

(2019) 01 SHI CK 0003
In the High Court Of Himachal Pradesh
Case No : Criminal Appeal No. 4226 Of 2013

State of Himachal Pradesh	Vs	APPELLANT
Kamal Verma		RESPONDENT

Date of Decision : 03-01-2019

Acts Referred:

Narcotic Drugs and Psychotropic Substances Act, 1985 — Section 20, 61

Citation : (2019) 01 SHI CK 0003

Hon'ble Judges : Surya Kant, CJ;Ajay Mohan Goel, J

Bench : Division Bench

Advocate : Ashok Sharma, Ritta Goswami, Ajay Kochhar, Vivek Sharma

Final Decision : Dismissed

Judgement

Surya Kant, CJ

1. State of Himachal Pradesh has preferred this Appeal against the judgment dated 29th June, 2013 passed by Special Judge, Shimla whereby the respondent has been acquitted in a case under Sections 20 and 61 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as 'the Act') registered vide FIR No. 263/2011 dated 24th November, 2011, Police Station Dhalli, District Shimla.

2. The case of the prosecution, as spelt out from the statement of Constable Anil Kumar (PW-1) (and verified from records also) is that he was posted as a Constable in SIU, Shimla when on 24th November, 2011, he alongwith HC Tek Ram, Constable Rajeev Patiyl and Constable Varun Joshi departed from Police Station Sadar, Shimla on patrolling duty and detection work duty at about 7.35 P.M. towards Sanjauli-Dhalli-Mashobra-Kufri etc. At about 9.40 P.M. they reached near Mashobra bifurcation. About 50 meters towards Mashobra, one person, namely the respondent, appeared at the scene wearing black coloured full sleeve T-shirt and blue coloured jeans. He was having one grey sky blue coloured rucksack on his right shoulder. When he saw the police party, he turned back and

tried to run away but was chased and caught by HC Tek Ram.

Meanwhile, a Maruti Car bearing registration No. HP-63A- 0782 came from Mashobra side which was stopped. Only the driver was present in that vehicle who disclosed his name as Bhupinder Chauhan. Said Bhupinder Chauhan was associated with the police party and in his presence, the respondent disclosed his name as Kamal Verma. As there was suspicion regarding possession of some contraband or suspicious substance by the respondent, hence he was told orally as well as in writing whether he intended to give his search to police or wanted the presence of some Magistrate or Gazetted Officer. The respondent allegedly gave in writing that he wanted to be searched by police party. Consequently, Consent Memo Ex. PW-1/A was prepared which was duly signed by the respondent and Bhupinder Chauhan. According to Constable Anil Kumar (PW-1), all the members of the Police Party gave their personal search to the respondent and no incriminating substance was found in their possession. Thereafter, the bag, which the respondent was carrying, was searched, from inside which one red colour bag was recovered. There was yet another polythene envelope inside the red colour bag in which black coloured substance was wrapped, which was found to be charas. The contraband was weighed with the help of electronic scale and it was found to be 1610 grams. The charas was again put in polythene and red colour bag and put in rucksack. All the articles were sealed in a cloth parcel with seal impressions 'T' (nine in number). The seal impression was thereafter taken on a separate piece of cloth. The Investigating Officer filled the NCB Form in triplicate at the spot. The specimen of seal was taken on NCB Forms and was handed over to independent witness Bhupinder Chauhan. The sealed parcel was signed by witnesses as well as by the respondent. The case property was taken into possession vide memo Ex. PW-1/C. Thereafter, HC Tek Ram prepared Ruka Ex. PW-12/A at the spot and forwarded it through Constable Rajeev Patiyl to Police Station Dhalli. Constable Anil Kumar (PW-1) further stated that specimens of seal impression 'T' were taken on a piece of cloth, which is Ex. PW-1/D, on which he could identify his signatures. It was also signed by the respondent as well as Bhupinder Chauhan. He identified the bags etc. recovered from the possession of the respondent, as also identified the respondent who was present in Court. On receipt of Ruka, formal FIR was registered, the respondent was formally arrested. HC Tek Ram, who sent the Ruka as complainant, also investigated the case as Investigating Officer.

3. A prima facie case under Section 20 of the Act was made out against the respondent, to which he pleaded not guilty and claimed trial.

4. The prosecution examined twelve witnesses in all including Bhupinder Chauhan (PW-8). The respondent also examined one Vivek Panwar as Defence Witness (DW- 1).

5. The issue that arose for consideration of the Special Judge was - whether the prosecution proved beyond reasonable doubt that the respondent was found in exclusive and conscious possession of 1610 grams of charas?

6. The Special Judge vide judgment under Appeal, answered the question in negative and held that the prosecution has failed to prove the case beyond reasonable doubt, leading to the acquittal of the respondent.

7. We have heard learned counsel for the parties at a considerable length in support of their respective contentions and gone through the record.

8. While evaluating the rival submissions, this Court has to firstly determine whether the prosecution can bank upon the statements of the police officials, and if not, whether the Special Judge was justified in giving due weightage to the statement of solitary independent witness Bhupinder Chauhan, who appeared as PW-8 and has not supported the prosecution case?

