

(2017) 05 SHI CK 0004
In the High Court Of Himachal Pradesh
Case No : 441 of 2016

Naresh Bahadur Sahi

APPELLANT

Vs

State of Himachal Pradesh

RESPONDENT

Date of Decision : 01-05-2017

Acts Referred:

Narcotic Drugs and Psychotropic Substances Act, 1985, Section 20 - Punishment for contravention in relation to cannabis plant and cannabis

Citation : (2017) 05 SHI CK 0004

Hon'ble Judges : Sanjay Karol, Vivek Singh Thakur

Bench : Division Bench

Advocate : G. R. Palsra, V. S. Chauhan

Judgement

1. The contradictions in the testimonies of police officials HC Nand Lal (PW-1) and Inspector Chet Singh (PW- 8), who carried out the search and seizure operations and the discrepancies in the testimonies of HHC Lalit Kumar (PW-2) and HHC Rakesh Kumar (PW-6) proving link evidence are the main grounds urged before us, in assailing the judgment of conviction of the appellant under the provisions of Section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the Act). Non association of independent witnesses is yet another ground urged by the appellant.
2. It is a matter of record that no independent witness was either associated by the police during the investigation nor examined by the prosecution during trial. From the testimonies of eight police officials, trial Court found the prosecution to have established its case of recovery of 1 k.g. 600 grams charas (a psychotropic substance) from the conscious and exclusive possession of the accused.
3. The only defence taken by the accused is of innocence and false implication. Undisputedly, no evidence in rebuttal, stands led by him.
4. In short, it is the case of the prosecution that on 8.2.2015, pursuant to orders

passed by the superior authorities, a naaka came to be led by Inspector Chet Singh (PW-8), S.H.O. of Police Station, Balh, at a place known as Nagchala, where at about 2.00 a.m., accused was noticed under suspicious circumstances. He was stopped and on suspicion searched. The bag carried by him contained fourteen packets of contraband substance which appeared to be charas. When weighed it was 1 k.g. and 600 grams. The recovered stuff was repacked and sealed. NCB form (Ext. PW-8/A), in triplicate, was filled up on the spot and ruka (Ext. PW-8/B) sent to the police station through HC Nand Lal (PW-1). With the registration of F.I.R. (Ext. PW- 3/A), accused came to be arrested. The contraband substance was entrusted to HHC Lalit Kumar (PW-2) who deposited it in the maalkhana and through HHC Rakesh Kumar (PW-6) sent it for chemical analysis, report whereof (Ext. PW-8/D), upon receipt, was taken on record. Also special report (Ext. PW-7/B) was sent to the superior authority. Since report of the chemical analyst established the contraband substance to be charas, challan came to be presented in the Court for trial. The accused was charged for having committed an offence punishable under the provisions of Section 20 of the Act, to which he pleaded not guilty and claimed trial.

5. In terms of the impugned judgment, he stands convicted and sentenced to serve imprisonment as also pay fine.

6. The apex Court in *Lal Mandi v. State of W.B.*, (1995) 3 SCC 603, has held that, though the powers of an appellate court, while dealing with an appeal against acquittal and an appeal against conviction are equally wide but the consideration which would weigh in dealing with an appeal against an order of acquittal and that of conviction are distinct and separate. The presumption of innocence of an accused which gets strengthened on acquittal is not available on conviction. An appellate court may give every reasonable weight to the conclusions arrived at by the trial court but it must be remembered that an appellate court is duty-bound, in the same way as the trial court, to test the evidence extrinsically as well as intrinsically and to consider as thoroughly as the trial court, all the circumstances available on record so as to arrive at an independent finding regarding guilt or innocence of the convict. An appellate court would fail in the discharge of one of its essential duties, if it fails to itself appreciate the evidence on record and arrive at an independent finding based on the appraisal of such evidence.

