

(2022) 10 SHI CK 0023

In the High Court Of Himachal Pradesh

Case No : Criminal Appeal No.280, 281 Of 2022

Anil Kumar And Others

APPELLANT

Vs

State Of Himachal Pradesh

RESPONDENT

Date of Decision : 21-10-2022

Acts Referred:

Narcotic Drugs And Psychotropic Substances Act, 1985 — Section 15
Code Of Criminal Procedure, 1973 — Section 161, 173, 313

Citation : (2022) 10 SHI CK 0023

Hon'ble Judges : Satyen Vaidya, J

Bench : Single Bench

Advocate : Bimla Gupta, Varun Thakur, Desh Raj Thkur

Final Decision : Disposed Of

Judgement

Satyen Vaidya, J

1. Both these appeals have arisen out of same judgment and also entail common questions of facts and law, therefore, these appeals are being decided by a common judgment.

2. The appellants by way of instant appeals have assailed judgment and sentence dated 06.07.2022 passed by learned Special Judge-II, Sirmaur District at Nahan, H.P. in Sessions Trial No. 35-N/7 of 2013, , whereby, appellants have been convicted for commission of offence punishable under Section 15 of the Narcotic Drugs and Psychotropic Substances Act (for short "the Act") and each of them has been sentenced to undergo rigorous imprisonment for 7 years and to pay fine of Rs. 50,000/- each and in default of payment of fine to further undergo simple imprisonment for six months.

3. The prosecution case was that police officials H.C. Rupinder Kumar, Constable Kailash Kant No. 565, Constable Vikramjit Singh No. 539 and Constable Amit Kumar, No. 427 of Special Investigation Unit (for short "SIU") left Police Station Nahan for patrol and detection of crime at 9.00 P.M., on 23.05.2013, vide G.D.

entry No. 54(A) (Ex.PW7/A). They laid "Naka" at Rajban near "Lau Devi Temple", within the jurisdiction of Police Station Ponta Sahib. At about 12.10 A.M., a person named Rajbir (PW-2) arrived at spot and in the meantime a car was also stopped, which was being driven by Joginder Chauhan (PW-1). Simultaneously, a scooter bearing registration No. HP-17-9748 approached from the side of Badripur, which was signalled to be stopped by police party by showing the torch light. The scooter was with a rider and a pillion. Appellant Ramesh Chand was the rider, whereas appellant Anil Kumar was on the pillion. A yellow colour plastic bag was found between the legs of rider on the foot rest of scooter. The scooter rider had got perplexed on noticing the police party. The plastic bag was checked and three more blue coloured plastic bags were found inside. All the three plastic bags were checked and poppy straw was recovered. The recovered contraband was weighed with the help of weight and measure brought from the car used by the police officials and the same was found to be 5 Kg in weight. Identification memo of contraband Ex.PW1/B was also prepared. All the three blue-coloured plastic bags were emptied in the yellow bag. The empty blue-coloured bags were also placed therein. The bag was tied on the top and was placed in a cloth parcel which was sealed with six seals with impression "T". Specimen of seal impression was separately taken on a cloth and the seal was handed over to PW-2, Raghubir. Relevant columns of NCB form Ex. PW3/C were filled. The sealed parcel, sample seal, NCB form in triplicate, driving licence of appellant Ramesh Chand and scooter Bajaj Chetak No. HP-17-9748 along with its key were taken in possession vide recovery memo Ex.PW1/A. The proceedings were photographed by PW-9 Constable Vikramjit Singh. Rukka, Ex.PW4/A was prepared and was sent to Police Station Paonta Sahib for registration of FIR through PW -11, C. Amit Kumar. FIR Ex.PW8/A was registered at 2.25 A.M. at Police Station Paonta Sahib. Site plan Ex.PW-10/A was prepared. Appellants were formally arrested. The case property along with other seized articles were brought to police station. PW-8 SHO Bhisham Thakur resealed the cloth parcel containing contraband with four seals with impression "X". Re-sealing certificate Ex.PW-8/D was issued and the case property was handed over to PW-3 HHC Narayan Singh for being kept in safe custody of "Malkhana". The entry, Ex.PW3/A was accordingly recorded in the "Malkhana" register. The contraband was sent to SFSL Junga on 26.05.2013 vide R.C. No. 40/2013, Ex.PW3/B through PW-6 HHC Naushad Akhtar. SFSL report was brought on 6.6.2013 by C. Inderjit Singh. SFSL report, Ext. PX opined the sample of contraband to be "poppy straw".

