
(2013) 05 SHI CK 0046
In the High Court Of Himachal Pradesh
Case No : Criminal A. No.: 90 of 2004-A

State of Himachal Pradesh

APPELLANT

Vs

Sangat Ram and Another

RESPONDENT

Date of Decision : 28-05-2013

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, 173

Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 20, 35, 54

Citation : (2013) CriLJ 4954 : (2013) 2 ShimLC 1043

Hon'ble Judges : Dharam Chand Chaudhary, J;Dev Darshan Sud, J

Bench : Division Bench

Advocate : B.S. Parmar and Mr. V.S. Chauhan, Additional Advocates General with Mr. Vikram Thakur, Deputy A.G, for the Appellant; Sandeep Chauhan, for the Respondent

Final Decision : Dismissed

Judgement

Dharam Chand Chaudhary, J.—The State has come-up in appeal against the judgment dated 1.11.2003 passed by learned Sessions Judge, Kullu in Sessions Trial No. 24 of 2003 whereby the respondents, hereinafter referred to as "the accused persons", who have been acquitted from the charge u/s 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985, hereinafter referred to as "the Act" in short, framed against each of them. The challenge to the impugned judgment is on the grounds, inter-alia that learned trial Judge has failed to appreciate the evidence available on record in its right perspective and recorded the findings qua acquittal of the accused in a perfunctory and slipshod manner and also on flimsy grounds. The testimonies of prosecution witnesses have been discarded without assigning any reason.

2. The present is a case where in the presence of PW-3 Shri Hans Raj and PW-4 Shri Aman Nag and that of police officials, namely, LHC Mast Ram (PW-5) and ASI Ram Sarup (PW-6), PW-9, S.I. Balwant Singh allegedly recovered charas weighing 1 kg. 650 gms. from the accused persons when reached near cinema

hall at Sarwari Bazaar, Kullu on 1.11.2002 around 11.00 a.m. Before that consent of the accused persons qua their search by Sub Inspector Balwant Singh aforesaid was obtained. The consent memos Ex. PW-3/A and PW-3/B whereby both the accused allegedly agreed for being searched by PW-9 S.I. Balwant Singh, memos Ex. PW-3/C and Ex. PW-3/D whereby PW-9 Balwant Singh allegedly gave his search first to the accused persons and thereafter searched them, seizure memo Ex. PW-3/E whereby charas weighing 1 kg. 650 gms. was recovered from the bag, accused Sangat Ram carrying on his back and taken into possession, memo Ex. PW-3/F and Ex. PW-3/G whereby both the accused were informed about the nature of the offence they committed and the provision of sentence provided under law for the commission of the said offence, memos Ex. PW-3/H and Ex. PW-3/J qua the personal search of both accused and map of the spot Ex. PW-9/B were prepared on the spot in the presence of the witnesses. It is thereafter rukka Ex. PW-9/A allegedly was prepared on the spot and forwarded to the police station through PW-5 Mast Ram for registration of the case. NCB-I Form Ex. PW-1/C is also claimed to be filled-up on the spot. The Investigating Officer sealed the recovered charas in a parcel with seal "B" and the charas separated for samples in two separate parcels weighing 25-25 gms. each with the same seal. The rest of the documents, that is, extract of malkhana register Ex. PW-2/A, R.C. Ex. PW-2/B, another extract of malkhana register Ex. PW-8/A and special report Ex. PW-8/B were also produced to connect the accused persons with the commission of the offence.

3. There are two sets of witnesses examined by the prosecution in order to sustain the charge against accused persons, i.e. PW-3 and PW-4, S/Shri Hans Raj and Aman Nag, independent witnesses, LHC Mast Ram PW-5, ASI Ram Sarup PW-6 and Sub Inspector Balwant Singh, the Investigating Officer, official witnesses. The 3rd set of witnesses examined are PW-1 ASI Karam Singh, the then officiating SHO, Police Station, Kullu, who on the receipt of rukka had recorded the FIR Ex. PW-1/A and with whom allegedly the case property was deposited, PW-2 HC Narain Singh to whom PW-1 had entrusted the case property alongwith NCB-I Form and sample "C" for safe custody in the malkhana and who had forwarded one of the sample parcel to Forensic Science Laboratory for chemical analysis alongwith NCB-1 form, PW-7 HC Lal Singh who had deposited the sample parcel in CTL, Kandaghat and PW-8 Constable Kashmi Ram, who had taken Ex. PW-8/B the special report of this case to the office of Deputy Superintendent of Police, Kullu.

