
(2015) 11 SHI CK 0076
In the High Court Of Himachal Pradesh
Case No : Criminal Appeal No. 273 of 2015

Aam Bahadur

APPELLANT

Vs

State of Himachal Pradesh

RESPONDENT

Date of Decision : 18-11-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 173, 313
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 20, 50

Citation : (2015) 11 SHI CK 0076

Hon'ble Judges : Rajiv Sharma and Sureshwar Thakur, JJ.

Bench : Division Bench

Advocate : Virbahadur Verma, Advocate, for the Appellant; P.M. Negi, Deputy Advocate General, for the Respondent

Final Decision : Allowed

Judgement

Sureshwar Thakur, J.—The instant appeal is directed against the judgment of the learned Special Judge-II (Additional Sessions Judge), Kullu, Himachal Pradesh, rendered on 24.01.2015 in Session Trial No. 86 of 2014 (2013), whereby, the learned trial Court convicted the accused for his having committed an offence punishable under Section 20 of the Narcotic Drugs and Psychotropic Substances Act (hereinafter referred to as "NDPS Act") and sentenced him to undergo rigorous imprisonment for 10 years and to pay a fine of Rs. 1,00,000/- and in default of payment of fine, sentenced him to suffer simple imprisonment for one year.

2. The facts relevant to decide the instant case are that on the evening of 7.7.2013 around 8.15 p.m., a police party headed by PW-8 SI Gaurav Bhardwaj of Police Post Manikaran, consisting of H.C. Yash Pal, H.C. Ramesh, C. Tej Ram and C. Bhagat Ram was present in connection with Nakabandi duty one kilometer ahead of Tegadi Nala on the road in official vehicle having been driven by C. Vishwa Nath, then accused came on foot from Barshaini side towards Manikaran and on seeing the police party and police vehicle accused turned back and tried

to flee away from the spot. At that time accused was carrying a black colour bag on his back and the accused was nabbed by the police party at a distance of 5 to 10 steps. The accused was asked about his name who disclosed his name as Aam Bahadur, citizen of Nepal and when the accused was asked by the police about the reason of his roaming at night time with bag, the accused got perplexed and could not reply satisfactorily. As the place was isolated and secluded one and no vehicular traffic was there, SI Gaurav Bhardwaj sent Constable Bhagat Ram (PW-7) to call independent witnesses, who came after ten minutes and disclosed that no local witness was available. The Investigating Officer Shri Gaurav Bhardwaj associated H.C. Yash Pal and C. Bhagat Ram as witnesses and in their presence apprised the accused orally as well as in writing about his legal right to be searched before a Magistrate or Gazetted Officer regarding which memo Ex. PW7/A was prepared. Thereafter personal search of the accused was conducted by the Investigating Officer but nothing incriminating was found regarding which memo Ex. PW7/C was prepared. Thereafter bag, Ex. P-6 which the accused was carrying in his hand was searched and on opening the zip of the main pocket of bag 16 packets wrapped with khakhi cello tape, Ex. P-2 were found and when the cello tape was removed inside the same transparent wrappers, Ex. P-3 containing black colour substance in pan cake shape were found and when the said wrappers were opened, black colour substance was found charas, Ex. P-4. The recovered charas was weighed with the help of an electronic scale and its weight was found 7 kg. 800 grams. The recovered charas was again put inside the wrappers and then in a cloth parcel, Ex. P-1 and the parcel was sealed with eight seals of "W". Sample of seal was separately taken on a piece of cloth, Ex. PW7/D as well as on NCB-1 form, Ex. PW1/A. The black colour bag, Ex. P-6 which the accused was carrying was also put in a cloth parcel, Ex. P-5 and the parcel was sealed with six seals of "A". Specimen of seal was also taken on a piece of cloth, Ex. PW7/E and both parcels were taken into possession through seizure memo Ex. PW7/F in the presence of witnesses who put their signatures on the seizure memo which was also signed by the accused. Rukka Ex. PW8/A was sent to the police station through C. Bhagat Ram on the basis of which FIR Ex. PW5/A was registered. The Investigating Officer prepared the site plan and the accused was arrested. The photographs of the spot were taken by the Investigating Officer. The Investigating Officer handed over the accused and besides that also handed over case property along with NCB-1 form, sample of seals, relevant papers to the then Station House Officer ASI Bala Ram for resealing who resealed the case property with six seals of "T" and after filling relevant columns of NCB-1 form Ex. PW1/A obtained sample of seal on a piece of cloth Ex. PW1/B and thereafter handed over the case property, i.e. sealed parcel, sample seals and other relevant documents of MHC H.C. Ram Krishan, who deposited the same in the malkhana by making entry in the Malkhana register and sent the case property i.e. parcel containing charas, sample seals and relevant documents through HHC Gian Chand, PW-6 vide R.C. No. 142/2013 for depositing at SFSL, Junga who accordingly deposited the same at SFSL, Junga and on his return handed over the receipt to the MHC. The

