
(2001) 07 SHI CK 0032
In the High Court Of Himachal Pradesh
Case No : Criminal Appeal No. 714 of 2000

State of Himachal Pradesh

APPELLANT

Vs

Shri Fred Robinson

RESPONDENT

Date of Decision : 30-07-2001

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, 173, 313
Evidence Act, 1872 — Section 114
Foreigners Act, 1946 — Section 14
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 20, 21, 42(2)
Opium Act, 1978 — Section 9A
Penal Code, 1860 (IPC) — Section 420, 467, 468, 471

Citation : (2002) 2 ShimLC 100

Hon'ble Judges : Lokeswar Singh Pant, J; Kamlesh Sharma, J

Bench : Division Bench

Advocate : K.D. Batish, A.A.G, for the Appellant; Deepak Gupta, for the Respondent

Final Decision : Dismissed

Judgement

Lokeshwar Singh Pant, J.—This appeal by State of H.P. is directed against the order of acquittal of the Respondent dated 21.7.2000 passed by Sessions Judge, Kullu in Sessions Trial No. 31 of 1998 for offence u/s 20 of the Narcotic and Psychotropic Substances Act, 1985 (hereinafter NDPS Act) and Section 14 of the Foreigners Act, 1946.

2. Briefly stated the prosecution case was that in the year 1999 Fred. Robinson Respondent herein a Zambian National visited Kullu as a tourist. On 21.5.1999 District Inspector Sh. Kuldip Chand Rana (PW-9) received a telephonic message that one foreigner was strolling near Himachal Road Transport Corporation Bus Stand, Sarwari who was in possession of brown sugar and speed (Amphetamine) contraband. The said information u/s 42(2) of NDPS Act marked Ext. PW6/A was sent to Superintendent of Police, Kullu. PW-9 then preceded towards Bus Stand accompanied by other Police Officials, namely, constable Ramesh (PW-8), Suresh

and Sohan Lal. At about 3.30 p.m. they had seen the Respondent at Bus Stand who on seeing the police party tried to run away. On inquiry, the Respondent disclosed his name as Fred. Robinson, and was traveling without passport. PW-9 asked the Respondent whether he wanted to give his search to the police present on the spot or wanted to be searched in the presence of gazetted officer or a Magistrate. The Respondent replied that he wanted to give his search in presence of a gazetted officer. The Respondent was taken to the office of Superintendent of Police where Sh. Munish Garg, Sub Divisional Magistrate (PW-6) and his Reader Prem Singh (PW-7) were present. The personal search of the Respondent was conducted in the presence of P Ws 6 and 7. On search of the Respondent conducted by PW-9, one pouch was recovered concealed inside the pocket of his underwear and inside the pouch two packets wrapped in polythene wrapper and ordinary paper cover were found. On opening the paper, Brown sugar weighing 9 gms and in the polythene, white powder of 10 gms called as Speed were recovered. Out of 10 gms of Speed two samples of 2 grams each were taken and sealed at the spot separately and the remaining quantity of Speed was also sealed in a separate packet. Two samples of one gram each of Brown sugar were taken which were sealed at the spot in the presence of P Ws 6 and 7 and the remaining quantity of brown sugar was also packed and sealed. The underwear of the Respondent was also taken into possession and sealed at the spot. The samples were marked Exts. P-5 and P-6. The sal mark "K" after use was handed over to PW-7. The grounds of arrest were also disclosed to the Respondent. PW-9 prepared ruqua Ext. PW-4/A and sent the same through constable PW-8 to the Police Station, Kullu. On the basis of ruqua First Information Report Ext. PW-4/B was recorded by Sh. Nihal Singh (PW-4), Station House Officer, Kullu at 5.30 a.m. The Investigating Officer prepared site plan Ext. PW-9/A and recorded the statements of the witnesses. He produced the property before PW-4 who re-sealed the case property with seal "H" and thereafter deposited the/same with Head Constable Gangbir Singh (PW-2). The Investigating Officer also prepared special report Ext. PW-1/B which was sent to the Superintendent of Police. The case file was handed over to Head Constable Satu Kumar. On receipt of Chemical Examiner's report Ext. PW-5/A, Station House Officer Sh. Rulia Ram, PW-5 prepared the challan and presented police report u/s 173 of the Code of Criminal Procedure against the Respondent before the learned Sessions Judge, Kullu.

