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SUMIT TOMAR

v.

THE STATE OF PUNJAB

(Criminal Appeal Nos.1690-1691 of 2012)

OCTOBER 19, 2012

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[P. SATHASIVAM AND RANJAN GOGOI, JJ.]

Narcotic Drugs & Psychotropic Substances, Act, 1985 – s.15 – Search and seizure – Independent witness – Non-examination of – Effect – Appellant allegedly found driving a car loaded with bags of contraband (poppy straw) – Convicted on the basis of evidence of official witnesses – Conviction challenged on the ground that ‘K’, an independent witness was not examined – Held: In a case of this nature, it is better if the prosecution examines at least one independent witness to corroborate its case – However, in absence of any such witness, if the statements of police officers/official witnesses are reliable and no animosity is established against them by the accused, conviction based on such statements cannot be faulted with – In the instant case ‘K’ had witnessed the recovery and the prosecution had taken necessary steps to summon him for examination, but he did not appear – Besides, no animosity was established on the part of the official witnesses by the accused in defence – Conviction of appellant accordingly affirmed in view of the evidence of the official witnesses; the owner of the car involved in the offence i.e. PW2 and the FSL report – Further, since 70 kgs. of poppy straw was involved which was more than commercial quantity, the Special Judge rightly imposed the minimum sentence (RI of 10 years) and fine in terms of s.15(c) of the Act.

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Narcotic Drugs & Psychotropic Substances, Act, 1985 – s.15 – Search and seizure – Taking out of samples – Procedure – Appellant allegedly found driving a car loaded

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with two bags of contraband (poppy straw) and thereafter convicted – Conviction challenged on the ground that after the alleged seizure of contraband in two separate bags, there was no need for the officers to mix both and then take out two samples, and this was an irregularity which went against the prosecution case – Held: S. 15 of the Act speaks about punishment for contravention in relation to poppy straw – Merely because different punishments have been prescribed therein depending on the quantity of contraband, mixing of the said two bags did not cause any prejudice to the appellant – Even after taking two samples of 250 grams each, the quantity of remaining contraband came to 69.50 kgs which was more than commercial quantity – Plea that the police should have taken two samples each from the two bags without mixing, not tenable.

According to the prosecution, a police party found the appellant driving a car in which two bags of contraband were loaded. The police officials mixed the contents of both the bags and thereafter two samples of 250 gms. each were taken out. The samples were sent to the Forensic Science Laboratory (FSL) for examination. On the same day, FIR was lodged by the police against the appellant and another accused under Sections 8, 15, 60, and 61 of the Narcotic Drugs & Psychotropic Substances, Act, 1985. During the pendency of the case, the other accused died. The Special Court convicted the appellant under Section 15 of the NDPS Act and sentenced him to undergo rigorous imprisonment (RI) for 10 years. The conviction and sentence was upheld by the High Court in appeal.

In the instant appeals, the appellant challenged his conviction on various grounds viz. i) that one 'K', an independent witness, who was allegedly joined by the prosecution was not examined and thus the entire story of the prosecution is liable to be rejected; ii) that in

- A absence of an independent witness, the conviction based
 on official witnesses cannot be sustained; and iii) that
 after the alleged seizure of contraband in two separate
 bags, there was no need for the officers to mix both, and
 then take out two samples and this was an irregularity
 B which went against the prosecution case.

Dismissing the appeals, the Court

- HELD: 1.1. It is the case of the prosecution that while
 'K' was just passing through, he met the police party who
 C had laid a special *nakabandi* near Basantpur Bus-stand
 for nabbing the anti-social elements. In such
 circumstance, his presence cannot be doubted, on the
 other hand, his presence seems to be natural and a
 perusal of the consent memo, the recovery memo and
 D the arrest memo shows that he was present at the time
 when the recovery was effected from the accused. His
 signatures appended in all these memos show that he
 has witnessed the recovery. It is true that the prosecution
 could have examined him, but for this, it is the stand of
 E the prosecution that inspite of necessary steps taken by
 issuing summons, he did not appear for which the
 prosecution case cannot be thrown out. [Para 8] [411-C-E]

