



IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA.

Cr. Appeal No. 396 of 2012

Reserved on: May 08, 2015.

Decided on: May 12, 2015.

Hardeep Singh

.....Appellant.

Versus

State of H.P.

.....Respondent.

Coram

The Hon'ble Mr. Justice Rajiv Sharma, Judge.

The Hon'ble Mr. Justice Sureshwar Thakur, Judge.

Whether approved for reporting? Yes.

For the appellant: Mr. Vivek Sharma, Advocate, vice Mr. Satyen Vaidya, Advocate.

For the respondent: Mr. Ramesh Thakur, Asstt. AG.

Justice Rajiv Sharma, J.

This appeal is instituted against the judgment dated 16.7.2012, rendered by the learned Special Judge, FTC, Una, H.P, in Sessions Case No. 12-VII-2011, whereby the appellant-accused (hereinafter referred to as the accused), who was charged with and tried for offence punishable under Section 15 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the ND & PS Act), has been convicted and sentenced to undergo rigorous imprisonment for a period of 10 years and to pay fine of Rs. 1,00,000/- and in default of payment of fine, he was further ordered to undergo rigorous imprisonment for six months.

2. The case of the prosecution, in a nut shell, is that on 16.1.2011 at about 4:20 AM, the police officials, namely, SI Shakti Singh alongwith ASI Sewa Singh and others were on patrolling in Govt. vehicle No. HP -20-C-0507. It was driven by Const. Rakesh Kumar from Haroli to

Tahliwal side. HC Sanjay Kumar met the police party and got his statement Ext. PW-7/A recorded with SHO to the effect that when he was present at Tahliwal near Haroli road Chowk at about 4:10 AM, he received telephonic information about the indulgence of accused Hardeep Singh in illegal business of selling poppy husk and he has gone towards Hoshiarpur in his Car No. PB-08W-4849 for bringing contraband and accused often use Nhai Da Mour to Palkwah road for bringing the contraband and if naka is laid at Nichla road, he can be caught red handed. The information was well founded and trustworthy. Accordingly, the statement of HC Sanjay Kumar was sent to PS on the basis of which FIR Ext. PW-7/B was registered. Report Ext. PW-8/A under Section 42 (1)(ii) was prepared and sent to SP, Una through Const. Sanjay Kumar. Naka was laid near Nichla Palkwah road to Bhai da Mour and at about 5:30 AM, a car bearing No. PB-08W-4849 came from Bhai da mour side which was stopped. Accused was found in the vehicle. He disclosed his name as Hardeep Singh and consent memo Ext. PW-5/A under Section 50 was prepared and HC Sanjay Kumar was sent to bring the Pradhan of the Gram Panchayat. In the presence of the accused, vehicle was searched leading to recovery of four plastic sacks from its dicky. No independent witness was available on the spot and local witnesses were arranged. In the morning at about 7:40 AM, after arranging the electronic weighing scale, the sacks were checked and on smelling sacks were found to be containing poppy husk. The contraband was weighed in

the presence of witnesses Heera Devi and Sandeep Kumar. Sack No. 1 contained 33.620 kg, 2nd sack contained 34.970 kg, 3rd sack contained 35.110 kg and 4th sack contained 38.800 kg. The total weight of the contraband was found to be 138.500 kgs. All the sacks were made homogeneous and four samples of 1 kg each Ext. SB-1 to SB-4 were taken. The samples and bulks were sealed with seal impression "J" and sample seal was separately drawn as Ext. PW-2/A on a piece of cloth. The IO filled in column Nos. 1 to 8 of the NCB forms. The seal was entrusted to witnesses Heera Devi and sack were marked as B-1 to B-4. Sacks, samples, vehicle, NCB forms and sample seal were taken into possession vide memo Ext. PW-2/B. The IO prepared the spot map. The accused was arrested and searched. The contraband was produced before SI Baldev Ram, who resealed the case property with seal "K". Special report was sent to the SP, Una. On 26.2.2011, IO moved an application Ext. PW-15/A before the learned JMIC, who prepared inventory Ext. PW-15/C. Samples were sent to chemical analysis and report was obtained. The investigation was completed and the challan was put up after completing all the codal formalities.

