

IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA.

Cr. Appeal No. 365 of 2003
Decided on : 28.02.2011

Surinder Singh alias Chhinda ... Appellant.

Versus

State of Himachal Pradesh
... Respondent.

Coram:
Hon'ble Mr. Justice V.K. Sharma, Judge.

Whether approved for reporting?¹ Yes.

For the appellant : Mr. N.K.Thakur, Advocate.

For the Respondent : Mr. Anil Jaswal, Dy. Advocate
General and Mr. J.S. Guleria,
Asstt. Advocate General.

V.K. Sharma, Judge

The appellant (convict) is in appeal against the judgment dated 28.7.2003, of the learned Sessions Judge, Una (H.P.), in Sessions Case No. 22/2002, State vs. Surinder Singh alias Chhinda, whereby he was tried for the offence under Section 18 of the Narcotic Drugs and Psychotropic Substances Act (in short NDPS Act) and was ultimately convicted and sentenced to undergo two years rigorous imprisonment and to pay fine of Rs. 25,000/- and in default to suffer further imprisonment for three months .

2. Briefly stated the case of the prosecution was that on 29.7.2002, constable Suresh Kumar (PW-1), received secret information at Sanoli Chowk that the convict was in

¹ Whether reporters of the local papers may be allowed to see the judgment?
Yes

possession of opium and was indulging in illicit sale of the same. When he was coming back to the Police Station to give said information to the higher ups, ASI Harbans Lal (PW-10), met him near High School Ajoli, who recorded his statement Ex.PA under Section 154 Cr.P.C. and sent the same to the Police Station, through constable Som Nath, on the basis of which FIR Ex.PL was registered. Thereafter, a raiding party was formed, which was headed by PW-10 ASI Harbans Lal. Tersem Lal and Ram Kumar PW-2, were joined as independent witnesses. The raiding party went to the house of the convict at village Mazara, where he was found sitting on the cot in the verandah. He was informed about the purpose of the raid in writing vide memo Ex.PC and was also informed that he had a right to be searched either in the presence of a Magistrate or a Gazetted Officer. However, vide memo Ex.PC, he consented to be searched by PW-10 ASI Harbans Lal. After the members of the raiding party offered themselves for search by the accused vide memo Ex.PD and nothing incriminating was found with them, personal search of the convict was carried out leading to recovery of opium contained in a polythene packet from the front pocket of his pants. On weighing it was found to be 100 gms, out of which two samples each weighing 10 gms were separated. The samples and the bulk were sealed separately with seal bearing impression 'A'. A sum of Rs. 9000/- was also recovered from the back pocket and the same was also taken into possession along with the recovered contraband and samples thereof vide recovery memo Ex.PE.

During interrogation the convict revealed that one Gurpal Singh was also taking opium from him for illicit sale. While in police custody the convict made disclosure statement Ex.PF under Section 27 of the Evidence Act that he had also kept concealed opium in his cattle shed and could get the same recovered. Thereafter, he led the police party to the cattle shed and got recovered opium weighing 2 Kg. 600 gms, out of which two samples weighing 20 gms each were drawn for analysis. The samples along with the bulk were sealed separately with the aforesaid seal. Further case of the prosecution was that the accused also produced Rs. 34,500/- from his trunk (iron box), which was stated to be the sale consideration of the opium already sold by him and the same was also taken in possession vide memo Ex.PG. After completion of the codal formalities on the spot, the accused was arrested. The samples of the recovered contraband were sent for examination to Examiner, Chemical Test Laboratory (CTL), Kandhaghat and report Ex.PX was obtained, which revealed that the same contained contents of opium.

3. On completion of investigation the convict was sent up to face trial. On being charged, he did not plead guilty and claimed to be tried. The prosecution evidence followed. In all, it examined 10 witnesses.

4. On close of the prosecution evidence, the convict was examined under Section 313 Cr.P.C, wherein, he pleaded innocence and false implication. In defence, he examined one witness, namely, DW-1 Niranjana Singh.

5. After hearing the parties, the learned trial Judge proceeded to convict and sentence the convict as above.

6. I have heard the learned counsel for the appellant-convict and the learned Assistant Advocate General for the respondent-State and gone through the records.

7. The gravamen of charge against the convict under Section 18 of the NDPS Act, was relating to contravention in relation to opium. Section 2(xv) of the NDPS Act defines opium as under:-

“(xv) “opium” means-

(a) the coagulated juice of the opium poppy; and

(b) any mixture, with or without any neutral material, of the coagulated juice of the opium poppy, but does not include any preparation containing not more than 0.2 per cent of morphine;”

8. The samples of the alleged contraband recovered from the convict were analyzed vide report Ex.PX, operative part whereof is as under:-

“a) Qualitative Tests:- Tests for meconic acid = positive.

b) Results of qualitative test. Test for morphine = positive.

c) General Observation of the chemist – I am of the opinion that the three exhibits marked here as 1925/1, 1925/2 and 1925/3 contain the contents of opium.”

