
(2009) 04 SHI CK 0007
In the High Court Of Himachal Pradesh

Shri Dhan Bahadur

APPELLANT

Vs

State of Himachal Pradesh

RESPONDENT

Date of Decision : 28-04-2009

Acts Referred:

Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 20, 20(b)(ii) (A), 20(b)(ii)(B)

Citation : (2011) 8 RCR(Criminal) 1401 : (2009) 2 ShimLC 203

Hon'ble Judges : Surinder Singh, J

Bench : Single Bench

Judgement

Surinder Singh, J.—The appellant has challenged the judgment of conviction and sentence passed by the learned trial Court u/s 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985, in short "the Act" for allegedly possessing 1.700 Kgs. of charas which contained 37.09% of resin, which is a constituent of charas and that comes to 640 gms. in the recovered quantity. Thus, the trial Court convicted and sentenced the appellant u/s 20(b)(ii)(B) of the Act to undergo rigorous imprisonment for a period of four years and to pay a fine of Rs. 25,000/- and in default of making payment of fine, the appellant was further ordered to undergo simple imprisonment for a period of four months, which has been challenged in this appeal.

2. In short, the prosecution case is that on 29.10.2006 PW-6, Sub Inspector, Ram Karan was on patrolling duty alongwith other police officials in Banjar area. At about 2.30 p.m. when the police party reached one K.M. from Sidhwan, they noted the appellant, a Nepali, carrying a polythene bag in his hand, who on seeing the police party travelling in the vehicle threw the bag on the road which he was carrying and started running on the path below the road. The police entertained suspicion that the appellant might be carrying some incriminating articles. Thus, Head Constable Ajay Kumar and Constable Dalip Kumar were instructed to chase him. The appellant was apprehended at a few distance and was brought before PW-6, Ram Karan, Sub Inspector. When he was questioned about the contents of the bag thrown by him, he could not reply. Thereafter the

appellant was asked to pick up the bag and hand it over to him. The appellant obeyed the instructions. Thereafter the said officer in the presence of A.S.I. Mathru Ram and HHC Ajay Kumar opened the polythene bag which had the impression "Vinny School Bag" printed on it and found one polythene packet therein containing charas in the shape of sticks. The Sub Inspector, aforesaid enquired about the identity of the appellant which was disclosed. The recovered stuff was weighed. It came out to 1.700 Kgs. Thereafter, he drew two samples of 25 gms. each from the recovered bulk and sealed into two separate parcels with six seal impressions of seal "N" on the each parcel. The remaining bulk of recovered charas was put in the same polythene packet and sealed into another parcel with the same seal. Thereafter he obtained the sample of the said seal on a separate piece of cloth, Ex.PW-4/A.

3. NCB forms in triplicate were also prepared on the spot and one of its copy is Ex.PW-3/E. After its use, the seal was handed over to A.S.I. Matharu Ram.

4. All the three parcels were taken into possession vide memo Ex.PW-4/B in the presence of the witnesses aforesaid, the copy of which was supplied to the appellant, he also put his signatures in token of its receipt.

5. All the parcels were also signed by the witnesses. Thereafter ruqa Ex,PW-3/A was handed over to HHC Ajay Kumar to take it to the police station for registration of F.I.R.

6. Sub Inspector, Ram Karan prepared the site plan Ex.PW6/ A and recorded the statements of witnesses. The appellant was arrested and the grounds of arrest recorded in Ex.PW-4/C were informed to him in writing. The appellant had no relation or friend in India, therefore, he did not want anybody to be informed about his arrest.

7. The case property was deposited with M.H.C., Chaman Lal at 6.00 p.m. in the Malkhana in police station, Banjar.

8. Next day, i.e. on 30.10.2006, at about 3.00 p.m. the special report Ex.PW-2/A was handed over to Additional Superintendent of Police, Shri Hirdesh Bisht, who handed over the same to his Reader on the same day.

9. PW-3, H.C. Chaman Lal, M.H.C. handed over one sample parcel in this case for its examination alongwith NCB forms in triplicate, copy of the F.I.R. and seizure memo to Constable Om Chand to deposit it in C.F.S.L., Chandigarh. After depositing the case property its receipt Ex.PW-1/A was handed over to him alongwith road certificate Ex.PW-3/F. After recording the statements of witnesses and on receipt of the report to Chemical analysis from Chandigarh, the challan was presented in the court for trial of accused/appellant.

