
(2014) 09 SHI CK 0166
In the High Court Of Himachal Pradesh
Case No : Criminal Appeal No. 236 of 2011

Khem Chand

APPELLANT

Vs

State of Himachal Pradesh

RESPONDENT

Date of Decision : 12-09-2014

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 20, 20(C),
35, 54

Citation : (2015) 1 ShimLC 302

Hon'ble Judges : Sanjay Karol, J;Piar Singh Rana, J

Bench : Division Bench

Advocate : Anoop Chitkara and O.C. Sharma, Advocate for the Appellant; B.S. Parmar, Ashok Chaudhary, Additional Advocates General, Vikram Thakur, Deputy Advocate General and J.S. Guleria, Assistant Advocate General, Advocate for the Respondent

Final Decision : Allowed

Judgement

Sanjay Karol, J.—Appellants-convicts Khem Chand, Guddu Ram and Kuldeep Singh, hereinafter referred to as the accused, have assailed the judgment dated 6.7.2011, passed by Special Judge, Solan, Himachal Pradesh, in Sessions Case No. 1-S/7 of 2010, titled as State of Himachal Pradesh v. Khem Chand & others, whereby they stand convicted of an offence punishable under the provisions of Section 20(C) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the NDPS Act) and sentenced to undergo rigorous imprisonment for ten years and pay fine of Rs. 1,00,000/- each, and in default thereof to further undergo rigorous imprisonment for a period of two years.

2. It is the case of prosecution that in the night intervening 30.12.2009 and 31.12.2009, ASI Hoshiar Singh (PW-12) alongwith police officials Anil Kumar (PW-1), Vikesh Kumar (PW-2), Raj Pal (not examined) and Home Guards Raju Singh & Prakash Chand was on a patrol duty. He has set up a Naka at Kasauli Chowk, Parwanoo (H.P.). At about 4.30 a.m., one Car bearing No. HP-35B-0300,

driven by accused Kuldeep Singh, came from Kasauli side. In the car, accused Khem Singh and Guddu Ram were also sitting. The vehicle was stopped for checking. Police party noticed accused Khem Singh sitting on the rear seat trying to drag the bag (Ex. P-3) kept on his lap. Suspecting that there may be a contraband substance in the vehicle, ASI Hoshiar Singh sent written intimation (Ex. PW-1/A & 1/B) to the SDPO Parwanoo through Constable Anil Kumar (PW-1). Accused, who were informed of their statutory rights of being searched, vide memo (Ex. PW-2/A) offered to be searched by the police party present on the spot. Investigating Officer first gave his search and thereafter searched the vehicle. From the bag (Ex. P-3), two packets containing Charas, weighing 1.5 kgs and 500 grams each, were recovered. They were weighed with the help of weighing scales kept in the IO Kit and sealed with seal impression "H" and seized vide Memo (Ex. PW-2/B). Specimen impression of seal "H" was drawn on Memo (Ex. PW-2/F). Necessary formalities of filling up of NCB form, in triplicate, were completed on the spot. Ruka (Ex. PW-5/A) was sent through Constable Raj Pal (not examined), on the basis of which FIR No. 111, dated 31.12.2009 (Ex. PW-5/B), under the provisions of Section 20 of the NDPS Act, was registered at Police Station Parwanoo by SHO Gobind Ram (PW-5). Accused were arrested vide Memos (Ex. PW-12/E, 12/F & 12/G). Hoshiar Singh handed over the case property to Gobind Ram, who resealed the same with his seal impression "S" and after filling up the remaining portion of the NCB forms, deposited the same with MHC Bhagirath (PW-10) to be kept in the Malkhana. For obtaining report of the Chemical Analyst, sealed parcel was handed over by Bhagirath to Constable Ram Swaroop (PW-11), who deposited the same at the Forensic Science Laboratory (FSL), Junga, vide Road Certificate (Ex. PW-10/C). Report (Ex. PW-5/H) from the Laboratory was taken on record. Investigation revealed the accused to have spent the night at Gagan Hotel, Parwanoo, as such, extract of the register of entry (Ex. PW-3/A) was taken by the police on record. Police party also clicked photographs of the accused, evidence pertaining to which was also taken on record. As such, with the completion of investigation, which prima facie revealed complicity of the accused in the alleged crime, challan was presented in the Court for trial.