9. As may be seen from the narration of facts, the prosecution version is that the Police Party headed by HC Tek Ram apprehended the respondent on suspicion and search of his bag was conducted in the presence of Bhupinder Chauhan - a private and independent witness.

10. Constable Anil Kumar (PW-1), duly supported by Constable Rajeev Patiyal (PW-2) and HC Tek Ram (PW-12) though have broadly supported the case of the prosecution but on a critical analysis of their statements, we find that various frequent contradictions have emerged which, coupled with the version of Bhupinder Chauhan (PW-8), have prompted the Special Judge to hold firmly that the prosecution could not bring the guilt home.

11. On re-appraisal of the entire evidence, we are inclined to concur with the findings returned by the Special Judge. We say so for the reasons that firstly the marginal witness Bhupinder Chauhan (PW-8) has not supported the prosecution case and has completely denied the recovery of contraband from the exclusive or conscious possession of the respondent in his presence. He further deposed that his signatures were obtained on the recovery memos at later stage in Police Station. He also did not identify the respondent in Court.

12. Constable Rajeev Patiyal (PW-2) also unfortunately could not give credence to the prosecution case. His version though runs side by side with Constable Anil Kumar (PW-1) but both having been contradicted by independent witness Bhupinder Chauhan (PW-8), the non- acceptance of version of Constable Anil Kumar (PW-1) would necessarily lead to disbelieving the statement of Constable Rajeev Patiyal (PW-2) too as he is also a police official.

13. So far as HC Shiv Kumar (PW-3) is concerned, he is a link witness who has simply stated that the sealed parcels alongwith NCB Forms were deposited in the Malkhana. HC Krishan Lal (PW-4) merely made an entry of departure of police officials from Police Station and his statement too does not advance the prosecution case. Similarly, HHC Saligram (PW-5) simply stated that the Special Report was received in the Office of Dy.SP Shimla whereas Constable Sanjeet Kumar (PW-6) has stated that he took the Special Report in the Office of Dy.SP. Both are, thus, formal witnesses. The other police officials, who have stepped

into the witness box (except HC Tek Ram PW-12) are also formal witnesses.

14. True it is that the statements of official witnesses may not be discarded merely because they are police officials. There is no gainsaying that if the prosecution produces some corroborative evidence, the Court can, with the aid and support of such corroborative evidence, rely upon the statements of police witnesses as well. Let us see whether such corroborative evidence has been led in the instant case?

15. The Special Judge in para 21 of the judgment under Appeal has found that the testimony of Rajeev Patiyal (PW-2) is not helpful to the prosecution in view of contradictory evidence of the eye witness, i.e. Bhupinder Chauhan (PW-8). It further found that testimonies of HC Shiv Kumar (PW-3), HC Krishan Lal (PW-4), HHC Saligram (PW-5), Inspector Amar Chand (PW-7), Constable Rakesh Kumar (PW-9), ASI Manohar Singh (PW-10) and ASI Sucha Singh (PW-11) are not at all helpful on account of the material contradictions and so far as HC Tek Ram (PW-12) is concerned, his version cannot be relied upon as he is the Investigating Officer and is, thus, an interested witness. The oral version of this witness too therefore is not worth reliance.

16. The findings so returned by the Special Judge are duly borne out from the record. Constable Anil Kumar (PW-1) deposed in the Court that on the fateful day, when the Police Party around 9.40 P.M. reached near Mashobra bifurcation, it saw one person wearing black coloured T-shirt full sleeves and blue coloured jeans about 50 meters towards Mashobra. According to him, this person was having one rucksack on his right shoulder which was of grey sky blue colour. When he saw the Police Party, he turned back and tried to run away, however, HC Tek Ram (PW-12) caught hold of him and in the meanwhile, from Mashobra side, one Maruti Car bearing registration No. HP-63A-0782 came, which was stopped, which was being driven by Bhuinder Chauhan, who was alone in the Court and who, on asking of HC Tek Ram (PW-12) disclosed his name and was associated with the Police Party. However, in his cross-examination, this witness stated that he could not tell as to who among them, i.e. the Police Patrolling Party, caught hold of the respondent after running behind him. As per him, Bhupinder Chauhan reached in his car within two-three minutes from the time of apprehension of the respondent.

17. Constable Rajeev Patiyal (PW-2) deposed in the Court that on the fateful day, around 9.40 P.M. when the Police Party, of which he was a part, reached near Mashobra bifurcation, one person-respondent came towards Mashobra side and when he saw Police Party, he turned back and tried to run away but was caught by HC Tek Ram (PW-12). He also deposed that in the meanwhile, one Maruti Car came from Mashobra side which was stopped and the only person in the vehicle was the one driving the same, who disclosed his name as Bhupinder Chauhan. He further deposed that in the presence of Bhupinder Chauhan the respondent disclosed his name and recovery of the contraband was effected from the respondent. In his cross-examination, this witness deposed that Bhupinder

Chauhan reached the spot in his Maruti Car 15 to 20 minutes after the apprehension of the respondent. He also deposed that the respondent could hardly run for few steps before all the members of the Police Party apprehended him at one time.