4. On completion of investigation, the challan was prepared and presented before the Court of competent jurisdiction. The appellants were tried in Sessions Trial No. 35-N/7 of 2013 by learned Special Judge-II, Sirmaur District at Nahan.

5. The learned Special Judge charged the appellants under Section 15 of the NDPS Act. Appellants pleaded not guilty and claimed trial.

6. Prosecution examined total 10 witnesses. PW-1 Joginder Singh, PW-2 Raghubir Singh, PW-4 C. Amit Kumar, PW-9 Vikramjit Singh and PW-10 HC

Rupinder Kumar were examined as spot witnesses. PW-3 HHC Narayan Singh was the MHC, Police Station Paonta Sahib at the relevant time and was examined to prove the safe custody in Malkhana and transit etc., of the contraband. PW-5 Sh. Suresh Kumar proved the factum of sale of scooter No. HP-17-9748 to appellant Ramesh Chand. PW-6 HHC Naushad Akhtar proved the safe transit of contraband from Police Station Paonta Sahib to SFSL Junga. PW-7 HHC Madan Dutt proved the recording of DDR 54(A) Ex.PW7/A. PW-8 Bhisham Thakur, the then SHO Police Station Paonta Sahib proved recording of FIR, re-sealing procedure conducted by him and deposit of case property in Malkhana with PW-3 HHC Narayan Singh. Appellants were examined under Section 313 of the Cr.P.C. They did not choose to lead defence evidence.

7. Learned Special Judge found charges framed against the appellants proved and convicted/sentenced them as noticed above.

8. I have heard Mr. Bimal Gupta, Senior Advocate, for the appellants and Mr. Desh Raj Thakur, learned Additional Advocate General for the State and have also gone through the record.

9. Shri Bimal Gupta learned Senior Advocate at the very outset contended that the entire prosecution case stood demolished as both the independent witnesses had not supported its case. He further contended that the testimonies of remaining Police witnesses were so discrepant and full of contradictions, embellishments that those could not be said to be sufficient for discharging the heavy burden that lied upon prosecution.

10. PW-1 Joginder Singh and PW-2 Raghubir Singh did not support the prosecution case and have turned hostile. These witnesses stated that nothing had happened in their presence. However, PW-1 and PW-2, both admitted their signatures on Ex.PW1/A, Ex.PW1/B, Ex.PW1/C and Ex.PW1/D. In addition, they also admitted their signatures on the cloth parcel containing contraband Ex.PA. They, however, stated that they were made to sign the documents without reading. PW-2 even stated that he was made to sign blank documents. While confronted with their presence shown in the photographs alongwith appellants/accused, they did not deny such presence but tried to explain that the photographs were of Police Post Rajban.

11. In light of above stand of the independent witnesses associated by Police, the question arises as to appreciation of their statements. Turning hostile by a prosecution witness is not uncommon in our system and there are many obvious reasons therefor. Keeping in view the practical realities the testimonies of such witnesses need more deeper scan. Both the above-mentioned witnesses have admitted to have signed the documents evidencing recovery, seizure of contraband etc. Their presence is shown in photographs alongwith the accused persons. The question arises as to veracity of explanations rendered by such witnesses. Whether such explanations are plausible and worth credence? In the instant case the explanation rendered by PW-1 and PW-2 that they signed the

documents without going through their contents or while they were blank does not appear to be convincing for the reason that the witnesses have not given any reason for doing so when as per their own saying it was not their normal behaviour. Further, simply by saying that their photographs with accused were snapped in Police Post will not absolve them from explaining further as to what was the occasion for them to visit Police Post alongwith accused persons at late hours of night and why they agreed to be part of the frames with accused persons. It is also worth noticing that the statement of PW-9, who clicked the photographs, has not been challenged as being incorrect. Thus, the entire statement of PW-1 and PW-2 cannot be discarded.