Investigating Officer also handed over special report to Addl. S.P. Nihal Singh on 8.7.2013.

3. On conclusion of the investigation, into the offence, allegedly committed by the accused, report under Section 173 of the Code of Criminal Procedure was prepared and filed in the Court.

4. The accused was charged by the learned trial Court for his having committed an offence under Section 20 of the NDPS Act. In proof of the prosecution case, the prosecution examined 8 witnesses. On conclusion of recording of the prosecution evidence, the statement of the accused under Section 313 of the Code of Criminal Procedure was recorded by the Court, in which the accused claimed innocence and pleaded false implication in the case besides chose not to lead any evidence in defence.

5. On an appraisal of the evidence on record, the learned trial Court, returned findings of conviction against the accused/appellant.

6. The convict/appellant is aggrieved by the judgment of conviction recorded by the learned trial Court. The learned defence counsel has concertedly and vigorously contended that the findings of conviction recorded by the learned trial Court are not based on a proper appreciation of the evidence on record, rather, they are sequelled by gross mis-appreciation of the material on record. Hence, he contends that the findings of conviction recorded by the learned trial Court against the accused be reversed by this Court in the exercise of its appellate jurisdiction and be replaced by findings of acquittal.

7. On the other hand, the learned Deputy Advocate General has with considerable force and vigour, contended that the findings of conviction recorded by the Court below are based on a mature and balanced appreciation of evidence on record and they do not necessitate interference, rather merit vindication.

8. This Court with the able assistance of the learned counsel on either side, has, with studied care and incision, evaluated the entire evidence on record.

9. The accused is alleged to have been found in exclusive and conscious possession of 7 Kg, 800 grams of charas while his carrying it in a bag, Ex. P-6 held by him in his hand. The official prosecution witnesses have deposed in tandem and in harmony in proof of each of the links in the chain of circumstances commencing from the proceedings relating to search, seizure and recovery thereof from the alleged conscious and exclusive possession of the accused till the consummate link comprised in the rendition of an opinion by the FSL on the specimen parcel sent to it for analysis, hence portraying proof of unbroken and un-severed links, in the entire chain of circumstances. As such, it is argued that when the prosecution case stands established, it would be legally unwise for this Court to acquit the accused. Besides when the testimonies of the official witnesses unravel the fact of theirs being bereft of any inter se or intra se contradictions, consequently they too are contended to enjoy credibility.

10. Apparently, the prosecution case gathers strength from the deposition of the official witnesses especially when they have deposed qua the genesis of the prosecution version in a consistent, uniform and harmonious manner. Consequently, their depositions acquire a hue of veracity.

