

(2007) 08 SHI CK 0004
In the High Court Of Himachal Pradesh

Ramesh Lal and Vinod Bhandari

APPELLANT

Vs

State of Himachal Pradesh

RESPONDENT

Date of Decision : 21-08-2007

Acts Referred:

Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 20, 29

Citation : (2007) 3 ShimLC 34

Hon'ble Judges : Surjit Singh, J; Surinder Singh, J

Bench : Division Bench

Judgement

Surinder Singh, J.—Both these appeals have arisen out of a common judgment passed by the learned Sessions Judge Kullu in Sessions Trial No. 128 of 2003, whereby the appellants were convicted of an offence u/s 20 read with Section 29 of Narcotic Drugs and Psychotropic Substances Act, 1985, in short, "the Act", and each of the appellants were sentenced to undergo rigorous imprisonment for a period of 10 years and pay a fine of Rs. one lac and in default of payment of fine, to further undergo imprisonment for a period of two years, allegedly having in their possession 2.270 kg. Charas.

Prosecution case

2. Succinctly, the prosecution story is that on 21.9.2003, at about 4.00 a.m., the Police party headed by SHO Dinesh Kumar (PW6) was present on the National Highway at the place known "Bandrol", they saw both the appellants coming from Manali side at such an odd hour. Appellant Vinod Bhandari was carrying a bag and Ramesh Lal was accompanying him, and suspected about the possession of some contraband with them. As there was no locality, therefore, independent witnesses were not available. However, the Police amongst themselves chose Ramesh Chand Constable (PW4) and A.S.I. Hem Raj (PW5) as witnesses. The Investigation Officer to satisfy the compliance of Section 50 of the Act, informed the appellants to exercise their option in writing vide memos Exhibit PW4/A and Exhibit PW4/B to exercise their legal right to be searched before the Magistrate or before a Gazetted Officer in the presence of the above witnesses. The

appellants consented to be searched by the Police. Inspector/S.H.O. Dinesh Kumar aforesaid subjected himself to be searched by the appellants nothing offensive was found. Memos Exhibit PW4/C and Exhibit PW4/D were executed to this effect. Thereafter, Dinesh Kumar S.H.O., had conducted the search of the bag (Ext. P4) carried by appellant Vinod Bhandari which was having a Pant Ext. P7 and a Shirt Ext. P8 of appellant Ramesh Lal and also recovered a polythene envelope which contained 2.270 kg. Charas wrapped in a polythene paper from the said bag. The police also found the Voters Identity Card (Ext. P9) of the appellant Ramesh Lal from the back pocket of the said pant (Ex. P8). The said Investigating Officer drew two samples of 25 grams each from the recovered quantity of Charas. The remaining Charas along with bag were packed and sealed with seal "T" in a separate parcel. The two samples were also sealed separately with the same seal. NCB form Exhibit (PW2/C) was filled in triplicate on the spot. The sample of seal "T" was also taken separately on Ext. PW.6/A, the case property was taken into possession vide memo Exhibit PW4/E. The Ruka Exhibit PW6/B was sent through Constable Ramesh Chand (PW4) to the Police Station, on the basis of which FIR Exhibit PW1/A was registered by Sub-Inspector Ram Karan (PW1). Appellants were arrested and were informed of the grounds of arrest vide memos Ex.PW5/A and Ex. DA. Police had prepared the site plan Ex. PW6/L. PW Dinesh Kumar S.H.O. had deposited the four parcels of the case property along with NCB form Exhibit PW2/C with M.H.C. Dharam Chand (PW2). To this effect, an entry Exhibit PW2/B was made in the Malkhana register. One sample of Charas along with NCB form was sent for analysis to C.T.L. Kandaghat through Constable Santosh Kumar (PW3). Special Report Exhibit PW6/D was sent to Dy. Superintendent of Police. On receipt of chemical report Ext. PA, the Challan was put in the Court for trial under the above offences.