4. The fact, however, remains that the prosecution case has not all been supported by the so called independent witnesses, S/Shri Hans Raj and Aman Nag and as regards the official witnesses, LHC Mast Ram, ASI Ram Sarup and Investigating Officer, S.I. Balwant Singh, they no doubt, had supported the manner in which the search, recovery and seizure of the contraband allegedly charas having taken place on the spot. It is the independent witnesses having turned hostile to the prosecution and certain discrepancies in the manner in which the investigation has been conducted, weighed with learned trial Judge

and ultimately resulted in the acquittal of the accused persons.

5. The only question needs consideration in this appeal is that learned trial Judge has failed to appreciate the evidence available on record in its right perspective and on that account, the findings of acquittal as recorded are perverse and the impugned judgment is not legally sustainable.

6. Having gone through the record and critically analyzing the rival contentions, we find that in this case there are two sets of witnesses, i.e., independent and official. The independent witnesses have turned hostile to the prosecution and did not support the manner in which the search, recovery and seizure of the contraband, allegedly charas had taken place. The official witnesses, no doubt, have supported the prosecution case as disclosed from the report u/s 173 Cr.P.C. and the documents annexed therewith. In view of such evidence having come on record, there emerge two possible views on record. In a case of such type of evidence, whether it is safe to convict the accused or not, is a million dollar question, which has engaged our attention. In the Act, there is provision of stringent punishment if the offence against an offender is found to have been made out. Therefore, the proof to connect the accused with the commission of the offence must be beyond reasonable doubt and the initial burden to bring the guilt home to an accused booked for the commission of an offence under the Act is always on the prosecution and in case the prosecution succeeds to prove the charge and onus on it, it is only the presumption as envisaged under Sections 35 and 54 of the Act, can be raised. The apex Court taking into consideration the gravity of the offence under the Act and the stringent provisions of punishment against an offender in Noor Aga Vs. State of Punjab and Another, has held as under:-

56. The provisions of the Act and the punishment prescribed therein being indisputably stringent flowing from elements such as a heightened standard for bail, absence of any provision for remissions, specific provisions for grant of minimum sentence, enabling provisions granting power to the Court to impose fine of more than maximum punishment of Rs. 2,00,000/- as also the presumption of guilt emerging from possession of Narcotic Drugs and Psychotropic substances, the extent of burden to prove the foundational facts on the prosecution, i.e., "proof beyond a reasonable doubt" would be more onerous. A heightened scrutiny test would be necessary to be invoked. It is so because whereas, on the one hand, the court must strive towards giving effect to the parliamentary object and intent in the light of the international conventions, but, on the other, it is also necessary to uphold the individual human rights and dignity as provided for under the UN Declaration of Human Rights by insisting upon scrupulous compliance of the provisions of the Act for the purpose of upholding the democratic values. It is necessary for giving effect to the concept of "wider civilization". The courts must always remind itself that it is a well settled principle of criminal jurisprudence that more serious the offence, the stricter is the degree of proof. A higher degree of assurance, thus, would be

necessary to convict an accused. In *State of Punjab v. Baldev Singh*, it was stated: (SCC p. 199, para 28)

28. ... It must be borne in mind that severer the punishment, greater has to be the care taken to see that all the safeguards provided in a statute are scrupulously followed.

[See also *Ritesh Chakravarti v. State of M.P.*]

57. It is also necessary to bear in mind that superficially a case may have an ugly look and thereby, *prima facie*, shaking the conscience of any court but it is well settled that suspicion, however high may be, can under no circumstances, be held to be a substitute for legal evidence.

58. Sections 35 and 54 of the Act, no doubt, raise presumptions with regard to the culpable mental state on the part of the accused as also place burden of proof in this behalf on the accused; but a bare perusal of the said provision would clearly show that presumption would operate in the trial of the accused only in the event the circumstances contained therein are fully satisfied. An initial burden exists upon the prosecution and only when it stands satisfied, the legal burden would shift. Even then, the standard of proof required for the accused to prove his innocence is not as high as that of the prosecution. Whereas the standard of proof required to prove the guilt of accused on the prosecution is "beyond all reasonable doubt" but it is "preponderance of probability" on the accused. If the prosecution fails to prove the foundational facts so as to attract the rigours of Section 35 of the Act, the *actus reus* which is possession of contraband by the accused cannot be said to have been established.

59. With a view to bring within its purview the requirements of Section 54 of the Act, element of possession of the contraband was essential so as to shift the burden on the accused. The provisions being exceptions to the general rule, the generality thereof would continue to be operative, namely, the element of possession will have to be proved beyond reasonable doubt.