3. Accused were charged for having committed an offence punishable under the provisions of Section 20 of the NDPS Act, to which they did not plead guilty and claimed trial.

4. In order to establish its case, prosecution examined as many as 12 witnesses and statements of the accused under the provisions of Section 313 of the Code of Criminal Procedure were also recorded, in which they took up the following common plea:

"I am innocent and I have been falsely implicated on the intervening night of 30/31.12.2009 were staying in the hotel Palace Parwanoo and at about 3.45 AM raid was conducted of our room as well as our car but nothing was recovered and thereafter our car was taken to police station by C. Raj Pal and all of us were

taken to the police station."

Accused also examined one witness in defence.

5. Believing the prosecution witnesses to be trustworthy and relying upon their testimonies, which proved the prosecution case, beyond reasonable doubt, trial Court convicted the accused of an offence punishable under the provisions of Section 20(C) of the NDPS Act and sentenced each of them as aforesaid. Hence, the present appeal by the accused.

6. The apex Court in *Lal Mandi Vs. State of West Bengal*, has held that in an appeal against conviction, the appellate Court is duty bound to appreciate the evidence on record and if two views, on appraisal of evidence are possible, benefit of reasonable doubt has to be given to an accused.

7. In the instant case, we find defence so taken by the accused to have been probablized by the prosecution witness, namely Roshan Lal (PW-3), Manager of the hotel, whose testimony we reproduce as under:

"I have been working as Manager in Gagan Hotel Parwanoo for the last six years. The entries to the guests in the hotel is incorporated in the register maintained in the hotel. That register is maintained by me. On dated 30-12-2009 as per entry in the register maintained by the hotel at serial No. 1098 on Guddu Ram son of Surti Ram village and Post Office Anni, District Kullu H.P. has been shown to have stayed in room No. 101 as he came on 10-12-09 at 4 A.M. The number of persons shown to have been stayed as three. The signatures of the person were obtained over the register against entry No. 1098. These persons have been shown to come over from Anni and thereafter returned and the purpose has been mentioned as purchase. This entry is in my hands, the photo copy of which is Ext. PW-3/A which is true and correct to the original

XXXXXX By Shri O.C. Sharma, Advocate counsel for accused.

The police from police Station Parwanoo had visited my hotel on 31-12-2009 at about 3-30/4 A.M. The police made a search in room No. 101 of the hotel. It is correct that accused Khem Chand, Kuldeep and Guddu were staying in the hotel in room No. 101 and the police made search to their belongings as well. It is correct that in my presence no contraband was recovered from the belongings of the accused. It is correct that the vehicle of the accused which was parked in the parking of the hotel was also searched in my presence by the police and no contraband was recovered. The accused were taken by the police in their vehicle and the vehicle of the accused was also taken by the police.

(At this stage the P.P. has sought the permission to re examine the witness so as to seek cross-examination of the witness as the witness has stated the facts for which he is not a witness. The prayer is considered and disallowed as there is no ambiguity in the statement of this witness)."

(Emphasis supplied)

8. Testimonies of police officials, who are in categorical and complete denial of the defence so taken by the accused, has to be examined in view of unambiguously clear, unrebutted and uncontroverted testimony of Roshan Lal to the effect that police party had actually searched the hotel, where the accused were staying and taken them to the police station in a police vehicle. To us genesis of the prosecution story having set up a Naka at Kasauli Chowk, Parwanoo; recovered the contraband substance and arrested the accused on the spot, in our considered view, is rendered to be extremely doubtful. It totally shatters the foundation of the prosecution story.