3. The appellants pleaded not guilty and claimed trial. The prosecution led evidence to prove their case. The appellants were examined u/s 313 of the Code of Criminal Procedure. Their case was denial simpliciter. However, they did not lead any defense.

4. Upon hearing the learned Counsel for the parties and on going through the evidence on record, the learned Sessions Judge held both the appellants guilty and sentenced each of them as aforesaid.

Contention in appeal

5. The impugned judgment of conviction and sentence has been assailed on the grounds that the evidence regarding the spot where the accused were apprehended is contradictory. There was also contradiction about stitching of the parcels of the case property thereby making the drawl of the sample a suspect. There has been a non-compliance of Section 42 and 50. The link evidence is not complete. It is further contended that Constable Ramesh Chand (PW4) had left the place at 6.45 a.m. whereas the grounds of arrest (Ex.DA) was shown to have been signed by said Ramesh Chand at 7.30 a.m. raises a doubt on the authenticity of the prosecution case. Further that Vinod Bhandari cannot be

attributed the knowledge of the alleged contraband and alternatively raised the plea for a lesser sentence on the plea that on the analysis of the sample by the chemical analyst, the resin was found to be 25.55% in 2.270 kg which comes around 580 grams which is less than the commercial quantity.

6. In Appeal No. 337 of 2004 precisely the appellant Ramesh Lal has alleged the non-compliance of Section 42 of the Act and contended that the prosecution story cannot be believed as there was no reason that the clothes and could have been in the bag of Vinod Bhandari. No knowledge of the contraband can be contributed to him. The independent witnesses were not associated to inspire the confidence in the prosecution case, the evidence of the prosecution is contradictory and therefore, the conviction is bad.

7. We have heard the learned Counsel Shri Anup Chitkara and Rakesh Jaswal for the appellants in detail and have thoughtfully gone through the evidence on record. Sh. Chitkara has also filed the synopsis of his arguments which have been taken on record and the learned Counsel has confined his arguments to the limited extent.

8. Now we shall take each and every point taken up by the Counsel for the appellants systematically as follows:

(A) Whether the case is vitiated for want of non-compliance of Section 42 of the Act: Our answer is "NO":

9. Because Sections 42 and 43 of the Act contemplate quite different situations. Section 42 contemplates entry into and search of any building, conveyance or enclosed place, while Section 43 contemplates a seizure made in any public place or in transit. In the instant case as per the case of the prosecution, the alleged recovery is made in a public place. Hence, Section 42 has no application to the facts of this case. It is Section 43 of the Act which is applicable. Please see: State of Orissa Vs. Rajendra Tripathy and Others, and State of Haryana Vs. Jarnail Singh and Others, Therefore, the point raised by Sh. Rakesh Jaswal Advocate that the trial is vitiated for non-compliance of Section 42 of the Act is devoid of any merit and is rejected.

(B) Whether there has been a compliance of Section 50 of the Act?

10. PW-6 Investigating Officer Dinesh Kumar has proved the option Ex.PW-4/A and B duly supported by the PWs Hem Raj and Ramesh Chand. In fact there is no particular form of giving the option. The written option referred above meets the requirement of Section 50 of the Act. Therefore, we hold that there is a compliance of this Section.

(C) Whether the link evidence is complete?

11. The case property duly sealed along with the NCB Form was deposited by PW-6 Dinesh Kumar Investigating Officer with PW-2 MHC Dharam Chand. He has proved the entry in Malkhana register Ex. PW2/A. According to him, one part of

the sample was sent through HC Santosh Kumar (PW-3) vide R.C. No. 270/03 (Ex.PW-2/B). He has denied any tampering with the case property. This fact has been corroborated by PW-3 aforesaid vide CTL report Ex.PA the sample so sent was received in C.T.L. Kandaghat on 22.9.2003 through HHC Santosh Kumar, with seals intact. Therefore, in our opinion the link evidence is complete and this argument is rejected that the link evidence is not complete.