3. The prosecution, in order to prove its case, has examined as many as 21 witnesses. The accused was also examined under Section 313 Cr.P.C. The accused has denied the prosecution case and has pleaded ignorance. The learned trial Court convicted the accused, as noticed hereinabove.

4. Mr. Vivek Sharma, Advocate, appearing on behalf of the accused, has vehemently argued that the prosecution has failed to prove its case against the accused. On the other hand, Mr. Ramesh Thakur, Asstt. AG, for the State has supported the judgment of the learned trial Court dated 16.7.2012.

5. We have heard learned counsel for both the sides and gone through the records of the case carefully.

6. PW-1 Satnam Singh, deposed that he did not remain associated with the investigation of this case nor any RC and insurance of Car was taken into possession by the police in his presence. He was declared hostile and cross-examined by the learned Public Prosecutor. In his cross-examination, he denied that recovery memo Ext. PW-1/A was prepared in his presence. He volunteered that the police obtained his signatures on blank papers. He admitted that RC Ext. PA and insurance Ext. PB are the same which he had seen in the Police Station. He admitted that he put his signatures on memo Ext. PW-1/A after reading and understanding its contents.

7. PW-2 Heera Devi, deposed that she saw the accused inside the vehicle. Nothing has happened in her presence. She saw four sacks kept outside the vehicle lying on the road. She was declared hostile and cross-examined by the learned Public Prosecutor. In her cross-examination, she denied that accused had told his name in her presence to the police. Volunteered that accused may have told his name as

Hardeep alias Sonu to the police before she reached at the spot. She denied that the police told her that they wanted vehicle to be searched in her presence. She denied that boy named Sandeep Kumar was also present at the spot. Volunteered that many people had gathered on the spot at that time. She denied that Sandeep Kumar and ASI Sewa Singh were associated in the investigation as witnesses. She denied that Dicky of the car was opened by the accused in her presence and four plastic sacks containing contraband were recovered. She denied that the police checked the sacks. Volunteered that one police official put his hand in the sack to check the material contained therein. She admitted that the police told her that contraband was poppy husk. She denied that the police got weighing scale and weighed the contraband in her presence. She admitted that the contraband was weighed by police in her presence. Volunteered that she did not notice the exact weight of the sacks and she saw the police weighing one sack only. She denied that the police had taken out the samples of contraband from each bag weighing 1 kg each. She deposed that samples were already prepared by the police in cloth parcel. She also denied that the police marked sacks with marks B-1 to B-4 in her presence. She also denied that cloth parcels containing samples of contraband were marked as mark SB-1 to SB-4. She did not know if sealed parcels containing samples of contraband were sealed with seal "J". She denied that the police has filled in NCB forms in her presence and put sample seal on the same and thereafter the seal was

given to her. She denied that the police took into possession Ceilo Car PB-08-W-4849 alongwith four sacks of contraband, samples, NCB forms vide memo Ext. PW-2/B. Volunteered that the police obtained her signatures on the already prepared memo. She identified her signatures on memo Ext. PW-2/A. When her statement was recorded, the prosecution has produced four cloth parcels containing samples of contraband duly sealed by FSL and seal impression J. Each parcel bore her signatures. The sacks were opened. The seal was not readable.