7. We now proceed to examine the testimonies of the prosecution witnesses. In Court, Inspector Chet Singh (PW-8) categorically states that pursuant to the directions issued by the Superintendent of Police, Mandi (Ext. PW-5/A) for setting up check posts at different places, on 8.2.2015 he laid a naaka at a place known as Nagchala. He was accompanied by police officials including HC Nand Lal (PW-1), Constable Bhanu and Constable Narender. The place was secluded. At about 2.00 a.m., accused was seen, walking on foot, carrying a bag on his left shoulder. Seeing the police party, he tried to flee away but on suspicion that he may be carrying some stolen articles, apprehended only after accused had covered a

distance of 25 - 30 meters. Suspecting that he may have kept some stolen articles in his bag, HC Nand Lal was sent to search for some independent witnesses. However, since it was night time and none was available, after associating HC Nand Lal and Constable Bhanu Sharma, he opened the bag (Ext. P-6) of the accused. Inside the said bag, amongst other articles, there was one light blue coloured bag which contained fourteen small packets wrapped in a transparent polythene. These packets contained substance in the shape of papad which appeared to be charas. The recovered stuff was weighed with the help of electronic balance and found to be 1 k.g. and 600 grams. The stuff was repacked in the same manner as it was opened, whereafter it was kept in a cloth parcel and sealed at nine places with seal impression-D, impression whereof was also taken on a piece of cloth (Ext. PW-1/A). NCB form (Ext. PW-8/A) was filled and seal embossed thereupon. Seals were handed over to HC Nand Lal. The stuff was recovered vide memo (Ext. PW-1/B). Ruka (Ext. PW-8/B), so scribed by him, was sent through HC Nand Lal to the police station where F.I.R. No. 37 of 2015 (Ext. PW-3/A), dated 8.2.2015, came to be registered against the accused under the provisions of Section 20 of the Act. The accused was arrested and with the party returning to the police station, case property entrusted to HHC Lalit Kumar (PW-2), maalkhana incharge, who after making entries in the maalkhana register, vide road certificate (Ext. PW-2/B) sent the same for chemical analysis. This witness also sent special report (Ext. PW-7/B) to the superior officer and upon receipt of report of the chemical analyst (Ext. PW-8/D), prepared and presented the challan in Court for trial. This witness has categorically identified the case property so produced in the Court to be the one which was recovered by him from the conscious and exclusive possession of the accused. Bag, polythene wrapper and charas so recovered stand proven by him on record. Now significantly this witness has clearly withstood the test of cross examination. His testimony, on all material fact(s) in issue, is clear, cogent and consistent. The only contradiction is with regard to the colour of the bag. Yes, in Court, bag so produced was found to be of light green colour. But then the witness, unrebutted, categorically and unequivocally clarified that it was due to night that such colour came to be recorded erroneously, as light blue and not light green.

8. The fact that he had set up naaka is not disputed. The fact that accused was present on the spot, there is not much dispute, for it is evident from the line of his cross examination. In fact, accused does admit his presence on the spot, for it is his suggested case that he was sitting on seat No. 16 alongwith one foreigner in a bus owned by State Transport (Haryana Roadways) and upon checking, police asked him to get down, only whereafter he was falsely implicated. Now significantly, at no point in time, prior to such suggestion having been put to this witness, accused ever protested against his illegal detention or put forward such defence. Undisputedly, he was produced before the Magistrate, in accordance with law. He was always represented by a Counsel. Hence his defence remains improbabilized.

9. Further, we find the testimony of HC Nand Lal (PW-1) to be corroborative in

nature on all material aspects. Yes, on first brush, contradictions so pointed in his testimony appear to be material, but on close scrutiny, we find it not to be so. He states the bag carried by the accused to be a pithoo bag, which fact is not so stated by Inspector Chet Singh (PW-8). Also bag produced in Court is not a pithoo. But then he has explained the bag to be the same only as he understood, purely on account of its shape and design, for it had two small strings which made him believe it to be so. Though initially this witness does state the other bag from which charas was recovered to be blue in colour, but then we do not find this contradiction to be material, rendering the genesis of the prosecution case to be false, entitling the accused for acquittal. Credence of this witness cannot be said to have been impeached only on this count. Otherwise, it is not that his version is not worthy of credence or that he is not a truthful witness. Variation with regard to the colour of the bag is also not so significant. The colour green can easily be mistaken for blue or vice-versa. Similarly description of the bag pails into insignificance in view of the fact that both the police officials have described it to be with the strings.

10. With vehemence, it is argued that prosecution case stands vitiated on account of non association of independent witnesses. Undoubtedly, no independent witnesses were associated by the police, in carrying out search and seizure operations. The issue as to whether in every case, and under all circumstances, police must associate independent witnesses, while carrying out search and seizure operations, is no longer res integra.

11. 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 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 eye-witness 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.

12. 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.