3. The learned Sessions Judge found prima facie case against the A spending and framed charge against him u/s 20 of the NDPS y. Act. The Respondent pleaded not guilty to the charge and claimed to be tried.

4. Prosecution examined 9 witnesses in support of its case and placed on record the relevant documents. The Respondent in his statement recorded u/s 313 of the Code of Criminal Procedure, denied the allegations leveled against him. His defence was that on 21.5.1999 he was returning to his residence after meeting his lawyer and at about 11 a.m. he was at Bus Stand, Kullu from where he was taken by some police personnel in Gypsy No. HP-34-0011 to the office of the

Superintendent of Police. Thereafter, he was taken to his residence at Kaish. The police personnel searched his house and nothing was recovered by them. Then again, he was taken to the office of the Superintendent of Police where he was forced by extending threats to sign some papers. He told the police that there was a case against him u/s 14 of the Foreigners Act which was being tried by the Chief Judicial Magistrate Lahaul and Spiti at Kullu and he was on bail in that case. He stated that he was innocent and a false case was lodged against him and that nothing was recovered from him. In defence he examined Sh. Lachhman Dass, Criminal Ahlmad of the Court of Chief Judicial Magistrate, Lahaul and Spiti as DW-1, who produced a case file of FIR No. 480/98 lodged against the Respondent u/s 14 of the Foreigners Act read with Sections 420, 467, 468 and 471 of the Indian Penal Code.

5. On analysis of the entire evidence, the learned Sessions Judge came to the conclusion that the prosecution has failed to prove the charge against the Respondent beyond reasonable doubt and accordingly acquitted him for offence u/s 20 of the NDPS Act. The State has assailed the correctness and validity of the order of acquittal in this appeal.

5. The appeal was admitted by this Court on 18.12.2000. The Respondent was produced by Police Constables in the Court from Central Model Jail, Nahan where he was lodged during the trial of criminal case pending against him u/s 14 of the Foreigners Act, 1947 read with Sections 420, 467, 468 and 471 of the Indian Penal Code. The Respondent requested for legal aid and his prayer was allowed on 8.1.2001 when Mr. Deepak Gupta, Advocate was appointed as legal aid counsel to conduct this appeal on his behalf. A Division Bench of this Court ordered the release of the Respondent on his furnishing bail bond in the sum of Rs. 20,000 with one surety of the like amount to the satisfaction of the Deputy Registrar (J) of his Court. It appears that the Respondent could not furnish surety bond, therefore, he could not be released on bail.

7. Mr. K.D. Batish, learned Additional Advocate General contended that the learned Sessions Judge has failed to appreciate the satisfactory and convincing evidence of the prosecution and acquitted the Respondent on unreasonable and unsustainable grounds without assigning any cogent reason. He also contended that the prosecution has complied with the mandatory provisions of law in the present case and the Respondent could not rebut the presumption that the contraband was not recovered by the police from his possession. The learned Sessions Judge has only relied upon minor and irrelevant discrepancies appearing in the evidence of the prosecution witnesses which were not sufficient to give the benefit of doubt to the Respondent. He next contended that the prosecution has proved on record that the search of the Respondent was conducted in the presence of Sub-Divisional Magistrate at the request of the Respondent and the contraband was recovered from the possession of the Respondent which was sealed in the presence of the witnesses and later on the seals were found intact without tampering and as such, the reasoning recorded

by the learned Sessions Judge that the prosecution has withheld from the Court the reports of the objections raised by the Chemical Examiners Junga, Kandaghat and Chandigarh. In the face of the final report (Ext. PW-5/ A) given by Chemical Examiner, Chandigarh wherein the sample sent for analysis was found of Diacetylmorphine (Heroin), the acquittal of the Respondent is erroneous as contended by the learned Additional Advocate General.

