
(2014) 09 SHI CK 0010
In the High Court Of Himachal Pradesh
Case No : Criminal Appeal No. 55 of 2011

State of Himachal Pradesh

APPELLANT

Vs

Roshan Lal

RESPONDENT

Date of Decision : 23-09-2014

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313, 417, 418, 423

Evidence Act, 1872 — Section 114

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

Citation : (2014) 09 SHI CK 0010

Hon'ble Judges : Sanjay Karol, J;Piar Singh Rana, J

Bench : Division Bench

Advocate : B.S. Parmar, Ashok Chaudhary, Additional Advocates General, Vikram Thakur, Deputy Advocate General and J.S. Guleria, Assistant Advocate General, Advocate for the Appellant; Anoop Chitkara, Advocate for the Respondent

Final Decision : Dismissed

Judgement

Sanjay Karol, J.—State has appealed against the judgment dated 10.12.2010 of the learned Special Judge, Fast Track Court, Kullu, Himachal Pradesh, passed in Sessions Trial No. 31 of 2010, titled as State v. Roshan Lal, challenging the acquittal of respondent Roshan Lal (hereinafter referred to as the accused), who stands charged for having committed an offence punishable under the provisions of Section 20(b)(ii)(C) of the Narcotic Drugs & Psychotropic Substances Act, 1985 (hereinafter referred to as the NDPS Act).

2. It is the case of prosecution that on 28.3.2010, police party, comprising of ASI Ram Swarup (not examined), Malkeet Singh (PW-1), Daya Ram (PW-2), Parveen Kumar (PW-4), was present at Bathar Jungle. Seeing the police party, at about 7.15 a.m., accused started fleeing away. However, on suspicion, he was apprehended. Suspecting that he may be carrying contraband substance, Daya Ram asked Malkeet Singh to fetch for independent witnesses. Since none was

available, Daya Ram associated Malkeet Singh and Ram Swarup, and after obtaining consent of the accused vide Memo (Ex. PW-1/A), searched him. From the right armpit of the accused, contraband substance (Charas), concealed in a packet, was recovered. Upon weighment, it was found to be 1 kg 100 grams. NCB form (Ex. PW-2/A) was filled up in triplicate. Bulk parcel was sealed with seal impression "H". On the basis of Ruka (Ex. PW-2/B), which was sent through Malkeet Singh, FIR No. 76 dated 28.3.2010 (Ex. PW-8/A) was registered at Police Station, Manali. Daya Ram handed over the case property to SHO Om Chand (PW-8), who resealed the same with his seal impression "Y" and deposited it with MHC Sher Singh (PW-3). The entire bulk parcel was sent to the Chemical Analyst, Forensic Science Laboratory, Junga, through Parveen Kumar (PW-4). Report (Ex. PW-2/E) from FSL, Junga, was obtained by the police. 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.

3. Accused was charged for having committed an offence punishable under the provisions of Section 20(b)(ii)(C) of the NDPS Act to which he did not plead guilty and claimed trial.

4. In order to establish its case, prosecution examined as many as 8 witnesses and statement of the accused under the provisions of Section 313 of the Code of Criminal Procedure was also recorded, in which he took the following plea:

"I was waiting for buses 15 Mile Bus stand on 28.3.2010 at 6 am. The police came. They had a bag. They enquired from me whether bag belonged to me. I replied in negative. I was taken to Manali police station, where I was beaten and my signatures were also obtained on some papers."

5. Based on the testimonies of witnesses and the material on record, trial Court acquitted the accused of the charged offence. Hence, the present appeal by the State.

6. We have heard Mr. Vikram Thakur, learned Deputy Advocate General, on behalf of the State as also Mr. Anoop Chitkara, Advocate, on behalf of the accused. 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 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- AIR 1934 227 (Privy Council) , in these words:

"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." "

9. Perusal of consent memo (Ex. PW-1/A) reveals that accused was not informed of his statutory right, which is mandatory, in terms of Section 50 of the NDPS Act.