13. Wherever, evidence of a police officer, after careful scrutiny, inspires confidence and is found to be trustworthy and reliable, 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. [Govindaraju alias Govinda v. State by Srirampuram Police Station and another, (2012) 4 SCC 722 ; Tika Ram v. State of Madhya Pradesh, (2007) 15 SCC 760; Girja Prasad v. State of M.P., (2007) 7 SCC 625); and Aher Raja Khima v. State of Saurashtra, AIR 1956].

14. Apex Court in Tahir v. State (Delhi), (1996) 3 SCC 338, 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."

15. We find even such fact not to have any bearing on the outcome of the case. From the conjoint reading of testimonies of Inspector Chet Singh (PW-8) and HC Nand Lal (PW-1) it is evident that the former had asked the latter to fetch for some independent witnesses and as is so disclosed by the latter, none could be associated for the reason that it was night time. One cannot forget that the accused was apprehended at 2.00 a.m. in the middle of night. It has come on record that certain vehicles did pass by, but then, it is not the case of either of the witnesses that any vehicle had crossed at the relevant time. Though it has emerged from the record that there are certain shops and establishments close-by, but then it is not that they were open. In fact, as is so suggested by the accused, the place was secluded and inhabited by wild life, thus confining people indoors. Even otherwise, we have found the testimonies of the witnesses to be inspiring in confidence and we see no reason for it to be corroborated by any independent witness.

16. This takes us to yet another contradiction, pointed out in favour of the convict and that being the shape of the contraband substance. One witness

states it to be chapatti, whereas, the other states it was papad. Well, this contradiction would also not make any difference, for it is not that the shapes are distinctly separate. The variation is only with regard to the thickness.

17. Next, it is pointed out that there is difference in the weight of the contraband substance allegedly recovered from the accused and the one analyzed in the laboratory. Well it is only of 0.62 grams which is almost 1%. In our considered view, even this difference is explainable, for what was weighed by the police on the spot was the contraband substance wrapped in fourteen poly wrappers and as is evident from the report of the laboratory (Ext. PW- 8/D), they analyzed the sample as under: "Total weight of parcel = 1.620Kg

Weight of carry bag & parcel cloth = 0.046Kg

Weight of exhibit with zip poly packets & poly sheets = 1.574Kg

Weight of zip poly packets & poly sheets = 0.136Kg Actual weight of exhibit = 1.438Kg"

The cumulative weight of the zip poly packets & poly sheets and the contraband substance is matching with the case property, weighed by the police on the spot.

18. It is next argued that on the specimen of the seal (Ext. PW-1/A) there are no signatures of the accused. But then, it is a mere irregularity and not illegality, which would vitiate trial. In any event, this lapse on the part of the Investigating Officer cannot be said to be a ground to totally disbelieve their ocular version or the documentary evidence, establishing the factum of recovery of the contraband substance from the conscious possession of the accused. Significantly other documents i.e. recovery memo (Ext. PW-1/B), arrest information memo (Ext. PW-1/C) and personal search memo (Ext. PW-1/D), so prepared on the spot are bearing his signatures.

19. Even by way of link evidence, we find the prosecution to have established its case. Inspector Chet Singh(PW-8) deposited the case property with HC Nand Lal (PW-2), who sent it for chemical analysis through HHC Rakesh Kumar (PW-6). It is not the suggested case of the accused that the property came to be tampered with. In any event they are categorical that till and so long the case property remained with them, it was not tampered with. HC Nand Lal does not remember the nature of the seal with which impression was embossed or the weight of the parcel. But then he was not supposed to remember such fact, for the case property never came to be sealed or weighed in his presence. In any event he was under no obligation to state such fact particularly when entry with regard thereto, came to be recorded in the maalkhana register (Ext. PW-2/A), as is evident from the testimony of Inspector Chet Singh and the Road Certificate (Ext. PW-2/C) so sent alongwith the case property to the laboratory. Significantly, such facts remain undisputed and uncontroverted.

20. We also find the SHO (PW-8) to have taken all precautions of informing his superior authority, which fact is evident not only from his testimony but also that

of HC Balam Ram (PW-7) who was posted as Reader to the Assistant Superintendent of Police, Mandi, the area in question.