12. It is trite law that statements of hostile witnesses are not liable to be discarded completely. The statements of hostile witnesses to the extent are relevant and admissible can always be looked into. In the instant case, witnesses PW-1 and PW-2 appears to have twisted their statements for reasons best known to them. Such practices are not uncommon in our legal system. In *Paulmeli & Anr vs State of Tamil Nadu*, (2014) 13 SCC 90, the legal position has been explained as under

"22. In *State of U.P. v. Ramesh Prasad Misra & Anr.*, 1996 AIR(SC) 2766, this Court held that evidence of a hostile witness would not be totally rejected if spoken in favour of the prosecution or the accused but required to be subjected to close scrutiny and that portion of the evidence which is consistent with the case of the prosecution or defence can be relied upon. A similar view has been reiterated by this Court in *Sarvesh Narain Shukla v. Daroga Singh & Ors.*, 2008 AIR(SC) 320; *Subbu Singh v. State by Public Prosecutor*, 2009 6 SCC 462; *C. Muniappan & Ors. v. State of Tamil Nadu*, 2010 AIR(SC) 3718; and *Himanshu @ Chintu v. State (NCT of Delhi)*, 2011 2 SCC 36). Thus, the law can be summarised to the effect that the evidence of a hostile witness cannot be discarded as a whole, and relevant parts thereof which are admissible in law, can be used by the prosecution or the defence."

13. Similarly in *Raja and Others V/S State of Kar-nataka* (2016) 10 SCC 506, it has been observed by Supreme Court as under:

"32. That the evidence of a hostile witness in all eventualities ought not stand efaced altogether and that the same can be accepted to the extent found dependable on a careful scrutiny was reiterated by this Court in *Himanshu @ Chintu* by drawing sustenance of the proposition amongst others from *Khujii vs. State of M. P.*, 1991 3 SCC 627 and *KoliLakhman Bhai Chanabhai vs. State of Gujarat*, 1999 8 SCC 624. It was announced that the evidence of a hostile witness remains admissible and is open for a Court to rely on the dependable part thereof as found acceptable and duly corroborated by other reliable evidence available on record."

14. Viewing the matter from another angle also, statements of PW-1 and PW-2 can also not be discarded as a whole, as the Investigating Ofcer PW-10 had

categorically deposed that statement of these witnesses under section 161 Cr.P.C Ex.PW-10/B and Ex.PW-10/C were recorded by him according to their respective versions. Record reveals that this part of deposition of I.O, PW-10, has neither been challenged nor shaken. In Mahesh Janardhan Gonnade vs State of Maharashtra (2008) 13 SCC 271, Hon'ble Supreme Court has observed as under:

“(Para 49) It is the evidence of PW-PSI Dhimole that portion mark 'A' appearing in the statement of PW-1 was recorded by him correctly. The defence has not brought on record any evidence to show why the Investigating Ofcer had recorded mark 'A' portion of the statement of PW-1 incorrectly. If PW-1 the maker of the complaint has chosen not to corroborate his earlier statement made in the complaint and recorded during investigation, the conduct of such a witness for no plausible and tenable reasons pointed out on record, will give rise to doubt the testimony of the Investigating Ofcer who had sincerely and honestly conducted the entire investigation of the case. In these circumstances, we are of the view that PW- 1 has tried to conceal the material truth from the Court with a sole purpose of shielding and protecting the appellant for reasons best known to the witness and therefore, no benefi could be given to the appellant for unfavorable conduct of this witness to the prosecution.”

15. Thus, the argument raised by learned Senior Advocate representing the appellants, as noticed above, is liable to be rejected. The appellants cannot derive any benefi from mere fact that learned Special Judge had failed to consider and elaborate on this legal aspect of the matter.

