
(2013) 05 SHI CK 0030

In the High Court Of Himachal Pradesh

Case No : Criminal Appeal No. 146 of 2012

Edward Samuel Charlton Hayes

APPELLANT

Vs

State of Himachal Pradesh

RESPONDENT

Date of Decision : 08-05-2013

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313

Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 20, 50, 54

Citation : (2013) CriLJ 4706

Hon'ble Judges : Surinder Singh, J; Dharam Chand Chaudhary, J

Bench : Division Bench

Advocate : B.R. Sharma, for the Appellant; D.C. Pathik and Mr. M.A. Khan, Additional Advocates General with Mr. Pushpender Jaswal, Dy. Advocate General, for the Respondent

Final Decision : Dismissed

Judgement

Surinder Singh, J.—The appellant U.K. national was charge-sheeted, tried and convicted for the offence punishable u/s 20 of the Narcotic Drugs & Psychotropic Substances Act, 1985, in short "the Act", for keeping in his possession 4.500 kilo grams Charas and sentenced to undergo rigorous imprisonment for a period of ten years and to pay a fine of Rs. 1,00,000/-; in default of payment of fine to further undergo imprisonment further for one year. Filtering unnecessary details, the prosecution story as emerges from the evidence on record can be stated thus. On 11.3.2011, PW6 ASI Daya Ram of Police Station Manali was heading a police patrol party in Vashisht area of Manali. Their departure was recorded in the daily diary Ext. PW4/A maintained in the Police Station. At about 4 p.m., when they reached near Samahan road, which is abutting Vashisht Chowk, they noticed the accused wearing woolen Coat and cap coming from the opposite side. On seeing the police party, though he tried to escape, but he was nabbed by the police at a distance of about 20 meters. The spot was secluded and lonely, no independent witness was available. Police enquired about the articles kept in his bag, on which his face got blushed and could not give any satisfactory answer.

Thereafter lady constable Meena Kumari was sent to arrange independent witnesses from nearby, but she was unsuccessful and returned back after about 20 minutes. Thus, said LC Meena Kumari and ASI Ram Swaroop were included as witnesses. Pass-port and Visa of the accused were checked and found valid. Thereafter, the bag which was hung on the right shoulder of the accused was checked. It was found containing brown coloured substance in the shape of sticks and round shape like Chapattis, which on its weightment turned out to be 4.500 kilo grams.

(ii) The whole recovered stuff was put in the same bag and made into a cloth parcel Ext. P1, sealed with seal impression "H" at five places. Column Nos. 1 to 7 of NCB forms in triplicate were filled in by the said Police Officer on the spot, one of which is Ext. PW2/D. The sample of seal impression "H" was separately taken on a piece of cloth Ext. PW5/C.

(iii) The case property was taken into possession vide seizure memo Ext. PW5/A. Copy of the seizure memo was supplied to the accused free of costs.

(iv) A Ruqa Ext. PW2/A was prepared on the spot and sent for registration of the FIR through PW5 ASI Ram Swarup. Thereafter the site plan Ext. PW6/A of the place of alleged recovery was prepared. The accused was arrested and grounds of arrest were informed to him in writing Ext. PW5/E.

(v) Case property and accused were produced before PW2 SI/SHO Shiv Singh. The accused was put in judicial lock-up, whereas, the recovered sealed parcel was produced alongwith NCB forms in triplicate before the SHO aforesaid. The parcel was resealed by him with his own seal impression "A". Its sample was also taken on a piece of cloth Ext. PW2/C. He filled in necessary columns of the NCB form Ext. PW2/D. Thereafter he handed over the case property alongwith relevant documents at 10 a.m. to PW4 MHC Sher Singh for its safe custody. He made the entry in the relevant register, the extract whereof is Ext. PW4/C. Its Rapat was fed in the official computer, the printout whereof is Ext. PW4/A.

(vi) The report regarding search and seizure was sent within the statutory period to the officer superior.

(vii) On 13.3.2011, the sealed parcel of this case was handed over to PW3 HHC Chande Ram alongwith sample of seals, NCB forms and other documents alongwith police docket Ext. PW4/E vide Road Certificate Ext. PW4/F with the direction to take all these articles to FSL Junga for analysis of the alleged contraband. He deposited the same in the Laboratory on 14.3.2011 and obtained receipt on the Road Certificate and handed over on his return to MHC aforesaid. According to the witnesses handling the case property it was not tampered so long it remained in their respective custody. As per report Ext. PW2/E, the stuff examined contained 39.69% weight-in-weight resin of cannabis plant alongwith other properties mentioned therein and in the opinion of the Chemical Analyst, the exhibit was extracted from Cannabis and is sample of Charas.