8. Per contra, Mr. Deepak Gupta, learned legal aid counsel has sought to support the reasoning and finding recorded by the learned Sessions Judge. He contended that the prosecution has miserably failed to prove that the contraband was recovered from the possession of the Respondent in the presence of P Ws 6 and 7, as PW-7 the Reader of PW-6 has not supported the case of the prosecution. He also contended that the prosecution has deliberately not examined the police officials who on earlier three occasions carried the samples for analysis to the Chemical Examiners nor it has produced the record of objections raised by the Chemical Examiners, therefore, adverse inference u/s 114 of the Evidence Act has to be taken against the prosecution case to hold that it was not the same sample which was on the last occasion sent to the Chemical Examiner, Chandigarh. He next contended that the prior information (Ext. PW-I/A) u/s 42(2) of NDPS Act appears to have been prepared by PW-9 later on because in that report he has specifically written that the Respondent was in possession of Brown Sugar and Speed and it has not been explained by the Investigating Officer in his deposition as to how he came to know about the specific contents of the contraband before the search of the Respondent was conducted.

9. Both the learned Counsel placed reliance upon judgments of the High Courts and Supreme Court in support of their submissions which we shall deal in this judgment at the appropriate stage.

10. We have given our thoughtful and anxious consideration to the rival contentions of the learned Counsel and re-appraised and re-analysed the entire evidence on record.

11. In letter of information (Ext. PW-I/A) sent by PW-9 to the Superintendent of Police u/s 42(2) of the NDPS Act it has been specifically stated that a secret information was received by PW-9 on telephone that one foreign national was strolling at HRTC bus stand Sarwari who was expected to be carrying Brown Sugar and Speed. On receipt of the information, PW-9 in the company of the other Police Officials including constable PW-8 proceeded to the spot and found the Respondent in the bus stand who was asked to give his consent regarding search vide memo (Ext. PW-8/A). The consent memo was prepared and signed by constable PW-8 Ramesh Kumar and constable Sohan Lal. In this memo too, the Investigating Officer has specifically written that the Police suspected the Respondent in possession of Brown Sugar and Speed It is admitted by PW-9 in his deposition before the Court that memo (Ext. PW-8/A) was prepared by him at the bus stand where many independent persons were present. PW-9 has admitted that in ruqua (Ext. PW-4/A) prepared by him, he had not mentioned

that before the Respondent was searched by him, he had not given his search nor any memo regarding his personal search was prepared by him. It has not been explained by PW-9 as to why the Respondent was taken by him to the office of the Superintendent of Police for search when the Respondent could be produced before any other Gazetted Officer or Magistrate posted at Kullu. The Investigating Officer could not give any explanation as to why he could not associate independent witnesses in the investigation of the case at bus stand Sarvari when alleged consent memo (Ext. PW-8/A) of the Respondent was prepared by him. The prosecution has mainly relied upon the evidence of P Ws 6 and 7 in whose presence the contraband was allegedly recovered from possession of the Respondent in the office of the Superintendent of Police who was also present in his office when the Respondent was brought there by PW-9. It has come in the evidence of PW-7 Prem Singh that he is posted as a Reader to SDM. Kullu since February 1999 and on 21.5.1999 at about 3.30 p.m. he had accompanied the SDM (PW-6) to the office of the Superintendent of Police, Kullu. In his deposition he has stated that when he was sitting in the room of Personal Assistant to the Superintendent of Police, he was called inside the room of the Superintendent of Police, where the Superintendent of Police; SDM (PW 6), PW-9 Kuldip Rana, the Respondent and 2-3 other persons were present. In his presence, PW-9 told the Respondent that Gazetted Officers, namely Superintendent of Police and SDM were sitting and whether he wanted to give his search in their presence to which the Respondent consented. On search PW-9 recovered one pouch from pocket of the underwear of the Respondent containing two packets of Brown Sugar and Speed which were weighed in his presence and two samples of one gram each of Brown Sugar and two samples of two grams each of contraband Speed were taken and sealed on the spot and remaining quantity of Brown Sugar and Speed were also sealed with seal "K". All the articles were taken in possession vide memo Ext. PW-6/A which was signed by him and PW-6 and by the Respondent. The District Inspector PW-9 also disclosed grounds of arrest to the Respondent vide memo Ext. PW-6/C. However, the witness has denied handing over of seal mark "K" to him by PW-9 after sealing the parcels. He was permitted to be cross-examined by the Public Prosecutor. He denied portion "A" to "A" of his statement Ext. PW-7/A recorded u/s 161 Code of Criminal Procedure having been made by him to the police that the seal after use was handed over to him. He also denied portion mark "A" to "A" of recovery memo Ext. PW-6/A prepared by the Investigating Officer after the contraband was sealed in parcels and handing over of the seal "K" after use to him. He has admitted in his cross examination conducted by the Public Prosecutor that he signed the recovery memo Ext. PW-6/A regarding recovery of contraband memo of personal search of PW-9 by the Respondent marked Ext. PW-6/B and memo giving grounds of arrest of the Respondent marked Ext. PW-6/C without reading their contents.

