
(2002) 08 SHI CK 0014
In the High Court Of Himachal Pradesh
Case No : Criminal Appeal No. 527 of 2001

Iacopo Lombardi

APPELLANT

Vs

State of Himachal Pradesh

RESPONDENT

Date of Decision : 08-08-2002

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 20, 42,
42(1), 42(2)

Citation : (2002) 2 ShimLC 431

Hon'ble Judges : R.L. Khurana, J;M.R. Verma, J

Bench : Division Bench

Advocate : I.S. Balhara and N.K. Thakur, for the Appellant; J.K. Verma,
Assistant A.G., for the Respondent

Final Decision : Allowed

Judgement

M.R. Verma, J.—This appeal is directed against the judgment dated 3.9.2001 passed by the learned Sessions Judge, Kullu, whereby the accused-Appellant (hereafter referred to as "the accused") had been convicted u/s 20 of the Narcotic Drugs and Psychotropic Substances Act (hereafter referred to as "the Act") and has been sentenced to undergo rigorous imprisonment for 10 years and to pay a fine of Rs. 1,00,000/- and in default of payment of fine, to suffer further imprisonment for six months.

2. Briefly stated, case of the prosecution is that HC Ramesh Lal (PW-10) along with HC Amar Chand, Constable Sanjay Kumar (PW-9), Ajay Kumar (PW-2) and Constable Mohar Dass (PW-5) was on patrol duty at MPCL Gate, Dhonkra on 17.2.2001. At about 6 p.m., he received a secret information that a person who had kept charas concealed in CD system, was coming from Manikaran in Taxi, bearing No. HPY-303. PW-10 recorded the information u/s 42 of the Act vide Ex.PW-1/A and sent the same to Deputy Superintendent of Police, Headquarters, Kullu, through PW-5. Thereafter, Ramesh Lal associated independent witnesses,

namely, Amin Chand (PW-7) and Brahma Nand (PW-8) with the police party and came to the chowk. Around 6.30 p.m., the said taxi was seen coming from Manikaran side. It was stopped. The accused was sitting on the back seat of the taxi and was having a bag. The taxi was then taken to the compound of the police post. After inquiries about the particulars of the accused and verifying such particulars as disclosed by the accused from his passport, he was apprised that he was suspected of being in possession of charas and was given option whether he wanted to be searched before a Gazetted Officer or a Magistrate. The accused consented to be searched by the police present on the spot vide memo Ex.PW-7/A. PW-10 gave his own search vide memo Ex.PW-7/B. Thereafter, the bag found in possession of the accused was checked. The bag contained CD system was taken to the verandah of the police post and was opened with the help of a screw driver. On opening of the CD system, charas wrapped in polythene paper concealed under a piece of woolen cloth was recovered. The charas so recovered was weighed and was found 1.200 kgs. Three samples of 25 grams each were separated from recovered charas and were made into separate parcels and were sealed with seal "T". The remaining charas was repacked in CD system in the same manner as it was earlier packed therein. The CD system was then made into a parcel and was sealed with seal "T. The seal impression was separately taken, NCB forms in triplicate were filled in and after use, the seal was entrusted to PW-8. Recovery memo Ex.PW-7/C was prepared and was attested by the witnesses. The accused was then apprised of the offence committed by him and the punishment provided there for vide memo Ex.PW-7/D. PW-10 drew up ruqua Ex.PW-10/A and sent the same to Police Station, Kullu, through PW-9 for registration of a case and as a consequence, FIR Ex.PW-4/A came into being at Police Station, Kullu. On 18.2.2001, the case property was produced by PW-10 before SHO Kanwar Singh (PW-4), who resealed the same with seal "H" impression whereof is Ex.PW-4/C. The case property was then deposited with MHC Bhagat Ram (PW-11) who entered the same in the Malkhana Register vide entry Ex.PW-11/A. On 20.2.2001, a sample of the case property was sent to C.T.L., Kandaghat vide RC Ex. PW-11/ B through constable Ramesh Kumar (PW-3). The report regarding chemical analysis of the sample is Ex.PW-6/A vide which the sample was found to be that of charas. On being satisfied of the commission of the offence by the accused, a charge sheet was submitted against him by the Officer In charge, Police Station, Kullu and the accused came to be tried on a charge u/s 20 of the Act by the learned Sessions Judge, Kullu.