11. Charas Ex. P-4 was recovered under recovery memo Ex. PW7/F. Its recovery was effected from bag, Ex. P-6 carried by the accused in his hand. The depositions of the official witnesses are firm and categorical in clinching the fact of Charas Ex. P-4 having been recovered under memo Ex. PW7/F from a bag, Ex. P-6, carried by the accused in his hands. The accused carrying bag Ex. P-6 in his hands wherefrom recovery of charas Ex. P-4 was effected nails a conclusion of his being in exclusive and conscious possession thereof. As a corollary, with the official witnesses deposing with intra se consistency in their respective examinations-in-chief qua the factum of its recovery therefrom, hence, when their respective depositions comprised in their examinations-in-chief are bereft of any intra se contradictions, as such, their testimonies qua the factum of recovery of charas Ex. P-4 under recovery memo Ex. PW7/F from bag, Ex. P-6 carried by the accused in his hands, are to be construed to be both trustworthy as well as credible. Apart therefrom, with no occurrence of any inter se contradictions in the testimonies of the official witnesses comprised in their respective examinations-in-chief vis-?-vis their depositions comprised in their respective cross-examinations lends impetus to an inference of their testimonies inspiring confidence besides, being trustworthy. Moreover, the effect of their respective depositions comprised in their examinations-in-chief being also bereft of any contradictions with their previous statements recorded in writing qua the occurrence benumbs any inference of their testimonies on oath being ridden with any taint of improvements or embellishments. In sequel this Court is constrained to with aplomb amass an inference of their testimonies being amenable to, theirs being imputed implicit reliance, for thereupon concluding qua the guilt of the accused.

12. Nonetheless, what detracts from the efficacy of the testimonies of the officials witnesses besides, impeaches their creditworthiness is the fact of the accused preceding recovery of Charas Ex. P-4 from bag Ex. P-6 held by him in his hands, having come to be subjected to personal search by the Investigating officer. Adherence to the provisions of Section 50 of the NDPS Act by the Investigating Officer while searching bag, Ex. P-6 held by the accused in his hands wherefrom charas Ex. P-4 was recovered, was wholly unnecessary as compliance, if any, by the Investigating Officer with the mandatory statutory provisions enshrined in the NDPS Act, arose only in the event of charas Ex. P-4 having stood recovered while its being carried by the accused in his pockets or from his arm pits, waist or any other part of the body of the accused whereto it stood inextricably fastened or strapped. However, when preceding the recovery of Ex. P-4 under memo Ex. PW7/F from bag, Ex. P-6 held by the accused in his hands, the Investigating Officer took to carry out a personal search of the accused, necessarily then compliance by him with the provisions of Section 50 of

the NDPS Act arose. Consequently, with necessity of compliance by the Investigating Officer with the mandatory/statutory requirements envisaged under Section 50 of the NDPS Act having arisen, as a corollary then, it was incumbent upon the Investigating Officer, to elicit the consent of the accused under an apposite consent memo recording therein the factum of his having a legal right to be searched before a Magistrate or a Gazetted Officer, which options having been foregone by him in favour of the Investigating Officer would have facilitated the latter to carry out a valid personal search of the accused, in sequel to the accused communicating to him his appositely recorded consent to him. Necessarily for validating the personal search of the accused by the Investigating Officer preceding recovery of Ext. P-4 under Memo Ext. PW-7/F from bag Ext. P-6 held by the accused in his hands, an apposite unfoldment of the accused having in writing consented to his personal search by the Investigating Officer was legally enjoined to occur in Ext. PW-7/A. However, the recorded consent of the accused to the Investigating Officer carrying out his personal search does not occur in Ext. PW-7/A. The Investigating Officer has portrayed in his deposition on oath corroborated by the deposition of PW-7, of the accused having only appended his signatures on consent memo Ex. PW7/A yet his having divulged to both, the factum of his apart therefrom his not possessing the skill to record therein his consent in writing to his personal search being carried out by the Investigating Officer which constraint besetting him precluded him to record his consent in writing for his personal search by the Investigating Officer, lack of its unfoldment therein in Ext. PW-7/A is nonetheless espoused before this Court to not detract from the legal efficacy of the personal search of the accused carried out by the Investigating Officer in face of both the Investigating Officer besides PW-7 having harmoniously deposed qua the accused while being for reasons aforesaid disabled to record in writing his consent for his personal search being carried out by the Investigating Officer his yet having orally communicated his consent to the Investigating Officer for the latter proceeding to carry out his personal search rather hence foists it with validity. However, it is imperative for this Court to ascertain by assessing the entire evidence on record whether the aforesaid propagation by the Investigating Officer carries any truth. In that endeavour a keen discernment of the evidence on record underlines the salient factum of the said explanation, emanating from the deposition of PW-7 and PW-8 of the accused only orally communicating to them his consent for his being personally searched by the Investigating Officer, his not excepting his possessing the skill to signature Ext. PW.7/A, which do exist thereon, possessing the skill to record therein his consent in writing for his personal search being conducted by the Investigating Officer, not for reasons ascribed herein-after attaining any probative consolidation nor its carrying any implicit credibility, especially when though it was incumbent upon the prosecution to prove the factum of the purported signatures of the accused existing on Ex. PW7/A belonging to him, it yet failed to by adducing cogent evidence comprised in the report of the Handwriting Expert concerned portraying therein on his comparing the purported signatures of the accused existing thereon with his admitted signatures the