12. It appears that Sh. Munish Garg, PW-6 was newly posted as Sub Divisional Magistrate, Kullu (for short SDM) in the year 1999. On 21.5.1999 he had gone to

pay courtesy call to the Superintendent of Police, Kullu at 3.30 p.m. accompanied by his Reader PW-7, PW-9 District Inspector Kuldip Chand Rana brought the Respondent to the office of the Superintendent of Police and told the Respondent that he could give his personal search in the presence of the officers sitting there for which the Respondent readily had consented as per version of PW-6. The Respondent was allowed to take the search of PW-9 District Inspector before giving his own search and thereafter PW-9 took the search of the Respondent and recovered one pouch (Thailli) concealed by him inside the pocket of his underwear. Two packets wrapped in polythene and ordinary paper cover were found in those pockets and on opening the paper cover, Brown Sugar was found and in the polythene wrapper there was some white powder which was disclosed by the Respondent known as Speed. Two samples of one gram each from Brown Sugar weighing 9 gms. and two samples of Speed weighing 10 gms. were taken and sealed by the Investigating Officer and the remaining quantity of Brown Sugar and Speed was sealed separately with seal "K". He identified underwear Ext. P-1, Pouch Ext. P-2, Speed Ext. P-3 and Brown Sugar Ext. P-4 in the Court. The sample of Brown Sugar Ext. P-5 and sample of Speed Ext. P-6 were also identified by him. He categorically stated that the seal after its use was handed over to his Reader PW-7. He admitted in his cross-examination that in his statement Ext. DA recorded u/s 161 Code of Criminal Procedure it was not stated by him that after the personal search of the Investigation Officer by the Respondent, some memo was prepared. We may notice here that search memo Ext. PW-6/B of the Investigation Officer was not filed with the Police report and it was produced by learned Public Prosecutor from his record file and placed on record in the Court.

13. PW-8 Constable Ramesh Kumar has supported the prosecution case that he had accompanied PW-9 District Inspector to bus stand Sarwari where the Respondent was apprehended by PW-9. He brought Ruqua Ext. PW4/A to the Police Station for formal registration of the First Information Report;

14. PW-2 HC Gangbir Singh deposed that on 21.5.1999 PW4 Inspector Sh. Nihal Singh deposited five sealed parcels sealed with mark "H" with him in the Malkhana. On 23.5.1999 he sent case property to C.T.L. Kandaghat for analysis but the same was received back with some objection. After removing the objection he again sent sample to F.S.L. Junga on 25.5.1999. The sample was again received back from F.S.L. Junga with some objection which was later on sent to Central Forensic Science Laboratory Chandigarh, on 28.5.1999. The sample was returned by CFSL Chandigarh, with some objection and again after removing objection he sent sample on 11.6.1999 to CFSL Chandigarh through constable Narpat Ram, PW-3.