8. PW-3 Sandeep Kumar, deposed that the police told him that a sikh gentleman sitting inside the Ceilo car was found possessing contraband. The police requested him to be a witness. The President of the Gram Panchayat reached on the spot after two hours. The police opened the dicky of the Car in his presence and four plastic sacks were taken out of it. The plastic sacks were weighed by the police in his presence. The police after checking told him that the contraband was poppy husk. The police mixed the contraband with their hands. Each bag was 30-35 kg. each. The police took out the samples from each sack. The police obtained his signatures on parcels containing samples and on plastic sacks B-1 to B-4, now Ext. P-1 to P-4. He did not remember sealed parcels containing samples of contraband were sealed by police with seal impression "J" in his presence. Volunteered that the same bears his signatures. He was declared hostile and cross-examined by the learned Public Prosecutor. He denied that the police sealed cloth parcels

containing samples with seal and he did not remember that plastic sacks P-1 to P-4 were sealed with seal "J". Volunteered that Ext. PW-2/A bears his signatures encircled red. The total weight of the sacks was between 130-140 kgs. approximately. He admitted that Ceilo Car along with Key, contraband sacks Ext. P-1 to P-4 and samples Ext. P-5 to P-8 were taken into possession by the police vide memo Ext. PW-2/B in his presence and the memo bears his signatures encircled red. He identified his signatures upon that. He denied that the police got weighing scale on the spot in a vehicle. Volunteered that it was already in the police vehicle.

9. PW-4 Shiv Kumar, deposed that he was registered owner of vehicle No. PB-08W-4849, as per RC Ext. PA. He sold this vehicle to accused.

10. PW-5 Const. Rakesh Kumar, deposed that the statement of HC Sanjay Kumar was recorded in the vehicle in his presence. It was sent to the Police Station. It was also sent to the S.P. Una. The naka was laid at Palkwah Nichla road near cause way. HC Sanjay Kumar was sent to village Kante to arrange independent witnesses. After about 10-20 minutes from laying naka, Ceilo Car No. PB-08W-4849 came from Bhai Ka Mour side. The vehicle was stopped. The SHO told the accused that police wanted to search his vehicle and also to conduct his personal search. The SHO further told the accused whether he wanted to be searched by the police or gazetted officer or Magistrate. The accused consented to be searched by the police and memo Ext. PW-5/a was

prepared. Nothing was found in the personal search of the police officials except govt. documents. Thereafter, SHO directed him and HC Santosh Kumar to bring weighing scale from village Samnal in the government vehicle. Satnam Singh provided electric weighing scale which they brought to the spot. When they reached back at the spot Pradhan Heera and Sandeep Kumar were present.

11. PW-6 HHC Harmesh Kumar, deposed the manner in which the accused was apprehended, vehicle was searched and the contraband was recovered. The contraband was weighed. It was sealed. He also clicked the photographs with digital camera.

12. PW-7 Const. Ashok Kumar deposed that HC Sanjay Kumar signaled police party to stop and driver of govt. vehicle Rakesh Kumar stopped the vehicle. He talked with the SHO Pathania and got his statement under Section 154 Cr.P.C. recorded in the police vehicle vide Ext. PW-7/A.

13. PW-8 Const. Sanjay Kumar also deposed the manner in which the accused was apprehended and the contraband was recovered, search and sealing process was completed on the spot. His statement u/s 154 Cr.P.C. was reduced into writing vide Ext. PW-7/A. SHO prepared the information report u/s 42(2) of the ND & PS Act.

14. PW-10 ASI Sewa Singh, deposed the manner in which the vehicle was signaled, stopped and codal formalities were completed on the spot, including search and sealing of the contraband. The contraband

was opened while recording his statement in the Court. He has seen the samples and sacks. He identified his signatures. Seals J, K, FSL on parcel were intact. The Court made the following observations:

"COURT OBSERVATIONS:

Parcel SB-1 contains three seals intact of FSL and one broken. This parcel also contains four intact seals. Two intact seals are having seal impression K. Two seals are partly broken. Mark on two seals are not visible.

Parcel SB-2 contains four intact seals of FSL and six other seals. The mark K is only visible in one seal.

Parcel SB-3 contains three seals of FSL and six other seals. Two seals are containing visible seal impression of seal K and one seal impression J. Other seals are not visible.

Parcel SB-4 contains four seals of FSL, another two seals of impression J and one seal of impression K."

