
(2016) 06 SHI CK 0007
In the High Court Of Himachal Pradesh
Case No : Cr. Appeal No. 37 of 2013

State of Himachal Pradesh	Vs	APPELLANT
Neeraj Sharma & others		RESPONDENT

Date of Decision : 17-06-2016

Acts Referred:

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

Citation : (2016) 3 HimLR 1883 : (2016) ILRHP 2013 : (2016) LatestHLJ(HP) 821

Hon'ble Judges : Mr. Rajiv Sharma and Mr. Chander Bhusan Barowalia, JJ.

Bench : Division Bench

Advocate : Mr. Parmod Thakur, Addl. AG, for the Appellant; Mr. N.K. Thakur, Sr. Advocate with Mr. Jagdish Thakur, Advocate, Mr. Praveen Chauhan, Advocate, for the Respondent

Final Decision : Disposed Off

Judgement

Mr. Chander Bhusan Barowalia, J.—The State has maintained the present appeal against the judgment of acquittal of the respondents (hereinafter referred to as "the accused"), dated 14.09.2012, rendered by the learned Special Judge, Fast Track Court, Chamba, District Chamba, H.P., in Sessions Trial No. 7 of 2012, for offence punishable under Section 20 of Narcotic Drugs & Psychotropic Substances Act, 1985 (hereinafter referred to as "NDPS Act").

2. The prosecution story, in brief, is that, on 10.02.2012 at about 3:30 a.m., HC Deva Nand (PW-10) along with HC Shaukat Ali No. 25, IO/HHC Subhash Chand No. 26, Constable Sandeep Kumar No. 269 and SPO Sanjeev Kumar proceeded to Zero point, Jassourgarh, in relation of picketing pursuant to Rapat No. 12, Ex. PW-4/A. At Zero Point, Jassourgarh, on the pedestrian path, HC Deva Nand (PW-10) noticed torch light and switching off the same thrice. In the meantime, one person was also noticed with torch light pointing towards pedestrian path standing at the curve at a little distance from Zero Point towards Chamba and the person who was pointing towards Chamba walked on foot to Zero Point. After

reaching Zero Point that person was again seen pointing with torch light towards pedestrian path. In the meanwhile, two persons, one wearing red coloured sweater and another wearing jacket, were seen walking towards Zero Point, Jassourgarh. Person wearing red coloured sweater was noticed carrying yellow green coloured bag and the person following him was having torch. The person carrying yellow green bag handed over the same to the person wearing jacket and took the torch from him. The person allegedly carrying yellow green bag opened it in order to show to the person, who was already standing at the curve at a little distance from Zero Point, Jassourgarh, and the person who had been shown the bag took possession of the same by holding it tightly between his knees and handed over one packet containing currency notes to the person wearing black jacket.

3. It is further alleged that the police officials, including HC Deva Nand (PW-10) caught hold the accused and the person to whom packet containing currency notes was handed over threw the same on the road. PW-10, HC Deva Nand, inquired about the credentials of those three persons held at Zero Point. On suspicion, accused were interrogated and they disclosed their names as Neeraj, Santan and Mahesh. All the police officials offered their personal search as well as search of Investigating Officer's kit before the accused and memo, Ex. PW-1/A, to this effect was prepared and signed by HC Shaukat Ali (PW-1) and SPO Sanjeev Kumar (PW-2) as witnesses. Investigating Officer/HC Deva Nand (PW-10) apprised the accused of their right to be searched before a Magistrate or Gazetted Officer, however, accused consented to be searched by the police officials on the spot. Their consent, Ex. PW-1/B, in writing, was signed by witnesses HC Sahukat Ali (PW-1) and SPO Sanjeev Kumar (PW-2) and accused also signed the same. During search, a green bag was recovered which was checked up by IO/HC Deva Nand (PW-10) and on opening the same, one polythene bag containing hard substance in the shape of slides was recovered, which on smelling and burning and also on the basis of experience, was found to be "charas". The charas, on weighing, was found to be 4 kilograms. The contraband was put in the polythene bag and then polythene bag was put into yellow green coloured bag. Thereafter, yellow green bag was stitched and sealed with five impressions of seal "W". Specimen impression of seal "W" was taken on a separate piece of cloth, Ex. PW-1/C, and recovery memo, Ex. PW-1/E, was prepared. NCB forms, Ex. PW- 3/B, was filled in by HC/IO Deva Nand. Currency notes, contained in a packet, were also lifted by HC Deva Nand (PW-10) and on counting, 56 currency notes in the denomination of Rs. 500/- and 200 currency notes in the denomination of Rs. 100/-, totalling Rs. 48000/- (rupees forty eight thousand), were found. All the currency notes, after wrapping in a paper, were sealed in the parcel, Ex. P-5 with impressions of seal "W". Specimen impression of "W" was also taken on separate piece of cloth, Ex. PW-1/D. The seal impression "W" was also taken on NCB forms. Both parcels, sealed with impressions each of "W" were taken into possession vide memo, Ex. PW-1/E, in presence of HC Shaukat Ali (PW-1) and Sanjeev Kumar (PW-2), who signed the

same. PW-10 also appended his signatures on the same.

