
(2013) 06 SHI CK 0036
In the High Court Of Himachal Pradesh
Case No : Criminal Appeal No. 58 of 2008

Raghuvir Singh

APPELLANT

Vs

State of Himachal Pradesh

RESPONDENT

Date of Decision : 27-06-2013

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 2, 2(iii), 2(iii)(a), 2(iii)(b), 2(iii)(c)

Citation : (2013) 06 SHI CK 0036

Hon'ble Judges : Surinder Singh, J; Dharam Chand Chaudhary, J

Bench : Division Bench

Advocate : Chaman Negi in Cr. Appeal No. 58/2008, Mr. Vinay Thakur in Cr. Appeal No. 202/2007, Mr. T.S. Chauhan in Cr. Appeal No. 226/2007 and Mr. P.P. Chauhan in Cr. Appeal No. 292/2007, for the Appellant; Virender Kumar Verma, Additional Advocate General with Mr. Ramesh Thakur, Assistant Advocate General, for the Respondent

Final Decision : Allowed

Judgement

Surinder Singh, J.—All these appeal are arising from the judgment of conviction and sentence passed by the learned trial Court in Sessions trial No. 8/2006, decided on 30.5.2007, against the appellants, hereinafter referred to as "the accused persons", in a joint trial for the offences punishable under Sections 20 & 25 of the Narcotic Drugs and Psychotropic Substances Act, 1985 in short "the Act", for allegedly transporting 8 kg "Charas" in Maruti Car No. DL-3CG-9417. In short, the prosecution story, as emerges from prosecution evidence, is that in the year 2005, PW-11 Head Constable Jai Gopal was Investigating Officer posted in Police Station Karsog. On 27.10.2005, he headed the police party and was on patrolling duty in official vehicle No. HP-33-8179, which was being driven by PW-9 MHC Balam Ram, since the driver was on leave. Around 11.30 a.m., they laid a Naka near Gagon Nalla. In the meantime, Maruti Car No. DL-3CG-9417 came from the side of Kelodhar. It was stopped. Accused Raghuvir Singh was

driving the aforesaid car and other three accused persons were its occupants. The police demanded the documents of the vehicle. They got frightened. Two of the accused persons, who were occupying the rear seat, were Krishan and Jasvir. They had tried to run away, but were over-powered. Accused Prem Singh was sitting on the front seat adjoining to the driver, holding a green and black-coloured bag, whereas accused Krishan and Jasvir were having black-coloured bag, which was kept by them in between their seat. All the accused persons were from Haryana State and on being asked, they informed the police that they were on their visit to Himachal Pradesh.

(ii) PW-11, Head Constable Jai Gopal checked the green-coloured bag which was with accused Prem Singh. It contained stuff, which was in the shape of small sticks and balls. He conducted the primary test and found it to be "Charas". Weight and Scale were arranged and on weighing, the stuff so recovered came out to be 5 kg. Another bag, which was found in possession of accused persons Krishan and Jasvir, who were sitting on the rear seat, also contained "Charas" in the same shape and colour. It turned out to be 3 kg.

(iii) PW-11, Head Constable Jai Gopal separated two samples of 25 grams each from the bag recovered from accused Prem Singh. Both these samples were sealed separately with seal impression "N". The remaining bulk was put in the same bag from which it was recovered and sealed with the same seal. Each of the sample parcels were marked as A-I and A-II.

(iv) From another bag, two samples of 25 grams each, were similarly separated and sealed with the same seal. These were marked as B-I and B-II. The remaining stuff was also sealed with the same seal in the same bag. The aforesaid police officer had taken the specimen impression on a piece of cloth Ext. PW-1/D, which was signed by accused persons Raghuvir, Prem Singh, Jasvir as well as marginal witnesses and thumb marked by accused Krishan.

(v) The seal after its use was handed over to PW-2 Constable Bhupinder Singh. The case property was taken into possession vide recovery memo Ext. PW-1/A. Search and seizure memo Ext. PW-1/B and attachment form Ext. PW1/C were also prepared. Ext. PW 1/A and Ext. PW-1/B were signed by accused persons Raghuvir, Prem Singh, Jasvir as well as marginal witnesses and thumb marked by accused Krishan. Its copy was given to the accused persons free of cost.

(vi) Rukka Ext. PW-11/A was sent for registration of the case. Police also prepared spot map Ext. PW-11/C.

