
(2020) 03 SHI CK 0045
In the High Court Of Himachal Pradesh
Case No : Criminal Appeal No. 486 Of 2008

Ashok Kumar

APPELLANT

Vs

State Of Himachal Pradesh

RESPONDENT

Date of Decision : 20-03-2020

Acts Referred:

Code Of Criminal Procedure, 1973 — Section 173(2), 207, 313, 314, 374(2)
Narcotic Drugs And Psychotropic Substances Act, 1985 — Section 15, 55

Citation : (2020) 03 SHI CK 0045

Hon'ble Judges : Anoop Chitkara, J

Bench : Single Bench

Advocate : Vinay Thakur, Ashwani K. Sharma, Nand Lal Thakur

Final Decision : Disposed Of

Judgement

Anoop Chitkara, J

1. Challenging the judgment of conviction for possessing 2 k.g. poppy straw, convict Ashok Kumar (appellant herein) has come up before this Court, by filing the present appeal under Section 374(2) of the Code of Criminal Procedure, 1973.
2. The gist of the facts apposite to decide the present appeal, traces its origin to Daily Diary Register No. 47, dated Sep 23, 2006, which is Ext. PW-5/A, whereby police party headed by ASI Sunder Singh (PW-9) departed towards bus stand and Vishwa Karma Chowk, within the jurisdiction of Police Station Paonta Sahib, Distt. Sirmour, to detect crime. When the police party was present at Vishwa Karma Chowk then they received a secret information from some reliable informant that one Ashok Kumar trades in poppy husk and at that time was selling poppy husk near Baweja Hospital. On this information, the Investigating Officer ASI Sunder Singh (PW-9) reduced the said information into writing and sent the same to the Sub Divisional Police Officer, Paonta Sahib, vide memo (Ext.PW-4/A)
3. After that the police party associated two independent witnesses namely Jai

Parkash (PW-1) & Vinod Kumar (PW-2) and reached at the spot. There the police noticed the said Ashok Kumar present. Consequently, the Investigating Officer informed him that they have reasons to believe that he is in possession of poppy husk and as such he is to be searched. After that, the Investigating Officer informed him whether he would like his search to be carried in presence of some Magistrate, Gazetted Officer or to the police present on the spot. In response to this offer the accused preferred to be searched by the police itself. The police prepared a consent memo to the said effect which is Ext. PW-1/A and obtained the signatures of the accused as well as the independent witnesses on it.

4. Upon search of the bag which accused Ashok Kumar was carrying in his hand, police recovered one red coloured polythene packet and inside it was a white coloured polythene packet which contained poppy husk in it. The police procured weighing scale & weights and when the contraband was weighed, it measured 2 k.g. After that the Investigating Officer ASI Sunder Singh (PW-9) took out two portions of poppy husk, each weighing 100 grams, for the purpose of samples. Subsequently, the police officials put these 100 grams samples in two separate cloth parcels and put the remaining bulk in a different cloth parcel after repacking the bulk in the same manner in which it was taken out from the polythene packets. The police stitched the cloth parcels and affixed specimen seal impression-S on the same.

5. The Investigating Officer also filled up three copies of NCB form (Ext. PW-9/B) and affixed the specimen impression of Seal-S on the same.

6. After this the Investigating Officer prepared search and seizure memo (Ext. PW-1/B) and obtained the signatures of the accused and the independent witnesses on the same.

7. The Investigating Officer sent Ruka/information about the detection of poppy husk to the SHO of Police Station Paonta Sahib vide memo (Ext. PW-8/A) through Cont. Vikas Kalyan (PW-8) who took the same to the Police Station and after registration of FIR came back to the spot and handed over the file to the Investigating Officer.

8. On the basis of the information received in the Police Station FIR No. 366 of 2006, dated Sep 23, 2006 (Ext. PW-10/A) was registered under Section 15 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (after now called NDPS Act), in Police Station Paonta Sahib, Distt. Sirmour, H.P. against accused Ashok Kumar.

9. After completion of investigation at the spot the Investigating Officer (PW-9) along with the accused and other police officials returned to the police station and entry to the said effect was made vide memo Ext. PW-5/B. On reaching the police station the Investigating Officer handed over the accused alongwith the contraband to the SHO Khazana Ram (PW - 10). On receipt of contraband the SHO in compliance of Section 55 of the NDPS Act resealed all the three parcels with seal impression-T and prepared certificate (Ext. PW-10/D) to the said effect.