4. MHC handed over the case file to HC Shaukat Ali (PW-1), after registration of FIR, who delivered the same to HC Deva Nand (PW-10). Rukka, Ex. PW-10/A, was sent to Police Station, Tissa, through HC Shaukat Ali (PW-1) for registration of FIR and on the basis of rukka, FIR Ex. PW-3/E, was registered. A copy of rukka, Ex. PW-5/A, was handed over to SPO Sanjeev Kumar (PW-2) to deliver the same in the office of S.P. Chamba on 10.02.2012, who handed over the same to Constable Chain Singh (PW-5), Assistant Reader to SP, Chamba. Constable Chain Singh delivered the copy of rukka, Ex. PW- 5/A, to SP, Chamba, who after perusal appended his signatures on the same and returned it to PW-5 to keep the same on record. On 11.02.2011, HC Deva Nand (PW-10) prepared special report, Ex. PW-6/A, and handed over the same to SPO Sanjeev Kumar (PW-2) to deliver the same to SP, Chamba, who delivered the same to HC Subhash Chand (PW-6), Assistant Reader to SP, Chamba. PW-6 Subhash Chand, placed the same before SP, Chamba, who after perusing it appended his signatures and returned the same to PW-6 for keeping the same on record.

5. Spot map, Ex. PW-10/B, was prepared and accused were arrested on 10.02.2012 at around 11:15 a.m. vide memo, Ex. PW-10/C, and vide memo, Ex. PW-10/D, personal search of the accused was conducted in presence of witnesses HHC Subhash Singh No. 226 and Constable Sandeep Kumar No. 269, who appended their signatures. All the accused appended their signatures on the same. PW-10 Deva Nand, Investigating Officer, recorded the statement of HC Shaukat Ali. Accused were got medically examined at CHC, Tissa, and accused persons along with case property were brought to Police Station, Tissa. Investigating Officer (PW-10) produced the case property, NCB forms in triplicate along with case file, specimen impressions of seal "W" before Inspector Jagdish Chand (PW-8), Police Station, Tissa for resealing of the case property. Investigating Officer, HC Deva Nand, deposited the parcel containing currency notes of Rs. 48000/- as referred above and articles taken during personal search of accused before MHC, Police Station, Tissa. Inspector Jagdish Chand (PW-8) resealed the parcel, Ex. P-1, in presence of HC Avinder and Constable Sunil Kumar by affixing five seals of impression "H" and embossed seal "H" on NCB forms , Ex. PW-3/B, and took specimen, Ex. PW-3/A, of seal "H" on a piece of cloth and prepared reseal memo, Ex. PW-3/C, and handed over the seal after use to MHC, Police Station, Tissa vide daily diary No. 20, Ex. PW-8/C. Photographs, Ex. PW-10/E, were also taken.

6. On 12.02.2012, MHC Avinder Singh handed over one parcel, Ex. P-1, duly sealed with impressions of seal "H" and "W" along with specimen impressions of aforesaid seals, NCB forms, copy of seizure memo, Ex. PW- 1/E, FIR, Ex. PW-3/E, and docket vide RC No. 21/12, dated 12.02.2012, to Constable Yog Raj (PW-7) for depositing the same in FSL, Junga, who accordingly deposited the aforesaid case property on 13.02.2012 in FSL Junga in safe condition and, on return, he handed over the receipt RC No. 21/12 to HC, Police Station, Tissa.

DDR No. 10(A), dated 10.12.2012, Ex. PW-8/B, and DDR No. 20(A), dated 10.12.2012, Ex. PW-8/C, were also entered and collected. Entry regarding depositing of the case property was made in malkhana register by MHC and copy of abstract of malkhana register is Ex. PW-3/D.