21. While contending that non production of seal is fatal to the prosecution case, learned counsel for the appellant invites attention to the decisions rendered by a Coordinate Bench of this Court in Customs Preventive Station of Customs Department vs. Bahadur Singh, Latest HLJ 2014 (HP) 804; State of Himachal Pradesh vs. Sunder Singh, Latest HLJ 2014 (HP) 1293; and State of Himachal Pradesh vs. Deen Mohammad, Latest HLJ 2010 (HP) 1386. Again the decisions are based on the attending facts and circumstances. There the genesis of the prosecution story of recovery of the contraband substance from the conscious possession of the accused, itself was in doubt. It is in this backdrop that the Court additionally found the circumstance of non production of the seal to be fatal. In any event, this Court in Criminal Appeal No. 305 of 2014, titled as Sohan Lal vs. State of Himachal Pradesh, decided on 2nd November, 2016, has subsequently clarified the issue as under: "52. Non-production of original seal in the Court also cannot be said to be fatal, for the police officials have fully established their case of having sealed the case property, both on the spot and at the Police Station. There is no discrepancy about the number and nature of the seals. Also, there is no iota of evidence that they were either broken or tampered with. Report of the FSL (Ex.PW-13/C) is also evidently clear to such effect.

53. On this issue much reliance is placed on a decision rendered us in Kurban Khan (supra) [2015 Cr.LJ 183] and Anil Kumar (supra) [Latest HLJ 2015(HP) 341], wherein it is held that nonproduction of original seals does render the prosecution case to be fatal. As authors of the said decisions, we ourselves clarify them to have been rendered in the given facts and circumstances, which fact, also subsequently stands clarified by another Coordinate Bench of this Court, by relying upon a judgment rendered by the apex Court in State represented by Inspector of Police, Chennai v. N.S. Gnaneswaran, (2013) 3 SCC 594, in Kishori Lal (supra) (Criminal Appeal No.201 of 2016), that the said decisions were rendered in the given facts and circumstances. Not only that, they further clarified that it was incumbent upon the accused to have established prejudice caused to him on account of non-production of the original seal(s) in the Court, particularly when otherwise there was sufficient evidence, linking the seal affixed on the sample and embossed on the documents to be the same and the case property to be the one so recovered from the conscious possession of the accused. The Court observed that "availability of other sufficient evidence renders non-production of originals seal as a technical defect, which does not vitiate trial unless prejudice is caused??.".

"Purpose of production of original seal in the Court is to compare it with seal affixed on parcels of contraband and sample in the Court so as to prove that the parcels produced in the Court are the same which were prepared and sealed on the spot at the time of recovery from the accused and also to ensure that parcel sent for chemical examination and received back were the same which were

seized and sealed on the spot.""

22. In *State of Himachal Pradesh vs. Shri Fred Robinson*, Latest HLJ 2001 (HP) 843 (DB), in the given facts and circumstances, Court found prosecution not to have proven, affirmatively, the fact that the report of the chemical examiner pertained to the very same material which was seized from the accused. However, in the instant case, as already discussed, such is not the position in hand

23. Also the apex Court in *Mohinder vs. State of Haryana*, (2014) 15 SCC 641 has observed as under: "11. Regarding the delay in sending the contraband for examination by the FSL, it was PW 2, who carried the samples from the police station to FSL at Madhuban but he was not asked any question in the cross-examination, though opportunity was given to the defence. Even otherwise, the FSL report, Ext. P1 would show that the sample was received at the FSL intact with the seal which tallied with the specimen seals forwarded. Accordingly, the said objection is liable to be rejected."

24. Hence cumulatively examined, it cannot be said that the Court below erred in completely and correctly appreciating the testimonies of the prosecution witnesses and holding the accused guilty of the charged offence.

25. Even on the question of sentence, also it cannot be said that Court below erred or that it failed to judiciously exercise the discretion so vested in it.

26. The ocular version as also the documentary evidence clearly establishes complicity of the convict in the alleged crime. The testimonies of prosecution witnesses are totally reliable and their depositions believable. There are no major contradictions rendering their version to be unbelievable.

27. Hence, in our considered view, prosecution has been able to discharge the burden of proving the recovery of the contraband substance from the conscious possession of the accused, beyond reasonable doubt. It cannot be said that the trial Court erred in correctly and completely appreciating the testimonies of the prosecution witnesses.

28. For all the aforesaid reasons, we find no reason to interfere with the 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 complete appreciation of the material so placed on record by the parties. Findings cannot be said to be erroneous in any manner. Hence, the appeal is dismissed. Records of the Court below be immediately sent back.