

(2015) 05 SHI CK 0040

In the High Court Of Himachal Pradesh

Case No : Criminal Appeal Nos. 392, 206, 211 and 393 of 2011

Deep Bahadur and Others

APPELLANT

Vs

State of Himachal Pradesh

RESPONDENT

Date of Decision : 04-05-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313

Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 20, 20(ii)(C)

Citation : (2015) 05 SHI CK 0040

Hon'ble Judges : Rajiv Sharma, J; Sureshwar Thakur, J

Bench : Division Bench

Advocate : Anup Chitkara, for the Appellant; M.A. Khan, Addl. AG, P.M. Negi, Dy. AG and Ramesh Thakur, Asstt. A.G., Advocates for the Respondent

Final Decision : Allowed

Judgement

Rajiv Sharma, J.

1. Since common questions of law and facts are involved in these appeals, all these appeals were taken up together for hearing, except Cr. Appeal No. 211 of 2011, titled as Deep Bhadur and anr. Vrs. State of H.P. It is made clear that accused Deep Bahadur has infact filed two Cr. Appeals bearing No. 392 of 2011 through Sh. Anoop Chitkara, Advocate and Cr. Appeal No. 211 of 2011 as Jail Appeal.

2. These appeals are directed against the common judgment dated 4/5.1.2011, rendered by the learned P.O. Fast Track Court, Mandi, H.P., in Sessions Trial No. 16 of 2009, whereby the appellants-accused (hereinafter referred to as the "accused"), who were charged with and tried for offence punishable under Section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the ND and PS Act) have been convicted and sentenced to undergo rigorous imprisonment for a period of 10 years each and to pay fine of Rs. 1,00,000/- each and in default of payment of fine, they were further ordered to undergo rigorous imprisonment for six months each under

Section 20(ii)(C) of the ND and PS Act.

3. The case of the prosecution, in a nut shell, is that on 2.9.2008, police party headed by Insp. Hemant Kumar Thakur, I.O. Police Station, SV and ACB, Mandi, H.P., set up a naka at Pansara bridge, a secluded place. At about 9:30 PM, the accused persons were seen coming from the area of Bhadoli-Kullu side. Accused Bal Bahadur was carrying a "Boru" on his shoulder. Accused Deep Bahadur and Asha Devi were carrying a "Pithu bag". Accused Deep Bahddur was holding that Pithu bag from one side while accused Asha Devi was holding that bag from the other side. The accused tried to turn back. The accused persons were nabbed. The Insp. Hemant Kumar Thakur, I.O. and other police officials gave their personal search to the accused vide memo Ext. PW-1/B. The accused persons were informed of their legal right to be searched by a Magistrate or a Gazetted Officer vide memo Ext. PW-1/A. The accused persons consented to be searched by the Police party. The boru carried by the accused Bal Bahadur was searched. It was found to be containing charas in the shape of chapattis, wrapped in polythene. The bag carried by accused Deep Bahadur and Asha Devi was found to be containing charas in the shape of sticks. The recovered stuff on smelling was found to be charas. The charas, so recovered from boru was weighed. It weighed 24 kgs whereas the charas, so recovered from Deep Bahadur and Asha Devi weighed 8 kgs. Out of the charas recovered from boru, two samples of 50 gms. each were drawn which were separately parceled and sealed with three seals of seal-S each. The bulk charas was put in that very boru which was parceled and sealed with six seals of seal-S. The sample parcels were marked as mark A-1 and mark A-II. The parcel containing balance charas was marked as mark P-1. Two samples of 50 gms. each were drawn from the charas recovered from the pithu bag carried by accused Deep Bahadur and Asha Devi. These were separately parceled and sealed with three seals of seal-S each. The bulk charas was put in that very pithu bag, which was parceled and sealed with six seals of seal-S. The sample parcels were marked as mark A-III and mark A-IV. The parcel containing balance bulk charas was marked as mark P-II. NCB form in triplicate was filled in on the spot. The recovered charas was taken into possession by the police vide memo Ext. PW-1/C. Rukka Ext. PW-3/A was scribed and sent to the Police Station through Const. Pankaj Kumar, on the basis of which FIR No. 9/2008 Ext. PW-4/A was registered at PS SV and ACB, Mandi, H.P. The case property was brought before the SI Om Verma for resealing, who resealed each parcel with three seals of "C" and prepared the reseal memo Ext. PW-4/E. Thereafter, he deposited the case property alongwith sample seals and other related documents with MHC. The sample parcels Mark A-I and A-III were sent for chemical analysis. The report of FSL is Ext. PW-4/D. During the pendency of the trial, the prosecution sent the parcels containing balance charas to the Laboratory for chemical examination and the report is Ext. PX. The investigation was completed and the challan was put up after completing all the codal formalities.

