
(2015) 05 SHI CK 0072
In the High Court Of Himachal Pradesh
Case No : Criminal Appeal No. 41 of 2013

Kishori Lal	Vs	APPELLANT
State of Himachal Pradesh		RESPONDENT

Date of Decision : 06-05-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 173, 313
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 20, 21

Citation : (2015) CriLJ 2979

Hon'ble Judges : Sureshwar Thakur, J

Bench : Single Bench

Advocate : Lakshay Thakur and Ajay Thakur, for the Appellant; Vivek Singh Attri, Deputy Advocate General, Advocates for the Respondent

Final Decision : Dismissed

Judgement

Sureshwar Thakur, J.

1. The instant appeal is directed against the findings of conviction recorded by the learned Judge Special Court (Additional Sessions Judge), Fast Track Court, Hamirpur against the accused/appellant for his having been proved to be in conscious and exclusive possession of 222.0 grams of Heroin and 03.397 grams of charas. However, the learned trial Court recorded findings of acquittal in favour of the accused/appellant qua his allegedly, consciously and exclusively possessing 50 grams of Heroin.

2. The appellant/accused is aggrieved by the findings of conviction recorded against him qua his allegedly, consciously and exclusively possessing 222.0 grams of Heroin and 03.397 grams of Charas. Nonetheless, the State of Himachal Pradesh has not preferred any appeal against the findings of acquittal recorded in favour of the accused/appellant qua his consciously, exclusively possessing 50 grams of Heroin.

3. Brief facts of the case are that on 3.5.2012 at 10.15 a.m. a police party

headed by SI Rajinder Kumar alongwith HC Kapil Dev, HHC Kamlesh Kumar, HHC Pawan Kumar, Constable Sumit Kumar and Constable Jagat Ram of State Vigilance and Anti Corruption Bureau (SV&ACB), Police Station, Hamirpur, District Hamirpur, H.P., were on patrol duty and when they reached at Shukkar Khad near Village Beri, Tehsil and District Hamirpur, at about 1.30 p.m. they saw the accused sitting alone at a deserted place in the khad. The accused on seeing the police started running. However, he was chased and apprehended by the police. On ascertaining the identity of the accused, SI Rajinder Kumar sent the police officials to secure the presence of independent witnesses, however, none could be associated as the accused was apprehended at a deserted place. The accused was then given an option either to be searched by the police officer or before a gazetted officer or before a Magistrate, the accused exercised his option to be searched by a police officer. The police officials also gave him their personal search, but during their search, nothing incriminating was recovered. On the personal search of the accused, one transparent polythene bag from the left pocket of his shirt containing 20 small paper packets (Puriyan) containing dark brown substance alongwith polythene pouch containing dark brown powder substance was recovered. On inquiry, the accused disclosed the substance aforesaid to be heroin. Thereafter SI Rajinder Kumar called for NDPS Testing Kit and on receipt thereof, the confirmatory test was conducted and the brown coloured powder substance was found to be Heroin, qua which confirmation test memo was prepared in presence of HC Kapil Dev and Constable Sumit Kumar. The recovered contraband was weighed and same was found to be weighing 50 grams. The polythene bag containing contraband was packed, stitched and sealed in a cloth parcel after affixing five seals bearing impression T and was taken into possession vide seizure memo. The sample seal impression H was taken on separate piece of cloth for the purpose of record and seal H after its use was entrusted to HC Kapil Dev. NCB forms in triplicate were filled in by the Investigating Officer. Facsimile seal impression H was also taken on the aforesaid forms. Ruuka was sent through HHC Pawan Kumar to Police Station State Vigilance and Anti Corruption Bureau, Hamirpur. On the basis of which, case FIR No. 3 of 3.5.2012 came to be registered against the accused for his having committed the offence punishable under Section 21 of the Narcotic Drugs and Psychotropic substances Act, 1985. Thereafter the police officials proceeded towards village Khathwin alongwith the accused for conducting the search of his house. On the way the police party associated Raj Kumar and Braham Dass, as independent witnesses. On 3.5.2012 at about 5.15 p.m., the accused was formally arrested by the police for being in possession of 50 grams of heroin, regarding which arrest memo was prepared. Prior to entering the house, the police officials offered themselves to be searched again by the accused in presence of the independent witnesses but nothing incriminating was recovered from them. The police officials thereafter entered inside the house alongwith independent witnesses and during the course of search of a room, they spotted one grain container (Drum) kept in a corner which was opened and searched leading to recovery of one transparent plastic container of Bournvita containing

