

HIGH COURT OF MADHYA PRADESH**BENCH GWALIOR****SINGLE BENCH:****HON'BLE SHRI JUSTICE G.S. AHLUWALIA****Criminal Appeal No. 531/2013****.....Appellant: Ballu Savita****Versus****.....Respondent : State of M.P.**

None for the appellant.

Shri Purshottam Rai, Panel Lawyer for the respondent/State.

Date of hearing : 27/07/2019

Date of Judgment : /08/2019

Whether approved for reporting: Yes

Law Laid down :

Significant paragraph numbers:

J U D G M E N T**(13/08/2019)**

This Criminal Appeal under Section 374 of Cr.P.C. has been filed against the judgment and sentence dated 27-6-2013 passed by Special Judge (NDPS Act), Gwalior in Special Sessions Trial No. 16/2011 by which the appellant has been convicted under Section 21(a) of N.D.P.S. Act and has been sentenced to undergo the jail sentence of rigorous

imprisonment of 4 months and a fine of Rs. 5000/-, in default rigorous imprisonment of one month.

2. By order dated 10-7-2013, the jail sentence of the appellant was suspended by this Court. However, lateron, the appellant did not appear and accordingly, warrant of arrest was issued and accordingly, in execution of production warrant, the appellant was produced before this Court on 28-2-2017 and he was sent back to jail for undergoing the remaining jail sentence, and thereafter, he never applied for bail. The appellant had remained in jail for a period of 63 days on the date of suspension of sentence by this Court i.e., 10-7-2013. Therefore, in all probabilities, the appellant has already undergone the entire jail sentence.

3. The necessary facts for the disposal of the present appeal in short are that on 24-5-2011, an information was received that one person is selling Smack, near Birla Nagar Over-bridge and accordingly, the information was recorded in Rojnamchasanha, Ex. P.1 and information was sent to City Superintendent of Police. The investigating officer, Sultan Singh Rawat, A.S.I. along with police party went to the spot. The appellant was found sitting near the bridge. The appellant was informed under Section 50 NDPS Act, Ex. P.3, about his right to get searched either by the investigating officer, or by Magistrate or Gazetted Officer. The appellant gave his consent, Ex. P.4 for getting himself searched by Sultan Singh. The personal search was given by the police party, and nothing objectionable was found. On personal search of the appellant,

smack, one scale, two old mobile phones were recovered from the pocket of the appellant. The smack was weighed and the total weight of the smack was found to be 15 gms. Two samples of 5 gms. each were prepared. The appellant was arrested and F.I.R. was lodged. The seized samples were sent to F.S.L. and according to F.S.L. report, the samples were found to be brown sugar. The police after completing the investigation, filed the charge sheet for offence under Section 8/21 of NDPS Act.

4. The Trial Court by order dated 9-9-2011, framed charge under Section 8/21(b) of NDPS Act.

5. The appellant abjured his guilt and pleaded not guilty.

6. The prosecution in order to prove its case, examined Sultan Singh Rawat (P.W.1), Bharat Singh Sen (P.W.2), Ramesh Yadav (P.W.3), Janak Singh (P.W.4), Dinesh Singh Sengar (P.W.5), and Roop Kishore Jatav (P.W.6). The appellant did not examine any witness in his defence.

7. The Trial Court by impugned judgment and sentence, held that as per the F.S.L. report 16.87 % of diacetylmorphine was found, therefore, it is clear that only 2.53 gms. of pure smack was recovered from the possession of the appellant and accordingly, held that the prosecution has failed to prove the guilt of the appellant under Section 21(b) of NDPS Act and accordingly, convicted under Section 21(a) of NDPS Act and sentenced him to undergo the rigorous imprisonment of 4 months and a fine of Rs. 5000/- with default imprisonment.

8. Challenging the sentence and conviction recorded by the Court

below, it is submitted that the mandatory provision of Section 50 of NDPS Act was not complied in its letter and spirit.

9. Per contra, it is submitted by the Counsel for the State that the Prosecution has proved the guilt of the appellant beyond reasonable doubt.