- 1.2. In a case of this nature, it is better if the
 F prosecution examines at least one independent witness
 to corroborate its case. However, in the absence of any
 animosity between the accused and the official
 witnesses, there is nothing wrong in relying on their
 testimonies and accepting the documents placed for
 basing conviction. After taking into account the entire
 G materials relied on by the prosecution, no animosity is
 established on the part of the official witnesses by the
 accused in defence and also no infirmity is found in the
 prosecution case. It is not in dispute that the appellant
 (A-2) was driving the car in question which carried the
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contraband. PW-2, owner of the car was also examined and proved its ownership and deposed that the appellant demanded the said car for personal use. In view of the above, it is clear that though it is desirable to examine independent witness, however, in the absence of any such witness, if the statements of police officers are reliable and when there is no animosity established against them by the accused, conviction based on their statement cannot be faulted with. On the other hand, the procedure adopted by the prosecution is acceptable and permissible, particularly, in respect of the offences under the NDPS Act. [Para 9] [411-H; 412-A-E]

2. There is no substance in the contention that the prosecution committed an irregularity by mixing up the contraband found in the two bags loaded in the car driven by the appellant and thereafter taking the samples. Section 15 of the NDPS Act speaks about punishment for contravention in relation to poppy straw. As per sub-section (a) where the contravention involves small quantity, the rigorous imprisonment may extend to six months or with fine which may extend to ten thousand rupees or with both whereas under sub-section (b) where the contravention involves quantity lesser than commercial quantity but greater than small quantity, rigorous imprisonment may extend to 10 years and with fine which may extend to one lakh rupees. Sub-section (c) provides that where the contravention involves commercial quantity, the rigorous imprisonment shall not be less than 10 years but which may extend to 20 years and shall also be liable to fine which shall not be less than one lakh rupees but which may extend to two lakh rupees. Merely because different punishments have been prescribed depending on the quantity of contraband, mixing the said two bags has not caused any prejudice to the appellant. Even after taking two samples of 250 grams each, the quantity measured comes to 69.50 kgs which is

A more than commercial quantity (small quantity 1000 gms/ commercial quantity 50 kgs. and above). In view of the same, the contention that the police should have taken two samples each from the two bags without mixing is liable to be rejected. [Para 10] [412-F-H; 413-A-D]

B 3. Taking note of all the materials, the evidence of official witnesses, PW-2, the owner of the car which was involved in the offence, possession of commercial quantity, FSL report which shows that the contraband is poppy straw and is a prohibited item, this Court is in
C entire agreement with the conclusion arrived at by the trial Court and affirmed by the High Court. Further, taking note of the fact that the quantity involved is 70 kgs. of poppy straw which is more than a commercial quantity, the Special Judge rightly imposed minimum sentence and fine in terms of Section 15(c) of the NDPS Act. [Para
D 11] [413-E-G]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1690-1691 of 2012.

E From the Judgment & Order of the High Court of Punjab and Haryana at Chandigarh dated 31.01.2011 in Criminal Appeal No. 2079 SB of 2009 and dated 17.05.2011 in Criminal Misc. No. 26283 of 2011.

F V. Giri, Nagendra Singh, Vishwa Pal Singh for the Appellant.

Noopur Singhal, Anil Grover, Kuldip Singh for the Respondent.

G The Judgment of the Court was delivered by

P. SATHASIVAM, J. 1. Leave granted.

H 2. These appeals are directed against the judgment and

order dated 31.01.2011 passed by the High Court of Punjab and Haryana at Chandigarh in Criminal Appeal No. 2079 SB of 2009 whereby the High Court dismissed the criminal appeal filed by the appellant herein and also of the order dated 17.05.2011 passed by the High Court in Crl.M. No. 26283 of 2011 regarding correction of the date in the judgment.