15. PW-11 SI Baldev Ram, deposed that at about 5:10 AM, he received rukka of HC Sanjay Kumar from Const. Ashok Kumar Ext. PW-7/A, on the basis of which FIR Ext. PW-7/B was recorded. At about 11:40 AM, HC Sanjay Kumar alongwith the police party came to PS and deposited case property four sacks weighing total 138.500 kgs. poppy husk, sealed each sack with seal J, sample seal, four samples one kg sealed with seal J bearing three seals on each sample, NCB form in triplicate. He resealed the sacks Ext. P-1 to P-4 with seal impression K. Thereafter, the case property was handed over to MHC of PS Harolli.

16. PW-12 Const. Gurmail Singh, has taken the contraband to FSL Junga and returned RC to MHC Vipan Kumar on 20.1.2011.

17. PW-13 Const. Jasbir Singh, deposed that on 1.3.2011, MHC Vipan Kumar handed over to him four sealed parcels sealed with court seal (SJ), vide RC No. 62/2011. The parcels were marked as S-1 to S-4 weighing 500 gms each which he deposited at FSL Junga the same day and returned RC to the MHC.

18. PW-14 HC Vipan Kumar, deposed that on 16.1.2011, SI Baldev Ram, SHO, PS Haroli deposited with him four plastic sacks Ext. P-1 to P-4 sealed with one seal J, resealed with one seal K, marked as B-1 to B-4, containing poppy husk. He entered the case property vide entry No. 507/11 in register No. 19 of Malkhana, Haroli. He filled in the NCB forms in triplicate. The samples alongwith the sample seals J and K, NCB forms in triplicate were sent to FSL, Junga vide RC No. 12/2011 dated 18.1.2011 through Const. Gurmail Singh. He proved copy of register No. 19 as Ext. PW-14/B. On 26.2.2011, four sacks of poppy husk were taken out alongwith the sample seals J and K by SI/SHO Shakti Singh for inventory and produced before the learned JMIC, Court No. 2, Una. The same day, four sacks and four homogeneous samples mark S-1 to S-4 sealed with court seal, alongwith sample seals J and K and sample seal of Court were again deposited with him in the malkhana by SHO. On 1.3.2011, homogeneous samples taken by the Court were sent to chemical test vide RC No. 62/2011 to FSL, Junga through Const. Jasbir Singh. On 11.3.2011, homogeneous samples sent to FSL Junga were received back through HHC Dharam Pal No. 314 alongwith the result.

The result Ext. PW-14/E was given to SHO. He admitted in his cross-examination that there was no entry in register about date and returning RC to him. Volunteered that such entries are often made in DDR Register as per procedure. The first result was received on 26.1.2011 and only NCB form was received with result. He admitted that DDR No. are not mentioned when samples are sent to FSL. Volunteered that at the time of sending sample to FSL, separate RC is issued. He also admitted that as per record, number of impression of FSL seals is not mentioned. The entry regarding DD No. 22 dated 26.2.2011 mentioned in the register did not depict time. The case property was taken out of malkhana with the order of SHO, who may be having such order.

19. PW-15 Yajuvender Singh, JMIC, Court No. 2, Una, deposed that on 26.2.2011, SHO PS Haroli Shakti Singh Pathania moved an application Ext. PW-15/A in case FIR No. 16/2011 under Section 52 of the ND & PS Act, seeking certification of inventory and for drawing representative samples. He allowed the application and order is Ext. PW-15/B and certificate is Ext. PW-15/D.