9. Undisputedly, police party did not associate any independent person while carrying out the search and seizure operations, which fact is evident from the admission made by ASI Hoshiar Singh. This was despite the fact that just at a distance of 15 metres from the place where Naka had been set up, Chowkidar posted in a bank was available. In the absence of any plausible explanation forthcoming on the part of the police party for non-association of independent witnesses, prosecution case is further rendered doubtful. Though we may clarify that this fact alone has not weighed with us, while arriving at our conclusions on the merits of the prosecution case, for we find testimonies of the police officials not to be inspiring in confidence or cogent and the witness to be reliable or trustworthy. Before we deal with the same, we would discuss the position of law as enunciated by Hon"ble the Supreme Court of India, in dealing with the testimonies of police officials.

10. It is a settled proposition of law that sole testimony of police official, which if otherwise is reliable, trustworthy, cogent and duly corroborated by other witnesses or admissible evidence, cannot be discarded only on the ground that he is a police official and may be interested in the success of the case. It cannot be stated as a rule that a police officer can or cannot be a sole eyewitness in a criminal case. It will always depend upon the facts of a given case. If the testimony of such a witness is reliable, trustworthy, cogent and if required duly corroborated by other witnesses or admissible evidences, then the statement of such witness cannot be discarded only on the ground that he is a police officer and may have some interest in success of the case. It is only when his interest in the success of the case is motivated by overzealousness to an extent of his involving innocent people; in that event, no credibility can be attached to the statement of such witness.

11. It is not the law that Police witnesses should not be relied upon and their evidence cannot be accepted unless it is corroborated in material particulars by other independent evidence. The presumption applies as much in favour of a police officer as any other person. There is also no rule of law which lays down that no conviction can be recorded on the testimony of a police officer even if such evidence is otherwise reliable and trustworthy. Rule of prudence may require more careful scrutiny of their evidence. If such a presumption is raised against the police officers without exception, it will be an attitude which could

neither do credit to the magistracy nor good to the public, it can only bring down the prestige of police administration.

12. Wherever, evidence of a police officer, after careful scrutiny, inspires confidence and is found to be trustworthy and reliable, it can form basis of conviction and absence of some independent witness of the locality does not in any way affect the creditworthiness of the prosecution case. No infirmity attaches to the testimony of the police officers merely because they belong to the police force and there is no rule of law or evidence which lays down that conviction cannot be recorded on the evidence of the police officials, if found reliable, unless corroborated by some independent evidence. Such reliable and trustworthy statement can form the basis of conviction.

[See: Govindaraju @ Govinda Vs. State by Srirampuram P.S. and Another, ; Tika Ram v. State of Madhya Pradesh, (2007) 15 SCC 760; Girja Prasad (Dead) by LRs. Vs. State of Madhya Pradesh, ; and Aher Raja Khima Vs. The State of Saurashtra,].

13. Apex Court in Tahir Vs. State (Delhi), , dealing with a similar question, held as under:-

"6..... In our opinion no infirmity attaches to the testimony of the police officials, merely because they belong to the police force and there is no rule of law or evidence which lays down that conviction cannot be recorded on the evidence of the police officials, if found reliable, unless corroborated by some independent evidence. The Rule of Prudence, however, only requires a more careful scrutiny of their evidence, since they can be said to be interested in the result of the case projected by them. Where the evidence of the police officials, after careful scrutiny, inspires confidence and is found to be trustworthy and reliable, it can form basis of conviction and the absence of some independent witness of the locality to lend corroboration to their evidence, does not in any way affect the creditworthiness of the prosecution case."

14. In view of the aforesaid statement of law, we now proceed to examine the testimonies of police officials.

15. Prosecution case primarily rests upon the testimonies of three police officials, namely Anil Kumar (PW-1), Vikesh Kumar (PW-2) and Hoshiar Singh (PW-12), who conducted the search and seizure operations.

