

(2015) 05 SHI CK 0141
In the High Court Of Himachal Pradesh
Case No : Criminal Appeal No. 56 of 2014

Pradeep Kumar and Others	Vs	APPELLANT
State of Himachal Pradesh		RESPONDENT

Date of Decision : 21-05-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 18, 20, 29, 50, 61

Citation : (2015) 05 SHI CK 0141

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

Bench : Division Bench

Advocate : G.R. Palsra, for the Appellant; Ramesh Thakur, Asstt. A.G.,
Advocates for the Respondent

Final Decision : Allowed

Judgement

Rajiv Sharma, J—This appeal is instituted against the judgment dated 8/9.1.2014, rendered by the learned Special Judge (III), Mandi, H.P., in Sessions Trial No. 79 of 2010, whereby the appellants-accused (hereinafter referred to as the accused), were charged with and tried for offences punishable under Section 18/20/29-61-85 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the ND and PS Act). Appellant No. 1 Pardeep Kumar was convicted and sentenced to undergo rigorous imprisonment for a period of 10 years and to pay fine of Rs. 1,00,000/- and in default of payment of fine, he was further ordered to undergo simple imprisonment for one year under Section 20 of the Act. He was also sentenced to undergo rigorous imprisonment for a period of 5 years and to pay fine of Rs. 30,000/- and in default of payment of fine, he was further ordered to undergo simple imprisonment for six months under Section 18 of the Act. Appellant No. 2 Rohit Gautam was also sentenced to rigorous imprisonment for a period of 3 years and to pay fine of Rs. 20,000/- and in default of payment of fine, he was further ordered to undergo simple imprisonment for five months under Section 18 of the Act.

2. The case of the prosecution, in a nut shell, is that on 15.8.2010, HC Rajmal (P.W. - 9) alongwith HC Mahant Ram HHC Uday Chand and HHG Mohinder Singh left the Police Station in official vehicle being driven by Const. Himat Ram for nakabandi and routine patrol checking to Larji Dam. At about 5:30 PM, one Maruti Van bearing regn. No. HP-51-3965 came from the Larji side. It was signaled to stop. Accused Pradeep Kumar was driver of the vehicle and another accused Rohit Gautam was sitting on the back seat of the vehicle. I.O. asked accused Pradeep Kumar to show the documents. He got frightened and suspicion was raised. The place was isolated and secluded one. One security guard of Larji Dam, namely, Jai Chand P.W. - 8 alongwith HC Mahant Ram P.W. - 1 were associated as witnesses. The accused were informed to exercise his option under Section 50 of the Act. They opted to be searched by the police party. Thereafter, written consent of Accused were taken vide memo Ext. P.W. - 1/A and P.W. - 1/B, respectively. The police officials gave their personal search. During personal search of accused Pradeep, both of his legs were checked and knee caps found on both the legs. On removing the knee cap from the right leg, 5 small packets made of khakhi wrappers were recovered and on removing the knee cap from the left leg two packets made of khakhi wrappers were recovered. On checking five packets, black coloured substance in the shape of sticks was recovered. On smelling it was found to be cannabis. On checking the remaining two packets, black coloured substance in semi-liquid form was found to be opium. Cannabis recovered from the 5 packets was weighed. It was found to be 1 kg 50 gms and opium was found to be 525 gms. P.W. - 9 packed both recovered substances into separate cloth parcels, sealed with seal A at 6 places each and separate seal was also taken on the piece of cloth. During the personal search of accused Rohit Gautam, one envelope wrapped with khakhi wrapper was found kept by him in the sock of his left leg. On checking, it was found containing black coloured substance in the form of semi liquid opium. It was weighed. It weighed 100 gms. of opium. It was packed in a cloth parcel and sealed with seal A at six places. NCB forms Ext. P.W. - 5/C, P.W. - 5/D and P.W. - 5/E in triplicate were prepared and columns 1 to 8 each were filled by P.W. - 9. He embossed seal A on it and took sample seal A on separate cloth Ext. P.W. - 1/C. The seal after its use was handed over to HC Mahant Ram. Parcels alongwith the NCB forms in triplicate, sample seal as well as Maruti Van, its keys and RC were taken into possession vide memo Ext. P.W. - 1/D. Parcel containing 1 kg 50 gms charas was marked as Ext. P-1, parcel containing 525 gms of opium was marked as P-2 and the third parcel containing 100 gms of opium was marked as P-3. P.W. - 9 scribed rukka Ext. P.W. - 9/B and sent the same to the PS through HHC Uday Chand P.W. - 2, upon which FIR was registered. The site plan was prepared. The case property was produced alongwith the NCB forms in triplicate and sample seal before the SI SHO P.W. - 5 Sharif Mohammad. He resealed the parcels with 3 seals of S each and filled the relevant columns 9 to 11 of the NCB form in triplicate Ext. P.W. - 5/C, P.W. - 5/D and P.W. - 5/E. Specimen seal S was embossed on the same. He also took sample seal S on a piece of cloth. He deposited the parcel alongwith the NCB form in triplicate and sample seals A and S with MHC Khem