20. PW-20 HC Sanjay Kumar, deposed that he went towards the area of PS Haroli in his private car in connection with detection of ND & PS Act and excise cases. At about 4:10 AM, on 16.1.2011, he reached at Tahliwal Haroli mod. He received secret information that accused Hardeep Singh was indulging in the sale of poppy husk and on that date he had gone to Hoshiarpur (Punjab) in his private vehicle PB-08W-4849,

to bring it. He used to go by road Bhai ka mod to Pakwah road to bring the contraband. He came to the conclusion that if naka is laid at Nichla road, accused could be caught red handed. The secret information was well founded and trustworthy. He was going to PS Haroli when SI Shakti Singh Pathania met him at village Palakwah near Nichla Mod. He got recorded his statement u/s 154 Cr.P.C. vide Ext. PW-7/A. Naka was laid down. HC Santosh Kumar was sent by SHO to arrange for independent witnesses of the village. On the asking of SHO this witness told him that he could not arrange the witnesses. In the meanwhile a vehicle came from Bhaida mod side towards Palkwah. SHO signaled that vehicle to stop with the help of torch light. Driver stopped the vehicle. The accused was asked whether he wanted his vehicle to be searched by Magistrate or Gazetted Officer. Accused gave in writing his willingness to get his vehicle searched by the police officer. The President of Gram Panchayat Palkwah was called on the spot. Another witness Sandeep Kumar was also standing on the spot. The contraband was recovered. It was weighed. NCB forms were filled up. The sacks were marked as B-1 to B-4. Samples were marked as SB-1 to SB-4.

21. PW-21 SI Shakti Singh Pathania, testified the manner in which the vehicle was stopped, accused was nabbed and contraband was recovered. The sampling process was completed on the spot including filling up of NCB forms. He also moved application Ext. PW-15/A before the JMIC, Una under Section 52-A of the Act. Inventory was prepared. In

his cross-examination, he deposed that naka was laid at about 5:10/5:20 AM.

22. The case of the prosecution, precisely is that naka was laid down. Accused came in his car. He was apprehended. He was asked about his right to be searched by the Gazetted Officer or Executive Magistrate. The contraband was recovered from the dicky. It was weighed. Sampling process was completed on the spot including filling up of NCB forms. The case property was sealed with seal 'J' and thereafter it was produced before the SI Baldev Kumar. He resealed the same vide P-1 to P-4 with seal impression "K". The case property was sent for chemical analysis. The parcel was taken by Gurmail Singh to FSL Junga on 18.1.2011 and thereafter by PW-13 Jasbir Singh on 1.3.2011.

23. The case of the prosecution has not been supported in entirety by PW-1 Satnam Singh, PW-2 Hira Devi and PW-3 Sandeep Kumar, though they have identified their signatures on the memos. The contraband was deposited by PW-11 SI Baldev Ram before the MHC, PS Haroli after resealing the same with seal impression "K". PW-14 HC Vipan Kumar, has proved copy of malkhana register Ext. PW-14/B. There is entry when the case property was deposited with him and it was sent for chemical analysis through Const. Gurmail Singh. There is entry about the receipt of first report of FSL. The samples were taken out vide DD No. 22 for making inventory by the JMIC, Una. It was received back as per the entry made in the malkhana register vide Ext. PW-14/B. These

samples were sealed with the court seal. DD was also prepared. The case property was produced in the court at the time of recording the statement of PW-10 ASI Seva Singh. According to PW-10 ASI Seva Singh, seals J, K, FSL on parcels were intact, however, as per the Court observation in parcel SB-1 only three seals of FSL were intact and one broken. The parcel contained four intact seals. Two intact seals were having seal impression K and two seals were partly broken. Mark on two seals were not visible. Parcel SB-2 contained four intact seals of FSL and six other seals. The mark K was only visible in one seal. Parcel SB-3 contained three seals of FSL and six other seals. Two seals were containing visible seal impression of seal K and one seal impression J. Other seals were not visible. Parcel SB-4 contained four seals of FSL, another two seals of impression J and one seal of impression K.