3. To prove the charge against the accused, prosecution examined as many as 11 witnesses. The accused was examined u/s 313 Code of Criminal Procedure wherein he denied the case of the prosecution as a whole and claimed that he is innocent and had been falsely implicated in the case. However, the accused did not lead any defence evidence.

4. On the basis of the material on record, the learned Sessions Judge held the accused guilty and convicted and sentenced him as aforesaid. Hence this appeal.

5. We have heard the learned Counsel for the accused and the learned Assistant Advocate General for the Respondent-State and have also gone x through the records.

6. The learned Counsel for the accused assailed the impugned conviction and sentence on the following grounds:

(i) that there is no cogent and reliable evidence to prove that the accused was found in conscious possession of the charas;

(ii) that there had been no compliance of the provisions of Section 42 of the Act, which is fatal to the case of the prosecution; and

(iii) that there being no link evidence, the prosecution has failed to prove that the sample analysed by the Chemical Examiner was of the charas allegedly recovered from the accused.

7. On the other hand, the learned Assistant Advocate General, while supporting the impugned judgment, has urged that the accused has been rightly convicted and sentenced.

8. Ground No. (i)

According to the prosecution, the Investigating Officer (PW-10) joined PW-7 and PW-8 as independent witnesses to witness the search. PW-8 has denied his presence on the spot where the vehicle in question was stopped by the police and has denied the taking of the accused to the Police Post in his presence. It is, however, stated by him that on 17-2-2001 he was called to the Police Post and was informed that Charas had been recovered. He further admits that the Charas was weighed in his presence; samples were separated, packed and sealed. The witness was declared hostile and the. Aforesaid admissions were made by him in his cross-examination. Thus, despite being hostile, he has supported the prosecution version about the weighing of the Charas, separating of samples and sealing of the case property in his presence. Even PW-7 has denied presence of PW-8 on the spot at the time when the vehicle was stopped and taken to the Police Post. In these circumstances, statement of PW-8 that at the time of stopping of the vehicle and conducting of search he was not present, seems to be correct.

9. PW-7 has supported the prosecution version partially to the extent that the vehicle was stopped by the police near his shop at Dunkhra and option was given to the accused for being searched either before a Mag iterate or a Gazetted Officer and the accused opted to be searched by the police. He has denied that the Investigating Officer gave his search to the accused vide memo. Ext. PW-7/B. He has further denied that CD was checked in his presence. However, he has stated that Charas and CD were seen by him at the Police Post where the Charas was taken out of the CD and was weighed. He has further admitted separating of the samples and taking the case property in possession by PW-10. However, according to him, the accused was not apprised of the grounds of his arrest etc.

At a later stage, he denied stopping of the vehicle by the Police but claimed that he saw it outside the Police Post. He has further stated that the contents of the documents prepared by the Police were not explained to him and he himself is an illiterate person. Thus, a perusal of the statement of this witness reveals that he has made a self-destroying statement admitting one fact at one stage and denying the same at the other. He seems to be a stock witness of the Police. He is admittedly a police witness in cases State v. Taka and State v. Daulat Ram. Thus, the statement of this witness is not confidence inspiring and reliable.