Chand P.W. - 7. P.W. - 7 made entry in the malkhana register at Sr. No. 526. He proved Ext. P.W. - 7/A. On 17.8.2010, P.W. - 9 sent the special report Ext. P.W. - 4/A to the Addl. SP, Mandi through HHC Gauri Chand. P.W. - 7 HC Khem Chand on 17.8.2010 forwarded the case property alongwith the documents to FSL Junga vide RC No. 60/2010, Ext. P.W. - 7/B. The investigation was completed and the challan was put up after completing all the codal formalities.

3. The prosecution, in order to prove its case, has examined as many as 8 witnesses. The accused were examined under Section 313 Cr.P.C. The accused have denied the prosecution case. The learned trial Court convicted the accused, as noticed hereinabove.

4. Mr. G.R. Palsra, Advocate, appearing on behalf of the accused, has vehemently argued that the prosecution has failed to prove its case against the accused. On the other hand, Mr. Ramesh Thakur learned Asstt. AG, for the State has supported the judgment of the learned trial Court dated 8/9.1.2014.

5. We have heard learned counsel for both the sides and gone through the judgment and records of the case carefully.

6. P.W. - 1 ASI Mahant Ram deposed that on 15.8.2010, he alongwith HC Rajmal (P.W. - 9), HHC Uday Chand and HHG Mohinder Singh left the Police Station in official vehicle being driven by Const. Himat Ram for nakabandi and routine patrol checking to Larji Dam. At about 5:30 PM, one Maruti Van bearing regn. No. HP-51-3965 came from the Larji side towards Aut. It was signaled to stop. Accused Pradeep Kumar was driver of the vehicle and one more person was sitting on the back seat of the vehicle. I.O. asked accused Pradeep Kumar to show the documents. He got frightened and suspicion was raised. The police apprised the accused his legal right to be searched either in presence of the Magistrate or the Gazetted Officer. The accused Pradeep Kumar consented to be searched by the police. Memo Ext. P.W. - 1/A was prepared. The accused also signed the memo. Accused Rohit was also apprised of his legal right to be searched either in presence of the Magistrate or the Gazetted Officer. The accused consented to be searched by the police vide memo Ext. P.W. - 1/B. The police officials gave their personal search. The vehicle was driven by accused Pradeep Kumar. Rohit was sitting in the Van. The search of accused Pradeep Kumar was carried out. It was found that he had tied two polythene envelopes on the back side of his both legs below the knee and it was tied with knee cap. The envelopes were of khakhi in colour made of plastic wrapper. Before removing the knee cap from the person of accused, the photographs were taken, marked as A and B. The knee cap from the right leg was removed and five envelopes made of khakhi wrapper were found. On checking of the envelopes, black colour substance in the shape of sticks was found. It was found to be charas. It weighed 1 kg 50 gms. On removing knee cap from the left leg of accused Pradeep Kumar two envelopes made of khakhi wrappers were found. On checking the envelopes brown colour substance in the shape of semi liquid was recovered. It was found to be opium. It weighed 525 gms. The recovered contraband was kept in a cloth