4. The prosecution, in order to prove its case, has examined as many as 14

witnesses. The accused were also examined under Section 313 Cr.P.C. They have denied the prosecution case. According to them, they were falsely implicated. The learned trial Court convicted and sentenced the accused persons, as noticed hereinabove. Hence, these appeals on behalf of the accused.

5. M/S. Anup Chitkara and M.L. Sharma, Advocates, appearing on behalf of the respective accused, have vehemently argued that the prosecution has failed to prove its case against the accused. On the other hand, Mr. M.A. Khan, Addl. AG, for the State has supported the judgment of the learned trial Court dated 4/5.1.2011.

6. We have heard learned counsel for both the sides and gone through the judgment and records of the case carefully.

7. PW-1 LC Chandra Thakur deposed that on 22.9.2008, she was associated by Insp. Hemant Kumar, in the raiding party. They all went in the official vehicle to Pansara bridge of Aut area of District Mandi. The police laid naka at Pansara bridge at 9:30 PM. In the meantime, two male persons and one lady came from Bhadyoli Kullu side. They were coming towards Pansara bridge. One male person was carrying jute bag on his left shoulder. The other male and lady were holding pithunuma bag of black and blue colour, in which the word "Alpine" was written. The lady was holding that bag from one side and the male was holding it from the other side. The accused disclosed their identity. The place where the accused were intercepted, was lonely place. The I.O. informed the accused persons of their legal right vide written option memo Ext. PW-1/A as to whether they intend to give personal search and of the articles in their possession, to a Gazetted Officer or to the police. The accused persons opted to give their personal search to the police. In this regard, memo Ext. PW-1/A was prepared. Hemant Kumar I.O. gave his personal search and that of the raiding party. Thereafter, Insp. Hemant got checked the jute bag (boru) after calling the accused Bal Bahadur to bring down the jute bag from his shoulder. The said bag was opened. It was found containing charas in the shape of chapatinuma and aitakar which was wrapped with polythene. It weighed 24 kgs. Thereafter, the bag which was carried by accused Deep Bahadur and Asha Devi was checked. It found containing charas. It weighed 8 kgs. The samples were drawn. The same were put in polythene bags. Thereafter, they were packed and sealed in separate cloth parcels. The charas was also put in the same jute bag i.e. 23.900 kgs and thereafter, it was packed and sealed in a cloth parcel. The sample parcels were marked as A-1 and A-2 and sealed with three seals of "S" on each parcel and the enclosure of the parcels were also signed by her, Rajender, Const. Lal Singh as well as by the accused. The parcel of Boru was marked as P-1 and six seal impressions were affixed on it on different places. Thereafter, the cloth parcels of sample were marked as A-3 and A-4 and sealed with the seal impression of "S" and three seals were affixed on the parcel and thereafter the parcel of Pithu bag was marked as P-2 and six seal impressions of seal "S" were affixed thereon. The I.O. has also taken the impression of seal on NCB form in triplicate. The sealed

articles were taken into possession vide recovery memo Ext. PW-1/D. In her cross-examination, she admitted that Pansara is a big village.

8. PW-2 Const. Rajinder Singh also deposed the manner in which the accused were apprehended, searched, recoveries were made and the codal formalities were completed on the spot. In his cross-examination, he admitted that it was the duty of the I.O. to associate some independent witnesses from Pansara and none of the member of the raiding party including the senior officer had tried to join any independent witness nor they reminded the I.O. to do so. The National Highway was just half a kilometer away from the Pansara bridge. On the National Highway, hundreds of vehicles, motor cycles, car and three wheelers used to ply day and night. No hukamnama was issued to any of the member of the raiding party to bring independent witnesses from the nearby locality. In his further cross-examination, he admitted that there were houses between NH 21 which leads to Kullu-Manali and the Pansara bridge.

