

(2015) 12 SHI CK 0018
In the High Court Of Himachal Pradesh
Case No : Criminal MPM No. 1554 of 2015

State of Himachal Pradesh

APPELLANT

Vs

Baba Rajinder Nath Ogpeer and Others

RESPONDENT

Date of Decision : 19-12-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 378(3), 417, 418, 423
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 20, 29

Citation : (2015) 12 SHI CK 0018

Hon'ble Judges : Sanjay Karol and Piar Singh Rana, JJ.

Bench : Division Bench

Advocate : Kush Sharma, Deputy Advocate General and J.S. Guleria, Assistant Advocate General, for the Appellant

Final Decision : Dismissed

Judgement

Sanjay Karol, J.—We have perused the entire record of the trial Court, so made available by Mr. Kush Sharma, Deputy Advocate General, which stands returned.

2. In relation to FIR No. 297 of 2013, dated 13.10.2013 (Ex. PW.5/A), registered at Police Station, Sadar, District Kullu, H.P., under the provisions of Section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the NDPS Act), accused Baba Rajinder Nath Ogpeer was charged to face trial for having committed an offence punishable under the provisions of Section 20 of the NDPS Act. Whereas, accused Naval Ram was charged to face trial for having committed offences punishable under the provisions of Sections 20 and 29 of the NDPS Act.

3. It is the case of prosecution that on 13.10.2013, police party comprising of Ramesh Kumar (not examined), Yash Pal (PW.3), Tej Ram (not examined), Sham Dass (PW.7) headed by Inspector Raj Kumar (PW.8), were on patrol duty at a place known as Hurludhar. Vehicle bearing No. HP-01K-3925 driven by Ram Krishan (PW.4) was stopped and searched. Inside the vehicle accused Baba Rajinder Nath Ogpeer and Naval Ram were sitting. From the bag carried by

accused Baba Rajinder Nath Ogpeer contraband substance, which appeared to be charas, was recovered. The same was searched and found to be 210 grams. Police party seized the same vide recovery memo (Ex. PW.4/A). NCB forms (Ex. PW.5/C) were filled up in triplicate. Sham Dass (PW.7) took the Rukka to the Police Station, on the basis of which FIR No. 297 of 2013, dated 13.10.2013 (Ex. PW.5/A) was registered under the provisions of Section 20 of the NDPS Act. The contraband substance was resealed by Inspector Firoz Khan (PW.5) and deposited in the Malkhana with MHC, who sent the sample for chemical analysis. Report of the chemical analyst (Ex. PW.5/E) was taken on record. With the completion of investigation, which prima facie revealed complicity of the accused in the alleged crime, Challan was presented in the Court for trial.

4. In order to establish its case, in all, prosecution examined as many as nine witnesses.

5. Trial Court, after appreciating the testimony of the prosecution witnesses acquitted the accused vide judgment dated 29.07.2015, passed in Sessions Trial No. 09/2014, titled as State of Himachal Pradesh Versus Baba Rajinder Nath Ogpeer & another. Hence the present leave to appeal filed by the State under the provisions of Section 378(3) of the Code of Criminal Procedure.

6. Having heard Mr. Kush Sharma, learned Deputy Advocate General and Mr. J.S. Guleria, learned Assistant Advocate General, on behalf of the State, we have also minutely examined the testimonies of the witnesses and other documentary evidence so placed on record by the prosecution. Having done so, we are of the considered view that no case for interference is made out at all. We find that the judgment rendered by the trial Court is based on complete, correct and proper appreciation of evidence (documentary and ocular) so placed on record. There is neither any illegality/infirmity nor any perversity with the same, resulting into miscarriage of justice.

7. It is a settled principle of law that acquittal leads to presumption of innocence in favour of an accused. To dislodge the same, onus heavily lies upon the prosecution. Having considered the material on record, we are of the considered view that prosecution has failed to establish the essential ingredients so required to constitute the charged offence.

8. In *Prandas Vs. The State*, , Constitution Bench of the apex Court, has held as under:

"(6) It must be observed at the very outset that we cannot support the view which has been expressed in several cases that the High Court has no power under S. 417 , Criminal P.c., to reverse a judgment of acquittal, unless the judgment is perverse or the subordinate Court has in some way or other misdirected itself so as to produce a miscarriage of justice. In our opinion, the true position in regard to the jurisdiction of the High Court under S. 417 , Criminal P.c. in an appeal from an order of acquittal has been stated in - *Sheo Swarup and Others vs. The King-Emperor* AIR 1934 227 (Privy Council) , in these

"Sections 417 , 418 and 423 of the Code give to the High Court full power to review at large the evidence upon which the order of acquittal was founded, and to reach the conclusion that upon that evidence the order of acquittal should be reversed. No limitation should be placed upon that power, unless it be found expressly stated in the Code. But in exercising the power conferred by the Code and before reaching its conclusions upon fact, the High Court should and will always give proper weight and consideration to such matters as (1) the views of the trial Judge as to the credibility of the witnesses, (2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at his trial, (3) the right of the accused to the benefit of any doubt, and (4) the slowness of an appellate Court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses. To state this, however, is only to say that the High Court in its conduct of the appeal should and will act in accordance with rules and principles well known and recognized in the administration of justice."