2. After recording the statements of the witnesses and completing the challan, it was presented before the Court for the trial of the accused. He was accordingly charge-sheeted, to which he pleaded not guilty and claimed trial.

3. To prove its case, prosecution examined its witnesses. The accused was also examined u/s 313 of the Code of Criminal Procedure. His case was denial simplicitor. According to him, the police officials made false statements against him. He was called from "Yeti Guest House" where he was staying and planted the case. To substantiate his defence, he examined DW1 Hukam Chand, who claimed himself to be a Manager of the Yeti Guest House. He stated that police took away the accused around 2 p.m. on the aforesaid date from his Guest House and he did not notice anything in his possession at that time and further he was working in the kitchen and later he came to know that he was involved in a Charas case. He also stated that DW2 Ms. Kim Thelander a foreigner was also residing in "Kiran Cottage" near Yeti Guest House. She was taking lunch in his Restaurant. In cross-examination, he could not produce any document that he was working as Manager in the said Guest House. He denied that he was bribed by the accused to depose in his favour. The suggestion with respect to DW2 Ms. Kim Thelander that she was not taking lunch in his Restaurant was also denied by him.

4. DW2 Ms. Kim Thelander stated that on the date aforesaid, when Sunami had come in Japan, she was taking lunch in the Restaurant of "Yeti Guest House" around 2 p.m. From there, the police had taken one person alongwith a bag. She enquired from the Manager, but he did not know anything about it. In cross-examination, she could not produce any document which could prove that she was staying in Kiran Cottage. She was also not certain if any of the police officials who took the accused from the said Guest House could be recognized by her. She denied that she was friendly with the accused, therefore making a favourable statement to save him.

5. The learned trial Court disbelieved the defence taken by the accused, however while relying upon the evidence of the prosecution, convicted and sentenced the accused as aforesaid. Thus, feeling aggrieved by the impugned judgment and order of sentence, directed the present appeal.

6. Shri B.R. Sharma, learned counsel for the accused vehemently argued that the police failed to associate any independent witnesses at the time of alleged recovery and the statements of the official witnesses are replete with contradictions. Further it is argued that the defence version stands probablised which causes a dent in the prosecution case. It is also contended that there was discrepancy in weight to the extent of 28 grams in excess when received in the Laboratory, which raises a doubt qua its identity. Further that in the initial story of the prosecution there is no reference that the accused was having a bag in his possession, which makes the prosecution story a suspect.

7. On the other hand, Shri D.C. Pathik, learned Additional Advocate General to

controvert the aforesaid arguments vehemently argued that though it is not mandatory to include independent witnesses at the time of search from an open place from the accused, yet an earnest attempt was made to include the independent witnesses, but could not arrange. It is further argued that the statements of the official witnesses cannot be thrown out merely on the ground that they are police officials. They are also required to be given the same weightage as that of other witnesses, more particularly when no malice is imputed to them. He also made a reference to the relevant papers on record to show that the accused was carrying a blue coloured bag with him, which contained contraband. Further that discrepancy in the weight is not so much, which could create any doubt in the story of the prosecution, more specifically when the parcel is proved to have been received in the Laboratory in the same shape duly sealed at the place of recovery from the accused. Therefore, the impugned judgment does not require any interference.

8. We have given our thoughtful consideration to the rival contentions of the parties and have carefully and critically examined the evidence on record in the light of well established principles of law.