(D) Whether there are contradictions on the material aspects of the case which are fatal to the prosecution case?

12. The learned Counsel for the appellants have argued that on some of the material aspects of the case, statements of the prosecution witnesses and documents prepared at the time of seizure and arrest, instead of lending corroboration, have sharply contradicted each other. The evidence regarding the spot where the appellants were apprehended and searched is contradictory, while the whole evidence regarding stitching and drawing of sample is also under cloud and great suspicion. Contradiction with respect to putting signatures, on Ex.DA the grounds of arrest, by Constable Ramesh Chand (PW-4) at 7.30 a.m. when he had returned to the spot at 7.40 p.m. from the Police Station makes the case further doubtful. Therefore, no reliance could be placed on such a doubtful evidence to sustain the conviction.

13. To answer this question, it is imperative on us to give a brief account of the evidence on which this argument is based.

14. To appreciate the points taken, first of all, the statement of Inspector Dinesh Kumar (PW-6) S.H.O. of Police Station, Kullu need to be referred. He has corroborated the prosecution version in toto and has assigned the reasons for non-inclusion of the independent witnesses. He has categorically stated that it was an isolated place and there was no locality and no independent witness was available, therefore, ASI Hem Raj (PW-5) and Constable Ramesh Lal (PW-4) were joined as witnesses, in whose presence the entire proceedings took place. Besides recovery of Charas, one pant and shirt of the appellant Ramesh Lal were also recovered from the same bag and from the back pocket of pant a Voter's Identity Card of appellant No. 2 was also recovered and sealed as aforesaid. The entire documentation was completed on the spot. After sealing the samples, the case property i.e. remaining bulk samples and clothes were deposited with the MHC Dharam Chand (PW-2) at 8.45 p.m. on the same day, along with NCB Form in triplicate alongwith other documents, qua which the PW-2 MHC had made an entry in Malkhana register. In the cross-examination it is denied by him that PW-4 Constable Ramesh Chand was not on the spot and his signatures were obtained subsequently. Ramesh Chand Constable (PW-4) and Hem Raj ASI (PW-5) have lent strength to the statement of Dinesh Kumar (PW-6) and the recovery of Charas stands proved from the appellants, as alleged.

15. However, Ramesh Chand PW-4, could not state as to who had prepared and stitched the parcel and whether the parcels were prepared earlier to taking ruqa

by him to the Police Station or thereafter. According to him the seals were not put on the parcels when he had left the place. Whereas, Hem Raj (PW-5) who was throughout on the spot with the I.O. has specifically stated that the cloth was with the Investigating Officer and it was stitched by the supporting staff though he could not supply his name but has deposed that one side of the parcel was stitched in his presence and about the remaining three sides the Investigating Officer would be in a position to tell however he clarified further that the cloth was already stitched from three sides at the time of its packing. Whereas PW-6 Dinesh Kumar the Investigating Officer has stated that the cloth was stitched from all the four sides with the hand but thereafter admitted the three sides of the cloth were stitched with the machine and fourth side was got stitched from a constable. In our opinion in the given circumstances, this is a minor contradiction and it cannot be said to be fatal to the prosecution.

(E) Next question is whether the signatures of Constable Ramesh Chand on Ext. DA arrest memo on the spot at 7.30 has made the search and seizure suspicious?