24. The contraband was sent for chemical analysis on two occasions. One by Gurmail Singh and another through Jasbir Singh. The report of FSL was received as per Ext. PW-14/B. However, there is no corresponding entry when the contraband was taken out from the malkhana to be sent to FSL Junga second time, though the report is Ext. PW-14/E. The case property is required mandatorily to be produced before the Court. There is a detailed procedure, the manner in which the case property is to be taken out from the malkhana after making corresponding entry in malkhana register and also by preparing DDR. The case property is sent through Constable to be placed before the

Court. Similarly, the case property after its production in the Court is received back and entered in the malkhana by preparing separate DDR. In case the case property has been taken out from the malkhana, it was produced in the Court, there should have been the entry in the malkhana register when it was taken out and when it was re-deposited. The person who has produced the contraband in the Court has not been produced. There is neither any entry in the malkhana register nor any DDR to this effect has been prepared. Thus, it cannot be said conclusively that it was the same case property which was recovered from the accused and sent for FSL examination twice and produced before the Court. Moreover, the case of the prosecution has also not been supported by the independent witnesses. PW-2 Heera Devi has denied that the dicky was opened in her presence and four plastic sacks were recovered. She has denied that the police weighed the contraband. She has also denied that the sampling and sealing process was completed on the spot including filling up of NCB forms. There is breach of mandatory provisions regarding deposit and re-deposit of the contraband in the malkhana register at the time of production and when it is sent back to malkhana.

25. Their lordships of the Hon'ble Supreme Court, in a recent decision in the case of ***Makhan Singh vrs. State of Haryana***, reported in ***JT 2015 (4) SC 222***, have held that it is well settled that conviction can be based solely on the testimony of official witnesses, condition precedent is that the evidence of such official witnesses must inspire

confidence. In that case, it was not as if independent witnesses were not available. Independent witness PW1 and another independent witness examined as DW-2 had spoken in one voice that the accused person was taken from his residence. In such circumstances, their lordships have held that the High Court ought not to have overlooked the testimony of independent witnesses, especially when it casts doubt on the recovery and the genuineness of the prosecution version. Their lordships have held as under:

“10. For recording the conviction, the Sessions Court as well as the High Court mainly relied on the testimony of official witnesses who made the recovery, i.e. H.C. Suraj Mal-PW2 and Inspector Raghbir Singh-PW6, and found them sufficiently strengthening the recovery of the possession from the appellant. In our considered view, the manner in which the alleged recovery has been made does not inspire confidence and undue credence has been given to the testimony of official witnesses, who are generally interested in securing the conviction. In peculiar circumstances of the case, it may not be possible to find out independent witnesses at all places at all times. Independent witnesses who live in the same village or nearby villages of the accused are at times afraid to come and depose in favour of the prosecution. Though it is well-settled that a conviction can be based solely on the testimony of official witnesses, condition precedent is that the evidence of such official witnesses must inspire confidence. In the present case, it is not as if independent witnesses were not available. Independent witnesses PW1 and another independent witness examined as DW2 has spoken in one voice that the accused person was taken from his residence. In such circumstances, in our view, the High Court ought not to have overlooked the testimony of independent witnesses, especially when it casts doubt on the recovery and the genuineness of the prosecution version.”

26. The prosecution has failed to prove that the contraband was recovered from the exclusive and conscious possession of the accused. Thus, the prosecution has failed to prove the case against the accused

beyond reasonable doubt for the commission of offence under Section 15 of the N.D & P.S., Act.

27. Accordingly, in view of the analysis and discussion made hereinabove, the appeal is allowed. Judgment of conviction and sentence dated 16.7.2012, rendered by the learned Special Judge, FTC, Una, H.P., in Sessions Case No. 12-VII of 2011, is set aside. Accused is acquitted of the charges framed against him by giving him benefit of doubt. Fine amount, if any, already deposited by the accused is ordered to be refunded to him. Since the accused is in jail, he be released forthwith, if not required in any other case.

28. The Registry is directed to prepare the release warrant of the accused and send the same to the Superintendent of Jail concerned, in conformity with this judgment forthwith.

(Rajiv Sharma),
Judge.

(Sureshwar Thakur),
Judge.

May 12, 2015,
(karan)