10. Finding a prima facie case against the appellant u/s 20 of the Act, he was accordingly charge-sheeted. The appellant pleaded not guilty and claimed trial. The prosecution examined six witnesses and then the appellant was also examined u/s 313 of the Code of Criminal Procedure. His case is of denial

simpliciter. No evidence in defence was led. At the end of trial, the appellant was convicted and sentenced as aforesaid.

11. Shri Harish Behal, learned Counsel for the appellant has argued with vehemence that in the instant case despite having of ample opportunity, the police did not associate any independent to witness the search and seizure operation. According to him, there are material contradictions in the statements of prosecution witnesses which create substantial doubt in this case and further he argued that the same taken from the bulk was not a representative sample and the reaming bulk was not ordered to be examined in order to ascertain as to what were the contents thereof. He places his reliance upon the judgment passed by the Hon''ble Supreme Court in Gaunter Edwin Kircher Vs. State of Goa, Secretariat Panji, Goa, , which was also followed in Javed A. Bhat Vs. Union of India (UOI), and contended that at the worst, the appellant can be held guilty for having in his possession only 25 gms. of charas which is a small quantity and the appellant, who is in jail with effect from 29.10.2006, has already served the sentence more than provided under the law. Therefore, he is required to be released, in this case forthwith.

12. In order to counter the above argument, Mr. J.S. Guleria, learned Assistant Advocate General has vehemently argued that in the instant case the recovery of the charas has been proved from the possession of the appellant in accordance with law. The sample of charas, which was taken on the spot, was sent for examination which proves that it was that of charas and further it is pointed out that during the trial of this case, the accused had also requested for re-examination of the second part of the sample to find out the percentage of the resin which was sent to F.S.L., Junga and it confirmed that the sample stuff was that of charas. Shri Guleria further argued that in the instant case, it was a chance recovery and the recovery of the charas was made from an open place and there was no need or requirement to associate independent witnesses. He further argued that the official witnesses examined in this case have proved the case of the prosecution and their testimonies are worth inspiring confidence, therefore there is no necessity to interfere with the conviction and sentence passed by the learned trial Court as the appellant was already given the benefit of the percentage of resin allegedly found in the sample analysed and the recovery of the incriminating article was assessed 640 gms. which is less than "commercial quantity" but more than "small quantity", thus the appellant was accordingly sentenced.

13. I have given my thoughtful consideration to the rival contentions of the parties and have thoroughly gone through the evidence on record.

14. In the instant case, PW-6, Sub Inspector, Ram Karan and other official witnesses without any material contradictions have has supported the version of the prosecution in toto. In so far as the non-inclusion of the independent witnesses is concerned, according to him, the place where the appellant was apprehended is an isolated place where no independent witness was available.

Therefore, PW-6 associated A.S.I., Matharu Ram and H.H.C. Ajay Kumar to witness the search and both these witnesses were examined in the Court who have supported this version. The contradiction occurring in the statement of PW-5, Ajay Kumar that search was not taken in his presence, is not fatal as the testimonies of PWs. Matharu Ram and Ram Karan are consistent and reliable. The accused did not assail their testimonies as to why he was implicated in this case if no recovery was made from him.

15. There is also no requirement of law to associate the independent witnesses in a case of chance recovery. The police has no malice or ill-will against the appellant. He happens to be a Nepali and was found alone alongwith polythene packet which was thrown by him on seeing the police on the spot itself shows that he had the knowledge as to what he was carrying. PW-6, Ram Karan testified on oath that on checking of envelope which was carried by the appellant recovery of 1 Kg. 700 gms. stuff was made, which was in the shape of sticks wrapped in the polythene packet, but in cross-examination, he has stated that the prescribed procedure was adopted by him for taking the sample, but that procedure was not spelt out. According to him, the sample of charas was taken from 3/4 sticks of charas, which fact has also been corroborated by PW-4, A.S.I. Matharu Ram in his cross-examination and after sealing both the samples separately with seal impression "N" it was deposited with Chaman Lal, PW-3 alongwith the remaining bulk and also the sample of seal used for sealing NCB forms in triplicate, on the same day. Case property was deposited by him in the Malkhana against entry No. 137.