factum of the accused having signed Ext. PW-7/A, discharge the onus of proving the factum probandum of the accused having signed Ext. PW-7/A. As a corollary, when the said onus cast upon the prosecution remained un-discharged by it constrains this Court to draw an apt conclusion of the accused having not signed Ext. PW-7/A. In sequel, even, if credence is to be tentatively imputed to the testimonies of PW-7 and PW-8 of the accused being deterred by his not possessing the skills to record his consent in writing to any of the options/proposals comprised in Ext. PW.7/A except his possessing the skill to signature it, which purported signatures of the accused exist thereon, which dis-empowerment in regard aforesaid led him to orally communicate his consent to the Investigating Officer holding his personal search, yet when for the aforesaid reasons their testimonies to the extent aforesaid are susceptible to skepticism, concomitantly renders inconsequential the effect, if any of the accused being purportedly enjoined with a legal disability to scribe his consent therein for his personal search being conducted by the Investigating Officer, besides also benumbs the factum, if any of his having purveyed any apposite oral communication to the Investigating Officer for validating his personal search, if any, in pursuance thereto as stood purportedly carried out by the former. Concomitantly, for reiteration, the effect of an oral communication, if any, purveyed by the accused to the Investigating Officer, after his having purportedly signed consent memo, Ex. PW7/A, authorizing the Investigating Officer to conduct his personal search, is, in the face of the prosecution having omitted to discharge the onus of proving the factum of the accused having signed Ex. PW7/A by adducing best and cogent evidence comprised in the report of a handwriting expert, is of its being construable in its entirety to be an invention or a concoction on the part of the Investigating Officer to circumvent the provisions of Section 50 of the NDPS Act. In aftermath, the preparation of Ex. PW7/A by the Investigating Officer is also in its entirety a sham or of its being construable to be ingenuously doctored by the Investigating Officer, to in its guise convey his having preceding the search of bag, Ex. P-6 held by the accused in his hands wherefrom charas, Ex. P-4 was recovered, his having meted compliance with the provisions of Section 50 of the NDPS Act. With the preparation of Ex. PW7/A having stood construed to be a sham or an invention, as such, even the recitals or portrayals therein of the accused after his having purportedly signed it, his having orally communicated to the Investigating Officer his consent to the latter holding or conducting his personal search, are too for reasons aforesaid prevaricated. Added impetus to the aforesaid inference of the accused having not orally communicated to the Investigating Officer his consent of his person being searched by him is lent by the factum of PW-7 having deposed in his testimony comprised in his examination-in-chief of the accused having been apprised by the Investigating Officer of his having a legal right to be searched by a Magistrate or a Gazetted Officer. However, during his cross examination when PW-7 stood qua the factum aforesaid confronted with his previous statement, comprised in Ex. D-1, the latter omitted to therein unravel the factum as deposed by him in his examination-in-chief, of his in his previous statement