10. It is also well established principle of law that (i) the appellate Court should not ordinarily set aside a judgment of acquittal in a case where two views are possible, though the view of the appellate court may be more probable; (ii) while dealing with a judgment of acquittal, the appellate court must consider entire evidence on record, so as to arrive at a finding as to whether views of the trial court are perverse or otherwise unsustainable; (iii) the appellate court is entitled to consider whether in arriving at a finding of fact, trial Court failed to take into consideration any admissible fact; and (iv) the trial Court failed to take into consideration any admissible evidence and/or had taken into consideration evidence brought on record contrary to law. (See: Sheo Swarup and Others vs. The King-EmperorAIR 1934 227 (Privy Council) ; Sheo Swarup and Others vs. The King-EmperorAIR 1934 227 (Privy Council) ; Sheo Swarup and Others vs. The King-EmperorAIR 1934 227 (Privy Council) ; Sheo Swarup and Others vs. The King-EmperorAIR 1934 227 (Privy Council) ; Sheo Swarup and Others vs. The King-EmperorAIR 1934 227 (Privy Council) ; Sheo Swarup and Others vs.

The King-EmperorAIR 1934 227 (Privy Council) ; Sheo Swarup and Others vs. The King-EmperorAIR 1934 227 (Privy Council) ; Sheo Swarup and Others vs. The King-EmperorAIR 1934 227 (Privy Council) and Sheo Swarup and Others vs. The King-EmperorAIR 1934 227 (Privy Council)).

11. In Sheo Swarup and Others vs. The King-EmperorAIR 1934 227 (Privy Council) , the Privy Council held that:

"...the High Court should and will always give proper weight and consideration to such matters as (1) the views of the trial Judge as to the credibility of the witnesses, (2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at his trial, (3) the right of the accused to the benefit of any doubt, and (4) the slowness of an appellate court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses...."

12. In Sheo Swarup and Others vs. The King-EmperorAIR 1934 227 (Privy Council) , the apex Court observed as under:

"(1) An appellate court has full power to review, re-appreciate and reconsider the evidence upon which the order of acquittal is founded.

(2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law.

(3) Various expressions, such as, "substantial and compelling reasons", "good and sufficient grounds", "very strong circumstances", "distorted conclusions", "glaring mistakes", etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasise the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.

(4) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court."

13. In Sheo Swarup and Others vs. The King-EmperorAIR 1934 227 (Privy Council) , the apex Court gave illustrations of certain circumstances in which the Court would be justified in interfering with a judgment of acquittal by the High

Court, which principle, in our considered view, would squarely apply to the judgment under review by us. The circumstances include; (i) The High Court's decision is based on totally erroneous view of law by ignoring the settled legal position; (ii) The High Court's conclusions are contrary to evidence and documents on record; iii) The entire approach of the High Court in dealing with the evidence was patently illegal leading to grave miscarriage of justice; (iv) The High Court's judgment is manifestly unjust and unreasonable based on erroneous law and facts on the record of the case; (v) Apex Court must always give proper weight and consideration to the findings of the High Court; and (vi) the apex Court would be extremely reluctant in interfering with a case when both the Sessions Court and the High Court have recorded an order of acquittal. The apex Court further held that "Thus, the law on the issue can be summarised to the effect that in exceptional cases where there are compelling circumstances, and the judgment under appeal is found to be perverse, the appellate court can interfere with the order of acquittal. The appellate court should bear in mind the presumption of innocence of the accused and further that the trial Court's acquittal bolsters the presumption of his innocence. Interference with the decision of the trial court in a routine manner, where the other view is possible should be avoided, unless there are good reasons for such interference."

(Emphasis supplied).

14. It is a settled proposition of law that sole testimony of police official, which if otherwise is reliable, trustworthy, cogent and duly corroborated by other witnesses or admissible evidence, cannot be discarded only on the ground that he is a police official and may be interested in the success of the case. It cannot be stated as a rule that a police officer can or cannot be a sole eyewitness in a criminal case. It will always depend upon the facts of a given case. If the testimony of such a witness is reliable, trustworthy, cogent and if required duly corroborated by other witnesses or admissible evidences, then the statement of such witness cannot be discarded only on the ground that he is a police officer and may have some interest in success of the case. It is only when his interest in the success of the case is motivated by overzealousness to an extent of his involving innocent people; in that event, no credibility can be attached to the statement of such witness.

15. It is not the law that Police witnesses should not be relied upon and their evidence cannot be accepted unless it is corroborated in material particulars by other independent evidence. The presumption applies as much in favour of a police officer as any other person. There is also no rule of law which lays down that no conviction can be recorded on the testimony of a police officer even if such evidence is otherwise reliable and trustworthy. Rule of prudence may require more careful scrutiny of their evidence. If such a presumption is raised against the police officers without exception, it will be an attitude which could neither do credit to the magistracy nor good to the public, it can only bring down the prestige of police administration.