polythene bags. The plastic container was opened, it contained two polythene bags (Pouches) out of which one contained dark brown colour powder and the other contained small paper packets (Puriyan) which were found to be containing powder substance. The police also recovered one small piece of black colour substance in the form of chapatti. The Brown colour substance contained in the polythene bags and paper packets was tested with the help of NDPS testing kit and was confirmed Heroin. In this context, NDPS confirmation test memo was prepared in the presence of independent witnesses. SI Rajinder Kumar also tested the black colour substance in the form of chapatti by burning and smelling and it was found charas. Separate confirmation test memo was prepared in this regard. The heroin was weighed and found to be 250 grams. Similarly charas was also weighed and was found to be 4 grams. The police thereafter completed seizure formalities. The polythene bags were put in the Bournvita container which was packed in a cloth parcel and stitched and sealed with 7 seals bearing impression J. Similarly, the charas was put in a polythene pouch and was packed, stitched and sealed in a cloth parcel by affixing 5 seals bearing impression J. The weighing scales alongwith weights were packed in a Boru and sealed with one seal bearing impression J and all the above articles i.e. 2 sealed parcels and one sealed boru were taken into possession vide seizure memo in presence of independent witnesses. Sample of seal impression J was taken on a separate piece of cloth and the seal J after its use was entrusted to independent witnesses. SI Rajinder Kumar also filled in NCB forms in triplicate. Facsimile seal impression J was taken on the NCB forms in triplicate. Spot map was prepared and statement of witnesses were recorded. The investigating Officer presented the parcels to Shri Balbir Singh, Dy.S.P for the purpose of resealing. The parcels were resealed by affixing 3 seals bearing impression T and its facsimile was taken on NCB forms in triplicate and requisite entry regarding reasoning was made. Sample of resealing seal impression T was taken on separate piece of cloth. The sealed parcels thereafter were handed over to HC Umeshwar Singh for its deposit in Malkhana. On 5.5.2012 the sealed parcels were sent for forensic examination to State FSL, Junga. On the same day special report of arrest and seizure of the contraband was also sent to SP SV and ACB, Central Range Mandi. On the basis of report of FSL, the contraband recovered from the possession of the accused was opined to be 28.000 grams+222.0 grams Heroin (Diacetylmorphine) and 03.397 grams of charas indicating the presence of cannabinoids including the presence of tetrahydrocannabinol. On conclusion of the investigation, into the offence, allegedly committed by the accused, final report under Section 173 of the Code of Criminal Procedure was prepared and filed in the Court.

4. The accused/appellant was charged by the learned trial Court for his having allegedly committed offences punishable under Sections 20 and 21 of the Narcotic Drugs and Psychotropic Substances Act, 1985, to which he pleaded not guilty and claimed trial.

5. In order to prove its case, the prosecution examined 13 witnesses. On closure

of prosecution evidence, the statement of the accused, under Section 313 of the Code of Criminal Procedure, was recorded in which he pleaded innocence and claimed false implication. However, he chose to lead evidence in defence.

6. On appraisal of the evidence on record, the learned trial Court, returned findings of conviction against the appellant/accused for his having committed offence punishable under Sections 20 and 21 of Narcotic Drugs and Psychotropic Substances Act, 1985, qua his allegedly, consciously and exclusively possessing 222.0 grams of Heroin and 03.397 grams of charas. However, the learned trial Court recorded findings of acquittal in favour of the accused/appellant qua his allegedly, consciously and exclusively possessing 50 grams of Heroin

7. The learned counsel appearing for the appellant have concertedly, and, vigorously contended, that, the findings of conviction, recorded by the learned trial Court, are, not based on a proper appreciation of evidence on record, rather, they are sequelled by gross mis-appreciation of the material on record. Hence, they, contend that the findings of conviction, be, reversed by this Court, in, the exercise of its appellate jurisdiction, and, be replaced by findings of acquittal.