16. Even otherwise, the statements of PW-4 Constable Amit Kumar, PW-9 C. Vikramjit Singh and PW-10 HC Rupinder Kumar are consistent and trustworthy in so far as the recovery of contraband from the appellants is concerned. All these witnesses have made depositions making the prosecution story credible. PW-4 Constable Amit Kumar, PW-9 Constable Vikramjit Singh and PW-10 H.C. Rupinder Kumar were present on spot. Their statements, recorded in the Court, are in harmony in so far as the mode and manner of laying Naka, making recovery of contraband and conduct of subsequent investigative procedure on spot is concerned. All the three witnesses have stated that they were part of the team of Special Investigation Unit, Nahan and had laid Naka at Rajban near “Lau Devi Temple”. They were in the private car of PW -10 HC Rupinder Kumar. After laying of Naka PW-2 Raghubir Singh arrived at the spot. In the meantime, PW-1 Joginder Singh also reached the spot in his car. Both of them were stopped by police party and immediately scooter No. HP-17-9748 was noticed coming from Badripur side. It was signalled to be stopped with the help of torch. Appellant Ramesh Chand was the rider and appellant Anil Kumar was on the pillion. A yellow-coloured plastic gunny bag was found lying on the foot rest of the scooter in between the legs of rider. The rider got perplexed on noticing the police party. The yellow-coloured gunny bag was checked and three separate blue-coloured plastic bags were found therein. All the three blue-coloured plastic bags were containing poppy straw. The same was weighed and found 5 kg. The substance

found from the packets was identified as poppy straw with the help of taste and experience and memo Ex.PW1/B was prepared in the behalf. Entire poppy straw was emptied in the yellow-coloured gunny bag. The emptied blue-coloured plastic bags were also placed in the gunny bag and the gunny bag was tied from the top and thereafter placed in a cloth parcel, which was sealed with six seals with impression "T". The sample of seal "T" was separately taken on a piece of cloth, Ex.PW1/D. After use the sample seal was handed over to PW-1 Joginder Singh vide memo Ex.PW1/C. Relevant columns of NCB form, Ex.PW3/C in triplicate were filled on spot. The sealed parcel containing contraband along with NCB form in triplicate, driving licence of appellant Ramesh Chand, scooter along with key were taken into possession vide memo Ext. PW-1/A. PW-10 prepared Rukka Ex. PW-4/A and dispatched the same to police station for registration of FIR through PW-4 C. Amit Kumar. FIR, Ex. PW8/A was registered at Police Station Paonta Sahib. PW-4 C. Amit Kumar brought the case file back to the spot. Site map Ex.PW10/A was prepared by PW-10 H.C. Rupinder Kumar. Photography and videography of the spot was conducted by PW-9 C. Vikramjit Singh. Photographs Ex.PW1/E-1, Ex.PW1/E-2, Ex.PW9/B, Ex.PW9/C along with CD, Ex.PW9/A were the result of such photography. There is nothing to discredit the statement of these witnesses to above effect. Despite their lengthy cross-examination, nothing could be elicited to discredit them. The conviction can be maintained on the statement of police witnesses, provided they inspire confidence. In *Rizwan Khan vs State of Chhattisgarh* (2020) 9 SCC 627, the Supreme Court has observed as under:

"12. It is settled law that the testimony of the official witnesses cannot be rejected on the ground of non-corroboration by independent witness. As observed and held by this Court in catena of decisions, examination of independent witnesses is not an indispensable requirement and such non-examination is not necessarily fatal to the prosecution case."

17. Further it has also been proved that the entire case property was forwarded to SHO, Police Station, Paonta Sahib, who resealed the parcel containing contraband with impression "X" and issued reseal certificate, Ex.PW8/D. Specimen of seal impression "X" was separately taken on cloth parcel, Ex.PW-9/C. The case property was then handed over to PW-3 HHC Narayan Singh to be kept in Malkhana in safe custody. Entry to that effect was made in the Malkhana register and abstract of which has been placed on record as Ex.PW3/A.

18. The safe and secure transit of contraband from Police Station to SFSL Junga and back has also been proved on record from the statements of PW-6 HHC Naushad Akhtar and PW-3 HHC Narain Singh. There is nothing on record which may suggest existence of any tempering in the case property at any stage. The sample examined by SFSL Junga was found to be poppy straw as per report Ext. PX.