16. Wherever, evidence of a police officer, after careful scrutiny, inspires confidence and is found to be trustworthy and reliable, it can form basis of conviction and absence of some independent witness of the locality does not in any way affect the creditworthiness of the prosecution case. No infirmity attaches to the testimony of the police officers merely because they belong to the police force and there is no rule of law or evidence which lays down that conviction cannot be recorded on the evidence of the police officials, if found reliable, unless corroborated by some independent evidence. Such reliable and trustworthy statement can form the basis of conviction.

"[See: Sheo Swarup and Others vs. The King-EmperorAIR 1934 227 (Privy Council) ; Tika Ram v. State of Madhya Pradesh, (2007) 15 SCC 760 ; Sheo Swarup and Others vs. The King-EmperorAIR 1934 227 (Privy Council) and Sheo Swarup and Others vs. The King-EmperorAIR 1934 227 (Privy Council)]."

17. Apex Court in Sheo Swarup and Others vs. The King-EmperorAIR 1934 227 (Privy Council) , dealing with a similar question, held as under:--

"6.....In our opinion no infirmity attaches to the testimony of the police officials, merely because they belong to the police force and there is no rule of law or evidence which lays down that conviction cannot be recorded on the evidence of the police officials, if found reliable, unless corroborated by some independent evidence. The Rule of Prudence, however, only requires a more careful scrutiny of their evidence, since they can be said to be interested in the result of the case projected by them. Where the evidence of the police officials, after careful scrutiny, inspires confidence and is found to be trustworthy and reliable, it can form basis of conviction and the absence of some independent witness of the locality to lend corroboration to their evidence, does not in any way affect the creditworthiness of the prosecution case."

18. Now Sham Dass (PW.7) states that all the occupants of the vehicle were asked to deboard and thereafter only the search took place. According to this witness charas was found from the bag carried by accused Baba Rajinder Nath Ogpeer, but then there is nothing on record to show complicity of other accused Navalu Ram.

19. We find that there are major contradictions with regard to the time when the alleged search and seizure operations took place. As per NCB form (Ex. PW.5/C), seizure took place at 9.30 AM. Now this document totally belies the version of the police official, according to whom, it was at about 9.00 AM. But then contradiction does not end here. According to Investigating Officer Raj Kumar (PW.8), recovery was effected at 10.30 AM. One finds the FIR to have been recorded at 2.00 PM. This could have only after Rukka (Ex. PW.8/A) was taken to the Police Station by Sham Dass (PW.7). Further now this document contradicts the version of Sham Dass, according to whom, Rukka was received in the Police Station only at 3.00 PM and further according to Inspector Firoz Khan (PW.5), it was at about 2.45 PM. Now which of the witnesses is speaking truth is not clear.

Whether all the police officials were present on the spot, as the prosecution wants the Court to believe is also in doubt. This renders the genesis of the prosecution story of having set up a Nakka and searched the accused on the spot, to be doubtful.

20. We notice that in the documents prepared on the spot i.e. NCB form (Ex. PW.5/C), spot map (Ex. PW.8/B) and the arrest memo, number of the FIR is recorded by the same person in the same flow of hand and ink. This further renders prosecution case to be doubtful. It appears that the documents were prepared not on the spot, but at the Police Station after registration of the FIR.

21. We find there is contradiction with regard to the person, who had inscribed the sample of seal. According to Inspector Raj Kumar (PW.8), it was so done by Yash Pal (PW.3). Whereas, according to Sham Dass (PW.7), it was so done by Ramesh Kumar (not examined).

22. According to Inspector Raj Kumar (PW.8), accused No. 1 had disclosed of having purchased the contraband substance from accused No. 2, but then this version is not corroborated by any of the other witnesses/police officials present on the spot. As*

23. We do not find prosecution to have proved its case, beyond reasonable doubt, by leading clear, cogent, convincing piece of evidence with regard to recovery of contraband substance from the conscious possession of the accused. Contradictions in the statements of police officials are glaring, material and relevant, totally shaking the edifice of prosecution story. Witnesses are unreliable and their testimonies not free from embellishments/contradictions/variations.

24. The Court below, in our considered view, has correctly and completely appreciated the evidence so placed on record by the prosecution. It cannot be said that judgment of trial Court is perverse, illegal, erroneous or based on incorrect and incomplete appreciation of material on record resulting into miscarriage of justice.

25. The accused have had the advantage of having been acquitted by the Court below. Keeping in view the ratio of law laid down by the Apex Court in Sheo Swarup and Others vs. The King-Emperor AIR 1934 227 (Privy Council) , since it cannot be said that trial Court has not correctly appreciated the evidence on record or that acquittal of the accused has resulted into travesty of justice, no interference is warranted in the instant case.

For all the aforesaid reasons, present leave to appeal, being devoid of merit, is dismissed, so also the pending application(s), if any.

*matter missing in source file