

(2015) 03 SHI CK 0008

In the High Court Of Himachal Pradesh

Case No : Criminal Appeals Nos. 73 and 75 of 2012

Mansha Ram and Others

APPELLANT

Vs

State of Himachal Pradesh

RESPONDENT

Date of Decision : 30-03-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 18, 20, 29, 42, 50

Citation : (2015) 03 SHI CK 0008

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

Bench : Division Bench

Advocate : J.R. Poswal, for the Appellant; Asok Chaudhary, V.S. Chauhan, Additional Advocates General and J.S. Guleria, Assistant Advocate General, Advocates for the Respondent

Final Decision : Dismissed

Judgement

Sanjay Karol, J.—Since both these appeals arise out of the very same impugned judgment, they are being disposed of by a common judgment.

2. Appellants-convicts Mansha Ram and Parkash Chand, hereinafter referred to as the accused, have assailed the judgment dated 14.12.2011, passed by Special Judge, Bilaspur, Himachal Pradesh, in Sessions Trial No. 12 of 2010, titled as State of Himachal Pradesh v. Parkash Chand and another, whereby they stand convicted of the charged offences and each of them sentenced to undergo rigorous imprisonment for a period of two years and pay fine of Rs. 20,000/-, each, and in default of payment thereof, to further undergo simple imprisonment for a period of two months, in relation to offence, punishable under Section 18 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the Act); and rigorous imprisonment for a period of 12 years and pay fine of Rs. 1,00,000/- each, and in default thereof to further undergo simple imprisonment for a period of six months, in relation to offence, punishable under

the provisions of Section 20 of the Act.

3. It is the case of prosecution that on 19.6.2010 at about 5.45 p.m., Inspector (SHO) Puran Chand (PW-11), alongwith Police Party, comprising of SI Mathru Ram (PW-1), SI Sanjit Kumar, ASI Amar Nath (PW-4), ASI Ranjhu Ram, Constable Ramjan Mohammed, Constable Husan Lal and Constable Balbir were on traffic checking duty at NTPC Chowk (Office), Barmana, Himachal Pradesh. Vehicle Bearing No. HP-1M-3819 came from Salappar side. On signal the same was stopped, in which accused Parkash Chand was on the wheels and accused Mansha Ram was sitting on the front seat. Finding something fishy, police party, on suspicion, wanted to do the checking. Accordingly, after informing the accused of their statutory rights, in compliance of Section 50 of the Act, the accused offered themselves to be searched by the police party, vide Memos (Ex. PW-2/A and 2/B), which were also signed by the accused. Independent witnesses present on the spot, namely Sushil Kumar (PW-2) and Raj Kumar (PW-3) were also associated. Police party, after giving its search to the accused, searched them and the vehicle. Nothing was recovered from the person of the accused persons, but however from the front mudguard of the vehicle (driver side), one packet, wrapped in a plastic sheet, was recovered, which contained four parcels of charas in the shape of sticks and chappatis. On checking the other side the mudguard, four packets, wrapped in a plastic sheet, were also recovered, out of which three parcels contained charas in the shape of sticks and chappatis and the fourth packet contained opium. Constable Ramjan Mohammed was asked to fetch scales and weights, which were brought from the shop of Raj Kumar (PW-9). Upon weighment the contraband substance(s), which appeared to be charas, was found to be of 14 kgs and opium was found to be 570 grams. Out of the recovered charas, two samples (A-1 and A-2), each weighing 6 kgs were taken out and the remaining stuff, i.e. 2 kgs was packed in a separate packet (A-3), and sealed with 12 seals of seal impression "M". Also opium(A-4) was packed separately and sealed with the very same seal impression. Inspector Puran Chand prepared Rukka (Ex. PW-4/A), which was taken by ASI Amar Nath (PW-4) to the Police Station, Barmana, on the basis of which F.I.R. No. 130, dated 19.6.2010 (Ex. PW-7/A), under the provisions of the Act, was registered there. File was taken back to the spot. Thereafter, all the necessary formalities were completed. NCB form was filled up on the spot; accused were arrested and informed of the grounds; contraband substance was also seized. Seized parcels as also the NCB form was deposited with the MHC Kishori Lal (PW-7), who sent two sealed parcels through Constable Hussan Lal (PW-10) for chemical analysis at the Forensic Science Laboratory, Junga and report (Ex. PW-7/B) obtained. Also, Special Report (Ex. PW-5/A) was sent to the Superior Officer, through Constable Shiv Ram (PW-6), which was received by ASI Kishori Lal (PW-5) in the Office of Superintendent of Police, Bilaspur. 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.

