
(2008) 09 SHI CK 0024
In the High Court Of Himachal Pradesh

Shyam Lal

APPELLANT

Vs

State of Himachal Pradesh

RESPONDENT

Date of Decision : 17-09-2008

Acts Referred:

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

Citation : (2008) 3 ShimLC 370

Hon'ble Judges : V.K. Ahuja, J;Deepak Gupta, J

Bench : Division Bench

Judgement

V.K. Ahuja, J.—This is an appeal filed by the appellant against the judgment of the Court of learned Special Judge, Kullu, dated 13.6.2006, vide which the appellant was held guilty u/s 20 of the Narcotic Drugs and Psychotropic Substances Act, hereinafter referred to as the NDPS Act and was sentenced to undergo rigorous imprisonment for 10 years and pay a fine of Rs. 1.00 lac. In default of payment, of fine, the appellant was to further undergo imprisonment for two years.

3. Briefly stated the facts of the case are that on 26.11.2004, PW-3 SI Joginder Singh, Incharge of Police Post, Manikaran, proceeded from the Police Post, Manikaran alongwith PW-1 HHC Hem Raj, PW-2 HC Yash Pal and HHC Nand Lal at 2.30 a.m. They laid a naka at Chhoj Nallah at 6.30 a.m. and found that the accused was coming on foot, carrying a pithu bag on his back. The accused became perplexed on seeing the police patty and was apprehended. The accused disclosed his name as Shyam Lal, a resident of Nepal. Thereafter, the Investigating Officer SI Joginder Singh PW-3 sent one of the police official in search of local and independent witnesses, but none could be associated and then the bag of the appellant/accused was searched in presence of the police officials. On checking of the bag, two plastic packets were found, which were containing Charas in the shape of chapatis and chura. On weighment, the Charas was found to be 1.850 kilograms. Out of the recovered Charas, two samples of 25 grams each were taken separately and the samples and the remaining Charas

was sealed at the spot, which Charas was taken in possession vide recovery memo and the Investigating Officer sent a Ruka to the Police Station, completed the formalities at the spot and on reaching the police station, he deposited the case properly with SHO Badri Singh, who re-sealed them. On completion of the investigation and on receipt of the report of the Chemical Examiner, the challan was filed before the learned trial Court, who tried the appellant u/s 20 of the NDPS Act leading to his conviction, as detailed above.

3. We have heard the learned Counsel for the parties and have gone through the record of the case.

4. The submissions made by the learned Counsel for the appellant were that inspite of opportunity to join independent witnesses, the Investigating Officer had not joined independent witnesses and, therefore, there was non-compliance of Section 100 Cr.P.C. It was also submitted that no option u/s 50 of the NDPS Act was given to the appellant and, therefore, the conviction imposed cannot be said to be proper. The learned Counsel for the appellant also referred to some contradictions in regard to time when the police party proceeded to the spot or returned from the spot and as such it was submitted that the prosecution has miserably failed to prove their case.

5. A perusal of the record of the case, it is clear that there is statement of PW-3 S.I. Joginder Singh, the then Incharge of Police Post, Manikaran, that he proceeded for laying the Naka alongwith 3 police officials named by him and has also proved the copy of daily diary report as Ext.PW-3/A. At 6.30 a.m., the accused was apprehended and the Investigating Officer PW-3 Joginder Singh sent PW-1 HHC Hem Raj in search of local and independent witnesses, but none could be brought by him. Thereafter, he associated HHC Nand Lal and HC Yash Paul PW-2 as witnesses. On search of the bag being carried by the appellant, Charas weighing 1.850 kilograms was recovered. Out of the said Charas, two samples of 25 grams each were taken and were sealed and the case property was taken in possession vide recovery memo Ext.PW-2/D, which was signed by the witnesses and the accused. The accused was intimated about the offence committed by him. He prepared Ruka Ext.PW-3/A and sent it through PW-1 HHC Hem Raj to Police Station for registration of the case. He prepared the spot map Ext.PW-3/D, recorded the statements of witnesses, arrested the accused at 11.00 a.m. and gave intimation of arrest. He reached the Police Station at 2.00 p.m. and handed over the case property to the SHO. He has also stated that he gave option to the accused vide Memo Ext.PW-2/A. The statement of PW-3 SI Joginder Singh has been materially corroborated by the statement of PW-1 HHC Hem Raj and PW-2 HC Yash Paul, who is the witness to the recovery memo Ext.PW-2/D also.