parcel alongwith wrapper which was sealed with seal A at six places. The recovered opium from the possession of accused Pradeep was also packed in a cloth parcel and was also sealed with seal A at six places. On carrying out the personal search of accused Rohit Kumar, one envelope wrapped with khakhi plastic was recovered from his left leg inside the socks. Before removing the envelope, photographs mark A, B and C were taken. On checking of the envelope, brown colour substance in the shape of semi liquid was recovered. It was found to be opium. It weighed 100 gms. The recovered opium was kept in a cloth parcel and was sealed with seal A at six places. Sample seal was taken on a piece of cloth vide Ext. P.W. - 1/C. The sample seal was handed over to P.W. - 2 Jai Ram after use. NCB forms in triplicate, vehicle, key and documents were taken into possession vide memo Ext. P.W. - 1/D. The case property was produced by HHC Charan Dass in the Court as mark P-1, P-2 and P-3.

7. P.W. - 2 HHC Uday Chand also deposed the manner in which the search operation was carried out, seizure and arrest were made on the spot on 15.8.2010 and contraband was recovered from the accused. The rukka was prepared and handed over to him. He handed over the same to the Police Station, on the basis of which, FIR was registered. On 17.8.2010, MHC Khem Chand handed over to him three parcels Ext. P-1, P-2 and P-3 sealed with seal A at six places and re-sealed with seal S at six places, alongwith the NCB form in triplicate alongwith copy of FIR and sample seals A and S vide RC No. 60/2010 for depositing the same in FSL, Junga. He deposited the case property on the same day and handed over the receipt to MHC.

8. P.W. - 5 SI Sharif Mohammad deposed that on 15.8.2010, MHC Udai Chand handed over to him a rukka scribed by SI Raj Mal for registration of FIR. He made endorsement on it vide Ext. P.W. - 5/A and FIR Ext. P.W. - 5/B was registered. On 15.8.2010, HC Raj Mal handed over to him three parcels out of which one was sealed with seal A at six places which was marked as P-1. Second parcel was marked as P-2 sealed with seal A at six places. Third parcel was marked as P-3. It was also sealed with six seal impression of seal A. He also produced before the Court sample seal A, NCB forms in triplicate. He appended three seals of seal S on all the parcels and filled NCB form in triplicate Ext. P.W. - 5/C, P.W. - 5/D and P.W. - 5/E and embossed specimen seal S on the NCB form after filling column No. 9 to 11. Sample seal was also taken on separate cloth. He deposited the same with MHC at Police Station.

9. P.W. - 7 HC Khem Chand deposed that SI Sharif Mohammad deposited with him one parcel with seal A at six places and resealed with seal S at 3 places marked as Mark P-1 containing 1 kg 50 grams charas, one parcel sealed with seal A at six places and resealed with S at three places stated to be containing 525 grams opium, one parcel sealed with seal A at six places and resealed with seal S at three places stated to be containing 100 grams opium. He made entry of the same in malkhana register at Sr. No. 526. He proved extract of malkhana register vide Ext. P.W. - 7/A. On 17.8.2010, he forwarded the case property to

FSL Junga vide RC No. 60/10 through HHC Udai Chand.