10. The SHO (PW-10) handed over the case property to MHC ASI Raghubir Singh (PW-7) who deposited the same in the maalkhana and made entries to the said effect, copies whereof are Ext. PW-7/A.

11. After that the MHC after various attempts got the sample tested from Central Forensic Science Laboratory, Chandigarh. Vide report (Ext. PW-9/F) the Laboratory opined that the sample weighing 84.68 grams had morphine, codeine, thebaine, papaverine, narcotine and meconic acid in it. In view of the presence of these ingredients of poppy straw the laboratory opined that the sample was that of poppy staw.

12. After completion of the investigation, the SHO in Police Station Paonta Sahib, prepared the police report under Section 173(2) CrPC and presented the same before the Special Judge, Sirmour, seeking prosecution of the accused.

13. The learned Special Judge took cognizance of the offence and supplied the copies of the police report to the accused in compliance with the provisions of Section 207 CrPC.

14. Vide order dated Apr 3, 2008, the learned Special Judge-II Sirmaur District at Nahan, HP, proceeded to charge the accused under Section 15 of the NDPS Act, for possessing 2 kg of poppy straw, allegedly recovered from his exclusive and conscious possession, to which the accused did not plead guilty and claimed trial.

15. After the examination of the prosecution witnesses, in compliance with provisions of Section 313 CrPC, the Trial Court put the incriminating evidence to the accused, to which he denied all the incriminating circumstances. The stand taken by the accused is that on Sep 23, 2006, at 9.00 p.m., police party visited his home and took him to the police station. He further explained that his family members and his tenant visited the police station to know the reasons for his detention. However, he did not attribute any allegation of animosity or ill-will against the Investigating Officer, in particular, and the police, in general.

16. The Court offered the accused to bring any evidence in support of his defence. However, he did not avail of his legal rights. Consequently, the trial court closed the evidence. The accused also did not file any written submissions as contemplated under Section 314 CrPC.

17. After hearing the arguments, the learned Special Judge-II, Sirmour District at Nanan, HP, accepted the prosecution evidence, and vide judgment dated Aug 13, 2008, passed in Sessions Trial No. 38-N/7 of 2007, titled as State of Himachal Pradesh vs. Ashok Kumar, held the accused guilty. The Trial Court convicted the accused under Section 15 of the NDPS Act, and sentenced him to undergo rigorous imprisonment for one year and to pay a fine of rupees five thousand and in default of payment of fine to further undergo imprisonment for six months. Challenging this judgment of conviction, the appellant has come up before this Court by filing the present appeal.

18. I have heard Mr. Vinay Thakur, Advocate, learned counsel for the appellant-convict and Mr. Ashwani K. Sharma and Mr. NandLal Thakur, learned Additional Advocates General for the respondent-State and have also waded through the entire record.

19. The prosecution has not proved that when they departed for detection of crime then at that point of time they were carrying the investigation kit which in turn had NCB forms, sealing material etc. The entry of departure from the police station, which is Ext. PW-5/A, does not reveal that the police officials were carrying the investigation kit. This anomaly assumes significance because it is the case of the prosecution that when they apprehended the accused near Baweja Hospital at Paonta Sahib then they arranged for the scale and weights from some nearby shop. It means that the police party did not have the scale and weights with them. Be that as it may, the defence counsel did not put a single suggestion about carrying of the investigation kit at the time of departure but the primary burden is on the prosecution to prove its case and not the accused. Consequently, the prosecution did not prove that at the time of departure they were carrying the investigation kit.

20. Another aspect of the case is that the prosecution did not examine the shop keeper from whom they had procured the scale and weights. Although it appears to be insignificant but it assumes importance in view of the defence taken by the accused in his statement under Section 313 CrPC and as was projected right from the first witness onward. Case set up by the accused is that he was picked up from his home. Both the independent witnesses i.e. Jai Prakash (PW-1) and Vinod Kumar (PW-2) did not support the case of the prosecution and categorically stated in cross examination by the defence that police had taken accused from his home. That being so, possibility of the entire sealing taking place in the police station and not at the spot as projected by the prosecution cannot be ruled out. Consequently, the examination of the shop keeper from whom the prosecution allegedly had brought the scale and weights assumes importance. Therefore, in the absence of examination of such witness the case of the prosecution that the search and seizure had taken place at the alleged spot comes under the scanner.