18. When we closely peruse the statements of Constable Anil Kumar (PW-1) and Constable Rajeev Patiyal (PW-2), who were part of the Police Party, one finds contradictions in their statements, which have gone unexplained. Whereas, in his examination-in-chief, Constable Anil Kumar (PW-1) has stated that the respondent was overpowered by HC Tek Ram (PW-12), in his cross-examination, he deposed that he could not say as to who overpowered the respondent. On the contrary, Constable Rajeev Patiyal (PW-2), in his cross-examination, has stated that the respondent was overpowered by the entire Police Party. He has not stated that respondent was overpowered by HC Tek Ram. Whereas as per Constable Anil Kumar (PW-1), eye witness Bhupinder Chauhan (PW- 8) reached the spot within two-three minutes of the apprehension of the respondent, Constable Rajeev Patiyal (PW-2) has deposed that the said eye witness reached the spot 15-20 minutes after the apprehension of the respondent.

19. Incidentally, eye witness Bhupinder Chauhan (PW-8) has completely denied his presence at the spot and he deposed that on the fateful day, i.e. 24th November, 2011, around 7.30 P.M. when he was coming in his personal Car bearing registration No. HP-63A-0782 from Mashobra towards Dhalli near the Bypass, police officials met him and they asked him to drop them at Police Station Dhalli where said police officials obtained his signatures on some papers and told him that they had recovered some contraband from some person. He did not even identify the respondent. Though he was subjected to lengthy cross-examination by the learned Public Prosecutor, however, nothing fruitful could be extracted from him to strengthen the prosecution case. In his cross-examination, this witness has denied the police version in totality. He has denied that any contraband was recovered from the possession of the respondent in his presence, as is the case set up by the prosecution.

20. Keeping in view the fact that the sole eye witness has not supported the case of the prosecution, the contradictions in the statements of Constable Anil Kumar (PW-1) and Constable Rajeev Patiyal (PW-2) gain importance and shroud the case of the prosecution with suspicion.

21. Regarding the documentary evidence, it has been found and could not be disputed by learned State Counsel that the NCB Forms (Ex. PW-11/C) have not been filled-up as per the mandatory procedure and Columns No. 9, 10 and 11 of these Forms have been kept blank. These columns deal with the re-sealing process. No explanation for keeping these columns blank has come forth from the prosecution side. The alleged eye witness Bhupinder Chauhan (PW-8) has not supported the prosecution version, seal 'T', which was separately kept in a cloth parcel and handed over to him, has also not been produced. The prosecution version is again conspicuously silent as to why the seal was not produced in

Court for comparison.

22. Adverting to the fairness of the investigation, it is undeniable that the complainant HC Tek Ram (PW-12) himself assumed the role of Investigating Officer. The Special Judge has held that in a case where the complainant himself conducts the investigation, there is every likelihood of causing prejudice to the accused.

23. While mere apprehension of causing prejudice may not be sufficient but once it is established that the complainant, while playing the role of Investigating Officer, had a tendency to substantiate the contents of his complaint, the inference of actual prejudice can be safely drawn. The fact that the solitary independent witness has testified in total contradiction to what the Investigating Officer of the case has deposed, gives weightage to the respondent's plea that it was not a case of fair investigation.

24. The reasons assigned by the Special Judge for disapproving the conduct of investigation by the complainant himself now find support from the recent decision of the Hon'ble Supreme Court in Mohan Lal versus State of Punjab (Crl. Appeal No.1880 of 2011 decided on August 16, 2018) reported in 2018 (9) Scale 663, where it has been ruled as follows:

"14. In a criminal prosecution, there is an obligation cast on the investigator not only to be fair, judicious and just during investigation, but also that the investigation on the very face of it must appear to be so, eschewing any conduct or impression which may give rise to a real and genuine apprehension in the mind of an accused and not mere fanciful, that the investigation was not fair. In the circumstances, if an informant police official in a criminal prosecution, especially when carrying a reverse burden of proof, makes the allegations, is himself asked to investigate, serious doubts will naturally arise with regard to his fairness and impartiality. It is not necessary that bias must actually be proved. It would be illogical to presume and contrary to normal human conduct, that he would himself at the end of the investigation submit a closure report to conclude false implication with all its attendant consequences for the complainant himself. The result of the investigation would therefore be a foregone conclusion."

25. Taking the cumulative effect of the facts that (i) the eye witness Bhupinder Chauhan (PW-8) has turned hostile and has not supported the prosecution case; (ii) the seal has not been produced in Court for comparison and no reason whatsoever has come forward to justify the non- production; (iii) there is substantial contradiction between examination-in-chief and cross-examination of the star witness Constable Anil Kumar (PW-1) and Constable Rajeev Patiyl (PW-2); and (iv) the complainant HC Tek Ram (PW- 12) himself being the Investigating Officer, the respondent has been subjected to severe prejudice, we are satisfied that no interference in the judgment under Appeal is called for.

26. Resultantly, the appeal fails and is accordingly dismissed. Bail bonds furnished by the respondent, if any, stand discharged.

27. Send down the records forthwith.