19. Learned counsel for the appellants, however, has submitted that there are material contradictions in the statements of PW-4, PW-9 and PW-10. He has

pointed out that according to PW-4 C. Amit Kumar, he had taken Rukka Ex.PW4/A to Police Station at 1.40 A.M., whereas PW-9 stated that Rukka was taken by PW-4 at 12.10 A.M. Similarly, he has further pointed out that according to PW-4, the Investigating Officer had conducted proceedings with the help of search light and according to PW-9, proceedings were conducted with the help of a torch. These contradictions cannot be said to be so material so as to be fatal to the entire prosecution case. The fact remains that the proceedings were conducted by Investigating Officer with the help of light. Search light and torch, in normal parlance could be used interchangeably. Similarly, the statement of PW-9 that the Rukka was taken by PW-4 at 12.10 A.M. could be the result of many factors such as the lapse of time between the date of recovery and date of his making statement. The recovery was effected on 24.05.2013 and PW-9 was examined on 05.01.2019 i.e. after more than five years. Another factor which cannot be ignored is that PW-9 is a police official and must have been part of various investigating teams in between 2013 to 2019. Human memory can falter and is always relatively dependent upon individual faculty of each human being. As per the prosecution case, as specifically deposed by PW-4 and PW-10, appellants were stopped by the police party at about 12.10 to 12.15 A.M. and PW-9 may have possibly been reminded of such time as the time of taking of Rukka by PW-4.

20. Learned counsel for the appellant next contended that statements of prosecution witnesses especially PW-4, PW-9 and PW-10 were falsified on the ground that the parcel containing contraband, Ex.PA did not have signatures of the appellants, whereas all the spot witnesses had stated that the appellants were also made to sign Ex.PA. This discrepancy again cannot be said to be of such a nature and magnitude that it by itself was sufficient to demolish the entire prosecution case. The Investigating Officer had obtained signatures of appellant on Ex.PW1/A, Ex.PW1/B, Ex.PW5/A and some other documents, viz. their arrest memos (though not exhibited), but were made part of report filed under Section 173 of the Cr.P.C. coupled with the fact that the witnesses have deposed after long lapse of time, the possibility of failure of memory cannot be ruled out and the discrepancy, thus, can be understood as explainable as such. Even otherwise, there is no mandatory requirement of obtaining the signatures of accused on the sealed parcel containing the case property.

21. It has also been contended that on all other documents, which were not prepared on spot, the FIR number was written with different pen and ink, but in NCB form Ex.PW3/C, FIR number was written in the same ink and pen and also in the same handwriting as others parts of columns No.1 to 8 of said documents were written. Investigating Officer, PW-10 Rupinder Kumar has filled column No. 1 to 8 of NCB form, Ex.PW3/C. He has not been cross-examined on this aspect save and except by putting a general suggestion that NCB form was not filled on the spot. Evidence suggests that PW-4 had taken Rukka to the police station and after registration of FIR, he had brought back the case file to the spot and PW-10 could have or might have written FIR number in column No.1 of Ex.PW1/C with

the same pen and ink, which he had used for filling up other relevant columns.

22. Another argument raised on behalf of the appellants is that the road certificate Ex.PW3/B, vide which the case property along with relevant documents was sent to SFSL, Junga, did not have mention of NCB form being part of the consignment. This omission again has no effect on the final outcome of the case. It is evident from the SFSL report, Ext.-PX that the seized contraband was received in the laboratory along with photo copies of FIR, seizure memo, daily station diary, NCB forms in triplicate and sample seals "T" & "X" (total 9 leaves). Thus, it is evident that though the NCB forms were also sent along with contraband to SFSL Junga, but the same were omitted to be mentioned in road certificate, Ex.PW3/B.

23. Keeping in view the entirety of the facts and circumstances, this Court is of considered view that the learned Special Judge-II, Sirmaur at Nahan, has rightly convicted and sentenced the appellants after due appreciation of evidence. The findings and conclusion drawn by learned Special Judge are borne from the record.

24. In result, both the appeals fail and are dismissed. Accordingly, the judgment and sentence order dated 06.07.2022 passed by learned Special Judge-II, Sirmaur District at Nahan, H.P. in Sessions Trial No. 35-N/7 of 2013 are affirmed. Both the appeals are disposed of accordingly so also pending miscellaneous application(s), if any.

25. Records of learned trial Court be sent back forthwith.