10. P.W. - 8 Jai Ram is an independent witness. He deposed that he was on duty from 2:00 PM to 8:00 PM. The police had laid naka on the road and were checking the vehicles. He was present on the bridge about at a distance of 200 meter from the place of naka. After about 3:30 PM, a white colour van came from Larji side whose registration number, he did not remember. The police stopped the vehicle and checked the same. Two persons were traveling in the vehicle. The police called him to witness the proceedings. No contraband was recovered from the accused in his presence. He was declared hostile and cross-examined by the learned P.P. He identified his signatures on memos Ext. P.W. - 1/A, P.W. - 1/B and Ext. P.W. - 3/A. He further admitted in his cross-examination that accused was searched on 15.8.2010 at 5:30 PM near Larji Dam by the police. He also admitted that the police clicked the photographs of the accused in his presence. He denied the suggestion that on checking of the knee cap of right side, five packets and from knee cap of left side two khakhi envelopes were recovered and they were packed in plastic. He denied that from the right side envelope black coloured substance in the shape of sticks was recovered which on smelling was found to be cannabis. He also denied that on the knee cap of the left leg opium was recovered. The contraband was not weighed in his presence. He further denied that cannabis was found to be 1 kg 500 gms and opium was found to be 525 gms. He denied that the recovered cannabis and opium were taken into possession by the police in his presence. He also denied that similarly the police searched accused Rohit in his presence and from his socks of left foot 100 gms of opium was recovered. He also denied that the police in his presence informed the accused persons of their legal right of search before Magistrate or Gazetted Officer. He also denied that consent memos Ext. P.W. - 1/A and Ext. P.W. - 1/B were prepared in his presence. He has identified the signatures on parcel Ext. P-1, parcel Ext. P-6 and parcel P-9. In his cross-examination on behalf of the accused, he admitted that on 16.8.2010, he was brought to Aut Police Station, where the police obtained his signatures on papers and parcel.

11. P.W. - 9 HC Raj Mal also deposed the manner in which the search operation was carried out, seizure and arrest were made on the spot on 15.8.2010 and contraband was recovered from the accused the three parcels were also produced while recording his statement by Const. Shashi Kumar. These were sealed with the seal of the Court.

12. The case of the prosecution, precisely, is that the accused were nabbed on 15.8.2010 and the contraband was recovered from them. Section 50 was complied with. The rukka was prepared on the spot. NCB forms in triplicate were also filled in and sent to the Police Station. FIR was registered and the case property was placed before the SHO. He resealed the same and deposited it with MHC. The contraband was sent for chemical examination.

13. The prosecution case has not been supported by the independent witness Sh. Jai Ram P.W. - 8. According to him, no contraband was recovered in his presence.

He was declared hostile. He has identified his signatures on Ext. P.W. - 1/A, P.W. - 1/B and P.W. - 3/A, as well as Ext. P-1, P-6 and P-9. He has further categorically denied that any recovery was made in his presence from the accused persons.

14. The case property was produced, as notice hereinabove, before SI Sharif Mohammad. He resealed the same and deposited the same with P.W. - 7 HC Khem Chand. He made entries at Sr. No. 526 of the malkhana register. He proved the extract of malkhana register Ext. P.W. - 7/A. We have gone through the extract of malkhana register Ext. P.W. - 7/A. There are entries made to the effect that the case property was deposited in the malkhana and the same was sent to FSL Junga. However, surprisingly there is no entry of the case property received from the FSL, Junga in the malkhana register. The case property was produced while recording the statement of P.W. - 1 by HHC Charan Dass No. 281. The statement of Charan Dass has not been recorded. There is no entry in the malkhana register when the case property was taken out to be produced before the Court. There is no corresponding entry when the case property was re-deposited in the malkhana register. There is no daily diary report to the effect that the case property was taken out from the malkhana and re-deposited in the malkhana after producing the same in the Court.