10. A Constitution Bench of the Apex Court in *State of Punjab Vs. Baldev Singh*, etc. etc., , has clearly held that accused has a right to be made aware of his right of getting searched before a Magistrate or a Gazetted Officer. Having regard to the Miranda clause as enunciated by the Supreme Court of the United States of America in *Miranda v. Arizona* [384 US 436], the Constitution Bench held that, although, such communication itself may not necessarily be made in writing but, as far as possible, such communication should be made in the presence of some independent and respectable persons witnessing the arrest and search. It was thereafter held as follows:

"57 On the basis of the reasoning and discussion above, the following conclusions arise:

(1) That when an empowered officer or a duly authorised officer acting on prior information is about to search a person, it is imperative for him to inform the person concerned of his right under sub-section (1) of Section 50 of being taken to the nearest gazetted officer or the nearest Magistrate for making the search.

However, such information may not necessarily be in writing.

(2) That failure to inform the person concerned about the existence of his right to be searched before a gazetted officer or Magistrate would cause prejudice to an accused."

(emphasis supplied)

11. A three-Judge Bench of Supreme Court in *Vijaysinh Chandubha Jadeja v. State of Gujarat* 2007(1) SCC 433 noticed the aforementioned dicta laid by the Constitution Bench in *Baldev Singh* (Supra) and in no uncertain terms opined that accused must be told of his right to be searched before a gazetted officer or a Magistrate.

12. Thereafter, the Apex Court in *Man Bahadur Vs. State of H.P.*, after taking note of judgments held that not only consent of the accused should be taken but he must also be informed of his right of getting himself searched in the presence of the Magistrate.

13. This Court in *Ashok Kumar versus State of H.P.* Latest HLJ 2009(HP) 557 has clearly held that if consent memo does not record that accused was informed of his right of being searched before a Magistrate or a Gazetted Officer, search is not in conformity with Section 50 of the Act.

14. In *Ashok Kumar Sharma Vs. State of Rajasthan*, , the apex Court held as under:

"8. We may, in this connection, also examine the general maxim "ignorantia juris non excusat" and whether in such a situation the accused could take a defence that he was unaware of the procedure laid down in Section 50 of the NDPS Act. Ignorance does not normally afford any defence under the criminal law, since a person is presumed to know the law. Indisputedly ignorance of law often in reality exists, though as a general proposition, it is true, that knowledge of law must be imputed to every person. But it must be too much to impute knowledge in certain situations, for example, we cannot expect a rustic villager, totally illiterate, a poor man on the street, to be aware of the various law laid down in this country i.e. leave aside the NDPS Act. We notice this fact is also within the knowledge of the legislature, possibly for that reason the legislature in its wisdom imposed an obligation on the authorized officer acting u/s 50 of the NDPS Act to inform the suspect of his right u/s 50 to be searched in the presence of a Gazetted Officer or a Magistrate warranting strict compliance of that procedure."

[Also see: *Vijaysinh Chandubha Jadeja Vs. State of Gujarat*, ; and *Myla Venkateswarlu Vs. The State of Andhra Pradesh*,]

15. In view of the law laid down, accused must also be informed about his right and since this was admittedly not done even orally, there is violation of mandatory provisions of Section 50 of the Act, rendering the prosecution case to

be fatal.

16. Even though in Court Daya Ram states that accused was informed of his statutory right, but he himself contradicted such version, as in his cross-examination he admits that "I had told the accused whatever had been written in Ex. PW1/A". In fact witness denies that no notice under the provisions of Section 50 of the NDPS Act was ever given to the accused. If that were so, then obviously presumption under the provisions of Section 114 of the Evidence Act has to be drawn against the prosecution, for no such notice has been placed on record.

17. Be that as it may, ocular version of Daya Ram is also not supported by Malkeet Singh, who simply states that Daya Ram prepared a memo, expressing his apprehension of the accused possessing contraband substance. Ram Swarup has not been examined in Court. Why so? has not been explained. After all, he was also a Police Officer and could have supported the version of Daya Ram.

18. Hence, it cannot be said that prosecution has been able to prove its case, by leading clear, cogent, convincing and reliable piece of evidence so as to prove that the accused was found in conscious and exclusive possession of Charas.

19. For all the aforesaid reasons, we find no reason to interfere with the well reasoned judgment passed by the trial Court. The Court has fully appreciated the evidence so placed on record by the parties.

20. The accused has 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 Md. Ankoos and Others Vs. The Public Prosecutor, High Court of A.P., , it cannot be said that the Court below has not correctly appreciated the evidence on record or that acquittal of the accused has resulted into travesty of justice. No ground for interference is called for. The present appeal is dismissed. Bail bonds, if any, furnished by the accused are discharged.

Appeal stands disposed of, so also pending application(s), if any.