(vii) The accused persons were arrested. They were informed about the grounds of arrest.

(viii) The maruti car in question alongwith its documents was taken into possession vide memo Ext. PW-11/D.

(ix) On the same day, on reaching Police Station, the case property was produced before PW-13 S.I./SHO Ishwar Dass. All the sample parcels and the

remaining bulk were sealed separately with seal impression "T". Its seal impression was taken on a piece of cloth, Ext. PW-13/C. Thereafter, he had handed over the case property to PW-9 MHC Balam Ram alongwith the NCB forms, over which he had taken the facsimile of seal "T".

(x) On 28.10.2005, special report of arrest and seizure Ext. PW-13/D was handed over to PW-4 Constable Om Parkash to be handed over it to S.D.P.O., Sunder Nagar.

(xi) PW-9 Head Constable Balam Ram on receipt of the case property alongwith other documents entered it in the Malkhana register, the abstract whereof is Ext. PW-9/A.

(xii) On 28.10.2005, two sample parcels bearing Mark A-I and B-I alongwith specimen seal impressions and documents were sent through PW-7 HHC Brij Lal vide R.C. No. 109/2005 to be deposited it in CTL Kandaghat, but he returned back on the same day and informed the MHC that the sample parcels were neither received at CTL Kandaghat nor at FSL, Junga.

(xiii) Constable Brij Lal was again sent to deposit the aforesaid two sample parcels vide same R.C., but returned on 3.11.2005 and informed the MHC that again they refused to take the samples for analysis. Thus, PW-7 Constable Brij Lal had deposited the sample parcels aforesaid alongwith R.C. etc. with MHC. Copy of R.C. is Ext. PW-9/B.

(xiv) On proceeding on leave by PW-9 MHC Balam Ram, PW-10 Head Constable Dhiraj had taken over the charge. He also happened to be a member of the patrolling party. He stated that on 28.10.2005, Head Constable Balam Ram had handed over charge of Malkhana to him and then on 1.12.2005, he had sent two sample parcels aforesaid alongwith NCB forms, copy of FIR, specimen seal impression vide R.C. No 115/2005 Ext. P.W. 10/A through Constable PW-8 Ravinder Kumar to CTL Kandaghat, to which he deposited on 2.12.2005 and handed over the receipt taken over on RC to him.

(xv) The sample parcels Ext. A-I and Ext. B-I were examined in the laboratory, which tested positive for "Charas". The report is Ext. PW-13/E.

2. On completing investigation, challan was presented in the Court for trial of the accused persons. They were accordingly charge-sheeted for the offences aforesaid, to which they pleaded not guilty and claimed trial.

3. To prove its case, the prosecution examined its witnesses. The accused persons were also examined u/s 313 of the Code of Criminal Procedure. They took up the defence that on 25.10.2005, all of them had decided to visit Himachal Pradesh in the vehicle aforesaid. During this time, they had visited Shimla and then Tatta Pani, where they took bath. Thereafter, they went towards Karsog side and stayed in "Kisan Dhaba". On 28.10.2005, in the wee hours of the morning, at about 4.00 a.m., they were caught by the police and taken to Police Station Karsog, where they were arrested. They denied any contraband

with them and also disputed the story of the prosecution. The accused persons also led evidence in defence.

4. According to DW-1 Khem Chand, Pradhan of Gram Panchayat, Lower Karsog, he was running "Kisan Dhaba" at Karsog. He stated that the accused persons had stayed in his Dhaba on 27.10.2005 and even prior to that, they had been staying there. On 28.10.2005, the accused persons had left the Dhaba around 4.00/5.00 a.m. When the accused persons were standing on the road, police took them to the Police Station. Later, he came to know that "Charas" was recovered from their vehicle.

5. DW-2 Jagbir, resident of Sonipat, was also produced as a defence witness by accused Raghuvir Singh. According to him, accused Jasvir and Prem were from his village. They had hired the vehicle of accused Raghuvir to visit Himachal Pradesh at the rate of Rs. 5.00 per kilometer. In other words, accused Raghuvir had tried to show that he was not in any way concerned with the transaction in respect of the contraband.

6. The learned trial Court disbelieved the defence version and while relying upon the prosecution evidence, convicted and sentenced the accused persons, as aforesaid.