10. Heard the learned Counsel for the parties.

11. Sultan Singh Rawat (P.W.1) has stated that on 24-5-2011, an information was received from an informer, that one person is selling Smack, near Birla Nagar Over-bridge and accordingly, the information was recorded in Rojnamchasanha , Ex. P.1 and information was sent to City Superintendent of Police, Ex. P.2. Thereafter this witness along with police party went to the spot. The appellant was found standing by the side of a pillar. The appellant was informed about his right to get searched either by the investigating officer, or by Magistrate or Gazetted Officer and the information under Section 50 NDPS Act is Ex. P.3. The appellant gave his consent, Ex. P.4 for getting himself searched by Sultan Singh. The personal search was given by the police party Ex. P.5 and on personal search of the appellant, smack, one scale, two old mobile phones were recovered from the pocket of the appellant which were seized vide seizure memo Ex. P.6. The seized smack was also produced before the Court and it was stated by this witness that Sample is Article A-1 and chit is Article A-2 which bears his signatures. Second Sample is Article A-3 and chit is Article A-4, which also bears his signatures. The scale is Article A-5 and the mobiles are Article A-6 and

A-7. The smack was weighed and the total weight of the smack was found to be 15 gms. The weigh panchnama is Ex. P.7. The samples were made homogeneous and memo is Ex. P.8. Two samples of 5 gms. each were prepared which are Article A-1 and A-3. The appellant was arrested by Arrest Memo Ex. P.10 and F.I.R., Ex. P.11 was lodged. This witness was cross examined in detail, however, nothing could be elicited from his cross examination, which may make his evidence unreliable.

12. Ramesh Yadav (P.W.3) who is the independent witness has also supported the prosecution case, and has also supported that 15 gms of smack was seized from the possession of the appellant.

13. Janak Singh (P.W.4) is the constable who had delivered the information to the office of City Superintendent of Police and obtained acknowledgment from Head Constable Dinesh Singh Sengar. The information is Ex. P.2.

14. Dinesh Singh Sengar (P.W.5) has stated that after receiving the written information, he had informed the then C.S.P. Neeraj Pandey on phone.

15. Roop Kishore Jatav (P.W.6) had investigated the matter and recorded the statements of the witnesses.

16. The F.S.L. Report has not been marked as Exhibit by the Trial Court. But the same is admissible under Section 293 of Cr.P.C. Further, under Section 313 of Cr.P.C. a question was put to the appellant with regard to the F.S.L. Report. Therefore, in the light of the provisions of Section 293 of Cr.P.C. coupled with the fact that a specific question was

put to the appellant in his examination under Section 313 of Cr.P.C, it is held that the F.S.L. report can be read in evidence. Accordingly, it is clear that the contraband seized from the possession of the appellant was morphine.

17. It appears that in the light of the judgment passed by the Supreme Court in the case of **E. Michael Raj Vs. Narcotic Control Bureau** reported in **(2008) 5 SCC 161**, the Trial Court has held that since, only 2.73 gms. of pure smack has been seized from the appellant, therefore, the offence would fall under Section 21(a) of NDPS Act. However, it appears that the Trial Court has ignored the notification No. S.A. 2941(E) dated 18th November 2009 by which the following provision was inserted in Notification specifying small Quantity and Commercial Quantity :

4. The quantities shown in column 5 and column 6 of the Table relating to the respective drugs shown in column 2 shall apply to the entire mixture or any solution or any one or more narcotic drugs or psychotropic substances of that particular drug in dosage form or isomers, esters, ethers and salts of these drugs, including salts of esters, ethers and isomers, wherever existence of such substance is possible and not just its pure drug content.

18. Thus, the reason assigned by the Trial Court does not appear to be correct. But, since, the acquittal of the appellant for offence under Section 21(b) of NDPS Act has not been challenged, therefore, this Court is not required to look into the correctness of the acquittal of the appellant for offence under Section 21(b) of NDPS Act.

19. Considering the evidence of the prosecution witnesses, it is held that the prosecution has established the guilt of the appellant for offence under Section 21(a) of NDPS Act beyond reasonable doubt. As the maximum sentence for offence under Section 21(a) is rigorous imprisonment of 1 year, and the Trial Court has already adopted a very lenient view, therefore, no further interference is called for.

20. Accordingly the judgment and sentence 27-6-2013 passed by Special Judge (NDPS Act), Gwalior in Special Sessions Trial No. 16/2011 is hereby affirmed.

21. The appellant is in jail. He be released after undergoing the jail sentence, if not already released.

22. The appeal fails and is hereby **Dismissed**.

(alok)

(G.S. AHLUWALIA)
Judge
13/08/2019