9. PW-3 Const. Pankaj Kumar, also deposed the manner in which the accused were apprehended, searched, recoveries were made and the codal formalities were completed on the spot. In his cross-examination, he admitted that there were residential houses within a span of 300 meters of village Badyawali and 700 meter at village Dalashani, where people do reside. He also admitted that village Dalshani is a big Panchayat where Panchayat Pradhan and other members were available. He further admitted that village Pansara is also a big village on National Highway 21, where Panchayat Pradhan and other members of the Panchayat were available. He did not remember that any member of the raiding party was instructed by the I.O. to bring local respectable members from nearby vicinity of villages Dalshani, Badayawali and Pansara.

10. PW-4 Om Parkash, deposed that Const. Pankaj Kumar produced rukka at about 2:15 AM in the PS, ACB, Mandi, on the basis of which, FIR Ext. PW-4/A was registered and its endorsement bears his signature. On 23.9.2008, at about 7:15 AM, Insp. Hemant Thakur produced the contraband before him. The resealing process was completed. He also filled in column No. 11 of the NCB form vide Ext. PW-4/D. He also prepared the certificate of resealing vide Ext. PW-4/E.

11. PW-5 HC Kuldeep Singh deposed that SI Om Prakash has deposited the case property with him. He made the entries in the malkhana register vide Ext. PW-5/A. He sent Const. Rajinder Singh vide RC No. 24/08 to deposit the samples at FSL Junga for chemical analysis. The copy of RC is Ext. PW-5/B. On 17.11.2008, Const. Brijesh Kumar took the report the chemical analysis alongwith the sample A-1 and A-3 from FSL Junga which were sealed with seals of FSL and deposited with him. He kept the aforesaid case property in the malkhana intact. In his cross-examination, he admitted that the malkhana register Ext. PW-5/A does not find mention regarding deposit of NCB forms. He also admitted that the sample was sent to FSL Junga after a delay of 72 hours. He categorically admitted that all the police officials prepared the documents together by sitting in the Police Station. He also admitted that in the report of FSL, Junga, it does not find

mention of RC number through which samples were allegedly sent to the laboratory. Column No. 12 in the NCB-1 form was filled up by him. He admitted that the said column does not find mention of the name of the laboratory where the sample was allegedly sent by him. He also admitted that column No. 12 was not stamped by him.

12. PW-7 Const. Som Dev, also deposed the manner in which the accused were apprehended, searched, recoveries were made and the codal formalities were completed on the spot.

13. PW-9 HC Brajesh Kumar, deposed that on 16.6.2008, he was deputed to collect the report from FSL, Junga. He went to FSL Junga on 16.11.2008 and collected the report and handed over the same to the MHC.

14. PW-11 HC Vinod Kumar, MHC deposed that on 17.6.2010, he received order from the Court that two parcels of this case were allowed to be sent to the laboratory for chemical examination. On 19.6.2010, both the parcels of this case sealed with the court seal were sent to the laboratory through HC Yog Raj vide R/C No. 40/10. According to him, so long as the case property remained in his custody, he did not do any tampering nor did he allow anybody to tamper with it. The FSL report was received on 6.7.2010. When the parcels were sent to the laboratory an entry was made to this effect in the malkhana register at Sr. No. 45/19.

15. PW-12 HC Yog Raj, deposed that on 19.6.2010, MHC handed over to him two parcels of this case sealed with the court seal vide R/C No. 40/10 for being taken to FSL Junga. He deposited the same after obtaining the receipt and returned the R/C and receipt to the MHC on his return.

16. PW-13 Const. Som Dev, deposed that on 6.7.2010, he went to FSL Junga to collect the case property of this case. He brought two parcels of this case vide Ext. PW-10/A and PW-10/B alongwith the FSL report Ext. PX. He handed over the same to MHC PS SV and ACB Mandi on 6.7.2010.