3. Brief facts:

(i) According to the prosecution, on 27.06.2004, at about 5.00 p.m., a special barricading was set up by the police party at Basantpur Bus Stand, Patiala. At that time, the police party signaled to stop a silver colour Indica Car bearing No. DL-7CC-0654 which was coming from the side of Rajpura. The driver of the said car (appellant herein), accompanied with one Vikas Kumar (since deceased), who was sitting next to him, instead of stopping the car tried to run away, but the police party immediately blocked the way and managed to stop the car. On suspicion, the police checked the car and found two plastic bags containing 'bhooki' opium powder from the dickey of the said vehicle. The contents of both the bags were mixed and two samples of 250 gms. each were taken out. The remaining contraband weighing 69.50 kgs. was sealed in two bags and the samples were sent to the Forensic Science Laboratory (FSL) for examination.

(ii) On the same day, i.e., 27.06.2004, a First Information Report (FIR) being No. 105 of 2004 was lodged by the police against the appellant herein and Vikas Kumar under Sections 8, 15, 60, and 61 of the Narcotic Drugs & Psychotropic Substances, Act, 1985 (in short "the NDPS Act").

(iii) On receipt of the report of the Chemical Examiner and after completion of all the formalities relating to investigation, the case was committed to the Special Court, Patiala and numbered as Sessions Case No. 118T/06.09.04/17.11.08. During the pendency of the case, Vikas Kumar died. The Special Court, Patiala, by order dated 20.08.2009, convicted

A the appellant herein under Section 15 of the NDPS Act and sentenced him to undergo rigorous imprisonment (RI) for 10 years alongwith a fine of Rs. One lakh, in default, to further undergo R.I. for one year.

B (iv) Being aggrieved, the appellant herein filed Criminal Appeal No. 2079 SB of 2009 before the High Court of Punjab & Haryana. Learned single Judge of the High Court, by impugned order dated 31.01.2011, dismissed the said appeal. Questioning the same, the appellant has filed these appeals
C by way of special leave before this Court.

4. Heard Mr. V. Giri, learned senior counsel for the appellant and Ms. Noopur Singhal, learned counsel for the respondent-State.

D 5. Mr. V. Giri, learned senior counsel for the appellant raised the following contentions:

E i) one Kaur Singh, an independent witness, was allegedly joined by the prosecution but has not been examined. Though the prosecution claimed that the presence of Kaur Singh at the spot was natural, since he was not examined, the entire story of the prosecution has to be rejected;

ii) in the absence of independent witness, conviction based on official witnesses, cannot be sustained; and

F iii) inasmuch as after the alleged seizure of contraband in two separate bags, there is no need for the officers to mix both the samples which was an irregularity and goes against the prosecution case.

G 6. On the other hand, Ms. Noopur Singhal, learned counsel for the State submitted that the person who was present at the time of seizure was Kaur Singh and, hence, he is a natural witness and to show their bona fide, the prosecution summoned him for examination, but he failed to appear. She further
H submitted that mixing of poppy husk found in two bags is not

an irregularity, on the other hand, according to her, the prosecution has proved its case beyond reasonable doubt and prayed for confirmation of the order of conviction and sentence. A

