

(2015) 03 SHI CK 0075

In the High Court Of Himachal Pradesh

Case No : Criminal Appeal Nos. 178 and 263/2012

Pawan Kumar and Others

APPELLANT

Vs

State of Himachal Pradesh and Others

RESPONDENT

Date of Decision : 16-03-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 20, 29, 42, 42 (2)

Citation : (2015) 2 ShimLC 714

Hon'ble Judges : Sureshwar Thakur, J.;Rajiv Sharma, J.

Bench : Division Bench

Advocate : N.S. Chandel, for the Appellant; P.M. Negi, Dy. A.G., Advocates for the Respondent

Judgement

Rajiv Sharma, J.—Since common questions of law and facts are involved in these appeals, the same are taken up together for hearing and the same are being disposed of by a common judgment.

2. Both these appeals are instituted against the judgment dated 17.1.2012, rendered by the Special Judge, Fast Track Court, Shimla in Sessions Trial No. 18-S/7 of 2010, whereby the appellant in appeal No. 178 of 2012 and respondent in Cr. Appeals No. 263 of 2012 were charged with and tried for offence punishable under Sections 20 and 29 of the Narcotic Psychotropic Substances Act (hereinafter referred to as "NDPS Act" for brevity sake.) The Trial Court has convicted and sentenced the appellant in criminal Appeal No. 178 of 2012 to rigorous imprisonment for a period of 12 years and to pay a fine of Rs. 1,00,000/- and in default of payment of fine to further undergo simple imprisonment for a period of three years. The respondents, in Cr. Appeal No. 263 of 2013 preferred by the State, have been acquitted by the trial court. The State has challenged the acquittal of these respondents.

3. Case of the prosecution, in a nutshell, is that on 18.1.2010 at 9:30 p.m.

Inspector Tenzin alongwith other police officials was present in Sanjauli Bazar in connection with patrolling-cum-crime detection duty. He received secret information that in vehicle No. HP-01A-0971 Narender Kumar @ Vicky along with his four associates was coming towards Shimla side from Anni carrying huge quantity of charas. Inspector Tenzin sent information under Section 42 of the Act to the Deputy S.P., Crimes. He proceeded towards Dhalli Chowk. At 10:30 p.m. Inspector Tenzin reached at Dhalli Chowk. He associated Gomati Prasad and Ashok Kumar Sood as independent witnesses in the raiding party. The Police Party laid naka. At 10:30 p.m., vehicle No. HP-01A-0971 reached at Dhalli. The Police Party stopped the vehicle. The Driver of the vehicle disclosed his name as Pawan Kumar. The other persons also disclosed their identities. The Police Party conducted the search of the vehicle. The ply boards of the door of the windows of the vehicle were opened and police party found 39 plastic envelops having marble shaped and wick shaped Charas. Police also recovered an electronic scale from the vehicle. The Charas was weighed and on weighing it was found to be 19.300 kgs. The Charas was put in a plastic sack, on which whole meal atta in red colour was inscribed. The sack was tied with blue color cloth. It was sealed with four seal impressions of seal "A". The vehicle alongwith its documents was taken into possession. The samples of the seal were taken on pieces of cloths and seal after use was entrusted to witness Ashok Kumar Sood. Rukka was prepared and the same was sent through Constable Dalip Singh to Police Station. FIR was registered. The accused were arrested. The case property and the accused were produced before the Station House Officer, Police Station State, CID o 19.10.2010 at 11 a.m. The S.H.O. re-sealed the case property with four seals of seal impression "H". The samples of seal were taken on pieces of cloth. The case property was handed over to MHC at 11:30 a.m. The MHC sent the case property for chemical analysis to F.S.L., Junga on 20.1.2010. The report was received from the F.S.L., Junga. Police investigated the case and the challan was put up in the court after completing all the codal formalities.

4. Prosecution examined as many as 13 witnesses in all to prove its case against the accused. Statements of accused under Section 313 Cr.P.C. were recorded. They have denied the case of the prosecution in entirety. Accused have also produced five witnesses in defence. Learned trial Court convicted and sentenced the accused Pawan Kumar and the other respondents, namely, Narender Kumar, Gita Nand, Gulzari Lal and Mahinder Singh were acquitted, as noticed hereinabove.