10. Against the aforesaid background, the statements of the Police officials, namely, constable Sanjay Kumar (PW-9) and Investigating Officer Ramesh Lal (PW-10) have to be read with great caution. A perusal of their statements reveals that there are material contradictions in their statements. It is not in the statement of PW-9 Sanjay Kumar that independent witnesses were joined in the police party before it proceeded to the Chowk, whereas it is so stated by PW-10. According to PW-9, the enquiries about the name and address of the accused and checking of his Pass Port were conducted and the accused was informed of the suspicion of his being in possession of Charas and option regarding search was given at the place where the vehicle was stopped and the bag containing the CD kept in the vehicle was also found there. It was thereafter that it started raining and the accused along with the bag was taken to the Police Post and the CD kept in the bag was taken out and after removal of the nuts, Charas wrapped in polythene packet was recovered from within the CD. However, contrary to it, according to PW-10, the taxi was stopped and taken to the compound of the Police Post and it was thereafter that the Pass Port of the accused was checked, the CD kept in the bag was found, the accused was given the option and consent memo was prepared. Thus, according to PW-9, major part of the investigation was carried out at the place where the vehicle was stopped and thereafter the accused and the bag were taken to the Police Post, whereas according to PW-10, the process of enquiries from the accused find the process of conducting his search started after the accused had been taken to the Police Post.

11. It may be pointed out here that as per the contents of Ext. PW- 10/E, on the basis of which FIR Ext. PW-4/A was recorded, Ajay Kumar (PW-2) was also present with the police patrolling party. PW-2 himself admits so. However, he has not been examined regarding the search and seizure in question despite the fact that he was produced as a witness by the prosecution.

12. It may also be pointed out that the taxi driver, who was driving the taxi in which the accused was traveling, was the best person to depose as to whether the bag in which the CD was kept belonged to the accused. However, the driver has not been examined by the prosecution. Therefore, an inference adverse to the prosecution has to be drawn for his non-production,

13. In view of the above discussion, the contradictory versions of PW-9 and PW-10 which are not supported by the independent witnesses, cannot be said to be reliable and trustworthy to hold that the Charas was recovered from the

conscious possession of the accused.

Ground No. (ii)

Section 42 of the Act reads as under:

42. Power of entry, search, seizure and arrest without warrant or authorisation.-

(1) Any such officer (being an officer superior in rank to a peon, sappy or constable) of the departments of central excise, narcotics, customs, revenue intelligence or any other department of the Central Government including paramilitary forces or armed forces as is empowered in this behalf by general or special order \\ by the Central Government, or any such officer (being an officer superior in rank to a peon, sappy or constable) of the revenue, drugs control, excise, police or any other department of a State Government as is empowered in this behalf by general or special order of the State Government, if he has reason to believe from personal knowledge or information given by any person and taken down in writing that any narcotic drug, or psychotropic substance, or controlled substance in respect of which an offence punishable under this Act has been committed or any document or other article which may furnish evidence of the commission of such offence or any illegally acquired property or any document or other article which may-furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act is kept or concealed in any building, conveyance or enclosed place, may between sunrise and sunset, enter into and search any such building, conveyance or place;

in case of resistance, break open any door and remove any obstacle to such entry;

seize such drug or substance and all materials used in the manufacture thereof and any other article and any animal or conveyance which he has reason to believe to be liable to confiscation under this Act and any document or other article which he has reason to believe may furnish evidence of the commission of any offence}*"" punishable under this Act or furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act; and detain and search, and, if he thinks proper, arrest any person whom he has reason to believe to have committed any offence punishable under this Act:

Provided that if such officer has reason to believe that a search warrant or authorisation cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place at any time between sunset and sunrise after recording the grounds of his belief.

(2) Where an officer takes down any information in writing under Sub-section (1) or records grounds for his belief under the proviso thereto, he shall within seventy-two hours send a copy thereof to his immediate official superior.

15. It is evident from a bare reading of the aforesaid provisions that in case an authorised officer on the basis of his personal knowledge or on information given by any person, has reason to believe that any narcotic drug, or psychotropic substance, or controlled substance in respect of which an offence punishable under the Act has been committed or any document or other article which may furnish evidence of the commission of such offence or any illegally acquired property or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under the Act is kept concealed in any building, conveyance or enclosed place and intends to carry out search between sunrise and sunset, he is required to record the reasons of his belief. However, if the search is to be conducted after sunset and before sunrise, proviso to Sub-section (1) of Section 42 supra further requires that if such officer has reason to believe that a search warrant or authorisation cannot be obtained without affording opportunity for the concealment of the evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place and carry out the search at any time between sunset and sunrise after recording the grounds of his belief and shall within 72 hours send a copy of so recorded grounds of his belief to his immediate official superior.