recorded in writing divulged therein the factum of his having disclosed to the Investigating Officer the germane factum of the accused having been apprised by the Investigating Officer of his having a legal right to be searched by a Magistrate or a Gazetted Officer, which option he may forego to be exercised in favour of the Investigating Officer. Hence, the testimony of PW-7 recording the aforesaid fact comprised in his examination-in-chief standing for the reasons aforesaid contradicted, the deduction which is drawable therefrom is, given the inferences hereinabove drawn by this Court of Ex. PW7/A being a concoction, of even both PW-7 as well as constable Yaspal being not contemporaneously available at the site of occurrence when the Investigating Officer initiated and concluded therein the apposite proceedings. Naturally then, redoubled vigor is lent to the factum of Ext. PW-7/A having been drawn up elsewhere or its being an invention. Obviously then, the legal efficacy and impact of Ex. PW7/A in its purportedly validating the personal search of the accused by the Investigating Officer, inasmuch as its meting compliance with the provisions of Section 50 of the NDPS Act stands denuded or whittled down. As a concomitant with Ex. PW7/A losing its legal efficacy the ensuing sequel therefrom is of charas Ex. P-4 recovered from bag Ext. P-6 under memo Ex. PW7/F having been planted therein by the Investigating Officer besides of recovery of charas Ex. P-4 from bag Ex. P-6 held by the accused in his hands being in a manner other than the one as portrayed in Ex. PW7/F. The arousal of the aforesaid inference when belying the genesis of the prosecution case, hence eroding its veracity also impinges upon the fairness as well as the transparency in which the Investigating Officer initiated and concluded the apposite proceedings at the site of occurrence. In sequel it has to be hence concluded that Ex. PW7/A was prepared other than at the site of occurrence and that the personal search of the accused was carried out by the Investigating Officer even when preceding such personal search Ex. PW7/A remained unprepared. Consequently, the entire proceedings are rendered invalid. Furthermore, for reiteration the herein-above discussion lends leverage to a concomitant deduction of the personal search of the accused having been carried out by the Investigating Officer in dire infraction of the provisions of Section 50 of the NDPS Act being drawable therefrom. Even though, PW-7 has deposed that the Investigating Officer had joined C. Yaspal as a witness at the time of preparation of Ex. PW7/A in pursuance whereof personal search of the accused was carried out by him yet HC Yashpal was neither cited as a prosecution witness nor he came to be examined as a witness. The aforesaid omission on the part of the prosecution appears to have been prompted to preclude him from deposing qua Ext. PW-7/A being not bereft of any element of doctoring or concoction. Moreover, it is apt to record herein that with the aforesaid infirmities making pervasive inroads into the genesis of the prosecution case, the effect thereof is of even the harmonious besides, consistent depositions on oath of the official prosecution witnesses losing their creditworthiness obviously no reliance hence can be placed upon the depositions of the official witnesses even when their depositions on oath qua the occurrence before the learned trial Court are bereft of any taint.

13. The learned Deputy Advocate General has contended before this Court that with the accused during the course of proceedings carried under Section 313 of the Cr.P.C. having purveyed an evasive answer to question No. 7 which stands extracted herein-after which encompasses the factum of the accused being apprised orally as well as in writing of his having a legal right of being searched by a Magistrate or a Gazetted Officer qua which memo Ex. PW7/A stood prepared, tantamounts to, while his not having specifically denied it, his having accepted the said fact comprised therein. Question No. 7 reads as under:-

"Q.7:- It is further in prosecution evidence led against you accused that on this PW-8 Sub Inspector Gaurav Bhardwaj associated Head Constable Yash Pal and Constable Bhagat Ram as witnesses and in their presence apprised you accused orally as well as in writing about your legal right to be searched before a Magistrate or Gazetted Officer regarding which memo Ex. PW7/A was prepared. What have you to say? Ans: I do not know."