8. The learned Deputy Advocate General has with considerable force and vigour, contended that the findings of conviction, recorded by the Court below are based on a mature and balanced appreciation of evidence on record and do not necessitate interference, rather merit vindication.

9. This Court with the able assistance of the learned counsel on either side, has, with studied care and incision, evaluated the entire evidence on record.

10. Since the prosecution witnesses have deposed in tandem and in harmony qua each of the links in the chain of circumstances commencing from the proceedings relating to search, seizure and recovery till the consummate link comprised in the rendition of an opinion by the FSL on the specimen parcels sent to it for analysis, portraying proof of unbroken and un-severed links, in the entire chain of circumstances, as such, it is argued that hence when the prosecution case stood established, it would be legally unwise for this court to acquit the accused.

11. Besides when the testimonies of the official witnesses, unravel the fact of theirs being bereft of any inter-se or intra-se contradictions, hence, consequently, they too enjoy credibility.

12. Mr. Lakshay Thakur, learned counsel appearing for the appellant/accused has vigorously canvassed, on the anvil of site plan comprised in Ex. PW-14/H and its displaying the factum of contraband having been recovered from room No. 1. He proceeds to canvass that in face of the deposition existing in the cross-examination of PW-11 and its divulging rather the factum of the accused being in possession of a room opposite to the kitchen disclosed in Ex. PW-14/H as room No. 2, whereas room No. 1, wherefrom items of contraband were allegedly recovered, being in possession of Kartar Chand, brother of the accused, naturally

exculpates the accused from the factum of his being in exclusive possession thereof, especially when the place or the premises wherefrom it was allegedly recovered was not in his possession, besides as a corollary de-establishing the factum of his exclusively and consciously possessing it. Reiteratedly, he contends with force before this Court that given the bequest qua the premises by the deceased father of both accused Kishori Lal and his brother Kartar Chand, highlighted in Ex. PW-14/H, besides with an admission existing in the cross-examination of PW-11 qua room No. 2 being the only premises in exclusive possession of the accused, whereas recovery of contraband was effected from room No. 1 not in possession of the accused, as such, the contraband allegedly attributed to have been recovered from the conscious and exclusive possession of the accused, whereas its having been recovered from a room not in possession of the accused, cannot be held to be, as such, recovered from the premises exclusively possessed by the accused. He, as a natural corollary, argues that the offence, for which the accused/appellant was charged and tried, staggers and falls apart.

13. The above argument appears to acquire a lot of sheen at its facade. Nonetheless, the deposition alone existing in the cross-examination of PW-11, underscoring the factum of contraband having been recovered from room No. 1, displayed by PW-11 to be not in the exclusive possession of the accused, does not per-se constrain an inference of its alone depicting the factum of Kartar Chand, brother of the accused/appellant who as conveyed by PW-11 to be in possession of room No. 1, did not as such continue to retain its possession, rather an advertence ought also to be made to the deposition existing in the cross-examination of DW-1 wherein there exists an admission of Kartar Chand having constructed a separate house under Indira Awas Yojna Scheme at Village Khatwin and his residing therein with his family members. The said admission existing in the cross-examination of a defence witness, is not discardable, it acquires immense probative tenacity as well as is imbued with veracity, especially when it is articulated by a defence witness. Besides, it overcomes the effect of the deposition existing in the cross-examination of PW-11, displaying therein that in pursuance to a testamentary disposition qua the premises displayed in PW-11/H, by the deceased father of accused and his brother Kartar Chand, the accused had come to occupy and possess only room No. 2, whereas the room No. 1, wherefrom recovery of contraband was effected, was in possession of Kartar Chand. Moreover it fosters a natural inference of Kartar Chand, brother of the accused/appellant having abandoned it, since his shifting to village Khatwin, sequelling an inference that possession of room No. 1 was retained by the accused. Reinforcingly when no apt evidence exists in the deposition of the prosecution witnesses, conveying that at the time when they entered room No. 1, they had broken open the locks. Consequently, the absence of the above evidence, with aplomb fillips a deduction that the premises nomenclatured as room No. 1 in the site plan comprised in Ex. PW-11/H, were open as well as accessible to the accused alone, and they as such, facilitated an

easy ingress therein of the prosecution witnesses. In aftermath, it has to be, with invincibility, concluded that the recovery of contraband was effected from the premises alone in the conscious and exclusive possession of the accused.

