
(1998) 08 P&H CK 0066
In the Punjab And Haryana At Chandigarh
Case No : Criminal Appeal No. 17-SB of 1998

Sewak Singh

APPELLANT

Vs

State of Punjab

RESPONDENT

Date of Decision : 17-08-1998

Acts Referred:

Citation : (1998) 4 RCR(Criminal) 832

Hon'ble Judges : R.L.Anand, J

Advocate : J.S. Brar, P.S. Hundal, Advocates for appearing Parties

Judgement

R.L. Anand, J. (Oral)

1. This appeal has been directed against the judgment and order dated 19th November, 1997 passed by the Court of Additional Sessions Judge, Amritsar, vide which the appellant was convicted under Section 22 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short "the Act") and was sentenced to undergo rigorous imprisonment for a period of 10 years on each count. The appellant was further directed to pay a fine of Rs. 1,00,000/ or in default of payment of fine each one of them was directed to undergo rigorous imprisonment for a period of three years.

2. Brief facts of the case can be noticed in the following manner :

On 9th January, 1994 S.H.O. Jagdip Singh of Police Station, Patti along with A.S.I. Kamal Kishore, A.S.I. Jagjit Singh, A.S.I. Balbir Singh and other police officials under the supervision of Shri Ravi Bhushan, D.S.P. Patti, along with his gunmen, on the instructions of Senior Superintendent of Police, Tarn Taran, were present at Lahore Chowk, Patti, in connection with picket duty. A secret information was received by Inspector Jagdip Singh that the accused Sewak Singh son of Hari Singh, resident of Rajoke, who was running Bhuller Medical Store, Gandhi Sath, Patti, has kept large quantity of intoxicant medicines and injections and if raid was conducted, he could be apprehended with large quantity of the same. On receipt of the secret information Inspector Jagdip

Singh, S.H.O. of Police Station Patti, recorded ruqa (Ex.PE) and sent it to the Police Station on the basis of which formal F.I.R. was recorded. Then the Police Party reached the shop of Sewak Singh accused. He was found present there. The accused was asked that the Police Party wanted to search his shop and offered him to get the search of the shop conducted in the presence of Magistrate or the D.S.P. accompanying the Police Party. The accused reposed confidence to get the search conducted in the presence of the D.S.P. On this consent memo. of the accused was reduced into writing, which was signed by the accused and attested by the D.S.P., Inspector Jagdip Singh and the witnesses. The search of the shop of the accused was conducted and two big boxes containing 50 small boxes, each box containing 100 intoxicant injections. The total injections were 10,000, which were recovered from the possession of the accused. The accused could not produce any licence or permit to retain the injections with him. The injections were kept in the same boxes and two big parcels were prepared which were sealed with the seal 'JS' and the entire case property was seized vide recovery memo. (Ex. PD), which was signed by the D.S.P. and other witnesses. Inspector Jagdip Singh prepared rough site plan with correct marginal notes, recorded the statements of the witnesses and on return to the Police Station, he deposited the case property with the Moharrir Head Constable. Both the big parcels containing 10,000 injections were sent to the Forensic Science Laboratory, Chandigarh, for analysis and on receipt of the report from the Forensic Science Laboratory and after completion of the investigation, the accused was challaned under Section 22 of the Act in the Court of the Illaqa Magistrate, who supplied copies of the documents to the accused and the accused was ultimately committed to the Court of Sessions vide order dated 2nd May, 1994 passed by the Sub Divisional Judicial Magistrate, Patti. Learned Additional Sessions Judge framed charge under Section 22 of the Act against him on 13th July, 1994 on the allegation that on 9th January, 1994 in the area of Patti he was found in possession of 10,000 Morphine Injections (Intoxicants) without any licence or permit and thereby he committed an offence punishable under Section 22 of the Act. The charges were read over and explained to the appellant, to which he pleaded not guilty and claimed trial.

3. In order to prove the charges the prosecution examined P.W.1 Shri Hari Singh Head Constable, who deposed that the case property was sent to the office of the Director, Forensic Science Laboratory through S.I. Sardool Singh; P.W.2 Shri Ravi Bhushan, D.S.P., deposed that the personal search as well as the search of the shop of the appellant was conducted in his presence; and P.W.3 Inspector Jagdip Singh, Investigating Officer, who took into possession the offending injections. The prosecution also tendered into evidence the report of the Chemical Examiner, besides the affidavit of A.S.I. Sardool Singh.