16. During the trial, M.H.C., Chaman Lal (PW-3) also brought the Malkhana register and its abstract was proved as PW-3/B and further stated that one of the sample was sent by him on 31.10.2006 for its analysis alongwith sample of seal and NCB forms in triplicate, copy of the F.I.R. and copy of the seizure memo through Constable Om Chand, PW-1 through the road certificate which he deposited on 1.11.2006 in C.F.S.L., Chandigarh and on his return, he handed over its receipt Ex.PW1/ A to him and both these witnesses have stated that so long as the case property remained with them, it was not fabricated or tampered by anyone. The report of analysis Ex.P-A confirmed that the sample so sent was that of charas. This fact was also reaffirmed by the F.S.L., Junga vide their report Ex.P-B, but additionally, it opined that the sample sent contained resin 37.09% weight in weight (W/W) which is an ingredient of charas, but the sample so sent also indicated that cannabinoids including the presence of tetrahydrocannabinol were present in the sample. Thus, the whole stuff was opined to be a sample of charas.

17. The samples sent to both the laboratories contained the seal impression "N" on the sample packets which tallied with the sample of seal sent to them separately. Thus, from the above evidence, it is deducible that both the samples which were taken from the recovered stuff were found to have contained charas which were only taken from 3/4 sticks. It is not known what were the contents of

the remaining bulk recovered.

18. Now the question is that whether the sample so taken at random was of a representative character.

19. In case of Mr. Gaunter Edwin Kircher (*supra*), the accused was arrested with two pieces of charas weighing 7 gms. and 5 gms. respectively and only one piece was sent for chemical analysis and the said piece was found to have less than 5 gms. Considering these facts, the Supreme Court observed that from the report of the chemical analyst it could not be presumed or inferred that the substance and the other piece weighing 7 gms, which was not sent for analysis also contained Charas and it was further observed that it had to be borne in mind that the act applied to certain Narcotic drugs and psychotropic substances and not to all kind of intoxicating substances and in any event, in the absence of positive proof that both the pieces recovered from the accused contained Charas only, it would not be safe to hold that the prosecution could prove that 12 gms. of Charas was recovered from the accused. The Supreme Court thus held that the prosecution could prove positively that the Charas weighing about 4.57 gms. was recovered from the accused and the failure to send the other piece had given rise to that inference. The Supreme Court also noted that in order to obviate this difficulty, the concerned authorities would do better if they send the entire quantity seized for chemical analysis so that there may not be any dispute of this nature regarding the quantity seized and if it is not practicable, in a given case, to send the entire quantity then sufficient quantity by way of samples from each of the packets or pieces recovered should be sent for chemical examination under a regular panchnama and as per the provisions of law.

20. Mr. Gaunter Edwin Kircher's judgment of the apex Court was followed by the learned single Judge of Bombay High Court (Goa Bench) in *Javed Bhat v. U.O.I.* 2008 (1) RCR 57 and also in *Firdous Ahmed v. U.O.I.*, Cr. Appeal No. 66 of 2006 decided on 7.8.2007 {2008 Cri.L.J. 1163 wherein the recovery of 1.35 KG. Hashish was made from the accused comprising of numerous cigar flats and flat slabs. The sample material was taken 705 gms. randomly on analysis was positively tested. The remaining bulk was not Hashish and the accused was held guilty only of 705 gms. of Hashish as having been conclusively proved, thus his conviction was altered to one u/s 20(b)(ii)(B) of the Act.

21. The above judgments were also discussed, cited and relied by this Court in *Krishan Chand v. State of H.P.*, Cr. Appeal No. 650 of 2008, decided on April 27th, 2009.

22. In the instant case, applying the above principle of law, the prosecution could only prove beyond doubt that the appellant was found in possession of 50 gms. of charas, i.e. two sample parcel packets containing 25gms. of charas each, but as already stated above, the prosecution could not prove as to what were the contents of the remaining bulk. Therefore, once this conclusion is arrived at, it is apparent that the appellant could not have been convicted and sentenced u/s

20(b)(ii)(B) of the Act, but has to be convicted and sentenced for the commission of an offence punishable u/s 20(b)(ii)(A) of the Act for which the maximum punishment provided under the Act is six months and fine not exceeding Rs. 10,000/- or with fine and with both.

23. Therefore, in the above circumstances, the sentence of the appellant is reduced to the maximum provided for the commission of offence u/s 20(b)(ii)(A) of the Act, i.e. rigorous imprisonment for a period of six months and to pay a fine of Rs. 10,000/-. In default of payment of fine, to further undergo simple imprisonment for a period of two months. With these modifications, the appeal is partly allowed.

24. Since the accused/appellant is in jail/detention since 29.10.2006 and has already undergone the sentence nearly for about 2 years and 5 months, more than provided for the offence proved. He be released forthwith, if not required in any other case.

25. The Registry of this Court to take further necessary steps forth with in compliance of this judgment. The matter stands disposed of.

26. Send down the records.