16. The Ruqa Ex.PW-6/B, was prepared by Inspector Dinesh Kumar (PW-6) at 6.45 a.m. which was allegedly sent through Constable Ramesh Chand (PW-4) for the registration of the case, on the basis of which FIR Ex.PW-1/A was registered at 7.15 a.m. the distance of the spot is 7 kilometers only from the Police Station, as indicated in the FIR. Though PW Dharam Chand has stated that Constable Ramesh Chand had returned to the spot at 7.30 a.m. after handing him over the case file, whereas the appellant Vinod Bhandari was arrested at 7.30 a.m. as per document Ex. DA which also bears signature of Constable Ramesh Chand. According to Constable Ramesh Chand, the appellants were not arrested in his presence but his signatures were obtained on the arrest document (EX. DA) by the Investigating Officer on his return to the spot from the Police Station with the file, whereas it is already stated above ASI Hem Raj (PW-5) had remained with the I.O. although and is consistent about the time of arrest of the appellant Vinod Bhandari as indicated in the Ex. DA. His deposition appears to be truthful about the recovery and the sealing of the case property and preparation of the documents on the spot. The statement of MHC (PW-3) aforesaid on the point of time is not based upon any document, it is his estimation. In fact FIR was lodged at 7.15 a.m. and the spot is 7 kms. from the Police Station and he could have reached at 7.30 a.m. on the spot. Therefore, no dent can be said to have been caused to the case of the prosecution in any manner. We did not find any material inconsistency with respect to the recovery and seizure of the case property. Therefore, this argument is also rejected.

17. Lastly Sh. Rakesh Jaswal Counsel for appellant Ramesh Lal has argued that said Ramesh Lal had no acquaintance with appellant Vinod Bhandari who is a Nepali and there was no reason to put his clothes in the bag (Ex.P-4) of Vinod Bhandari and further no case of abetment or conspiracy is made out to attract the provisions of Section 29 of the Act.

18. We have also considered this aspect of the matter. The statements of PWS 4,

5 and 6 referred above are quite consistent. The facts which stands proved on record are that in very early hours of the morning when it was dark the police spotted the appellants coming together on the highway at a lonely place and Vinod Bhandari appellant, who is Nepali was carrying a bag, which raised the suspicion to the police. The bag Ext. P-4 contained the Charas as discovered on search along with the clothes of the appellant Ramesh Lal as stated above along with his Voter's Identity Card Ext. P-9. The case of both the appellants in their statements, recorded u/s 313 of the Code of Criminal Procedure, was denial simpliciter they did not offer any cogent explanation. Therefore, in these circumstances it cannot be said that they were not having the knowledge of the contraband being carried in the bag. There is a connecting evidence i.e. the clothes of Ramesh Lal appellant and his Voter's Identity card (Ex.P-9) found in the back pocket of the Pant (Ex.P-8), which was in the bag along with the Charas. The above proved circumstances make it a clear case falling under the provisions of Section 29 of the Act.

Conclusion

19. To sum up, in the totality of the circumstances, we have found the consistency in the evidence of the statements of the prosecution witnesses. The witnesses are not supposed to give parrot like version; minor contradictions in their statements are bound to be there owing to time taken for recording their statements in the Court. On the evidence aforesaid, duly tested on the settled law, we are of the opinion that the Charas was recovered from the appellant as alleged and on the perusal of the impugned judgment passed by the learned trial Court we do not find any discrepancy or infirmity in so far as the recovery and seizure of the contraband from the appellants is concerned.

20. Sh. Anup Chitkara Advocate has made his last attempt with an alternative prayer that if this Court did not agree with his above submissions then the quantity recovered in this case does not fall within the "commercial quantity" for the purposes of the punishment because the total stuff recovered was 2.270 Kg. but the chemical Examiner found on analysis 25.55% resin which alone is Charas. If the contents recovered are taken into account, this would be a case involving non-commercial quantity punishable with the lesser term of imprisonment. His this contention has a substantial force.