5. Mr. N.S. Chandel, learned counsel for the accused Pawan Kumar has vehemently argued that the prosecution has failed to prove its case against his client.

6. Mr. P.M. Negi, learned Deputy Advocate General, has supported the conviction and sentence of Pawan Kumar in Criminal Appeal No. 178 of 2012. He has also contended that the prosecution has proved its case against all the accused in Criminal Appeal No. 263 of 2012.

7. Mr. Vivek Sharma, Mr. Manoj Pathak and Mr. J.R. Poswal appearing on behalf of respective respondents have supported the judgment passed by the learned Trial Court.

8. We have heard the learned counsel for the parties and have gone through the record meticulously.

9. Statement of PW-1 Devinder Kumar is formal in nature.

10. PW-2 Gargesh Kumar has deposed that on 19.1.2010 Inspector Tenzin Negi gave him special report at 2 p.m. for handing it over to the Reader of S.P. Crime Shimla. He handed over the same to the Reader ASI Shiv Ram at 4:25 p.m. On the next day, MHC Parkash Chand gave him a sealed bag along with NCB form in triplicate, a copy of memo, sample seals of seal impression "A" and "H" and envelop containing letter addressed to FSL Junga vide R.C. No. 5 of 2010 for depositing the same with FSL, Junga. He proceeded from Police Station CID, Kasumpti and deposited all the articles with FSL Junga.

11. PW-3 Constable Satish Kumar has deposed that on 19.1.2010 Shri Brijesh Sood, Deputy S.P. on visiting office handed over to him intimation which he had received earlier. He made entries in the relevant register and appended the original intimation in the relevant file.

12. PW-4 ASI Shiv Ram has deposed that on 19.1.2010 Constable Gargesh Kumar brought special report from Police Station, CID, Shimla. It was handed over to him. He made endorsement on the special report regarding its receipt. Thereafter, he took the special report to S.P., Crime, Shimla for necessary action. Smt. Sumedha Diwedi was S.P. Crime. She perused the special report and wrote word "seen" over it.

13. PW-5 Prakash Chand is the material witness. According to him, on 18.1.2010 at 7:30 p.m. Inspector Tenzin Negi, Head Constable Rajesh Kumar, Constable Dalip Kumar, Constable Ajay Kumar, Constable Yegesh Kumar, Constable Nirupam Sharma, Constable Om Prakash, Constable Rajinder and Constable Naveen Kumar came to the Police Station, CID and entry regarding their arrival was made in the Rojnamcha. At 8 p.m., the Police Party departed from Police Station along with ASI Rajinder Singh in vehicle No. HP-07-0321 and HP-07A-0366. On 19.1.2010, at 12:30 a.m. Constable Dalip Kumar brought Rukka in the Police Station which was presented by him before the SHO Lal Singh. The rukka was handed over to him by the SHO for registration of FIR. He registered FIR Ext. PW5/A. On 19.1.2010, at 11 a.m., Inspector Tenzin produced the case property which was in a plastic bag and sealed with four seals of seal impression "A". He also presented sample seal as well as NCB form in triplicate, seizure memo and electronic scale. SHO Lal Singh re-sealed the plastic bag with seal impression "H" and put four seals on the bag. At 11:30 a.m., case property, NCB form, sample seals A and H, seizure memo, re-sealing certificate and electronic scale were deposited with him by the SHO. He made entries regarding it in the malkhana register. He sent the case property consisting of plastic bag, NCB forms, sample

seal, seizure memo, re-sealing certificate and docket to FSL Junga through constable Gargesh Kumar vide R.C. No. 5/10. He brought the RC back. He has admitted that columns No. 10 and 12 were in his writing.

14. PW-6 Brijesh Sood has deposed that on 18.1.2010, Head Constable Raj Kumar came to his residence at 10:15 p.m. and gave him a report Ext. PW3/B. He made endorsement on Ext. PW3/B.