4. Both the accused persons were charged for having committed offence

punishable under the provisions of Sections 18 and 20, read with Section 29 of the Act, to which they did not plead guilty and claimed trial.

5. In order to establish its case, prosecution examined as many as 11 witnesses and statements of the accused, under the provisions of Section 313 of the Code of Criminal Procedure were also recorded. Accused Mansha Ram took the following defence:

"I am innocent. I boarded the vehicle in question at Bus Stand, Mandi as I was requested by the co-accused Parkash Chand to accompany him to Kiratpur and back as he told me that he would be alone on coming back from Kiratpur. I acceded to his request and accompanied him from Mandi. I do not know about the contraband kept in the vehicle. I also do not know Tule Ram." Accused Parkash Chand took the following defence:

"I am innocent. Tule Ram met me one day prior to 19.6.2010 and had told me to hire my vehicle for going to Kiratpur and the fare was fixed at Rs. 3500/-. He had also hired my vehicle on 2/3 occasion earlier. Tule Ram told me to go on the night of 18.6.2010, but I expressed my inability to go during the night hours and on 19.6.2010 at about 12.30 P.M. Tule Ram came to Banjar and I had lunch alongwith him and thereafter we proceeded from Banjar at 12.30 P.M. From Banjar, I requested my co-accused Mansha Ram on telephone to accompany me to Kiratpur and back as I would be alone while returning from Kiratpur. On this, he acceded to my request. My vehicle was also checked by the police at Brindabani check point near Mandi. Mansha Ram met me at Bus Stand, Mandi. Thereafter, we proceeded from Mandi alongwith my co-accused Mansha Ram and when we reached near Barmana, Tule Ram alighted from the jeep alongwith one bag on the pretext that he was going to answer the call of nature. However, after alighting from the vehicle, he fled away and I drove my vehicle a little ahead, where the police party signaled me to stop the vehicle. On the signal of the police party, I stopped my vehicle and thereafter, the police party searched the vehicle and during the search of the vehicle when the police party found that there was contraband in the front tyres of my vehicle, the police party asked me to bring my vehicle to police station and thereafter, all the formalities were completed at police station. The police party told me to trace Tule Ram and also told me that if Tule Ram was traced then we would be kept as witnesses otherwise, we would be arrested. On this, I made various attempts on telephone/mobile to trace Tule Ram, but he could not be traced and police party also tried to locate him, however, he could not be traced and ultimately at 11.30 P.M. we were arrested at the police station." Accused persons led evidence in their defence. Significantly, accused Parkash Chand examined himself as a defence witness (DW-3), and two other witnesses were also examined.

6. Based on the testimonies of witnesses and the material on record, trial Court convicted the accused persons of the charged offences and sentenced them as aforesaid. Hence, the present appeal by the accused.

7. Learned counsel for the accused assails the judgment by making the following submissions: (i) from the evidence on record, it is apparent that police had prior information and as such there is infraction of the provisions of Section 42 of the Act, which is fatal to the prosecution case; (ii) there is contradiction with regard to the person who filled up the NCB form, rendering the prosecution version of having conducted the search and seizure operations to be doubtful; (iii) seal impression, so embossed on the documents is different from the one so disclosed by the prosecution witnesses; and (iv) reduction of case property by 150 grams, remains unexplained by the prosecution, rendering the prosecution story to be fatal.

8. We have examined the entire evidence on all points, including the one so argued before us.

9. For establishing the factum of recovery of the contraband substance from the conscious possession of the accused, prosecution seeks reliance upon the testimonies of SI Mathru Ram (PW-1), Sushil Kumar (PW-2), Raj Kumar (PW-3), ASI Amar Nath (PW-4), and Inspector Puran Chand (PW-11). It be only observed that independent witnesses Sushil Kumar and Raj Kumar have not supported the prosecution case. They were declared hostile and extensively cross-examined. It is a settled proposition of law that merely because a witness has turned hostile, his entire evidence cannot be termed to be unworthy of credence. It is for the Court to consider, whether as a result of contradiction, witness stands fully discredited or part of his testimony can still be believed. If the credit of a witness is not fully shaken, Court can rely upon that part of the testimony which appears to be creditworthy. We shall independently deal with their testimonies, but at this juncture, we may observe that their testimonies do not render the prosecution case to be doubtful or testimonies of prosecution witnesses to be belied or contradicted on material points. Also it cannot be said that another view has emerged on record.