60. Whether the burden on the accused is a legal burden or an evidentiary burden would depend on the statute in question. The purport and object thereof must also be taken into consideration in determining the said question. It must pass the test of doctrine of proportionality. The difficulties faced by the prosecution in certain cases may be held to be sufficient to arrive at an opinion that the burden on the accused is an evidentiary burden and not merely a legal burden. The trial must be fair. The accused must be provided with opportunities to effectively defend himself.

7. Scrutinizing the given facts and circumstances and also the evidence on record in the light of the ratio of the judgment of the apex Court hereinabove, it is not proved beyond all reasonable doubt that the police party headed by PW-9, S.I. Balwant Singh was patrolling at Sarwari Bazaar, Kullu in connection with the search and seizure of Narcotic and Drugs substances and that they noticed both

accused persons standing outside the cinema hall for the reason that the independent witnesses, namely, Hans Raj and Aman Nag did not support the case of the prosecution to this effect at all.

8. Similarly, the factum of consent of the accused persons qua their search by PW-9 and the recovery of the contraband allegedly charas weighing 1 kg. 650 gms. from the bag allegedly being carried by accused Sangat Ram on his back after PW-9 having given his search to the accused, cannot also be said to be proved beyond all reasonable doubt, for the reason that the independent witnesses, no doubt, have admitted their signatures on the consent memos Ex. PW-3/A and Ex. PW-3/B and the memos vide which the accused persons allegedly searched PW-9 before giving their search to him and recovery memo Ex. PW-3/E, however, not on the spot but at such a stage when these memos were not reduced into writing and their signatures rather were obtained in police station on blank papers. They were not at Sarwari Bazaar near cinema hall and rather going to Dhalpur side and when reached near Veterinary Hospital, called by the police and taken them to the police station. There they were made to sit for half an hour and thereafter made to put their signatures on blank papers. Both witnesses belong to Sundernagar district Mandi. On the other hand, both accused belong to village Behar and Til, Tehsil Chachiot, no doubt, of the same district, i.e. Mandi to which the independent witnesses, namely, Hans Raj and Aman Nag belong, however, distantly located. Therefore, it cannot be said that the independent witnesses were interested to help the accused persons unduly. There is nothing on record to show that they are persons of tainted character or undependable. Thus due weightage has to be given to their version that they were not present at the spot and rather called to the police station. Such evidence, as has come on record by way of their testimonies, has rendered the entire prosecution story highly improbable and doubtful. The police witnesses no doubt have supported the prosecution case in toto, however, the element of such witnesses normally are interested in the success of the prosecution case, cannot be ruled out. At this stage, it is well settled that in the event of the independent witnesses having turned hostile to the prosecution, whereas the official witnesses support its case, the testimonies of the official witnesses cannot be discarded, however, if otherwise inspire confidence and the conviction of the accused can be based on that alone. Their testimonies, however, have to be scrutinized with all precautions. We can take support of the judgment rendered by a Co-ordinate Bench of this Court in State of Himachal Pradesh Versus Rajesh Dhiman and another, 2012 (3) Shim. LC 1583 in this behalf.

9. It is, however, again well settled that to associate the independent witnesses during the search, seizure and recovery is not a mere formality, but to ensure fairness in respect of search and seizure and ultimately to support the manner in which the search and seizure allegedly has taken place during the course of trial. While arriving at such a conclusion we have taken support again from the judgment of our own High Court in State of H.P. Vs. Hanacho Alias Stewart, Had it been the version of the independent witnesses that they were present on the

spot and associated by the police there, may have established the presence of police party and also their presence on the spot and in that event judicial notice of their having resiled from their statements Ex. PW-9/C and Ex. PW-9/D recorded by the police u/s 161 Cr.P.C., would have been taken. They, however, were not present there and rather taken to police station where made to sign blank papers. We have already discussed hereinabove that there is no reason for the said witnesses to help the accused persons, that too, when they belong to distant places and the accused even after their arrest in this case were in judicial custody till their acquittal vide the judgment impugned before this Court in the present appeal.