17. PW-14 Insp. Hemant Kumar deposed the manner in which the accused were apprehended, searched, recoveries were made and the codal formalities were completed on the spot. He filled up the NCB form. He sent the rukka to the Police Station. In his cross-examination, he admitted that village Bashing was at a distance of 4 kms. from Kullu towards Manali. He did not send any police official to call any independent person. He could not assign any special reason for not sending any police official to call any independent person. He also admitted that Pansara is a big village but not thickly populated. He also admitted that he did not associate any independent witness in the raiding party. Voluntarily deposed that there were various reasons for it like witnesses turn hostile and witnesses do not come forward to join the raiding party. He also admitted that he did not make any efforts to associate any independent witnesses.

18. The case of the prosecution, precisely, is that the accused were nabbed on

22.9.2008 carrying charas in boru and pithu. The samples were drawn and these were sealed. The bulk was also sealed. NCB forms were filled up in triplicate. Rukka was sent to the Police Station, on the basis of which, FIR was registered.

19. According to PW-5 Kuldeep Singh, the samples were sent for analysis to FSL Junga through Constable Rajinder Singh to be deposited in the FSL vide RC No. 24/08. The copy of RC is Ext. PW-5/B. On 17.11.2008, Const. Brijesh Kumar took the report of the chemical analysis alongwith the sample A-1 and A-3 from FSL Junga which were sealed with seals of FSL and deposited with him. He kept the aforesaid case property in the malkhana intact. In his cross-examination, he has categorically admitted that all the police officials prepared the documents together by sitting in the Police Station, though the documents are required to be completed, including filling up of NCB forms, on the spot. Initially, two parcel samples Ext. A-1 and A-3 were sent for chemical analysis to FSL Junga. Thereafter, the Court sent the bulk charas for chemical analysis as per the trial Court order dated 16.6.2010. The samples were sent by PW-11 HC Vinod Kumar to laboratory through HC Yog Raj, PW-12 vide RC No. 40/10. The FSL report was received on 6.7.2010. When the parcels were sent to the laboratory, the entry to this effect was made in the malkhana register at Sr. No. 45/19. Parcels Ext. PW-10/A and PW-10/B were taken by HC PW-12 Yog Raj through RC No. 40/10 to FSL Junga. The samples were brought back with the report Ext. PX by Const. Som Dev (PW-13).

20. The case property was produced before the Court while recording the statement of PW-14 Insp. Hemant Kumar. He identified the case property. We have gone through Ext. PW-5/A malkhana register, carefully. The entry at Sr. No. 45/19 has been made to the effect that the case property was deposited by PW-4 Om Prakash on 23.9.2008. The samples A-1 and A-3 were sent for chemical analysis vide RC No. 24/08 through Const. Rajender Singh to Junga. These were received back through Brijesh Kumar on 17.11.2008 carrying seal of the FSL.

21. PW-11 MHC Vinod Kumar, as noticed by us hereinabove, stated that on 19.6.2010, both the parcels of this case sealed with the court seal were sent to the laboratory through HC Yog Raj vide R/C No. 40/10. Surprisingly, RC No. 40/10 has not been proved. According to him, when the parcels were sent to the laboratory an entry was made to this effect in the malkhana register at Sr. No. 45/19. There is no corresponding entry of the bulk charas being taken out from the malkhana on 19.6.2010. The malkhana register is not on the prescribed proforma and the case property when deposited, entry is required to be made and when the same is taken out corresponding entry is also required to be made. PW-12 HC Yog Raj, deposed that he was handed over two parcels of this case, PW-10/A and PW-10/B, sealed with the court seal vide R/C No. 40/10 for being taken to FSL Junga. He deposited the same after obtaining the receipt and returned the R/C and receipt to the MHC on his return. These samples were brought from FSL Junga by PW-13 Const. Som Dev alongwith the report of the FSL Ext. PX. He handed over the same to MHC PS SV and ACB Mandi on

6.7.2010. There is no corresponding entry of re-deposit of Ext. PW-10/A and PW-10/B in the malkhana register Ext. PW-5/A. Thus, there is no entry in the malkhana register when the bulk was taken out for analysis and when it was re-deposited by PW-13 Const. Som Dev. The case property was produced in the Court but there is no entry in the malkhana register when it was taken out. The necessary entry was to be made in the malkhana register when Ext. PW-10/A and PW-10/B were taken out from the malkhana to be produced in the Court alongwith the DDR report. Similarly, when the case property after its production in the Court was to be brought back in the malkhana, the entry was required to be made alongwith the DDR. The case property when taken out from the malkhana is entrusted to police official/officer, for its safe custody from malkhana to the Court and to be brought back. Since the case property, as per the procedure duly established, has neither been deposited nor taken out from the malkhana as per law, it casts serious doubt whether it was the same contraband/case property, which was seized from the accused and sent for chemical analysis at FSL, Junga. It has caused serious prejudice to the accused persons.