21. In fact the appellants were tried and convicted by the trial Court for offences punishable u/s 20 read with Section 29 of the Act, as aforesaid. Section 20 of the Act makes the cultivation of cannabis plant or production, manufacture, possession, sale, purchase, transport, import inter-state, export inter-state or use of cannabis punishable. Punishment varies according to the quantity, when the offence pertains to cannabis plant. The punishment is rigorous imprisonment for a term which may extend to six months or with fine if the quantity is "small". Where the quantity is more than "small" but lesser than "commercial", punishment is rigorous imprisonment which may extend to ten years and with fine which may extend to rupees one lakh. If the quantity is "commercial", the

punishment may extend to twenty years and to pay a fine of rupees two lakh, but the minimum sentence in such a case is rigorous imprisonment for ten years and fine of rupees one lakh.

22. Similar point was considered in detail by the Division Bench of this Court, in *Dharm Pal v. State of H.P.* Latest HLJ 2007 (HP) 827, wherein one of us (Surjit Singh, J.) was heading the Bench. He while speaking for the Court, took note of the definition "Cannabis (hemp)" as defined vide Clause (iii) of Section 2 of the Act. As per its definition, cannabis (hemp) has three forms one is "Charas", second is "Ganja" and the third is any mixture of any of the first two forms of cannabis.

23. In the present case, appellants were tried for possessing the first form of cannabis, i.e. "Charas", which has separated resin. The definition of cannabis (hemp) makes it amply clear that it is only the "resin" content of the cannabis plant which is "Charas".

24. In the instant case the appellants were not tried on the charge that they had the cannabis in the form of mixture, the charge was that they had in their possession "Charas" which means the resin extracted from the cannabis plants and the resin content in the recovered stuff as per the opinion (Ext. PA) of the Chemical analyst was 25.55% resin in terms of the weight; the Charas content of the recovered stuff was 580 gms., which was more than the "small quantity" but lesser than the "commercial quantity" as fixed by entry No. 23 of the notification No. S.O. 1955(E) dated 19.10.2001 of the Central Government issued in exercise of the powers under Clauses (viia) and (xxiiia) of Section 2 of the Act fixing upper limit of "small quantity" and the lower limit of "commercial quantity" of various Narcotic Drugs and Psychotropic Substances, whereby separate limits have been fixed in respect of cannabis resin, i.e. "Charas" or "hashish" as defined vide Sub-clause (a) of Clause (iii) of Section 2 of the Act, "Ganja" has also been defined separately in Sub-clause (b) of Clause (iii) of the Act and "mixture of different Narcotic Drugs and Psychotropic Substances" in Clause (c) of Clause (iii) of Section 2 of the Act vide entries No. 23, 55 and 239 respectively. Thus, in these circumstances, it was held in *Dharam Paul's* case *supra*, by this Court that the appellants could not have been held guilty of possession "commercial quantity" of Narcotic Drug or Psychotropic Substance because Entry No. 239 of the Notification of the Central Government which says that in case of any mixture or preparation that of with or without a neutral material, of any of the Narcotic Drugs or Psychotropic Substances, mentioned in the entries 1 to 238, lesser of the small quantities given against the respective Narcotic Drug or Psychotropic Substance mentioned in the entries 1 to 238, forming part of the mixture, shall be taken to the "small quantity" and the lesser of the "commercial quantity" between the two quantities given against the respective Drugs or Psychotropic substances mentioned at entries No. 1 to 238 forming part of the mixture shall be taken to the "commercial quantity".

25. Thus in the case in hand the quantity of the contents recovered from, the

appellants herein, is 580 gms. resin regarding rest of the stuff recovered there is no report, hence, it can safely be assumed that it was a neutral material. The said quantity found in possession of the appellants is less than the "commercial quantity" and more than the "small quantity", therefore, while upholding the conviction of the appellants u/s 20 read with Section 29 of the Act, passed by the learned trial Court, the sentence awarded by it on the assumption that the quantity which the appellants possessed was "commercial" is substituted by the sentence of Five years and a fine of Rs. 25,000/- each; in default of payment of fine simple imprisonment for a period of six months. Each of the appellants shall undergo this substituted sentence. Accordingly both the appeals stand disposed of.

26. No other point is urged before us.