6. Apart from the above, the prosecution had examined PW-4 Constable Sunil Kumar, who was posted as M.C. in Police Post, Manikaran and has proved the copy of raport Ext.PW-3/A in regard to departure of police party for patrolling etc.

7. PW-5 HC Roop Singh, the then MHC, Police Station, Kullu has stated that on 26.11.2004, at 2.20 p.m., SHO Badri Singh, Police Station, Kullu deposited with him the sealed parcels allegedly containing Charas bearing four seal impressions of seal J and four impressions of seal H on each parcel. Alongwith the parcels, the samples of seals and NCB forms in triplicate and other documents were also handed over to him and he deposited the case property in the Malkhana. He sent one of the sample parcel alongwith NCB form to CTL, Kandaghat through Constable Khub Ram, who deposited it there and returned the original R.C. to him. The said Khub Ram, Constable, has been examined as PW-6, who corroborated this version. The said SHO, who deposited the case property with MHC Roop Singh PW-5, has also been examined as PW-8, who has corroborated this version that the case property was deposited with him by PW-3 SI Joginder Singh and he re-sealed the same and gave it to the MHC alongwith other documents.

8. The report of the Chemical Examiner Ext.PW-3/B has been tendered in evidence, which proves that the samples were found to be that of Charas.

9. Coming to the question of non-joining of independent witnesses, as raised by the learned Counsel for the appellant during the course of arguments, a perusal of the statement of PW-3 SI Joginder Singh shows that the spot was isolated and there was no possibility of associating local independent witnesses. He further stated that inspite of that, he had sent PW-1 HHC Hem Raj in search of local and independent witnesses, but he did not bring anyone with him and returned alone to the spot. He thereafter associated HHC Nand Lal and HC Yash Paul as witnesses. The time of recovery is 6.30 a.m. Nothing could be brought in his cross-examination to show that there were any houses, shops or persons available near the place of recovery. He denied his knowledge in case there is small house above the place where the accused was arrested or 3-4 Nepalis reside near the residence of the accused. PW-1 HHC Hem Raj has clearly stated that he was sent in search of local and independent witnesses, but he could not find any independent witness because there was no habitation nearby. PW-2 HC Yash Paul has corroborated this statement that PW-1 HHC Hem Raj was sent in search of local independent witnesses, but could not bring anyone. Nothing has come up in the statements of these two witnesses also that there were houses, shops or persons were available nearby and could have been associated by the Investigating Officer.

10. Keeping in view the fact that the recovery was effected in the early hours in an isolated place, where there were no houses or shops and efforts were made to associate independent witnesses, as per the evidence, it cannot be said that there was non-compliance of the provisions of Section 100(4) of the Cr.P.C, when the accused had been apprehended suddenly and the bag being carried by him was searched by the police party. Thus, there is no substance in the plea raised by the learned Counsel for the appellant that independent witnesses could have been associated and, therefore, the recovery was not legal.

11. Coming to the contradictions in regard to the time, all the three witnesses have clearly stated that the recoveries were effected at 6.30 a.m. in the morning. In regard to the contradiction, PW-2 HC Yash Paul has stated that they remained at the spot till 10/10.30 a.m., while PW-3 SI Joginder Singh has stated that the formalities were completed at the spot at about 11.00 a.m. PW-2 HC Yash Paul had stated that they reached the spot at about 5.00 a.m., PW-1 HHC Hem Raj has stated that they reached the place at 6.30 a.m., while PW-3 SI Joginder Singh has stated that they reached at the spot at 5.00 a.m. All the witnesses have clearly stated the time of apprehension of the accused as 6.30 a.m., though there is some contradiction in regard to the time of arrival of the police party at the spot. This contradiction cannot be termed as material. There is no contradiction in regard to the place of recovery, the time of recovery or the quantity of Charas recovered from the possession of the appellant.

