

(2013) 03 SHI CK 0005

In the High Court Of Himachal Pradesh

Case No : Criminal Appeal No. 209 of 2012

Sachhida Nand and Another

APPELLANT

Vs

State of Himachal Pradesh

RESPONDENT

Date of Decision : 01-03-2013

Acts Referred:

Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 20, 42, 50

Citation : (2013) CriLJ 4324 : (2013) 2 ShimLC 1175

Hon'ble Judges : Dev Darshan Sood, J

Bench : Single Bench

Advocate : Manoj Pathak, for the Appellant; Ashok Chaudhary, Additional Advocate General and Mr. R.P. Singh, Assistant Advocate General, for the Respondent

Judgement

Dev Darshan Sood, J.—The appellants challenge their conviction u/s 20 of the Narcotic Drugs and Psychotropic Substances Act 1985 (hereinafter referred to as "NDPS Act"). They have been sentenced to undergo rigorous imprisonment of one year and fine of Rs. 1,000/- each for possession of charas weighing 350 grams from first appellant-Sachhida Nand and 250 grams from second appellant-Meera Sharma. The prosecution case in brief is that on 28.3.2009 PW 9 ASI Sh. Prem Chand along with PW 1 H.C. Sh. Shashi Kumar, PW 8 L.C. Sh. Meena and some other police officials were on patrolling duty at Fagu. At around 5.40 P.M., they were checking vehicles at random. One Mahindra Pick-up No. HP 63-0490 was coming from Cheog proceeding towards Fagu. On seeing the police party, the occupants of the vehicle tried to run away but were intercepted by PW 9 ASI Sh. Prem Chand. Accused Sachhida Nand was driving while accused Meera Sharma was seated. The police suspected that accused were in possession of some narcotic drugs/substances. From accused-Sachhida Nand one polythene envelop Ext. P13 was recovered which concealed in his shirt and below the belt of his pant. On examination, it was found containing charas Ext. P12. Accused Meera Sharma was wearing a jacket Ext. P-22 which on search by PW 8 L.C. Sh. Meena was found to contain one polythene envelop Ext. P20 in the inner right

pocket of the jacket. The charas was weighed and found to be containing 350 grams from first accused and 250 grams from second accused. This contraband on analysis by the Forensic Science Laboratory was certified to be charas. It is on this evidence that the learned trial Court convicted both the appellants to undergo rigorous imprisonment of one year each and fine as noticed.

2. Learned Counsel appearing for the appellants urges (a) that the prosecution has not been able to establish as to whether it was the sample which was seized from the accused was in fact was sent for analysis or not. He relies upon the prosecution evidence of PW 6 H.C. Sh. Het Ram, who states that he handed over two sample parcels containing 25 grams of charas each to HHC Bhagwan Singh for being taken to Forensic Science Laboratory, Junga for chemical examination along with samples of seal "P" and "A", N.C.B. forms, recovery memo and copy of First Information Report. He proved on record the road certificate Ext. PW 6/B. On 6.7.2009 H.C. Ravinder Singh (not produced as a witness) handed over two remaining sample parcels of charas and two bulk parcels of charas containing 300 grams and 200 grams of charas to H.C Sh. Ramesh Chand vide R.C. No. 50/2009 for being taken to F.S.L. Junga for chemical analysis. He then proceeds to states:

The said case property was returned from FSL Junga with certain objections. On 5.8.2009, I handed over two remaining sample parcels containing 25-grams of Charas each and the bulk parcels containing 200 grams and 300 grams charas along with sample of seal P and A. Copy of NCB Forms, copy of recovery memo and photo copy of FIR for being taken to FSL Junga for chemical analysis vide R.C. No. 69/09 to C. Prem Singh No. 1399

3. In cross-examination he admits:

There is no entries in the Malkhana register showing redeposit of case property after 6.7.2009 when the same were taken out for sending the same to FSL Junga.

4. It is this evidence of the prosecution which is relied upon by Sh. Manoj Pathak, learned Counsel to urge that there is no evidence to establish (a) when the samples returned by the Forensic Science Laboratory were re-deposited in the Malkhana (b) sent again to the Forensic Science Laboratory for analysis (c) what was the objection raised by Forensic Science Laboratory in not accepting the samples for analysis, which had been sent in the first instance. In these circumstances, learned Counsel submits that there can be no certainty that it was the seized charas which in fact had been sent for chemical analysis.