7. On analysis of contraband, the Chemical Examiner, as per report, Ex. PX, opined that the substance examined was extract of cannabis and the sample of "charas" and the quantity of resin found therein was 18.28% w/w. After completion of investigation and on receipt of report of FSL, the case file was presented before SHO, who prepared the challan and filed the same in the Court.

8. The learned Trial Court acquitted the accused, hence the present appeal.

9. We have heard the learned Additional Advocate General for the appellant-State, learned counsel for the accused and have also gone through the judgment and records of the case carefully.

10. The learned Additional Advocate General argued that the Court below has failed to appreciate the fact that the prosecution has proved the guilt of the accused beyond the shadow of doubt and the law, which is overruled, is applied and so the judgment is liable to be set-aside. On the other hand, the learned defence counsel has argued that though the accused have been acquitted after applying the law as laid down in *Sunil v. State*, 2010 (1) Shimla Law Cases 192, and the recovered material cannot be termed as charas as tetrahydrocannabinol is found not only in charas, ganja, leaves, seeds and in stumps of cannabis and presence of resin in various parts of the plant would not make it charas as defined in section 2(iii)(a) of NCPS Act and he has also argued that the law was wrongly applied, but, in the instant case, the prosecution has otherwise also failed to prove the guilt of the accused, as the option, as required under Section 50 of NDPS Act, was not given to the accused.

11. As far as report of FSL is concerned, the recovered material is of charas. It has come in evidence that the accused were apprised by the Investigating Officer/ Head Constable Deva Nand (PW-10) of their right to be searched before the Magistrate/Gazetted Officer and accused consented to be searched by the Police officials. Their consent in writing, Ex. PW-1/B, was recorded which was signed by the witnesses. The consent memo prepared on the spot, Ex. PW-1/B, was a joint option given to all the accused persons and it reads as under:

"The Police party present has a suspicion that you Mahesh Chand son of Guman Ram, village Kohla, Santan son of Naresh, village Banjal and Neeraj Sharma son of Ashok Kumar VPO Nalsua are possessing some suspicious material or some narcotic substances, therefore, personal search of all of you and your bag is required to be conducted. You give me in writing whether you want your personal search and the search of your bag to be carried before Magistrate or Gazetted Officer as you have a right under Section 50 of the NDPS Act ."

12. In *Aman Kumar v. State of H.P.*, Criminal Appeal No. 387 of 2014, decided on

31.08.2015, this Court, in para No. 15, has held as under:

15. Their Lordships of the Hon'ble Supreme Court in *State of Rajasthan v. Parmanand* reported in (2014) 5 SCC 345, have held that there is a need for individual communication to each accused and individual consent by each accused under Section 50 of the Act. Their lordships have also held that Section 50 does not provide for third option. Their lordships have also held that if a bag carried by the accused is searched and his personal search is also started, Section 50 would be applicable. Their lordships have held as under:

"15. Thus, if merely a bag carried by a person is searched without there being any search of his person, Section 50 of the NDPS Act will have no application. But if the bag carried by him is searched and his person is also searched, Section 50 of the NDPS Act will have application. In this case, respondent No. 1 Parmanand's bag was searched. From the bag, opium was recovered. His personal search was also carried out. Personal search of respondent No. 2 Surajmal was also conducted. Therefore, in light of judgments of this Court mentioned in the preceding paragraphs, Section 50 of the NDPS Act will have application.

16. It is now necessary to examine whether in this case, Section 50 of the NDPS Act is breached or not. The police witnesses have stated that the respondents were informed that they have a right to be searched before a nearest gazetted officer or a nearest Magistrate or before PW-5 J.S. Negi, the Superintendent. They were given a written notice. As stated by the Constitution Bench in *Baldev Singh*, it is not necessary to inform the accused person, in writing, of his right under Section 50(1) of the NDPS Act. His right can be orally communicated to him. But, in this case, there was no individual communication of right. A common notice was given on which only respondent No. 2-Surajmal is stated to have signed for himself and for respondent No. 1-Parmanand. Respondent No.1 Parmanand did not sign.

17. In our opinion, a joint communication of the right available under Section 50(1) of the NDPS Act to the accused would frustrate the very purport of Section 50. Communication of the said right to the person who is about to be searched is not an empty formality. It has a purpose. Most of the offences under the NDPS Act carry stringent punishment and, therefore, the prescribed procedure has to be meticulously followed. These are minimum safeguards available to an accused against the possibility of false involvement. The communication of this right has to be clear, unambiguous and individual. The accused must be made aware of the existence of such a right. This right would be of little significance if the beneficiary thereof is not able to exercise it for want of knowledge about its existence. A joint communication of the right may not be clear or unequivocal. It may create confusion. It may result in diluting the right. We are, therefore, of the view that the accused must be individually informed that under Section 50(1) of the NDPS Act, he has a right to be searched before a nearest gazetted officer or before a nearest Magistrate. Similar view taken by the Punjab & Haryana High

Court in Paramjit Singh and the Bombay High Court in Dharamveer Lekhram Sharma meets with our approval.