10. Their Lordships of the Hon''ble Supreme Court in Ashok @ Dangra Jaiswal Vs. State of M.P., have held that seizure witnesses turning hostile may not be very significant by itself, as it is not an uncommon phenomenon in criminal trials, particularly in cases relating to NDPS Act.

11. Their Lordships of the Hon''ble Supreme Court in Yomeshbhai Pranshankar Bhatt Vs. State of Gujarat, have held that evidence of hostile witness may contain elements of truth and should not be entirely discarded. Their Lordships have held as under:

"22. The learned counsel for the appellant further submitted the doctor had not given his written opinion that the deceased was fit enough to give her statement. Though orally, the doctor said so. Relying on this part of the evidence especially the evidence of the husband of the deceased, the learned counsel for the appellant submitted that even though the husband may have been declared hostile, the law relating to appreciation of evidence of hostile witnesses is not to

completely discard the evidence given by them. This Court has held that even the evidence given by hostile witness may contain elements of truth.

23. This Court has held in *State of Uttar Pradesh Vs. Chet Ram and Others*, , that merely because the witnesses have been declared hostile the entire evidence should not be brushed aside. [See para 13 at page 1548]. Similar view has been expressed by three-judge Bench of this Court in *Khujji alias Surendra Tiwari Vs. State of Madhya Pradesh*, . At para 6, page 1857 of the report this Court speaking through Justice Ahmadi, as His Lordship then was, after referring to various judgments of this Court laid down that just because the witness turned hostile his entire evidence should not be washed out."

12. Their Lordships of the Hon"ble Supreme Court in *Bhajju @ Karan Singh Vs. State of M.P.*, have held that evidence of hostile witnesses can also be relied upon by the prosecution to the extent to which it supports the prosecution version of the incident. Their Lordships have held as under:

"36. It is settled law that the evidence of hostile witnesses can also be relied upon by the prosecution to the extent to which it supports the prosecution version of the incident. The evidence of such witnesses cannot be treated as washed off the records, it remains admissible in trial and there is no legal bar to base the conviction of the accused upon such testimony, if corroborated by other reliable evidence. Section 154 of the Act enables the Court, in its discretion, to permit the person, who calls a witness, to put any question to him which might be put in cross-examination by the adverse party.

37. The view that the evidence of the witness who has been called and cross-examined by the party with the leave of the court, cannot be believed or disbelieved in part and has to be excluded altogether, is not the correct exposition of law. The Courts may rely upon so much of the testimony which supports the case of the prosecution and is corroborated by other evidence. It is also now a settled cannon of criminal jurisprudence that the part which has been allowed to be cross-examined can also be relied upon by the prosecution. These principles have been encompassed in the judgments of this Court in the cases:

- (a) *Koli Lakhmanbhai Chanabhai Vs. State of Gujarat*,
- (b) *Prithi Vs. State of Haryana*,
- (c) *Sidhartha Vashisht @ Manu Sharma Vs. State (NCT of Delhi)*,
- (d) *Ramkrushna Vs. State of Maharashtra*,

13. We find the prosecution witnesses to be worthy of credence. Their testimonies are natural, reliable and inspiring in confidence. They are consistent and cogent in their deposition.

14. Inspector Puran Chand states that on 19.6.2010, he had set up a Naaka at NTPC Office Barmana. He records presence of other police officials on the spot. It was on the NH-21. At about 5.45 p.m., vehicle bearing No. HP01M-3819 came