7. The learned Counsel for the accused persons vehemently argued that the link evidence in the instant case is missing and further that the report of analysis does not prove that the samples so examined in the laboratory were of "Charas". To substantiate their case, they put reliance on the Division Bench judgment of this Court in Sunil Vs. State of H.P.: Latest HLJ 2010 (HP) 207.

8. On the other hand, Shri Virender Kumar Verma, Additional Advocate General assisted by Shri Ramesh Thakur, Assistant Advocate General supported the impugned judgment of conviction and argued that the link evidence in the instant case is complete and no fault can be found with the report of analysis, as it is clearly mentioned therein that the sample parcels examined contained the contents of "Charas".

9. We have carefully and meticulously scanned the evidence. On the perusal of the prosecution evidence, it is absolutely clear that the accused persons had been staying in and around Karsog for the last about 2-3 days. The case of the prosecution is that on 27.10.2005, at about 11.30 a.m. while traveling in Maruti Car No. DL-3CG-9417, they were stopped and alleged recovery was effected from their persons. On this point, the statements of PW-11 Head Constable Jai Gopal, PW-9 Head Constable Balam Ram, PW-7 HHHC Brij Lal and PW-8 Constable Ravinder Kumar are consistent without any material contradictions. They were also meticulously cross-examined by the defence, but no dent could be caused in their statements, so far as the recovery of the stuff from the bags, as alleged, is concerned. It is also established that from the stuff recovered from the bag which was with accused Prem Singh, two sample parcels of 25 grams each were separated and marked as A-I and A-II and sealed with seal impression "N". Its

facsimile was also taken on all the three NCB forms, one of which is Ext. PW-11/B. The case property was taken into possession vide seizure memos, referred above. Rukka was sent for registration of the case, as is testified by the Investigating Officer and also by S.I./S.H.O. Ishwar Dass (PW-13). There is also clinching evidence to conclude that the case property consisting of two bulk parcels as well as four sample parcels with descriptive marks A-I, A-II, B-I and B-II were placed before the Investigating Officer for re-sealing, which were re-sealed with seal impression "T". The sample of the seal was taken separately on a piece of cloth and its impression/facsimile was also taken on the NCB forms, which is clearly decipherable as per NCB forms Ext. PW-11/B, referred above. PW-13 S.I./S.H.O. Ishwar Dass further testified, as also admitted by PW-9 Head Constable Balam Ram that the case property alongwith sample parcels, copy of FIR etc. were deposited in the Malkhana with him and to that effect, the abstract of the Malkhana register is Ext. PW-9/A. Till this point, there is no ambiguity in the evidence of the prosecution at all. Though, these witnesses have been cross-examined at length, but nothing material could be brought on record to shake their testimonies.

10. Now henceforth, the story, as projected, goes on a different direction which causes breach in link. According to PW-9 Head Constable Balam Ram, two sample parcels Mark A-1 and B-I were handed over on 28.10.2005 to P.W. 7 HHC Brij Lal vide R.C. No. 109/2005, Ext. PW-9/B for its deposit in the laboratory. But according to HHC Brij Lal, the sample parcels were not accepted in CTL Kandaghat as well as in FSL Junga. They raised objections, but it is not clear, what were the objections, which were raised. However, again on 1.11.2005, the sample parcels were handed over to PW-7 HHC Brij Lal for its deposit in CTL Kandaghat vide the same RC. But again, the sample parcels were not accepted and he returned back to Police Station Karsog and deposited these two sample parcels alongwith documents with MHC Balam Ram. We do not find any reference in the RC regarding any objection raised in the laboratory. Neither it is stated by him nor by MHC Balam Ram, what were those reasons which compelled the laboratory to accept it then, without writing anything on the R.C. Even both these witnesses, who had handled the sample parcels, also did not say that the case property was received back and deposited in the Malkhana in the same condition as it was handed over to the said Constable. The reasons for not accepting the sample parcels could even be that the seals were either broken or not tallied with the samples/facsimile of seal on NCB forms, which were later fabricated and re-sent by PW-10 Head Constable Dhiraj, who took out charge from MHC Balam Ram as MHC or that it was a cooked up story to cover up the delay in sending the sample parcels for analysis on 1.12.2005 after about one month through PW-8 Constable Ravinder Kumar vide R.C. No. 115/2005, Ext. P.W. 10/A, for its deposit in CTL Kandaghat. Otherwise this inordinate delay of one month in sending the said sample parcels has also not been explained. This is also not explained either by PW-10 Head Constable Dhiraj, the then MHC, or by PW-8 Constable Ravinder Kumar, what was the condition of the samples when

it was entrusted to Constable Ravinder Kumar and what were the objections earlier raised and how these were removed later before its acceptance.