9. As a matter of fact, when the recovery of the contraband is from an open place from a person, there is no essential or legal requirement to include two independent witnesses to witness the search and particularly in the instant case, the Investigating Officer PW6 ASI Daya Ram has clearly stated that it was a lonely and secluded place and L.C. Meena Kumari was sent to arrange the independent witnesses, but she reported back that though she contacted 2-3 shopkeepers, but they refused to oblige. Now the question is whether the official witnesses examined in the Court are confidence inspiring. On scrutiny, we find that PW6 ASI Daya Ram has supported the prosecution case in verbatim. He stated that he had noticed a bag when accused turned back and tried to escape, which fact also clearly find mentioned in the seizure memo and Ruqa Ext. PW2/A sent for the registration of the case. In his cross-examination, the accused desperately tried to establish that the accused was not having a bag, for want of its disclosure in the opening lines of the Ruqa, but while going through the said document in its entirety it does show that the accused was having a bag Ext. P2, when he was apprehended, hung on his right shoulder. This fact is corroborated by PW5 ASI Ram Swarup. In Mark-D, in the middle of this document, there is also a reference with respect to the bag being carried by the accused. Both the above witnesses denied the case of the accused that he was nabbed from "Yeti Guest House" Vashisht, but there is no suggestion to any of the witnesses in the cross-examination, what was the malice which the police officials entertained against the accused to plant a false case against him that too of a huge recovery of 4.500 Kilograms of Charas. Even he failed to explain when there was direct dialogue with the Court while recording statement u/s 313 of the Code of Criminal Procedure, therefore, in our considered opinion, on the totality of evidence scrutinized by us we are constrained to hold that the learned trial Court was right in coming to the conclusion that the recovered stuff was in the blue

coloured bag Ext. P2, to which the accused was carrying on his right shoulder on the relevant date and time, to which they also identified during the trial in the Court.

10. Further, the resealing of the case property was done by PW2 SI/SHO Shiv Singh on the same day and the accused was also produced before him in the Police Station. He also did not make any complaint of false implication to him, even he did not raise his voice about his false implication, when he was produced within 24 hours before the Court by the police from "Yeti Guest House" as is being alleged during the trial of the case.

11. The link evidence in the instant case is complete also from the time of the recovery of the contraband till its deposit in the Malkhana alongwith sample of seals and NCB forms, which also contained the facsimile of the seal affixed on the recovered stuff, which was already put into the same bag and then made into a parcel, which was later taken by PW3 HHC Chande Ram vide Road Certificate Ext. PW4/F for analysis alongwith relevant papers and deposited in the Laboratory in the same condition. The description of the parcel and seals finds mentioned against column No. 7 of the report Ext. PW2/E. The parcel and seals were found intact and tallied with the specimen seals affixed. It is also certified that the parcel was kept in the safe custody of the Assistant Chemical Examiner till the report of the same was signed and dispatched. The total weight of the parcel as mentioned against Column No. 10 was found to be 4.946 Kgs, and the weight of the parcel cloth and cloth bag 0.474 Kg and thus, the net weight of the contraband was 4.472 Kg. i.e. in excess by 28 grams of the weight taken by the Police Inspector on the spot, which could only be by the reason that the seals used by the laboratory was more sensitive and sophisticated, than used on the spot, but however, the fact remained that the seals on the recovered parcel remained the same as it was sealed on the spot and resealed thereafter and received in the laboratory in the same condition and tested positive for Charas. Further, the stuff alongwith the bag and cloth parcel were returned with the seal of the Laboratory to the Police Station after its examination and during the trial, the witnesses aforesaid testified to be the same which was recovered from the possession of the accused and the learned trial Court also found the parcel Ext. P1 so produced in the Court was duly sealed. On opening it, the Charas Ext. P3 was in the shape of sticks and Chapattis as stated by PW5 ASI Ram Swarup, but to a Court question, the Charas contained in the blue coloured bag was in the shape of sticks and not in the round shape of flat Chapattis is not fatal because, the perception differs from person to person, as small size of round shape of broken pieces can be taken as round shape of Chapattis.

12. Since the recovery of the contraband as alleged stands proved from the accused in accordance with law, the presumption is required to be drawn from the possession of the illicit article u/s 54 of the Act, as he failed to account satisfactorily for it. The defence raised could not be probablised.

13. Faced with the above situation, the learned counsel for the accused further

ventilated that it was a case of personal search because at the first instance, the bag was not visible, therefore, the presumption is that it was attached to the body inside his wearing apparels, therefore, the trial is vitiated for non-compliance of mandatory provisions of Section 50 of the Act. This argument in our opinion has only been raised simply to reject it outright, because the trial of the accused is not based on the recovery of the contraband on a personal search as is revealed from the facts discussed above, which attract the provision of Section 50 of the Act. Therefore, the ratio of the judgments in Dilip and Another Vs. State of M.P., Centre for PIL and Another Vs. Union of India (UOI) and Another, , does not apply in this case.

14. On having considered thoroughly, points taken for the aforesaid reasons, we do not find any force in the appeal as it sans merit, accordingly dismissed. Send down the records.