15. Statement of PW-7 P.K. Negi is formal in nature.

16. PW-8 Gomati Prasad was associated by the Police as independent witness. He has deposed that on 18.1.2010 at about 10:30 p.m., he and Ashok after closing shops were about to go, there a maxi cab bearing No. 0971 was standing outside the liquor vend, Dhalli. They were called by Mukesh, the police official, and told that Bhang etc. which was in the shape of sticks and round pieces have been recovered from the vehicle. The police was having scale and weights with them. The contraband weighed 19.300 kg. The contraband was in plastic bags and those were 39 in number. The police asked to bring a plastic bag (Katta), so that the contraband recovered could be put in that and thereafter the recovered contraband was put into the bag and sealed with seal impression "B". Some papers were prepared by the Police and those were signed by him and Ashok Kumar. A big plastic white colour bag was produced stated to be containing contraband. The bag was tied with blue cloth strip and sealed with seal. It was broken. The broken pieces numbering four were tagged with the bag. The seal was not legible. He identified bag Ext. P-1. On its opening, another white plastic bag was taken out from which 40 yellow colour polythene bags were taken out. The contraband was kept in these 40 bags. The entire contraband was in the bag. The white colour plastic bags were Ext. P-1 and P-2 whereas yellow colour poly bags were Ex. P-3 to Ex. P-42 and the contraband was Ex. P-43. He was declared hostile and cross-examined by the learned Public Prosecutor. In his cross-examination, he has deposed that he has signed on one bag only. He has not signed Ex. P-1 and Ex. P-2. No one has signed Ex. P-1 and Ex. P-2.

17. PW-9 Dalip Kumar has deposed that on 18.1.2010, he was with the police party headed by Inspector Tenzin. They received secret information that a vehicle bearing No. HP-01-0971 was coming towards Shimla carrying contraband. Two independent witnesses Gomati Prasad and Ashok Kumar were associated in the party at Dhalli Chowk. The vehicle was searched with the help of police officials accompanying them. During search, 39 poly packets containing contraband in the shape of sticks and round balls were recovered. The recovered contraband alongwith poly packets was put into a plastic bag which was obtained by sending Gomati Prasad. The bag was tied with blue cloth strip and sealed with four different seals of seal "A". Sample was separately taken on a cloth. NCB forms were prepared by Inspector Tenzin. The seal after use was given to Ashok Kumar.

18. PW-10 Rajinder Singh has also deposed the manner in which the vehicle was

searched, recovery was effected, sealing process etc. were completed on the spot.

19. PW-11 Lobeshwar has deposed that on 18.1.2010 his driver was not present and he had engaged Pawan Kumar as driver.

20. PW-12 Inspector Tenzin Negi has deposed that he received a secret information at Sanjauli that an information under section 42 (2) of the Act Ex. PW-3/B was noted down by him and sent through HC Rajesh Kumar to Dy. S.P. Crime. The vehicle was searched and the contraband was recovered. It weighed 19.300 kgs. Gomati Prasad was sent to bring a bag to keep the recovered contraband. He brought a polythene bag in which the contraband was kept and tied with a cloth strip and sealed with seal impression "A". The seal after use was given to Ashok Kumar. The vehicle alongwith documents was taken into possession vide memo Ex. PW-8/A. The sample seal was separately taken on a cloth. The NCB forms were Ex. PW-12/A and its columns No. 1 to 8 were filled by him at the spot. Rukka Ex. PW-12/D was prepared by him and sent through Head Constable Dalip Singh to Police Station, Kasumptati. On 19.1.2010 at 11.00 A.M. case property, NCB forms, specimen seal, copy of recovery memo were produced before Inspector Lal Singh. The FSL report Ex. PW-12/E was received by him and it was taken on the file. After completion of investigation, file was given to the S.H.O. Lal Singh. He got intimation from F.S.L. Junga that since the bag cover was loose, so he asked them to tag a cloth at the particular portion of the bag. However, they kept contraband in Ex. P-2 and the bag was again put in Ex. P-1. He obtained the signatures of the witnesses on Ex. P-1, but the same were not legible. In his cross-examination, he has admitted that he did not incorporate any word during investigation or in the charge sheet that he has received a phone from F.S.L. that the earlier plastic bag has become loose. No zimni was recorded to this effect. They remained on the spot from 10.35 P.M. to 1.00 A.M.