5. Learned Additional Advocate General urges that this evidence in fact was not required for the reason that the first dispatch of the samples itself stands proved and the fact that they were received again in the laboratory, there was sealed which fact stands confirmed by the report Ext. PX-1.

6. Having given my careful consideration to the submissions made by the learned Counsel appearing for the parties, I cannot accept the explanation as furnished

by the State. The custody of the sample between 6.7.2009 to 5.8.2009 has not been explained on the record. Surely, if there was some objection which fact again has not been established on the record, the objections taken by the Forensic Science Laboratory should and ought to have been proved on the record as also the factum of safe custody of the samples in the police Malkhana. There is no evidence whatsoever. In these circumstances, there is obviously a doubt which has been created by the evidence of the prosecution with respect to the analysis of the contraband. In these circumstances, I do find that the appellants have made out a case for acquittal.

7. The other points urged by the learned Counsel is that there is total non-compliance of Section 42 of the "NDPS Act". Learned Counsel places reliance on the decision of the Supreme Court in *Kishan Chand Vs. State of Haryana*, , holding:

17. In our considered view, this controversy is no more *res integra* and stands answered by a Constitution Bench judgment of this Court in the case of *Karnail Singh Vs. State of Haryana*, . In that judgment, the Court in the very opening paragraph noticed that in the case of *Abdul Rashid Ibrahim Mansuri Vs. State of Gujarat*, a three Judge Bench of the Court had held that compliance of Section 42 of the Act is mandatory and failure to take down the information in writing and sending the report forthwith to the immediate officer superior may cause prejudice to the accused. However, in the case of *Sajan Abraham Vs. State of Kerala*, again a Bench of three Judges, held that this provision is not mandatory and substantial compliance was sufficient. The Court noticed, if there is total noncompliance of the provisions of Section 42 of the Act, it would adversely affect the prosecution case and to that extent, it is mandatory. But, if there is delay, whether it was undue or whether the same was explained or not, will be a question of fact in each case. . . .(P.510)

8. I also noticed at this stage one other important point urged by learned Counsel appearing for the appellants that there was non-compliance of Section 50 of the "NDPS Act". For this purpose, learned Counsel has placed reliance on the decisions of the Supreme Court in *Vijaysinh Chandubha Jadeja Vs. State of Gujarat*, and *Narcotics Central Bureau Vs. Sukh Dev Raj Sodhi*,

9. In *Narcotics Control Bureu's* case *supra*, the Supreme Court holds:

3. Now, the learned Counsel for the appellant submits that in the instant case, from the search notice (at Annexure P-1), it will appear that the requirement of Section 50 of the NDPS Act has been complied with. From the said notice, it appears that the accused was informed that he has the option of being searched either in the presence of gazetted officer or Magistrate and it appears that the accused wanted to be searched in the presence of gazetted officer. The learned Counsel for the appellant submits that by giving the option to the accused, the appellant has complied with the requirement u/s 50 of the NDPS Act.

4. The obligation of the authorities u/s 50 of the NDPS Act has come up for

consideration before this Court in several cases and recently, the Constitution Bench of this Court in the case of *Vijaysinh Chandubha Jadeja Vs. State of Gujarat*, has settled this controversy. The Constitution Bench has held that requirement of Section 50 of the NDPS Act is a mandatory requirement and the provision of Section 50 must be very strictly construed.

5. From the perusal of the conclusion arrived at by this Court in *Vijaysinh Chandubha Jadeja's* case, it appears that the requirement u/s 50 of the NDPS Act is not complied with by merely informing the accused of his option to be searched either in the presence of a gazetted officer or before a Magistrate. The requirement continues even after that and it is required that the accused person is actually brought before the gazetted officer or the Magistrate and in Para 32, the Constitution Bench made it clear that in order to impart authenticity, transparency and creditworthiness to the entire proceedings, an endeavour should be made by the prosecuting agency to produce the suspect before the nearest Magistrate.

(emphasis supplied) (P.393).

10. Learned Additional Advocate General urges that this is not the requirement of the law and has not been held so by the Hon''ble Supreme Court. This submission cannot be accepted. It is not for this Court to explain as to what the Supreme Court holds which is manifest in the judgment itself. In the totality of the facts and circumstances of the case, I hold that the prosecution has been unable to prove the custody of the sample for analysis for one month as to where the sample was kept safely after it had been returned by the Forensic Science Laboratory which admittedly is the case of the prosecution and admitted by the prosecution witnesses. In these circumstances, the conviction cannot be sustained. The judgment of the learned Sessions Judge is set aside. Bail bonds furnished by the appellant shall stand discharged.