16. ASI Hoshiar Singh states that on 31.12.2009 he alongwith police officials had set up a Naka at Kasauli Chowk, Parwanoo. At about 4.30 a.m., a Car bearing No. HP-35B-0300, driven by accused Kuldeep Singh, came from Kasauli side, in which accused Khem Singh and Guddu Ram were also sitting. When the vehicle was stopped for checking, they saw accused Khem Singh, sitting on the rear seat, trying to push a bag kept on his lap. Suspecting that there may be contraband substance in the vehicle, he sent written intimation (Ex. PW-1/A & 1/B) to the SDPO Parwanoo through Constable Anil Kumar (PW-1). Accused who

were informed of their statutory right of being search, vide memo (Ex. PW-2/A) offered to be searched by the police party on the spot. This witness first gave his search and thereafter searched the vehicle. From the bag (Ex. P-3), two packets containing Charas, weighing 1.5 kgs and 500 grams each, were recovered, which was weighed with the help of weighing scales kept in the IO Kit and sealed with seal impression "H". The same was seized vide Memo (Ex. PW-2/B). Specimen impression of seal "H" was drawn on Memo (Ex. PW-2/F). NCB form, in triplicate, was filled up on the spot. Also, accused were arrested vide Memos (Ex. PW-12/E, 12/F & 12/G). Ruka (Ex. PW-5/A) was sent through Constable Raj Pal, to the Police Station for registration of case. Finally, the witness handed over the case property to SHO Gobind Ram. Since investigation revealed the accused to have spent the night at Gagan Hotel, Parwanoo, as such, extract of the register (Ex. PW-3/A) was taken on record. He also got the photographs of the accused clicked, evidence pertaining to which was also taken on record.

17. This version of Hoshiar Singh stands corroborated by Anil Kumar and Vikesh Kumar. However, when we examine the cross-examination part of testimony of all these witnesses, we find that there are major and material improvements, contradictions, exaggerations and embellishments, impeaching their credit, rendering them not to be trustworthy witnesses.

18. Police officials have denied conducting any search of hotel Gagan or that the accused were taken by them in a police vehicle to the Police Station. But their version stands contradicted by Roshan Lal. Thus, two views have emerged on record.

19. That apart, if Hoshiar Singh could prepare memos (Ex. PW-1/A & 1/B) and have then sent to the SDPO, then why is it that he did not make any endeavour of associating independent witnesses. After all, Naka had been set up in Parwanoo town itself. Chowkidar of the Bank was available. He could have taken the accused directly to the Police Station or get witnesses from the nearby Bus Stand. After all, Parwanoo is a small industrial township where all public utility facilities are open throughout the night and are close by. It is not the case of this witness that any one of the accused had tried to flee away or that recovery was effected by chance. After all, according to this witness, from the place of Naka, vehicle was taken to the Gumti (Cabin), wherein search and seizure operations were carried out at about 5 a.m. Now, Hoshiar Singh states dimension of the Gumti to be 5''X4''. He categorically states that all operations, including preparation of documents, were conducted inside the Gumti. We find this version of the witness not to be inspiring in confidence at all, for according to Anil Kumar, size of the Gumti was 3''X3'' and according to Vikesh Kumar it was 3''X4''. Assuming the Gumti to be of the dimensions so narrated by Hoshiar Singh, it is humanly impossible for four persons to be accommodated therein, specifically when it has come in the testimony of this witness that all persons were sitting on the Bench inside the Gumti. Variation in the size of the Gumti, though minor, acquires significance, in view of unrebutted testimony of Sukh Raj Sharma

(DW-1), official of the Electricity Department, that there was no electric supply/ connection to the Gumti and also no street light near the Gumti. Now, if there was no light inside the Gumti, then how is that the police party, in a cold wintry morning, before dawn, conducted the search and seizure operations and prepared the necessary documents, for it is not the case of any one of the police officials that it was so done in the light of torch or the vehicle.