4. The accused was examined under Section 313 of the Code of Criminal Procedure and all the incriminating circumstances appearing in the prosecution case were put to him, to which the accused denied and stated that he had been falsely implicated and no recovery was effected from him. In defence he

examined D.W.1 Shri Balbir Singh, Head Constable, and according to this witness Roznamcha dated 9th January, 1994 had already been destroyed.

5. Believing the prosecution story to be true, learned Additional Sessions Judge, Amritsar, convicted and sentenced both the appellant in the manner stated above and aggrieved by his conviction and sentence the appellant has filed the present appeal, which I am disposing of with the assistance rendered by Shri P.S. Hundal, Advocate, appearing on behalf of the appellants, and Shri J.S. Brar, Deputy Advocate General, Punjab, appearing on behalf of the State and with their assistance have gone through the record of the case.

6. Before I proceed further into the matter, I may mention that in this case the commitment order was passed by Shri J.P. Mehmi on 2nd May, 1994, and he was the officer who convicted and sentenced the appellant vide judgment and order dated 19th November, 1997. In the opinion of this Court, no illegality has been committed by the learned Additional Sessions Judge, Amritsar, because when he was discharging the duties of the Magistrate, he was only to see if there was any prima facie case from which it could be held that the appellant should be committed to the Court of Session. While passing the judgment of conviction, he was to satisfy himself whether the prosecution has been able to prove the charge against the appellant beyond any reasonable doubt. Since he had to offer two separate parameters at the time of the commitment and at the time of the trial, I am not inclined to remand the case to the trial Court again. Moreover the appellant is in custody. He has already served more than one year's sentence. It will be highly improper for me to send the records of this case again to the trial Court for passing a proper judgment.

7. Shri P.S. Hundal, learned counsel appearing on behalf of the appellant submitted that it is not proved on the record that the appellant was in possession of psychotropic substance within the meaning of the definition of Section 22 read with Section 2 subclause (xxiii) of the Act. The counsel submitted that the appellant was chargesheeted under Section 22 of the Act and the allegations against him were that he was found in possession of psychotropic substance, i.e., 10,000 injections containing morphine. Section 2(xxiii) defines 'psychotropic substance' which means any substance, natural or synthetic, or any natural material or any salt or preparation of such substance or material included in the list of psychotropic substances specified in the Schedule. The Schedule has also been added in the Act after Section 83 thereof, in which list of 'psychotropic substances' mentioned for the purposes of Section 2(xxiii). A close reading of this schedule would reveal that nowhere it is mentioned that morphine sulphate would fall within the meaning of the definition of 'psychotropic substance'. Reverting to the report of the Chemical Examiner (Ex.PB), it would show that the Chemical Examiner in this report has given the following observations by stating that each injection contained Morphine Sulphate 20 mg. approximately in every mili litre. Thus it can be said that the incriminating article recovered from the possession of the appellant does not fall within the definition of 'psychotropic

substance".

8. Now it is to be found whether the appellant can be convicted under Section 18 of the Act, treating that each injection contained Morphine Sulphate 20 ml. approximately per mililitre. Section 18 of the Act lays down that whoever possesses opium shall be punished under that section. `Opium" has again been defined under Section 2(xv) of the Act, which means :

(a) xx xx xx

(b) any mixture, with or without any natural material, of the coagulated juice of the opium poppy,

but does not include any preparation containing no more than 0.2 per cent of morphine;

In order to achieve success under Section 18 of the Act, the prosecution has to establish that the incriminating injections contained morphine, the strength of which was more than 0.2 per cent.

9. Reverting to the report (Ex.PB), again it is not clear nor it is so certified by the Director, Forensic Science Laboratory (Chemical Examiner) that each of the injections contained morphine, the strength of which was more than 0.2 per cent. Only a reference has been made in Ex.PB that each injection contained morphine sulphate 20 mg. against per mililitre approximately. The salt observed by the Chemical Examiner does not fall within the meaning of opium as defined under Section 2(xv) of the Act.