15. On perusal of report Ext. PW-5/A dated 15.10.1999 the Senior Scientific Officer, CFSL, Chandigarh has found both the samples containing Diacetylmorphine (Heroin).

16. The prosecution has not examined the police official who carried the sample

for analysis for the first time to C.T.L. Kandaghat and there- after to FSL Junga and CFSL, Chandigarh when the sample was returned back with some objections raised by the Chemical Examiners of the said Laboratories. The documents of objections raised by the Laboratories at Kandaghat, Junga and Chandigarh were also not placed on record which has further created doubts about the nature of the objections raised by the Laboratories and the trial Judge has rightly recorded adverse inference about the truthfulness of the prosecution case in such circumstances.

17. In the State of Rajasthan Vs. Daulat Ram, the Hon"ble Supreme Court had the occasion to consider the provisions of Section 9-A of the Opium Act, 1978 and held as under:

Where the samples of opium changed several hands before reaching the public analyst and yet none of those in whose custody the samples remained were examined by the prosecution to prove that while in their custody the seals on the samples were not tampered with, the inevitable effect of the omission was that the prosecution failed to rule out the possibility of the samples being changed or tampered with during the period in question a fact which had to be proved affirmatively by the prosecution This is the main infirmity which has been relied upon by the High Court in holding that the prosecution has not proved that right from the stage of the seizure of the opium up to the time when the samples were handed over to the public analyst the seals remained intact. The prosecution has not taken the court into confidence in disclosing as to the reasons why the office of the Superintendent of Police refused to take the samples. Even though the labels were not in order it was for the prosecution affirmatively to prove that the seals were still intact.

18. The report of the Chemical Examiner Ext. PW5/ A will not support the case of the prosecution that it was the same sample which was earlier carried by the police officials to Laboratories at Kandaghat, Junga and Chandigarh for analysis. Entry of Malkhana register giving number of seals and particulars thereof has not been produced and forwarding letter of the Superintendent of Police sending parcels to the Chemical Examiners at Kandaghat, Junga and Chandigarh not exhibited. The sample of the contraband deposited in CFSL Chandigarh on 11.6.1999, was analysed by the Senior Scientific Officer on 15.10.1999 and it is not explained by the prosecution as to why the Senior Scientific Officer took about four months for its analysis. The prosecution has also not explained whether on the sample sent by PW-2 for the first time to CTL Kandaghat on 23.5.1999 and on its receipt with objection, the seals were intact till the sample was second time sent to FSL Junga on 25.5.1999. Again it is not explained that the seals remained intact when the sample was third time sent to CFSL Chandigarh on 28.5.1999 and on its return the sample remained in the same condition till it was fourth time sent to CFSL Chandigarh on 11.6.1999. In the facts and circumstances of the case the non-examination of the police officials and non-disclosure of the objections raised by the Public Analyst of CTL

Kandaghat, FSL Junga and CFSL Chandigarh on earlier three occasions have definitely raised serious doubts about the safe custody of the sample and there was every likelihood of tampering of the sample. It is an admitted fact that the seal mark "K" has not been produced in Court by PW-7 Prem Singh who has specifically stated that no seal after sealing of the samples by the Investigating Officer PW-9 was handed over to him. Without proving affirmatively that the final report of the Chemical Examiner Ext. PW-5/A pertains to the same material which was seized from the Respondent, the prosecution cannot succeed and the Respondent cannot be held guilty of such a serious offence, the minimum punishment of which is so harsh, [please refer to: Baldev Singh Vs. State of Punjab, ; Khalak Singh v. State of Madhya Pradesh 1992 Cr.iLJ. 1150 ; Wilson Dayal Vs. State, and Valsala Vs. State of Kerala,

19. In Bhola Ram Kushwaha Vs. The State of Madhya Pradesh, their Lordships have held that if there are glaring discrepancies in the statements of the prosecution witnesses, the accused is entitled for the benefit of doubt and the conviction of the accused u/s 21 of the NDPS Act has been set aside.

