

(2013) 01 SHI CK 0069

In the High Court Of Himachal Pradesh

Case No : Criminal Appeal No. 207 of 2004-B

State of Himachal Pradesh

APPELLANT

Vs

Sortino Francesco

RESPONDENT

Date of Decision : 08-01-2013

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 20, 20(b)(ii)
(B), 41, 42, 43

Citation : (2013) CriLJ 1380

Hon'ble Judges : Kuldeep Singh, J;Deepak Gupta, J

Bench : Division Bench

Advocate : Vivek Thakur, A.A.G. and Mr. Rajesh Mandhotra, Deputy A.G, for the Appellant; Sunil Chaudhary, for the Respondent

Final Decision : Allowed

Judgement

Kuldeep Singh, Judge

1. The acquittal of respondent by Sessions Judge, Kullu, in Sessions Trial No. 58-03 on 07.02.2004 has been assailed in the appeal. The prosecution case, in brief, is that on 03.01.2003 PW-9 S.I. Balwant Singh, PW-6 A.S.I. Ram Saran, PW-7 H.H.C. Om Prakash, H.H.C. Narpat Ram and constable Gurdial Singh were at Kukri Kelo for "nakabandi". At about 6.00 a.m., a foreigner was noticed by the police party with a bag coming from Barshaini side. The foreigner on seeing the police party became perplex, his passport was demanded, which was found correct. On inquiry by PW-9, the foreigner disclosed his name Sortino Francesco.

2. PW-9 suspected some contraband with the respondent, he gave option to respondent to be searched by Magistrate or Gazetted Officer vide memo Ex. PW 6/A. The respondent consented for the search by the police. PW-9 before conducting search of respondent gave his search vide memo Ex. PW 6/B and thereafter conducted search of respondent. A small bag during search was found hidden under the underwear of the respondent, leading to the recovery of

"Charas" wrapped in two polythene packets.

3. On weighing of recovered "Charas", it was found to be 550 grams, out of the recovered "Charas", two samples of 25 grams each were taken, packed and sealed with seal "B". The remaining bulk "Charas" along with bag was separately packed and sealed with seal "B". N.C.B. forms Ex. PW 4/C were filled in triplicate. The seal impression Ex. PW 6/C was retained. The bulk "Charas" and sample "Charas" were taken into possession vide seizure memo Ex. PW 6/D, a copy of which was supplied to respondent. The respondent was apprised of the offence committed by him vide memo Ex. PW 6/E.

4. PW-9 sent a rukka Ex. PW 9/A through H.H.C. Om Prakash for registration of case to Police Station, Kullu, and thereupon PW-8 A.S.I. Mathru Ram recorded FIR Ex. PW 8/A. He made endorsement Ex. PW 8/B on the rukka and sent the file to PW-9 through the same constable.

5. PW-9 prepared site plan Ex. PW 9/B. He recorded the statements of witnesses. The case property was produced before PW-8 A.S.I. Mathru Ram, who resealed the same with his seal and retained seal impression Ex. PW 8/C. The resealing officer deposited the case property along with N.C.B. form with PW-4 M.H.C. Narain Singh, who made entry Ex. PW 4/A in Malkhana register. PW-4 on 03.01.2003 sent one of the sample of "Charas" vide R.C. Ex. PW 4/B along with documents to C.T.L., Kandaghat through PW-2 constable Surat Ram. On receipt of chemical examiner report Ex. PA, the sample was found to be of "Charas". The special report Ex. PW 3/B was handed over to Dy. S.P., Kullu, who got it entered in the relevant register from his Reader PW-3 H.C. Kashmi Ram vide entry Ex. PW 3/A.

6. On completion of investigation, challan was submitted in the Court. The respondent was charged for offence punishable u/s 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985, (for short "Act"). The respondent pleaded not guilty and claimed trial. The prosecution has examined 9 witnesses. The statement of respondent was recorded u/s 313 Cr. P.C. He denied the prosecution case and pleaded his innocence. The respondent did not lead any evidence in defence. On completion of trial, Sessions Judge acquitted the respondent on 07.02.2004, hence appeal.

7. We have heard learned Additional Advocate General and learned counsel for the respondent and we have also gone through the record. It has been argued by learned Additional Advocate General that learned Sessions Judge has erred in applying Section 50 of the Act. The occurrence took place on 03.01.2003. The evidence was recorded in the Court after 9/10 months, slight variations in the depositions of witnesses after gap of 9/10 months are natural. The variations in the statements are not so fundamental so as to throw out the case of the prosecution. The learned Sessions Judge has erred in disbelieving the prosecution case. The prosecution has proved the case against respondent beyond reasonable doubt. The submission was made for setting aside impugned

judgment. The learned counsel for the respondent has submitted that the Court below after appreciation of material on record has recorded a finding of acquittal. The view learned Sessions Judge has taken is in consonance with the evidence on record, merely another view is possible is no ground to convert acquittal into conviction in appeal. The learned counsel for the respondent has supported the impugned judgment. He has submitted if the Court is not inclined to accept his submissions then lenient view may be taken keeping in view that the case is ten years old.