20. Significantly, in the instant case, Constable Raj Pal, who carried the Ruka to the Police Station, has not been examined. Why so? has not been explained. His non-examination acquires significance in the backdrop of testimony of Gobind Ram, who admits that he received the Ruka (Ex. PW-5/A) from ASI Hoshiar Singh at 7.30 a.m. We notice the time of registration of the FIR to be 7.30 a.m. Now, if FIR was registered at 7.30 a.m., then how is it that number of the FIR was recorded in the NCB form (Ex. PW-5/B), which even according to Hoshiar Singh was filled up by him, complete in all respects, on the spot at 6.45 a.m., for he does not state that any portion thereof was filled up later on. It has also not come on record, after registration of the FIR, as to who brought the case file from the Police Station to the spot. Hoshiar Singh is categorical in his statement that columns No. 1 to 8 of the NCB form were filled up on the spot at 6.45 a.m. Preparation of the documents at the Police Station, as is the case of the accused, cannot be ruled out.

21. There is also contradiction with regard to the time, which the police party spent, on the spot, for conducting the search and seizure operations. According to Hoshiar Singh, he handed over the contraband substance at about 11.45 a.m., whereas according to SHO Gobind Ram (PW-5), it was so done at 12.15 p.m. and according to Vikesh Kumar, police party had reached the Police Station at "about 8 A.M. after completing the formalities on the spot". Variation in time is significant and major. Which one of these witnesses is telling the truth is difficult to decipher, for perusal of Malkhana Register would reveal that the case property already stood entered there at 11.45 a.m. On this issue, we may also observe that there are two entries pertaining to deposit of the contraband substance in the Malkhana Register. The first one records the time to be 11.45 a.m. and the second one as 12.45 p.m. None has come forward to explain this contradiction. There could have been only one entry in the register with regard to deposit of the contraband substance, for it is not the case of prosecution that immediately after deposit the contraband substance was drawn from the Malkhana and then re-deposited. Explanation of Bhagirath (PW-10) that second entry was made subsequent to resealing the case property by the SHO only contradicts the prosecution case, for it is the case of the SHO himself that prior to deposit of the case property in the Malkhana, he had already resealed the same with his seal impression "S". Thus link evidence being weak further renders the prosecution version to be doubtful.

22. Case of the accused that no search and seizure operations were carried out on the spot, and in the manner in which prosecution wants us to believe, is

further amplified with the admission made by Vikesh Kumar, according to whom the Investigation Officer recorded his statement in the morning of the incident, at the Police Station, which version though stands belied by Hoshiar Singh, according to whom it was so done on the spot. But then how can testimonies of Police officials be said to be reliable and trustworthy.

23. We may also observe that the Court below erred in appreciating the fact that there was neither any charge nor any evidence of abetment of joint possession of the contraband substance, for it is the case of prosecution that the bag, allegedly containing Charas, was in the lap of accused Khem Chand. There is no evidence of exclusive and conscious possession of the contraband substance with accused Gobind Ram and Kuldeep Singh.

24. Law laid down by the apex Court in Sorabkhan Gandhkhan Pathan and Another Vs. State of Gujarat ; and Narcotics Control Bureau, Jodhpur Vs. Murlidhar Soni and Others, , is squarely applicable to the instant facts. Statutory presumption under the provisions of Sections 35 & 54 of the NDPS Act is squarely inapplicable in the given facts.

25. In our considered opinion, prosecution has failed to establish its case. Falsehood has no legs but leaves its imprints, which, in the instant case, have emerged in the shape of contradictions, which are material, totally knocking down the genesis of prosecution case, rendering the prosecution version to be extremely doubtful, if not false. From the evidence on record, as discussed herein above, it cannot be said that the contraband substance was recovered from the conscious and exclusive possession of the accused.

26. Thus, findings of conviction and sentence, returned by the Court below, cannot be said to be on the basis of any clear, cogent, convincing, legal and material piece of evidence, leading to an irresistible conclusion of guilt of the accused.

27. Hence, for all the aforesaid reasons, the appeal is allowed and the judgment of conviction and sentence, dated 6.7.2011, passed by Special Judge, Solan, Himachal Pradesh, in Sessions Case No. 1-S/7 of 2010, titled as State of Himachal Pradesh v. Khem Chand & others is set aside and all the accused persons are acquitted of the charged offences. They be released from jail, if not required in any other case. Amount of fine, if deposited by the accused, be refunded to them accordingly. Release warrants be immediately prepared.

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