7. We have carefully considered the rival submissions and perused all the relevant materials. B

8. As regards the first two contentions raised by learned senior counsel for the appellant, it is true that Kaur Singh, according to the prosecution, is an independent witness, however, he was not examined on the side of the prosecution. It is the case of the prosecution that on 27.06.2004 while Kaur Singh was just passing through, he met the police party who had laid a special nakabandi near Basantpur Bus-stand for nabbing the anti-social elements. In such circumstance, his presence cannot be doubted, on the other hand, his presence seems to be natural and a perusal of the consent memo, the recovery memo and the arrest memo shows that he was present at the time when the recovery was effected from the accused. His signatures appended in all these memos show that he has witnessed the recovery. It is true that the prosecution could have examined him. For this, it is the stand of the prosecution that in spite of necessary steps taken by issuing summons, he did not appear for which the prosecution case cannot be thrown out. C
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9. In order to substantiate its claim, the prosecution examined Shri Lakhwinder Singh, Head Constable as PW-1, Shri Devinder Kumar, owner of the car as PW-2, Shri Gurdeep Singh, Assistant Sub-inspector of Police as PW-3 and Shri Mohan Singh, Head Constable as PW-6. The Special Court as well as the High Court, on going through the evidence of the above-mentioned official witnesses and the documents, namely, FIR, seizure memo, FSL report etc., accepted the case of the prosecution. Even before us, learned senior counsel for the appellant took us through the evidence of the above-mentioned prosecution witnesses and the connected materials. In a case of this nature, it is better if the prosecution examines at least F
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A one independent witness to corroborate its case. However, in the absence of any animosity between the accused and the official witnesses, there is nothing wrong in relying on their testimonies and accepting the documents placed for basing conviction. After taking into account the entire materials relied on by the prosecution, there is no animosity established on the part of the official witnesses by the accused in defence and we also do not find any infirmity in the prosecution case. It is not in dispute that the present appellant (A-2) was driving the car in question which carried the contraband. PW-2, owner of the car was also examined and proved its ownership and deposed that Sumit Tomar demanded the said car for personal use. In view of the above discussion, we hold that though it is desirable to examine independent witness, however, in the absence of any such witness, if the statements of police officers are reliable and when there is no animosity established against them by the accused, conviction based on their statement cannot be faulted with. On the other hand, the procedure adopted by the prosecution is acceptable and permissible, particularly, in respect of the offences under the NDPS Act. Accordingly, we reject both the contentions.

10. The next contention, according to the learned senior counsel for the appellant, is that the prosecution has committed an irregularity by mixing up the contraband found in the bags and taking samples thereafter. We find no substance in the said argument. The present appellant was driving the car in which two bags of contraband were loaded. He further pointed out that in view of Section 15 (c) of the NDPS Act, which prescribes minimum sentence of 10 years and which may extend to 20 years where the contravention involves commercial quantity, the mixing of two bags is a grave irregularity which affects the interest of the appellant. We are unable to accept the said contention. It is true that Section 15 of the NDPS Act speaks about punishment for contravention in relation to poppy straw. As per sub-section (a) where the contravention involves small quantity, the rigorous imprisonment may extend to six months

or with fine which may extend to ten thousand rupees or with both whereas under sub-section (b) where the contravention involves quantity lesser than commercial quantity but greater than small quantity, rigorous imprisonment may extend to 10 years and with fine which may extend to one lakh rupees. Sub-section (c) provides that where the contravention involves commercial quantity, the rigorous imprisonment shall not be less than 10 years but which may extend to 20 years and shall also be liable to fine which shall not be less than one lakh rupees but which may extend to two lakh rupees. Merely because different punishments have been prescribed depending on the quantity of contraband, we are satisfied that by mixing the said two bags, the same has not caused any prejudice to the appellant. Even after taking two samples of 250 grams each, the quantity measured comes to 69.50 kgs which is more than commercial quantity (small quantity 1000 gms/ commercial quantity 50 kgs. and above). In view of the same, the contention that the police should have taken two samples each from the two bags without mixing is liable to be rejected.

11. Taking note of all the materials, the evidence of official witnesses, PW-2, owner of the car which was involved in the offence, possession of commercial quantity, FSL report which shows that the contraband is poppy straw and is a prohibited item, we are in entire agreement with the conclusion arrived at by the trial Court and affirmed by the High Court. Further, taking note of the fact that the quantity involved is 70 kgs. of poppy straw which is more than a commercial quantity, the Special Judge rightly imposed minimum sentence and fine in terms of Section 15(c) of the NDPS Act. We are in agreement with the said conclusion.

12. In the light of the above discussion, we do not find any merit in the appeals, consequently, the same are dismissed.

B.B.B.

Appeals dismissed.

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