18. It bears repetition to state that on the written communication of the right available under Section 50(1) of the NDPS Act, respondent No. 2 Surajmal has signed for himself and for respondent No. 1 Parmanand. Respondent No. 1 Parmanand has not signed on it at all. He did not give his independent consent. It is only to be presumed that he had authorised respondent No. 2 Surajmal to sign on his behalf and convey his consent. Therefore, in our opinion, the right has not been properly communicated to the respondents. The search of the bag of respondent No. 1 Parmanand and search of person of the respondents is, therefore, vitiated and resultantly their conviction is also vitiated.

19. We also notice that PW-10 SI Qureshi informed the respondents that they could be searched before the nearest Magistrate or before a nearest gazetted officer or before PW-5 J.S. Negi, the Superintendent, who was a part of the raiding party. It is the prosecution case that the respondents informed the officers that they would like to be searched before PW-5 J.S. Negi by PW-10 SI Qureshi. This, in our opinion, is again a breach of Section 50(1) of the NDPS Act. The idea behind taking an accused to a nearest Magistrate or a nearest gazetted officer, if he so requires, is to give him a chance of being searched in the presence of an independent officer. Therefore, it was improper for PW-10 SI Qureshi to tell the respondents that a third alternative was available and that they could be searched before PW-5 J.S. Negi, the Superintendent, who was part of the raiding party. PW-5 J.S. Negi cannot be called an independent officer. We are not expressing any opinion on the question whether if the respondents had voluntarily expressed that they wanted to be searched before PW-5 J.S. Negi, the search would have been vitiated or not. But PW-10 SI Qureshi could not have given a third option to the respondents when Section 50(1) of the NDPS Act does not provide for it and when such option would frustrate the provisions of Section 50(1) of the NDPS Act. On this ground also, in our opinion, the search conducted by PW-10 SI Qureshi is vitiated.

20. We have, therefore, no hesitation in concluding that breach of Section 50(1) of the NDPS Act has vitiated the search. The conviction of the respondents was, therefore, illegal. The respondents have rightly been acquitted by the High Court. It is not possible to hold that the High Court's view is perverse. The appeal is, therefore, dismissed."

13. Though the accused were informed that they had right to be searched, but the individual option was not given. The Hon"ble Supreme Court in State of Rajasthan v. Parmanand, (2014) 5 SCC 345, has held that "a joint communication of the right may not be clear or unequivocal. It may create confusion. It may result in diluting the right. We are, therefore, of the view that the accused must be individually informed that under Section 50(1) of the NDPS Act, he has a right to be searched before a nearest gazetted officer or before a nearest Magistrate."

14. At the same point of time, it has come in evidence that HC Deva Nand (PW-10) noticed torch light and switching off the same thrice. In the meanwhile, one person was also noticed with torch light pointing towards pedestrian path standing at a curve at a little distance from Zero Point towards Chamba and the person who was pointing towards Chamba walked on foot to Zero Point. On reaching at Zero Point that person was again seen pointing towards pedestrian path with torch light. The prosecution has failed to recover any torch from the accused persons and this also cast a shadow of doubt on the prosecution story.

15. It has been held in *K. Prakashan v. P.K. Surenderan* (2008) 1 SCC 258 that when two views are possible, appellate Court should not reverse the judgment of acquittal merely because the other view was possible. When judgment of trial Court was neither perverse, nor suffered from any legal infirmity or non-consideration/misappropriation of evidence on record, reversal thereof by High Court was not justified.

16. The Hon''ble Supreme Court in *T. Subramanian v. State of Tamil Nadu*, (2006) 1 SCC 401, has held that where two views are reasonably possible from the very same evidence, prosecution cannot be said to have proved its case beyond reasonable doubt.

17. The net result of the above discussion is that the prosecution has failed to prove the guilt of the accused persons conclusively and beyond a shadow of doubt, as reasonable suspicion has occurred in the prosecution story.

18. In view of the aforesaid decision of the Hon''ble Supreme Court and discussion made above, we find no merit in this appeal and the same is accordingly dismissed. All the pending application(s), if any, stand(s) disposed of accordingly.