12. Coming to the plea in regard to non-compliance of Section 50 of the NDPS Act, since the bag was to be searched in possession of the appellant, it was not mandatory to comply with the provisions of Section 50 of the NDPS Act. A plea was also raised by the learned Counsel for the appellant that the samples of 25 grams each were taken by the Investigating Officer, but on analysis by the Chemical Examiner, the weight was found to be 26.0612 grams, which shows that the same sample was not sent to the Chemical Examiner and, therefore, the report of the Chemical Examiner cannot be linked with the appellant. There is nothing on the record to show that the Investigating Officer had used which type of weighing scale and in case the traditional weighing scale is used, the weight is given by approximation. However, in the laboratory, the new scales are used and accordingly the net weight was found to be 1.0612 grams more than as per the prosecution story. This question has been considered by the Apex Court in *Pon Adithan Vs. Deputy Director, Narcotics Control Bureau, Madras*, in which it was found that there was a variation of 1.9 grams. It was held that the minor discrepancy in regard to weight of the sample sent to chemical analyst is immaterial. Similar view was also taken in *Madan Lal and Another Vs. State of Himachal Pradesh*. Therefore, the plea raised by the learned Counsel for the appellant is repelled on both the grounds being devoid of any force.

13. On a careful perusal of the evidence available on record, we are satisfied that there are no material contradictions or infirmities in the prosecution case and the findings recorded by the learned trial Court holding the appellant guilty u/s 20 of the NDPS Act are liable to be affirmed.

14. The other submission made by the learned Counsel for the appellant was that keeping in view the decision of the Division Bench of this Court in *Dharam Pal v. State of H.P.* Latest 2007 MHLJ 827, the quantity of Charas recovered cannot be said to be 1 Kg. and as such the appellant was entitled to punishment provided for recovery of small quantity only in view of the reasoning given by the Division Bench of this Court.

15. A perusal of the aforesaid decision shows that a question was raised before

the Division Bench that in case the percentage of resin found in the content of Charas is less than the recovered Charas, the quantity of resin found can be said to be Charas and not the whole quantity recovered from possession of the accused. Accordingly, it was held that the sentence has to be imposed keeping in view the quantity of resin found in the total quantity of Charas recovered from the possession of the accused. A perusal of the said judgment of the Division Bench further shows that a similar plea was raised before the Bench and in that case the quantity of Charas recovered was 1.600 grams, but the chemical examiner on the analysis of representative of the sample of the stuff found that it contained only 28.92% resin and accordingly had referred to the term cannabis, Charas, Ganja etc. The Division Bench finally concluded that since the report of the chemical examiner shows that percentage of resin found was 28.92% and it was silent, about the rest of the contents of the stuff which means that the entire quantity of the recovered stuff was not Charas.

16. The Apex Court in a decision in E. Micheal Raj Vs. Intelligence Officer, Narcotic Control Bureau, , has also held that the imposition of sentence is to be based on content of offending drug in mixture and not on weight of the mixture as such.

17. Applying the decisions in the above cases in which it was held that recovered stuff was Charas only to the extent of resin content found therein and accordingly, it is concluded that since in the present case the resin content found was 34.07% approximately 1/3rd, it can be concluded that the Charas recovered from the possession of the accused was 1/3rd of the total substance i.e. about 630 grams only.

18. Therefore, the recovered Charas can be said to be more than small quantity but less than commercial quantity since the commercial quantity is 1 Kg. while the small quantity is 100 grams and, therefore, the appellant does not deserve the maximum punishment prescribed u/s 20 of the Act as awarded by the learned trial Court for ten years and fine of Rs. 1.00 lac. Therefore, relying upon the decision of the Division Bench, the sentence imposed deserves to be reduced considerably and keeping in view the fact that the punishment for recovery of commercial quantity of 1 Kg. is prescribed as ten years, we are of the opinion that the appellant is entitled to rigorous imprisonment for a period of six years and to pay a fine of Rs. 60,000/-.

19. Keeping in view the above discussion, the appeal filed by the appellant is partly accepted to this extent that the sentence awarded by the learned trial Court is reduced to rigorous imprisonment for a period of six year. The fine is also reduced to Rs. 60,000/- and in default of payment of fine, the appellant shall undergo rigorous imprisonment for a period of six months.

20. The learned trial Court shall take steps that the appellant serves the sentence and fresh jail warrant be issued accordingly by the trial Court. The information regarding deposit of fine shall also be sent to this Court as and when

the fine is realized. A copy of the judgment alongwith record be returned to the learned trial Court.