21. PW-13 Inspector Lal Singh has deposed that on 18.1.2010, a police party headed by Inspector Tenzin Negi was sent towards Dhalli regarding information relating to NDPS cases. On 19.1.2010, he received rukka Ex. PW-12/D through constable Dalip. On 19.1.2010 at about 11.30 A.M. Inspector produced before him one bag (Boru) sealed with four seals of A, NCB forms in triplicate, Ex. PW-12/A and sample seal A, Ex. P-45. He resealed the bag (Boru) containing charas. He filled the requisite columns of NCB form Ex. PW-12/A. He after resealing the bag handed over the same to HHC Prakash for depositing the same in Malkhana. The sample seal Ex. P-46 was taken on cloth and given to MHC. In his cross-examination, he has deposed that before 11.30 A.M. case property was with the I.O. On 18.1.2010, he was in Police Station, CID Kasumptati from 3.00 P.M. to 1.00 A.M. He did not remember his mobile number, which he was holding at that time.

22. What emerges from the statements recorded hereinabove is that the vehicle bearing registration No. HP-01A-0971 was apprehended by the police. Charas was recovered. Sealing was undertaken and the rukka was sent for the

registration of the case. According to Investigating Officer PW-12 Inspector Tenzin Negi, the police had received secret information.

23. Codal formalities were completed by the police party on the spot by 1.00 A.M. PW-12 Tenzin Negi has deposed that on 19.1.2010 at 11.00 A.M. case property, NCB forms, specimen seal and copy of recovery memo were produced before Inspector Lal Singh. However, PW-13 Lal Singh has deposed that on 19.1.2010 at 11.30 A.M. Inspector produced before him one bag sealed with four seals of "A", NCB forms in triplicate Ex. PW-12/A and sample seal "A" Ex. P-45. PW-5 Prakash Chand has deposed that on 19.1.2010 at 11.00 A.M., Inspector Tenzin Negi produced the case property, which was a plastic bag and sealed with four seals of seal "A". He also presented sample seal as well as NCB forms in triplicate, seizure memo and an electronic scale white in colour before the S.H.O. Lal Singh. At 11.30 A.M., the case property, NCB forms, sample seals A and H, seizure memo, resealing certificate and electronic scale were deposited with him by the S.H.O. Thus, according to I.O. PW-12 Tenzin Negi, he produced before the S.H.O., i.e. PW-13 Lal Singh, case property at 11.00 A.M. PW-13 Lal Singh has deposed that he received the case property at 11.30 A.M. PW-5 Prakash Chand has deposed that the I.O. produced the contraband before the S.H.O. at 11.30 A.M. as the police had completed the codal formalities by 1.00 A.M. on 19.1.2010. However, as noticed hereinabove, the contraband alongwith necessary documents, i.e. NCB forms, sample seals, seizure memo etc. were deposited only at 11.30 A.M. According to PW-13 Lal Singh, case property has remained with the I.O. till it was deposited with him. PW-12 Inspector Tenzin Negi, I.O. was to place the contraband before the S.H.O. immediately. He was not supposed to keep the contraband with him for more than 11 hours. The same was required to be kept in safe custody.

24. Learned counsel appearing on behalf of the accused has drawn the attention of the Court to NCB form. Columns No. 9, 10 and 11 are supposed to be filled up by the S.H.O. In this case, column No. 10 has been filled up by PW-5 Prakash Chand. The purpose of resealing and filling fill up of columns of NCB forms is to ensure that no person is falsely implicated and all the codal formalities, i.e. sealing, filling up of columns No. 1 to 8 by the I.O. etc. are in accordance with law. It is clear from NCB form Ex. PW-12/A that the names of the accused have been subsequently inserted at the top of NCB form. PW-5 Prakash Chand, in his cross-examination, has admitted that columns No. 10 and 12 of mark "B" are in his handwriting, however, the writing above column No. 1 of mark "B" showing the name of accused is not in his handwriting and he did not know who has written it. Surprisingly, PW-13 Lal Singh has deposed that the handwriting in column No. 8 could be the handwriting of I.O. The I.O. was his immediate subordinate. He should have known his handwriting. The NCB form was not filled in accordance with law.