20. In Gurbax Singh v. State of Haryana (2001) 3 SCC 28, it has been held that when the prosecution has not led any evidence whether the chemical analyser received the sample with proper intact seals, it creates a doubt whether the same sample was sent to the chemical analyser. Further that it was the statement of the panch witness that muddamal seal used by the PSI was a wooden seal and as against this, it was the evidence of PW-2 SI/SHO that it was a brass seal and that on the basis of the evidence and faulty investigation it would not be safe to convict the accused for a serious offence of possessing poppy husk.

21. Learned Additional Advocate General contended that in a criminal trial, law does not require that seal used for sealing case property by the Investigating Officer if not produced in Court by PW-7 will vitiate the proceedings against the Respondent. In support of this contention the learned Counsel has relied upon a Full Bench judgment of the Punjab and Haryana High Court in case Piara Singh Vs. State of Punjab, In that case the learned Judges have held that in the absence of any mandatory or even a directory provision in the whole of Code of Criminal Procedure and the Punjab Police Rules requiring that the seal used by the Investigating Officer for sealing case property must be handed over to a third person forthwith and further that in cases where it might at all have been so done then the non-official must be put into the witness box and any failure to do so would vitiate the whole proceedings, it is incorrect to say that it is mandatory for the Investigating Police Officer to hand over the seal used by him for sealing the incriminating articles and the samples to a non-official immediately thereafter and that the non-appearance or non-production of such a non-official who was entrusted with the seal would by itself be fatal to the prosecution case.

22. We are afraid to apply the ratio of the aforesaid decision of the Full Bench in the facts and circumstances of the present case. As noticed above in the case on

hand the Investigating Officer has stated that the seal used for sealing the contraband, was handed over to PW-7 Prem Singh in the presence of PW-6 Sh. Munish Garg, SDM, and that PW-7 the Reader of the SDM has specifically stated that no seal was handed over to him after sealing the samples.

23. In the absence of the link evidence, the possibility of samples being tampered with cannot be ruled out altogether and the prosecution has failed to show that there was no tampering with the seals of the sample parcels by the police official or the Public Analyser when the sample article was sent to different laboratories on three earlier occasions which were returned after raising objections by the Public Analysers of CTL Kandaghat, FSL Junga and CFSL Chandigarh.

24. In our considered view in the facts and circumstances enumerated above no affirmative reliance can be placed on the report of the Senior Scientific Officer CFSL Chandigarh mark Ext. PW-5/A that the said sample was not tampered with.

25. We may point out that the Investigating Officer has not explained any reason why the Respondent was taken to the office of the Superintendent of Police for his personal search when the prior special report u/s 42(2) of the NDPS Act as stated by him was already sent to the said Officer. It is also not explained by the Investigating Officer as to how he came to know about the presence of PW-6" Sh. Munish Garg, SDM in the office of the Superintendent of Police before whom the Respondent was taken for personal search. The cumulative effect of all the above said circumstances will lead to an irresistible conclusion that the prosecution case is not free from reasonable doubt about the involvement of the Respondent in the commission of the offence leveled against him and the learned trial Judge has rightly acquitted him by giving him benefit of doubt. We find no cogent reason to interfere with the order of acquittal of the Respondent.

26. No other point has been urged before us by the learned Counsel for the parties.

27. In the result, the appeal is dismissed. The Respondent is in jail as he could not furnish the bonds. He shall be released forthwith, if he is not required in any other case. The copy of this order shall be sent by the Registry office to the Superintendent Model Central Jail, Nahan for compliance.

28. Before parting with this judgment, we place on record our appreciation to Mr. Deepak Gupta learned Legal Aid Counsel for his able and valuable assistance rendered to us.