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**(1979) 11 P&H CK 0015**  
**In the Punjab And Haryana At Chandigarh**  
**Case No : Criminal Revision No. 245 of 1977**

Janak Raj Chintu

APPELLANT

Vs

State of Punjab

RESPONDENT

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**Date of Decision :** 02-11-1979

**Acts Referred:**

Opium Act, 1878 — Section 9(a)

**Citation :** (1979) 11 P&H CK 0015

**Hon'ble Judges :** D.S. Tewatia, J

**Bench :** Single Bench

**Advocate :** D.R. PuriMr. Gurjit Singh, for the Appellant; M.S. Chadha, for A.G. Punjab, for the Respondent

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## Judgement

D.S. Tewatia, J.—The Petitioner Janak Raj alias Chintu was convicted on 29th May, 1979, by the trial Court for an offence u/s 9(a) of the Opium Act He was sentenced to undergo rigorous imprisonment for two years and to pay a fine of Rs. 2,00(sic)/ or in default to a further dose of 6 months rigorous imprisonment the(sic) challenged his conviction and sentence in an appeal before the learned Sessions Judge It was urged that the trial Court had not complied with the mandatory provisions of Section 248(2) of the Code of Criminal Procedure, is that, before passing the sentence imprisonment it had not given any opportunity to lead evidence in regard to mitigation of sentence The learned Session Judge by his order dated 27th January. 1977, while sustaining the conviction of the Appellant, set aside the sentence of the accused and remanded the case to the Court of Shri Dina Nath, Judicial Magistrate 1st Class, Sangrur, to pass sentence upon the accused after complying with the provisions of Section 248(2) of the Code of Criminal Procedure. The learned Magistrate after due compliance of the said order and after affording due opportunity to the accused in terms required by Section 248(2) of the Code of Criminal Procedure sought to impose upon the accused sentence of one year's rigorous imprisonment and a fine of Rs. 1000/- in default further rigorous imprisonment for 8(sic) months by his order dated 28tb February, 1977. The accused assalled(sic) that order in appeal

2. The learned Sessions Judge of(sic) his order dated 14th March. 1977, rejected the same holding that he having already sustained the conviction of the accused his earlier order no appeal against the sentence being permissible, the appeal before him was incompetent

3. In my opinion no remind of the kind is contemplated by the provisions of section - 80(sic)(b) which is in the following terms: -

After perusing such record and hearing the Appellant or his pleader, if he appears, and the public prosecutor if he appears, and in case of an appeal u/s 377 or Section 7(sic) , the accused if he appears, the Appellate Court may, if it considers that there is no sufficient ground for interfering dismiss the appeal, or may -

(a) \* \* \* \*

(b) in an appeal from a conviction -

(i) reverse the finding and sentence and acquit or discharge the accused, or order him to be retried by a Court of competent jurisdiction subordinate to such Appellate Court or committed for trial or

(ii) alter the finding, maintaining the sentence, or

(iii) with or without Altering the finding, alter the nature of the extent, or the nature and extent, of the sentence but not so as to enhance the same ;

(c) \* \* \* \*

(d) \* \* \* \*

(e)\*\*\*\*

provided that the sentence shall not be enhanced unless the accused has had an opportunity of showing cause against such enhancement:

Provided further that the appellate Court shall not inflict greater punishment for the offence which in its opinion the accused has committed than might have been inflicted for that offence by the Court passing the order or sentences under appeal.

4. However, in order to satisfy(sic) the provisions of Section 208(sic)(2) of the Code of Criminal Procedure, it was open to the Appellate Court either to afford opportunity in terms of the said provisions itself or have the said opportunity afforded through the Court below, that is, it could direct the Court below to receive any evidence that may be led by the accused in regard to the sentence in terms of Section 248(2) of the Code of Criminal Procedure, but neither it was open to the Sessions Judge to require the trial Magistrate to impose a sentence nor he had any such right Under law to do so. Accordingly that part of the order of the Sessions Judge wherein he had required the Magistrate to pass a fresh sentence of imprisonment after giving opportunity to the accused being illegal the same is quashed So also is quashed the order of the trial Magistrate dated

28th February, 1977(sic).

5. In view of the above, the order of the Trial Court dated 28th February, 1977, pronouncing sentence upon the accused is also quashed. As a result of the aforesaid finding the position that emerges is that the first appeal filed by the accused before the Sessions Judge has to be restored to the file and the learned Sessions Judge on the basis of the evidence received by the Magistrate shall have no consider as to whether the sentence imposed by the trial Magistrate by his order dated 29th May, 1976, has or has not to be maintained having regard to the evidence adduced by the accused in pursuance of his directions In view of the above, the Second Appeal filed by the accused has become a mere surplusage and irrelevant and, therefore, the order rejecting the same required no interference The learned Sessions Judge is directed to decide the Question of sentence on his own, in the light of the evidence adduced by the accused u/s 248(2) of the Code of Criminal Procedure and finally dispose of the Appeal.