14. The learned counsel for the accused/appellant has further adverted to the fact of road certificate comprised Ex. PW-1/B reciting description of 3 parcels as under:--

"(1)one parcel marked P-1 sealed with 5 seals of H and re- sealed with 3 seal of T(2) one parcel marked P-2 sealed with 7 seals and re-sealed with 3 seals of T(3) one parcel sealed with 5 seals of (J) and resealed with seal of T

(4) Sample of seal J and T = 2 adad

(5) Sample of reseal= 1 adad

(6) Photocopy of FIR= 2 pages

(7) Seizure memo = 2pages

(8) NCB form= 6 pages"

15. Now when the property elucidated therein was submitted by PW-2, for rendition of an opinion, qua its contents, before the State Forensic Science Laboratory, the latter had recorded in Ex. PW-13/C, the factum of parcel No. 2 though described in Ex. PW-1/B to be sealed with 7 seals and re-sealed with seal "T" without enunciation of the English alphabet borne on the 7 seals, to be though also embossed with 7 seals, yet theirs also bearing/carrying the alphabet letter "H", as such, the non-enunciation of the English alphabet borne on the 7 seals of parcel-2, in the road certificate, though subsequently elucidated qua the 7 seals in the FSL report, comprised in Ex. PW-13/C, is argued to be constituting a discrepancy, as such, rendering Ex. PW-13/C to be not connected to the case property. However, the aforesaid discrepancy would not render the report of FSL comprised in Ex. PW-13/C in-consequential nor would it render to be not relatable to the case property or unreadable, especially when the omission of enunciation of the English alphabet borne on 7 seals qua P-2 in as much as it being not embossed with seal "H" may be attributable to be arising from some typographical mistake. Moreso, when at the time of receipt of parcel-2 detailed in Ex. PW-1/B in the State FSL, Junga, the parcels were found intact. Moreover, when there is no suggestion put to PW-2 that when he carried the parcels to FSL, they had come to be tampered with nor also when no apposite suggestion has been put to the mohariar, incharge Malkhana, concerned, that when they were retrieved by him from the malkhana and were handed over to PW-2, P-2 did not bear seal impression "H". Accordingly, the argument is rejected and the appeal is dismissed. The appreciation of the evidence as done by the learned trial Court does not suffer from any infirmity, or, perversity. Consequently reinforcingly, it can be formidably concluded, that, the findings of the learned trial Court, are, well merited, and, do not merit interference.

16. In view of the above discussion, the appeal is dismissed, and, the judgment of the learned trial Court is maintained and affirmed. However, keeping in view the facts and circumstances of the case and also bearing in mind that the weight of "charas" falls within the category of "small quantity" hence, qua it, the sentence of imprisonment imposed upon the accused by the learned trial Court is maintained and affirmed. Nonetheless, since the weight of "Heroin" falls within the category of "lesser than commercial quantity but greater than small quantity", as such, in the interest of justice, the accused is sentenced, qua the offences constituted by his proven to be consciously and exclusively possessing "Heroin", to imprisonment for the term already undergone by him. He be released from the custody forthwith, if not required in any other case. The sentence of fine imposed upon the accused by the learned trial Court qua his having been found guilty for his consciously and exclusively possessing "Heroin" as well as "Charas" is modified and the appellant is directed to, within one week from the date of receipt of copy of this judgment, deposit before the learned trial Court a sum of Rs. 5000/- as fine qua each of the items of the contraband and in default of payment of fine to undergo rigorous imprisonment for one month.

17. The registry is directed to prepare the release warrant of the accused and send it to the Superintendent of the jail concerned, in conformity with this judgment forthwith. Records be sent down.