from Salappar side. Accused Parkash Chand was sitting on the wheels and accused Mansha Ram was sitting on the front seat alongwith the driver. On signal, the vehicle was topped. The driver was asked to produce documents. However, it was observed that his hands were trembling and accused Mansha Ram got perplexed. On suspicion, he desired of checking the accused and the vehicle. Accordingly, he associated independent witnesses Sushil Kumar and Raj Kumar. After informing the accused of their statutory right of getting themselves searched before a Gazetted Officer, Magistrate or the police officials, accused opted to be searched by him. Consent Memos (Ex. PW-2/A and 2/B) were signed by the accused persons. Thereafter, members of the police party gave their personal search to the accused. In this regard, Memo (Ex. PW-2/C) was drawn. In the mudguard, towards the driver seat, there was a hole in which a parcel, wrapped in Khaki cover, was concealed. On opening the same, four packets, wrapped in plastic sheet, were found. The same were opened and charas, in the shape of sticks and chappatis, was found. From the other side of the mudguard, again four packets were found, out of which three packets contained charas, in the shape of sticks and chappatis, and the fourth packet contained opium. On his asking, Constable Ramjan Mohammed brought the scales and weights and packing material. Upon weighment, the contraband substance was found to be 14 kgs of charas and 570 grams of opium. The samples were repacked in separate parcels and sealed with 12 seals of impression "M". NCB form, in triplicate, was filled up on the spot and the sample of the seal drawn separately on a piece of cloth (Ex. PW-11/A). The sealed parcels of charas were marked as A-1, A-2 and A-3 (A-1 and A-2 of 6 kgs each and A-3 of 2 kgs) and parcel containing opium was marked as A-4. Ruka (Ex. PW-4/A) was sent through Amar Nath for registration of F.I.R. at Police Station, Barmana. With the completion of formalities on the spot, accused were arrested and Memos (Ex. PW-4/B and PW-4/C) were prepared to such effect. He prepared Special Report (Ex. PW-5/A), which was sent to the Superintendent of Police, Bilaspur, Himachal Pradesh for information. Also, sealed samples were sent to the FSL, Junga and report (Ex. PW-7/B) taken on record.

15. This witness, in our considered view, has withstood the test of cross-examination. Suggestions put to the witness, with an endeavour of probalizing the defence, in our considered view, are of no avail. Witness does state that finding the accused to have got perplexed, he became suspicious and thus checked the vehicle. This witness does record accused Parkash Chand of having informed the police about the contraband substance being loaded in the vehicle by one Tule Ram. But then he clarifies that an attempt was made to trace Tule Ram, and except for the disclosure statement of the accused there was nothing else against him. As such, for this reason no further proceedings were initiated. Witness also states that Mansha Ram and Parkash Chand are members of the same Panchayat and Mansha Ram was also sitting in the vehicle at the time when recovery was effected from their conscious possession. Mansha Ram has not been able to probalize his defence.

16. Testimony of this witness, in our considered view, stands materially corroborated by Mathru Ram and ASI Amar Nath, who have also deposed that search and seizure operations were carried out in their presence. This factor having been proved on record, beyond reasonable doubt, statutory presumption would automatically into play.

17. Now, police had no prior information and only after informing the accused of their statutory right(s) and completing the statutory formalities, checking was done.

18. Police officials do admit that Mansha Ram, who is a tractor driver, had boarded the vehicle at Mandi on the request of Parkash Chand, but then it has not come on record the purpose for which Mansha Ram agreed to travel in the vehicle upto Kiratpur, which is snot close by. Why the vehicle was to be taken to Kiratpur, has not been explained. There were no goods in the vehicle. Also none were to be brought from there. Simply because he is a friend of accused Parkash Chand, that fact would not, in any manner, render the prosecution case to be weak or doubtful. Neither Parkash Chand nor Mansha Ram have stated the purpose of their visit either from Kullu or from Mandi towards Bilaspur. Mansha Ram has not examined his employer to establish the factum of his leave.

19. Significantly, independent witnesses, when examined by the Public Prosecutor, have admitted the case of the prosecution. Except for the factum of signing the papers on the spot, in our considered view, they have corroborated the testimonies of police officials, on all counts, on the question of signing of documents, we find these witnesses to have not deposed truthfully, for their statements, so recorded by the police, recording the events, including signing the papers, which took place on the spot, at the time of conducting the search and seizure operation, to be duly reflected in their prior statements (Mark X and Z)(Ex. PW-11/C and PW-11/D), so proved by the Investigating Officer, which can be used only as a corroborative piece of evidence. These witnesses admit that prior to conduct of search, accused were informed of their statutory rights and their consent obtained. Also police officials were searched by the accused persons. Witnesses admit it to be correct that from the vehicle, contraband substance was recovered; it was weighed; repacked and sealed with seal impression "M". Witness states that accused persons did make an attempt to contact Tule Ram, but then that is all and nothing more, to show, that the contraband substance actually belonged to Tule Ram and that it was he who had hired his vehicle. Prosecution witnesses admit accused Parkash Chand of having informed about the alleged involvement of Tule Ram. We are not inclined to disbelieve the prosecution version of recovery of the contraband substance from the conscious possession of the accused on this count. This we say so for the reasons: (i) it has come in the testimony of police officials that involvement of Tule Ram was ruled out; (ii) assuming hypothetically that Tule Ram was involved, that fact itself would not absolve complicity of the accused persons in the crime, after all Tule Ram was not in the vehicle; (iii) Testimony of accused Parkash