16. In the case in hand, the Investigating Officer though recorded the secret information as received by him vide Ext. PW-1/A, however, the search of the vehicle in which the accused was allegedly traveling was admittedly carried out after sunset and before sunrise, therefore, compliance of proviso to Sub-section (1) of Section 42 was required to be made but the Investigating Officer has not complied with the requirement of the proviso to Sub-section (1) and Sub-section (2) of Section 42 supra.

17. In case *State of Punjab v. Balbir Singh* 1994 (1) Crimes 753, the Hon'ble Supreme Court while dealing with the scope of the above Section, Id as under:

under Section 42(1) the empowered officer if has a prior information given by any person, that should necessarily be taken down in writing. But if he has reason to believe from personal knowledge that offences under Chapter IV have been committed or materials which may furnish evidence of commission of such offences are concealed in any building etc., he may carry out the arrest or search without a warrant between sunrise and sunset and this provision does not mandate that he should record his reasons of belief. But under the proviso to Section 42(1) if such officer has to carry out such search between sunset and sunrise, he must record the grounds of his belief.

To this extent these provisions are mandatory and contravention of 1 the same would affect the prosecution case and vitiate the trial u/s 42(2) such empowered officer who takes down any information in writing or records the grounds under proviso to Section 42(1) should forthwith send a copy thereof to his immediate official superior. If there is total non-compliance of this provision the same affects the prosecution case. To that extent it is mandatory. But if there is delay

whether it was undue or whether the same has been explained or not, will be a question of fact in each case.

18. A Division Bench of this Court in *Ms. Shriki Ravit v. State of H.P.*, Criminal Appeal No. 41 of 2002, decided on May 9, 2002, held as under:

In the present case, the search of the vehicle and luggage was carried out by PW 13 Sub Inspector Chuni Lal at about 4.30 a.m., that is, before the sun-rise. He has stated that he became suspicious on the two accused persons becoming perplexed, that they may be possessing some contraband. The moment PW 13 became suspicious and had reasons to believe that the two accused might be in possession of some contraband, it was obligatory for him to have recorded the reasons for his belief before carrying out the search, which was carried out after Sun-set and before the Sunrise. It was further obligatory for PW 1 to send a copy of the grounds of his belief to his immediate Superior Officer.

Since the mandatory requirement u/s 42 N.D.P.S. Act has not been complied with in the present case, the trial stands vitiated and the two accused cannot be convicted and sentenced for the offence u/s 20, N.D.P.S. Act.

19. In view of the above legal and factual position, the Investigating Officer having failed to comply with the mandatory requirements u/s 42 of the Act, the impugned conviction and sentence cannot be sustained.

20. Ground No. (iii)

The link evidence with reference to any psychotropic and narcotic substance seized when found in unlawful possession, is the evidence which provides link in the evidence from the stage of taking the sample till its examination by the Chemical Examiner. This evidence is material to connect the sample with the bulk case property and the prosecution is duty bound to lead this evidence to prove that the sample sent to the Chemical Examiner was the same which was drawn from the recovered contraband. In the absence of such evidence, a person cannot be convicted for possession of the recovered contraband. [See *Roop Ram v. State of H.P.*, Criminal Appeal No, 674 of 2000 and *Lalu Ram v. State of H.P.*, Criminal Appeal No. 569 of 2000, decided by a Division Bench of this Court respectively on 18-7-2002 and 19-7-2002].

21. In view of the above position in law, it requires examination and consideration whether the prosecution has by leading cogent and reliable link evidence established that the sample sent to the Chemical Examiner in this case is proved to be the sample of the recovered case property.