25. According to the prosecution case, the entire contraband was put in one bag i.e. Ex. P-1. It was deposited with PW-5 Prakash Chand by the S.H.O. Lal Singh.

PW-5 Prakash Chand handed over the same to be taken alongwith necessary documents, i.e. NCB forms etc. to F.S.L. Junga. According to report Ex. PW-12/E, one sealed poly gunny bag bearing four seals of "A" and resealed with four seals of "H" were sent through Constable Gargesh Kumar. The seals were found intact and tallied with specimen seals sent by the forwarding authority on the form NCB-1. The parcel was kept in safe custody of the Assistant Chemical Examiner till the report. However, when the bag Ex. P-1 was opened in the court, it contained another bag Ex. P-2. The contraband was sealed in one bag on the spot. The I.O. has deposited only one bag with the S.H.O. The S.H.O. in turn has deposited with PW-5 Prakash Chand one bag. PW-5 Prakash Chand has handed over only one bag to PW-2 Gargesh Kumar. He deposited only one bag with F.S.L. Junga. It has come on record that only one bag was deposited with F.S.L. Junga. However, when the case property was produced in the court, it contained in two bags, i.e. Ex. P-1 and Ex. P-2. The explanation given by PW-12 Inspector Tenzin Negi to explain as to how another bag was found in Ex. P-1 cannot be believed. In his cross-examination, he has deposed that he did not incorporate any word during investigation or in the charge sheet that he has received a phone call from F.S.L. Junga that earlier plastic bag has become loose. Similarly, no zimni order to this effect was recorded. PW-12 Tenzin Negi has also deposed in his examination-in-chief that he has obtained the signatures of the witnesses on Ex. P-1, but the same were not legible. Moreover, in case the bag was loose, it could not be accepted by F.S.L. Junga. Normal practice in the F.S.L. Junga or for that matter in any other analyzing agency is that the sample is returned immediately to do the needful. In case he had received any information that the bag was loose, he should have recorded the same in Rojnamcha and taken steps in accordance with law. Thus, the possibility cannot be ruled out that the case property produced before the Court was not the case property, which was sent to F.S.L. Junga for the purpose of analyses of sample. Learned trial court has omitted to notice this glaring defect in the investigation, which has caused prejudice to the accused.

26. The matter is required to be considered from another angle. All the accused were charged for offence punishable under section 20 read with section 29 of the Act. The police has also put up the amended charge sheet against all the accused persons under section 20 read with section 29 of the Act for conspiring with each other and being in joint and conscious possession of charas weighing 19.300 kg being transported in vehicle bearing No. HP-01-A-0971. The trial court has acquitted four accused and has convicted one accused Pawan Kumar. In case they all were charged and tried for offence under section 29 of the Act for abetting and entering into conspiracy, all of them should have been acquitted.

27. Their Lordships of the Hon"ble Supreme Court in Balkar Singh Vs. State of Haryana, have held that one alleged conspirator cannot be convicted if all co-conspirators are acquitted, when conspiracy itself is not established from the evidence.

28. NCB form was not filled in accordance with law. There is no explanation where the sample remained for 11 hours before being deposited in the Malkhana. There is no cogent and convincing explanation given why the case property was put into two bags, i.e. Ex. P-1 and Ex. P-2 though throughout the proceedings there was only one poly gunny bag, which was sent upto F.S.L., Junga bearing four seals of "A" which was resealed with four seals of "H". The explanation, as noticed above, given by PW-12 Inspector Tenzin Negi is liable to be discarded.

29. Accordingly, Cr. A. No. 178/2012 is allowed. Judgment of conviction and sentence dated 17.1.2012 rendered in Sessions Trial No. 18-S/7 of 2010 qua accused Pawan Kumar is set aside. Accused Pawan Kumar is acquitted of the charge framed against him by giving him benefit of doubt. Fine amount, if already deposited, be refunded to the accused. Since the accused is in jail, he be released forthwith, if not required in any other case.

30. The Registry is directed to prepare the release warrant of accused Pawan Kumar in Cr. A. No. 178/2012 and send the same to the Superintendent of Jail concerned in conformity with this judgment forthwith.

31. Cr. A. No. 263/2012 preferred by the State is dismissed.