21. The most significant aspect of this case is the missing link in evidence. The Investigator instead of sending the entire bulk to the laboratory preferred to send the sample which was perfectly legal. However, it was incumbent upon the prosecution to establish that such sample reached the laboratory without any opportunity of being tampered with. To prove the link evidence the prosecution examined ASI Raghubir Singh as PW-7. The extract of the relevant portion of his statement reads as follows:

"... On 28-9-2006, I handed over the sample parcel, NCB form and sample of seal to HHC Surat Singh No. 432 vide RC No. 112/06 to deposit in CFSL, Chandigarh for chemical examination. The said HHC Surat Singh returned the above mentioned sample parcel, NCB form and sample of seal to me as the same

could not be deposited in CFSL, Chandigarh due to some objection raised thereto by CFSL, Chandigarh. On 4-10-2006, I again handed over the sample parcels, NCB form and sample of seal to Constable Khem Raj No. 193 vide RC No. 114/06 for depositing the same at CFSL, Chanigarh. The Constable named above returned the material given to him to be deposited in CFSL, Chandigarh as the same could not be deposited due to some objections raised by the CFSL, Chanigarh. On 12-10-2006 the above mentioned sample parcel, NCB form and sample of seal were again sent to CFSL, Chandigarh through HHC Surat Singh vide RC No. 119/06. The said material was again returned to me un-deposited due to some objections by HHC Surat Singh." ...

22. The perusal of the above statement explicitly reveals that HHC Surat Singh had carried the sample from ASI Raghubir Singh (PW-7) firstly on 28. 9.2006 and then again on 12.10.2006. Apart from him, it further reveals that on 4.10.2006 Const. Khem Raj had also taken possession of the sample from ASI Raghubir Singh (PW-7) for the purpose of carrying the same to CFSL, Chandigarh. Now the sample which tested positive for poppy straw remained with HHC Surat Singh on two occasions and Const. Khem Raj on one occasion. Primarily the burden is on the prosecution to prove that after the seizure till the testing by the Laboratory none tampered with the sample. Simply because the laboratory found seals to be intact is not sufficient because these are not seals as fine as Bar Code or QR. Even otherwise the sample was put in cloth parcel and not some tamper proof unopenable packet. Thus the prosecution has miserably failed to prove that the sample, which the laboratory tested remained untampered.

23. There is another aspect of the matter. HHC Surat Singh and Const. Khem Raj returned the sample to the Incharge Maalkhana (PW-7) on the explanation that the Laboratory had raised certain objections. On this aspect the learned defence counsel had cross examined ASI Raghubir Singh (PW-7). In response to the suggestion the explanation offered was that oral objections were raised by the concerned department. To the contrary ASI Joginder Singh (PW-6) explicitly stated that written instructions were made at CFSL Chandigarh. In view of the testimony of ASI Joginder Singh (PW-6) who stated that he had handed over the said written objections to Raghubir Singh, Incharge Maalkhana (PW-7) and thus it was obligatory on the prosecution to tender such objections in evidence, however, it simply ignored them and Raghubir Singh (PW-7) told lie by stating that the objections were oral and not written.

24. The result of the above analysis and discussion leads to an irrefutable conclusion that the prosecution has failed to prove the link evidence. Prosecution did not prove by examining HHC Surat Singh and Const. Khem Raj that during the time the sample remained in their possession, there was no opportunity for them or anyone else to tamper with the same. Prosecution sent the sample to the laboratory and it was the sample which was representing the bulk 2 kilograms of poppy husk. Once the sample is not proved to be untampered, the

contraband within the bulk leads to the same inference. Resultantly, the prosecution did not prove that what was initially seized from the accused, the laboratory tested the same contraband and in between there was no opportunity with anyone to tamper with the same. Consequently, the prosecution has failed to prove its case beyond reasonable doubts, and the benefit must go to the accused.

25. Hence, for all the reasons mentioned above, the appeal is allowed. The judgment of conviction and sentence, dated Aug 13, 2008, passed by Special Judge-II, Sirmaur District at Nahan, H.P., in Sessions Trial No. 38-N/7 of 2007, titled as State of Himachal Pradesh vs. Ashok Kumar, is set aside, and the accused is acquitted of the charged offence. The appellant is entitled to claim refund of the fine amount, if deposited. Bail bonds stand discharged.

The appeal stands disposed of, so also pending application(s), if any.