However, the said argument necessitates its being rejected on the ground that the rule of want of specific denial by the defendant in his written statement to the apposite corresponding averments constituted in the plaint sequels an inference of an admission thereof by the defendant, is inapplicable in its fullest sway to proceedings under Section 313 of the Cr.P.C. nor the accused is enjoined to while answering questions put to him in proceedings drawn up under Section 313 of the Cr.P.C. specifically admit or deny them. Consequently, even if an evasive denial has ensued from the accused to the afore extracted apposite question, conveying the factum of his having been orally as well as in writing apprised by the Investigating Officer qua his having a legal right of his being searched before a Magistrate or a Gazetted Officer regarding which memo Ex. PW7/A was prepared, yet would not tantamount to an inference of the accused arising from his not having specifically denied it, his having admitted it, besides the recitals recorded therein especially the one conveying the oral consent of the accused to the Investigating Officer holding his personal search especially when for the reasons aforesaid, the rule of specific denial by the accused to any question put to him in proceedings drawn up under Section 313 of the Cr.P.C. for estopping an inference of his having hence acquiesced to it is unattractable to proceedings drawn therein, more so when the rule aforesaid stands engrafted in the Code of Civil Procedure obviously renders it to be applicable only to pleadings constituted in the Code of Civil Procedure and not to pleadings constituted in proceedings drawn under Section 313 of the Code of Criminal Procedure. If an inference of the accused having by his omitting to give a specific answer to the afore-referred question No. 7 with an encapsulation therein, of the apposite fact existing therein his hence having admitted it, it would be permitting the prosecution to avail an untenable leverage therefrom even when it is a cardinal principle of criminal jurisprudence of the prosecution being enjoined to prove by adducing cogent evidence, the factum of Ex. PW7/A being signed by the accused as also of its hence concomitantly proving the factum of the accused not possessing any skills to write except signing, disabling him to record therein his

consent in writing, for his personal search being carried out by the Investigating Officer for validation whereof the accused purportedly orally conveyed his consent to the apposite proposals manifested in Ext. PW-7/A. Even otherwise when the said obligation cast upon the prosecution for the reasons aforesaid stood undischarged by it rather when as emanable from the discussion aforesaid the prosecution failing to unflinchingly prove the factum of the accused having signed Ex. PW7/A, absence of proof in regard aforesaid, concomitantly belying the deposition of both PW-7 and PW-8 of the accused after his having signatured Ex. PW7/A his having orally conveyed his consent to the Investigating Officer holding his personal search, renders the espousal of the learned Deputy Advocate General arising from the factum of the accused having evasively answered the aforesaid apposite question No. 7 drawn up under Section 313 of the Cr.P.C. and its hence tantamounting to acceptance by him of the apposite proposals existing in Ex. PW7/A, to be legally unworthwhile as well as carrying no legal efficacy in dispelling the adversarial effect as enunciated aforesaid of the prosecution omitting to discharge the onus of proving the signatures of the accused on Ex. PW7/A. Concomitantly, for the reasons assigned herein above when Ex. PW7/A has been construed to be an invention or a concoction wherefrom a deduction has ensued of the Investigating Officer having not, while carrying out the personal search of the accused complied with the mandatory statutory requirement enshrined in Section 50 of the NDPS Act, this Court is prodded to infer that Ex. P-4 was planted in P-6 at the instance of the Investigating Officer besides this Court is also constrained to deduce that recovery of Ex. P-4 from bag Ex. P-6 held by the accused in his hands stands engulfed in a shroud of doubt, benefit whereof ought to go to the accused.

14. For the reasons which have been recorded hereinabove, this Court holds that the learned trial Court has not appraised the entire evidence on record in a wholesome and harmonious manner apart therefrom the analysis of the material on record by the learned trial Court suffers from a perversity or absurdity of mis-appreciation and non appreciation of the evidence on record.

15. For the foregoing reasons, the appeal is allowed and the judgment of the learned trial Court is set-aside. Accused/appellant is acquitted of the offences charged. He be set at liberty forthwith, if not required in any other case. Fine amount, if any, deposited by the accused/appellant, be refunded to him. Release warrant be prepared accordingly. Records be sent back.