Chand (DW-3).

20. Accused Parkash Chand, who stepped into the witness box admits himself to be owner of the vehicle from which the contraband substance was recovered. He never allowed anyone else to drive his vehicle. He admits his presence on the spot. He admits police having associated independent witnesses for carrying out search operations. He admits that during such search, contraband substance was recovered from the tyres of the vehicle. Now, if this witness never allowed anyone else to drive his vehicle, then how is it that Tule Ram concealed the contraband substance inside the mudguard of the vehicle. For it is not his case that Tule Ram was left alone in the vehicle for some time. Also, defence of vehicle being hired by Tule Ram stands not probabalized. There is no receipt of hiring the vehicle on record. His version that he called up Mansha Ram on telephone to accompany him to Kiratpur does not inspire confidence, for it has not come on record that Mansha Ram was free on that date and was not required to ply the tractor. He admits himself to be a paid driver and there is no record of his having obtained leave from his employer. Also, version of this witness that seeing the police party, Tule Ram deboarded the vehicle and ran away from the spot does not appear to be true. Defence so taken, of involvement of Tule Ram, was never taken at the first opportune moment.

21. We further find that even by way of link evidence prosecution has been able to establish its case, beyond reasonable doubt. Raj Kumar (PW-9) does state that Ramjan Mohammed took electronic weighing machine from his shop, which is at Kainchi Mor Barmana.

22. HC Kishori Lal does state that Rukka was brought by ASI Amar Nath, on the basis of which F.I.R. was registered by him. He further states that the contraband substance as also the NCB forms were deposited with him, which he kept in the Malkhana. So long as the parcels/samples remained with him, they were not tampered with. The samples were sent for chemical analysis through Constable Hussan Lal alongwith Road Certificate. Report (Ex. PW-7/B) was also taken on record.

23. Hussan Lal also states that the samples, bearing 12 seals of impression "M", handed over to him by HC Kishori Lal, were deposited by him at the FSL, Junga and so long as the samples remained with him, these were not tampered with.

24. From the testimony of the prosecution witnesses and also Road Certificate, Malkhana Register and the report, it is evident that the seal impression put on the samples was of seal "M" and not "H", as is so urged before us.

25. In the instant case, police has taken all precautions of informing the superior authorities, as is evident from the testimonies of ASI Kishori Lal and Shiv Ram.

26. From the testimonies of defence witnesses (DW-1 and DW -2), defence of the accused cannot be said to have been probabalized. These witnesses have simply produced relevant extract of the case diaries and the entries made in the police

record, but then this does not falsify the prosecution case at all, more so in view of the admitted position of the accused and the independent witnesses, with regard to the fact that police had set up Naaka; checked the vehicle, from which recovery of charas and opium was effected.

27. There is no question of violation of provisions of Section 42 of the Act, for it is a case of chance recovery. None of the police officials has, even remotely, admitted factum of prior information. Investigating Officer states that he did fill up the NCB form.

28. Considering the quantity of the contraband substance, reduction in weight is negligible. In any case, weighment is done only for determining the quantity and that too for the purpose of sentencing. *Virender Vs. State of Himachal Pradesh*, . Here, there cannot be dispute with regard to quantity being commercial in nature.

29. A Division Bench of this Court in *Raj Mohammed alias Raju Vs. State of H.P.*, , has already held that the discrepancy relating to difference in weight is trivial.

30. For all the aforesaid reasons, we find no reason to interfere with the well reasoned judgment passed by the trial Court. The Court has fully appreciated the evidence placed on record by the parties. There is no illegality, irregularity, perversity in correct and/or in complete appreciation of the material so placed on record by the parties. Hence, the appeal is dismissed.

Pending application(s), if any, also stand disposed of.