10. Yet it is to be seen whether the appellant has committed the offence for allegedly found in possession of the Narcotic drugs within the meaning of Section 2(xiv) of the Act. "Narcotic Drug" means coca leaf, cannabis (hemp), opium, poppy straw and includes all "manufactured drugs". For our purpose `manufactured drug" has been defined in section 2(xi) which means :

(a) all coca derivatives, medicinal cannabis, opium derivatives and poppy straw concentrate;

(b) any other narcotic substance or preparation which the Central Government may, having regard to the available information as to its nature or to a decision, if any, under any International Convention, by notification in the Official Gazette, declare to be a manufactured drug,

but does not include any narcotic substance or preparation which the Central Government may, having regard to the available information as to its nature or to a decision, if any, under any International Convention, by notification in the Official Gazette, declare not to be a manufactured drug.

For our purpose we have to see whether the incriminating article allegedly recovered from the possession of the appellant falls within the definition of `opium derivative", or whether it has been so declared as a `manufactured

drug" for the purpose of Section 2(xi)(b). Again the answer of this Court would be that the report (Ex.PB) cannot be helpful to the prosecution because it does not talk about the strength of "morphine", which has to be read independently from "morphine sulphate", which is again an independent compound. Once it is established that the prosecution has not been able to prove the psychotropic substance within the meaning of Section 22 read with Section 2(xxiii) of the Act, the conviction of the appellant cannot be maintained under this Section.

11. To proceed further there are other defects in the investigation of this case. It is the case of the prosecution that the Police Party received a secret information in heart of Patti city. The Investigating Officer Shri Jagdip Singh did not take the trouble of associating any respectable person of the locality perhaps for the reason that the Police Party had already with it Shri Ravi Bhushan, D.S.P. To proceed further the compliance of Section 50 of the Act in this case has also not been done very properly. Exhibit PC is the consent statement of appellant Sewak Singh. A reading of the same would show that Shri Jagdip Singh asked the appellant whether the latter wanted to give the search of the shop in the presence of a Magistrate or in the presence of the D.S.P. who is already in the Police Party. In other words, Shri Jagdip Singh has restricted the option of the appellant only to Shri Ravi Bhushan, D.S.P., who was already a member of the Police Party. The case of the prosecution is that the appellant reposed confidence qua the D.S.P. Thereafter the search of the shop was conducted. Learned counsel for the appellant submitted that the option given by Shri Jagdip Singh was a partial offer as the appellant has not been apprised of his rights that he can also take the assistance of any other Gazetted Officer for the purpose of giving search of the shop.

12. I find merit in the contention of the learned counsel for the appellant. Shri Jagdip Singh has restricted the offer of the appellant by confining his option qua Shri Ravi Bhushan, D.S.P., and this does not amount to compliance for the purpose of Section 50 of the Act, specially of the fact that after receipt of secret information the Investigating Officer S. Jagdip Singh has not made the effort of associating a respectable person of the locality.

13. The present recovery has to be labelled doubtful for one more additional reason. It is the case of the prosecution that the case property was taken to the Office of the Director, Forensic Science Laboratory by Shri Sardool Singh, who gave his statement on affidavit (Ex.PA). The proceedings of the trial Court dated 3rd October, 1994 indicate that the Addl. P.P. appearing for the State tendered in evidence the affidavit (Ex.PA) of Shri Sardool Singh and the report of the Director, Forensic Science Laboratory, Chandigarh. No opportunity was afforded by the trial Court to the accused to crossexamine this witness. In other words, if the affidavit (Ex.PA) of Shri Sardool Singh is taken out from the record, it has to be inferred that the link evidence in this case is missing and a vital link has been broken.

14. The conclusion of the above discussion thus comes to that the injections

allegedly recovered from the possession of the accused do not come within the definition of "psychotropic substance" or "opium" or "narcotic drug". Secondly the option allegedly given to the appellant under Section 50 of the Act is a partial one and thirdly the link evidence in this case is missing. For all these factors, the benefit of doubt has to go to the appellant.

15. Resultantly, I accept this appeal, set aside the judgment and order of the trial Court and acquit the appellant of the charge framed against him. The case property stands confiscated to the State and the same shall be destroyed according to the rules. The appellant is stated to be in custody at Central Jail, Amritsar. He shall be set at liberty forthwith, if not wanted or convicted in any other case.

Appeal accepted