9. Thus, it is manifest that the contraband allegedly recovered from the convict was opined to “contain the contents of opium” as the tests for “meconic acid” and “morphine” were found to be “positive”.

10. In ***Amarsingh Ramjibhai Barot vs. State of Gujarat***, 2005 Supreme Court Cases (Cri) 1704, the Hon'ble Apex Court, has held as under vide paras 12, 14 and 15:-

"12. Sections 17, 18 and 21 of the NDPS Act are intended to operate in different circumstances. Section 17 prescribes the punishment *intra alia* for possession of "prepared opium"; Section 18 prescribes the punishment *inter alia* for possession of "opium" and Section 21 deals with the punishment *inter alia* for possession of "manufactured drugs". Each one of these terms has been defined in the NDPS Act. "Opium" is defined in Section 2 (xv) as:

"2.(xv) "opium" means-

(a) the coagulated juice of the opium poppy; and

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

but does not include any preparation containing not more than 0.2 per cent of morphine;."

14. There does not appear to be any acceptable evidence that the black substance found with the appellant was "coagulated juice of the opium poppy" and "any mixture, with or without any neutral material, of the coagulated juice of the opium poppy". FSL has given its opinion that it is "opium as described in the NDPS Act". That is not binding on the court.

15. The evidence also does not indicate that the substance recovered from the appellant would fall within the meaning of sub-clauses (a), (b), (c) or (d) of Section 2(xvi). The residuary clause (e) would take into its sweep all preparations containing more than 0.2 per cent of morphine. The FSL report proves

that the substance recovered from the appellant had 2.8 per cent anhydride morphine. Consequently, it would amount to “opium derivative” within the meaning of Section 2(xvi) (e). Clause (a) of Section 2(xi) defines the expression “manufactured drug” as:

“2.(xvi) ‘manufactured drug’ means-

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

(b) * * *

All “opium derivatives” fall within the expression “manufactured drug” as defined in Section 2(xi) of the NDPS Act. Thus, we arrive at the conclusion that what was recovered from the appellant was “manufactured drug” within the meaning of Section 2(xi) of the NDPS Act. The material on record, therefore, indicates that the offence proved against the appellant fell clearly within Section 21 of the NDPS Act for illicit possession of “manufactured drug”.

11. Relying upon the case of **Amarsingh Ramjibhai Barot**, supra, a Division Bench of this Court in **Daulat Ram vs. State of Himachal Pradesh**, 2007 (2) Shim.LC 282. has held as under, vide paras 8, 9 and 10 of the judgment:-

“8. From a bare reading of the definition of opium, it is clear that “opium” means coagulated juice of opium poppy or any mixture with or without neutral material of the coagulated juice of opium poppy having more than 0.2 per cent of morphine.

8. In the present case, report of the Chemical Examiner Ex.PR says that the samples were tested for meconic acid and morphine. Report does not say that the stuff was coagulated juice of opium poppy or it was mixture of coagulated juice

with or without any neutral material and the percentage of the morphine in the mixture was more than 0.2 per cent.

10. The Hon'ble Supreme Court in *Amarsingh Ramjibhai Barot v. State of Gujarat*, 2005 Supreme Court Cases (Cri) 1704, has held that where the report of the Forensic Science Laboratory does not say that the stuff was coagulated juice of the opium poppy or it was a mixture with or without any neutral material of coagulated juice of opium poppy but simply expresses the opinion that the stuff is opium, as defined in the Narcotic Drugs and Psychotropic Substances Act, such a report is not acceptable and not binding on the Court. This implies that the report of the Scientific Expert has to specifically mention that either the stuff is coagulated juice of opium poppy or it is a mixture of such juice with some other material having morphine content in excess of 0.2 per cent."

12. When CTL report Ex.PX is considered in the light of the law laid down by the Hon'ble Apex Court, as followed by this Court in the aforesaid judgments, it is abundantly clear that the conclusion arrived at there-under simply goes to show that the samples of the contraband allegedly recovered from the convict tested positive for meconic acid and morphine and were found to contain contents of opium. However, the report is not in accordance with the definition of opium contained in Section 2 (xv) of the NDPS Act, as the same is absolutely silent about the presence of "the coagulated juice of the opium" and "percentage of morphine" and as such cannot be relied upon to fasten criminality against the accused for the offence for which he was charged.

13. In view of the above, the appeal succeeds and is accordingly allowed. Consequently, the impugned judgment dated 28.3.2007, shall stand set aside leading to acquittal of the convict and refund of the amount of fine of Rs. 25,000/- to him. Ordered accordingly. The aforesaid two sums of Rs. 9,000/- and Rs. 34,500/-, shall be liable to be dealt with in accordance with law.

14. The appeal stands disposed of in the above terms.

(V.K. Sharma)
Judge.

February 28, 2011.
(lsp)