11. All these things remained unexplained in the statements of the aforesaid official witnesses and otherwise also, no explanation has been offered, even while addressing the arguments by the prosecution before the learned trial Court. When confronted in appeal, the learned Additional Advocate General also had no answer as to what were the objections put by the laboratories and whether these were with respect to the seals on the sample parcels or any discrepancy in the documents so sent to them or there was any other reasons which compelled the laboratories not to accept these sample parcels.

12. As a matter of fact, the prosecution is obliged to explain every doubt which has crept in the prosecution case which shakes the very foundation of its case. It is not in dispute as to why the prosecution story is silent on the objections raised by the laboratories and the means and manners these were removed.

13. Further, we also find that the report of analysis Ext. PW-13/E is not in consonance with the definition of "Charas" and the judgments passed by this Court. The perusal of the report of analysis shows that the Chemical Examiner had conducted qualitative and quantitative tests. These samples were examined on 21.6.2006, i.e. after about six months from the receipt thereof. The result of the examination is reproduced hereunder verbatim:

14. "Charas" is one of the three form of cannabis (hemp), as defined in Section 2(iii) of the Act, which reads as follows:

(a) "charas", that is, the separated resin, in whatever form, whether crude or purified, obtained from the cannabis plant and also includes concentrated preparation and resin known as hashish oil or liquid hashish.

17. According to the definition of "charas", as given in Section 2(iii)(a) of the Act, the stuff to fall in the category of charas, should be resin of cannabis plant only or the concentrated preparation and resin known as hashish oil or liquid hashish. In other words, the definition does not include other parts, like flowering and fruiting tops, leaves or stem, of cannabis plant.

18. Flowering and fruiting tops of cannabis plant have been defined to meant ganja, per Section 2(iii)(b) of the Act and when seeds and leaves of the plant accompany such flowering or fruiting tops, they also form part of ganja.

19. When Charas, i.e. resin and/or ganja, i.e. flowering or fruiting tops of the cannabis plant, mixed, with or without any neutral material, they fall in the category of Mixture of cannabis (hemp), as defined in Section 2(iii)(c) of the Act.

20. Being in possession of cannabis (hemp) is an offence, punishable u/s 20 of the Act. Punishment varies according to the quantity possessed. Quantities are defined as small and commercial in sections 2(viia) and 2(xxiiia), respectively. Small and commercial quantities of charas, ganja and mixture are different, per

Table notified by the Ministry of Finance, Department of Revenue, vide notification No. S.O. 527 (E), dated 16th July, 1996, under clauses vii(a) and xxiii(a) of Section 2 of the Act. For charas and hashish, which are referred to as extracts and tinctures of cannabis plant in entry No. 23, small quantity is less than 100 grams and commercial quantity is above 1 kg. In respect of ganja, small quantity is less than 1000 grams and commercial quantity is more than 20 kgs, per entry 55.

15. Almost similar reports were examined by the Division Bench of this Court in Sunil Kumar's case alongwith other connected matters (Latest HLJ 2010 (HP) 207), which were not found in conformity the definition of "Charas"

16. In the instant case from the stuff recovered, one of sample parcels from each of the recovered stuff was sent for examination to CTL Kandaghat, report whereof does not show the presence of characteristic cystolithic hair nor it has been mentioned whether the resin found in the said sample was that of cannabis plant so as to bring it within the definition of "Charas", referred to above. It also does not depict the presence of cannabidiol/tetrahydrocannabinol. In other words, the report of chemical examiner did not say any thing about the source of resin. Therefore, in our considered opinion, report of the analysis Ext. PW-13/E is discrepant and does not conform to the definition of "Charas", as such, the conviction and sentence passed against the accused persons is liable to be set aside. Ordered accordingly.

17. In result, all these appeals are accepted. The accused persons are acquitted by giving them the benefit of doubt, since they are in jail undergoing the sentence. The Registry is hereby directed to issue release warrants of the accused persons, forthwith. Send down the records.