22. The accused were nabbed on 22.9.2008 at about 9:30 PM, when the police had laid down naka at Pansara bridge. PW-2 Rajinder Singh, in his cross-examination has admitted specifically that it was the duty of the I.O. to associate some independent witnesses from Pansara and none of the member of the raiding party including the senior officers have tried to join any independent witnesses nor they reminded the I.O. about the same. The National Highway was just half a kilometer away from the Pansara bridge. According to him, on the National Highway, hundreds of vehicles, motor cycles, car and three wheelers used to ply day and night. No hukamnama was issued to any of the member of the raiding party to bring independent witnesses from the nearby locality. In his further cross-examination, he admitted that there were houses between NH 21 which leads to Kullu-Manali and the Pansara bridge. PW-3 Const. Pankaj Kumar has admitted that there were residential houses within a span of 300 meters of village Badyawali and 700 meter at village Dalashani, where people do reside. He further admitted in his cross-examination that village Dalshani is a big Panchayat where Panchayat Pradhan and other members were available. He further admitted that village Pansara is also a big village on National Highway 21 where Panchayat Pradhan and other members of the Panchayat were available. He did not remember that any member of the raiding party was instructed by the I.O. to bring local respectable members from nearby vicinity of villages Dalshani, Badayawali and Pansara. PW-7 Const. Som Dev also admitted that Pansara is a big Panchayat having Panchayat Pradhan and its members. It is a thickly populated village.

23. PW-14 Insp. Hemant Kumar, in his cross-examination, has admitted that village Bashing was at a distance of 4 kms. from Kullu towards Manali. He did not send any police official to call any independent person. He could not assign any special reason for not sending any police official to call any independent person. He also admitted that Pansara is a big village but not thickly populated. He also

admitted that Pansara Panchayat was headed by Pradhan. He did not send any police official to associate any independent person. However, he stated that there were various reasons, when cross-examined by the learned Advocate appearing on behalf of accused Bal Bahadur and Deep Bahadur, that at times, witnesses turn hostile and witnesses do not come forward to join the raiding party. He further admitted that he did not make any efforts to associate any independent witnesses. It is proved on the basis of the statements, as discussed, hereinabove, that the independent witnesses, though available from villages Dalshani, Badayawali and Pansara, were not associated. PW-14 Insp. Hemant Kumar has not even made any efforts to associate independent witnesses. No hukamnama was issued to the police party to bring the independent witnesses.

24. The accused were nabbed at village Pansara at about 9:30 PM. The National Highway was nearby, where hundreds of vehicles ply day and night. Thus, it cannot be presumed that it was a secluded place, where independent witnesses were not available. The purpose of joining independent witnesses at the time of arrest, search and sealing process is to inspire confidence that all the codal formalities were completed on the spot at the time of arrest, search and sealing process.

25. Thus, the prosecution has failed to prove the case against the accused beyond reasonable doubt for the commission of offence under Section 20 of the N.D and P.S., Act, since the mandatory provisions have not been complied with and the manner in which the case property was taken out and re-deposited, coupled with the fact that no independent witnesses, though available were associated.

26. Accordingly, in view of the analysis and discussion made hereinabove, the appeals are allowed. Judgment of conviction and sentence dated 4/5.1.2011, rendered by the learned P.O. Fast Track Court, Mandi, H.P., in Sessions Trial No. 16 of 2009, is set aside. Accused are acquitted of the charges framed against them by giving them benefit of doubt. Fine amount, if any, already deposited by the accused is ordered to be refunded to them. Since the accused are in jail, they be released forthwith, if not required in any other case.

27. The Registry is directed to prepare the release warrants of the accused and send the same to the Superintendent of Jail concerned, in conformity with this judgment forthwith.

Cr. Appeal No. 211 of 2011.

28. In view of the judgment rendered in Cr. Appeal No. 392 of 2011, no orders are required to be passed in this appeal.