned by ASI Sajjan Singh after 10-15 days.

(c) The accused was produced before the Illaqua Magistrate but the case property and the sample were not produced before the Illaqua Magistrate. Thus, provisions of Section 52(2) of the Act were not complied with. Though, Section 52(2) of the Act cannot be said to be mandatory but its breach in the given circumstances can be construed against the prosecution.

(d) HC Bhoop Singh PW-6 had stated that in report No. 10 dated 8th February, 2000, there is no mention of sample seal. DSP Parveen Kumar had prepared a forwarding memo dated 7th February, 2000. On 8th February, 2000 HC Bhoop Singh PW-6, who was an officiating MHC, had taken the sample out of the malkhana and had entrusted the same to Constable Harish Kumar PW-5 for onward deposit to the Forensic Science Laboratory, Madhuban. Non mentioning of the sample seal in report No. 10 is to be taken with a pinch of salt.

15. Therefore, when all the above said circumstances are taken in totality, i.e. (a) Partap Singh PW-2 was under the influence of ASI Sajjan Singh, (b) the seal was not handed over to the independent witness but to ASI Sajjan Singh, (c) ASI Sajjan Singh has not been examined by the prosecution, and (d) ASI Sajjan Singh had returned the seal after 10-15 days to SI Sampat Ram PW-3; a possibility cannot be ruled out that before the sample was sent, it may have been changed or tampered with. In this context, non-mentioning of the sample seal in report No. 10 assumes importance.

16. All the above circumstances assume importance, especially in view of the fact that only the accused was produced before the Illaqua Magistrate and the case property, along with the sample, was not produced, and the Illaqua Magistrate had not appended his initials on the sample and the case property. Thus, it is not safe to uphold the conviction of the Appellant and therefore, he is entitled to the benefit of doubt.

17. Accordingly, the present appeal is accepted. Conviction and sentence of the Appellant are set aside and he is acquitted of the charges.