15. The learned trial Court has observed that MHC Charan Dass has produced the parcel Mark P-1 which was sealed with seal "S" at four places. Two seals were not visible. The SHO has only put three seals on three parcels Ext. P-1 to P-3. In case, he has put only three seals, there was no occasion for the 4th seal "S" put on mark P-1. Similarly, the case property was also produced while recording the statement of P.W. - 9 HC Raj Mal. It was resealed with seal of the Court. It was produced by Const. Shashi Kumar. Const. Shashi Kumar has also not been examined by the prosecution. There is no entry made in the malkhana register when the case property was taken out to be produced before the Court by Const. Shashi Kumar and also at the time of re-depositing the same after its production in the Court. It, thus, casts serious doubt whether it was the same case property which was recovered from the accused, sent to FSL, Junga and produced in the Court. The case property is required to be produced before the Court to establish that it was the same case property which was recovered from the accused. The case property has to remain in safe custody from the point of initial seizure till its production in the Court and when it is re-deposited in the malkhana after being produced in the Court. In this case, there is also no DDR when Shashi Kumar has produced the case property before the Court and when it was re-deposited in the malkhana. The case of the prosecution has also not been supported by independent witness P.W. - 8 Jai Ram, qua the recovery of the contraband.

16. Their lordships of the Hon'ble Supreme Court, in a recent decision in the case of Makhan Singh Vs. State of Haryana(2015) 5 AD (SC) 417 : (2015) 3 AJR 689 : (2015) 90 ALLCC 712 : (2015) 3 BomCR(Cri) 296 : (2015) 2 CCR 232 : (2015) CriLJ 3282 : (2015) 2 Crimes 346 : (2015) 3 JCC(Narcotics) 100 : (2015)

3 JLJR 84 : (2015) 2 MLJ(Cri) 631 : (2015) 3 PLJR 268 : (2015) 2 RCR(Criminal) 834 : (2015) 5 SCALE 430 : (2015) 2 UC 927 , have held that it is well settled that conviction can be based solely on the testimony of official witnesses, condition precedent is that the evidence of such official witnesses must inspire confidence. In that case, it was not as if independent witnesses were not available. Independent witness P.W. 1 and another independent witness examined as D.W. - 2 had spoken in one voice that the accused person was taken from his residence. In such circumstances, their lordships have held that the High Court ought not to have overlooked the testimony of independent witnesses, especially when it casts doubt on the recovery and the genuineness of the prosecution version. Their lordships have held as under:

"10. For recording the conviction, the Sessions Court as well as the High Court mainly relied on the testimony of official witnesses who made the recovery, i.e. H.C. Suraj Mal-P.W. 2 and Inspector Raghbir Singh-P.W. 6, and found them sufficiently strengthening the recovery of the possession from the appellant. In our considered view, the manner in which the alleged recovery has been made does not inspire confidence and undue credence has been given to the testimony of official witnesses, who are generally interested in securing the conviction. In peculiar circumstances of the case, it may not be possible to find out independent witnesses at all places at all times. Independent witnesses who live in the same village or nearby villages of the accused are at times afraid to come and depose in favour of the prosecution. Though it is well-settled that a conviction can be based solely on the testimony of official witnesses, condition precedent is that the evidence of such official witnesses must inspire confidence. In the present case, it is not as if independent witnesses were not available. Independent witnesses P.W. 1 and another independent witness examined as D.W. 2 has spoken in one voice that the accused person was taken from his residence. In such circumstances, in our view, the High Court ought not to have overlooked the testimony of independent witnesses, especially when it casts doubt on the recovery and the genuineness of the prosecution version."

17. The prosecution has failed to prove that the contraband was recovered from the exclusive and conscious possession of the accused. Thus, the prosecution has failed to prove the case against the accused beyond reasonable doubt for the commission of offence under Section 18/20/29-61-85 of the N.D. and P.S., Act.

18. Accordingly, in view of the analysis and discussion made hereinabove, the appeal is allowed. Judgment of conviction and sentence dated 8/9.1.2014, rendered by the learned Special Judge-III, Mandi, H.P., in Sessions trial No. 79 of 2010, is set aside. Accused are acquitted of the charges framed against them by giving them benefit of doubt. Fine amount, if any, already deposited by the accused is ordered to be refunded to them. Since the accused are in jail, they be released forthwith, if not required in any other case.

19. The Registry is directed to prepare the release warrants of the accused and send the same to the Superintendent of Jail concerned, in conformity with this

judgment forthwith.