10. As per the prosecution case the police party headed by PW-9 was on patrol duty in Sarwari Bazaar, Kullu. Had it been so, a rapat to this effect should have been recorded in the rapat rojnamcha of police post, Akhara Bazaar, Kullu. No such rapat, however, is produced in evidence during the course of trial to remove all doubts qua the presence of police party at the place where search and seizure allegedly has taken place. There is again no rapat qua the arrival of the police party headed by PW-9 in police station, Kullu alongwith accused persons and recovered contraband, allegedly charas. In such a situation, the version of the independent witnesses that they were made to sign on blank papers in police station, Kullu, cannot be ruled out. As a matter of fact, nothing of the sort seems to have taken place at the alleged place of recovery, i.e. near cinema hall, Sarwari Bazaar, Kullu. The entire documentation seems to have taken place in the police station. As per FIR Ex. PW-1/A, the rukka was received in the police station at 2.20 p.m. The place of occurrence from the police station is about 1/2 Km., as has come in the FIR. The Investigating Officer right from 11.00 a.m. to 2.20 p.m. remained engaged on the spot and conducted investigation there, is highly doubtful, particularly, when nothing has come on record to show that where the Investigating Officer was sitting while preparing all the documents. It seems that neither rukka Ex. PW-9/A was sent from the spot nor FIR was registered at 2.20 p.m. as had it been so, the copy thereof would have been forwarded to the learned Special Judge immediately thereafter. The FIR in this case, however, was received by the Chief Judicial Magistrate, Kullu on the next day, i.e. 2.11.2002 at 12.30 p.m. The distance between police station, Kullu and the Judicial Court Complex is only 100 metres as admits PW-1 ASI Karam Singh, who has written the FIR, Ex. PW-1/A. In case the FIR was registered at 2.20 p.m. on 11.2.2002 itself, it remains unexplained as to why the delivery thereof in the Court concerned was delayed till next day, i.e. 2.11.2002, that too, till 12.30 p.m.

11. The defence of the accused that neither rukka was sent to the police station nor recovery was effected from them on the alleged place of occurrence, as emerges from the trend of cross-examination of the prosecution witnesses, seems to be plausible and nearer to the factual position.

12. The other glaring discrepancies, which go to the very root of the prosecution

case, are that in NCB-I Form, Ex. PW-1/C, the contraband allegedly charas is not entered against either of its columns from Sr. No. 1 to 11. Column No. 11 of this document rather is blank. As a matter of fact, against this column, the identity of the contraband allegedly recovered from the accused should have been entered to remove all doubts in this behalf. The place of alleged search and seizure as per this document is cinema hall near Tibbati Market, whereas, in the rukka and also FIR, it is Sarwari Bazar, near cinema hall.

13. As per version of PW-6, ASI Ram Sarup around 50 shops exist at the alleged place of recovery. Meaning thereby that it is a thickly populated area. No explanation is forthcoming to suggest that why someone from that locality was not associated as independent witness and why passers-by, namely, Hans Raj and Aman Nag, who belong to Sundernagar, district Mandi, were associated in preference to the local persons. The seal allegedly was given to PW-3, Hans Raj. He, however, did not support the prosecution case at all. He has even not been cross-examined also that the seal was given to him or that he has not produced the same for extraneous consideration or just to help the accused persons. Meaning thereby that the seal was in the police station itself and if it is so, one can easily imagine about the homogeneous and representative character of the samples allegedly that of recovered charas drawn by the Investigating Officer. The authenticity of the report of Chemical Examiner, CTL, Kandaghat, Ex. P-A is, therefore, also highly doubtful. It is surprising to note that during the personal search of PW-1, Sangat Ram, only a currency note worth Rs. 10/- was recovered from him, whereas from accused Gopal Singh no money is shown to have been recovered. The reference to this effect can be made to the recovery memos Ex. PW-3/H and Ex. PW-3/J. Surprisingly enough, the accused were carrying contraband, allegedly charas weighing 1 kg. 650 gms., but having no money with them except for currency note worth Rs. 10/-. This also renders the recovery of the contraband, allegedly charas, from the accused persons highly doubtful.

14. The crux of what has been stated hereinabove would be that the prosecution has miserably failed to persuade us to reverse the judgment of acquittal and convict both accused persons on the testimony of the official witnesses for the reason that the scrutiny of the testimonies of the said witnesses vis-a-vis the glaring discrepancies noticed supra and also the version of the independent witnesses, we are not inclined to reverse the impugned judgment and record the findings of conviction against the accused persons. Even no such finding can be recorded against the accused persons on the testimonies of the police witnesses, which to our mind hardly inspire any confidence. As a matter of fact, the prosecution has failed to bring the guilt home to the accused by producing cogent and reliable evidence. The present rather is a case where from the perusal of evidence two possible views emerge on record and as per the settled legal principles, in the criminal administration of justice, the view which favours the accused should be believed to be correct and the benefit of doubt given to the accused. The trial Court has thus appreciated the evidence available on record in its right perspective while recording the findings of acquittal against the

accused. The findings so recorded cannot be said to be perverse or illegal. We thus find no reason to interfere with the impugned judgment and the same rather deserves to be up-held. For all the reasons stated hereinabove, this appeal fails and the same is accordingly dismissed. Personal bonds furnished by the accused persons stand cancelled and surety bonds discharged. Pending application(s), if any, also shall stand disposed of.