22. According to PW-10 the Investigating Officer, he prepared the NCB forms on the spot and thereafter handed over the case property along with such forms to PW-4 who re-sealed it and deposited in the Malkhana. PW-4 has stated that the case property was produced before him which he sealed with seal impression "H" and handed over the same to MHC (PW-11) for being kept in the Malkhana. HC Bhagat Ram (PW-11) has also stated that the case property was handed over to

him by PW-4 along with NCB form which he entered in the Register and on 20-2-2001 sent one sample through constable Ramesh Kumar (PW-3) along with sample seal and NCB form"" to CTL Kandaghat. PW-3 has stated that the sample along with NCB form, sample seal and other documents were handed over to him by MHC on 20-2-2001 for being deposited in the C.T.L. and he took the sample to CTL Kandaghat. Thus, on the face of it, the prosecution has led the link evidence.

However, there are inherent discrepancies in the evidence so led which renders it highly unreliable and untrustworthy.

23. The NCB form consisting of Sections I and II Ext. PW-6/A is placed on the record. A perusal of this form reveals that in Section I against serial No. 1 it bears the FIR number and particulars thereof. It is admitted case of PW-10 that Section 1 of the NCB form Ext. PW-6/A was filled in on the spot and he did not make any alterations/omissions therein at Kullu. It is also not in dispute that copy of the FIR was not received by him on the spot. If so, there is no explanation as to how the FIR number and its full particulars came to be given against serial No. 1 in Section I of Ext. PW-6/A at the spot. Against serial No. 5 of Section 1 of Ext. PW-6/A, the date of drawl/despatch of the sample has been mentioned as 19-2-2001. It is case of the prosecution itself and it has led consistent evidence to prove that the sample was sent to the Laboratory on 20-2-2001. Therefore, the date mentioned against serial No. 5 aforesaid cannot be the date of despatch of the sample to the CTL but can be the date of drawal. However, according to the prosecution, the samples had already been drawn and been sealed in three separate packets on the spot on 17-2-2001. There is no explanation as to how, why and under what circumstances the sample sent to C.T.L. had to be drawn on 19-2-2001. Therefore, the only inference which can be drawn is that the case property was tampered with on 19-2-2001 for drawal of sample but not in the presence of any witness.

24. It may also be noticed here that the samples which were initially drawn as per the prosecution version weighed 25 gms. each. However, the sample which was delivered in the Laboratory and was analysed, weighed only 17.892 gms. Had the investigating agency sent to the Laboratory the sample of 25 gms., allegedly separated and sealed on the spot, the weight of such sample could not be reduced to 17 and odd grams. This reduction of about 7 grams in the weight of the sample is also indicative of the fact that the sample had been tampered with.

25. PW-4 has not stated as to what seal impression the case property and the samples were bearing when these were produced before him for re-sealing. Similarly, PW-11 has not stated as to what was the seal impression on the packets of the samples and the bulk case property when deposited with him and what was the seal impression on the sample packet he handed over to PW-3 for being delivered in C.T.L. Similarly, PW-3 has not stated as to what seal impression the sample, which was handed over to him for being delivered at the C.T.L., was bearing. In these circumstances, non-production of the seals used for

sealing the samples and the bulk case property also assumes importance and is a factor which goes against the credibility of the prosecution version.

26. The above discussion leads us to the conclusion that there is no cogent and reliable link evidence to connect the bulk case property with the sample analysed by the Assistant Chemical Examiner. Therefore in view of the legal position as already set out hereinabove, the conviction and sentence of the accused cannot be sustained even on this ground.

27. As a result this appeal is allowed and the impugned conviction and sentence are set aside and the accused is acquitted of the charge against him.

28. The accused is presently in custody undergoing the terms of imprisonment awarded to him. He be set at liberty forthwith if not required to be detained in custody under any other process of law and the fine, if recovered, be refunded to him.