8. The rukka Ex. PW 9/A is the first version of the prosecution. In Ex. PW 9/A, it has been stated that S.I. Balwant Singh along with A.S.I. Ram Saran, H.H.C. Om Prakash, H.H.C. Narpat Ram and constable Gurdial Singh were at Kukri Kelo at about 6.00 a.m. on 03.01.2003 in connection with "naka". A foreigner came from Barshaini side walking with bag on his back. On seeing the police, he became perplex, passport was demanded from him which on checking was found correct.

9. In Ex. PW 9/A, it has been also stated that accused was orally and in writing told that the police suspected that he was carrying some contraband and whether he wanted to give search of his rucksack in presence of Gazetted Officer. The said person orally and in writing declined search by Magistrate or Gazetted Officer. He voluntarily agreed to give his personal search and search of his rucksack by the police. The place was isolated, no independent local person was available. Therefore, in presence of A.S.I. Ram Saran and constable Gurdial Singh, Investigating Officer gave his personal search to the accused and thereafter personal search of accused was conducted.

10. It has further been stated in Ex. PW 9/A that during search of said foreigner a small green pouch was found concealed under "pant" and underwear in which in polythene two wrappers were found containing "Charas" in stick form which on weighment was found 550 grams. Two samples of 25 grams each were separated. The samples and bulk "Charas" were sealed with seal "B". A separate sample of seal was taken. N.C.B. form was filled in triplicate. The seal was handed over to A.S.I. Ram Saran and the recovery was effected through memo, a copy of which was given to accused. The accused was orally and in writing informed about the offence committed by him. The rukka was sent for registration of case through H.H.C. Om Prakash. Thereafter, FIR Ex. PW 8/A was registered.

11. It is, thus, clear there is no independent witness of the recovery of "Charas". The place was isolated and the recovery was made at about 6.00 a.m. on 03.01.2003, at that time, in the month of January due to darkness and cold, it is reasonable to infer that no independent person was on the spot when the "Charas" was recovered. There is no rule of law that police witnesses in absence of independent witnesses cannot be believed. The only requirement is that in such situation statements of police witnesses are to be considered with extra caution. In these circumstances, the statements of PW-6 A.S.I. Ram Chand,

PW-7 Om Prakash, PW-9 Balwant Singh S.I. are most important together with other evidence on record. PW-6 A.S.I. Ram Chand has stated that on 03.01.2003 he along with S.I. Balwant Singh, H.H.C. Om Prakash, H.H.C. Narpat Ram and constable Gurdial Singh was present at place Kukri Kelo in connection with "nakabandi". At 6.00 a.m., a foreigner was spotted coming from Barshaini side carrying a bag. On seeing the police, he got frightened. S.I. Balwant Singh told the accused that he had suspicion that accused might be carrying some contraband. The passport of the accused was found correct. The accused was intimated that he had right to be searched either before the Magistrate or the Gazetted Officer vide memo Ex. PW 6/A which bears his signatures. The accused opted to be searched before the police. The consent of accused on Ex. PW 6/A is Mark-A and Mark-B. The memo was signed by the accused. The place was isolated and no independent witness was available. He and constable Gurdial Singh joined as witnesses.

12. PW-6 continued that the Investigating Officer gave his personal search to the accused vide memo Ex. PW 6/B and thereafter personal search of the accused and his bag was carried out. One small bag was recovered hidden under the underwear of the accused which he was wearing under his trousers. The "Charas" in the shape of sticks was recovered. On weighment 550 grams "Charas" was recovered, three samples of 25 grams were separated and sealed with seal "B". The remaining "Charas" was packed and sealed with seal "B". N.C.B. form Ex. PW 4/C was filled in triplicate. The sample seal Ex. PW 6/C was prepared and it bears his signatures. The seal was handed over to him. The case property was taken into possession vide memo Ex. PW 6/D which bears his signatures. The accused was informed about the offence committed by him vide memo Ex. PW 6/E which bears his signatures.

13. PW-6 has further stated that the rukka was sent through H.H.C. Om Prakash for recording FIR. The bigger parcel is Ex. P1 and smaller parcel is Ex. P2 which bears his signatures. He identified Ex. P4 bag and Ex. P5 "Charas". In cross-examination, he has stated that accused was arrested at 11.30 a.m. and at that time memo Ex. PW 6/E was prepared. H.H.C. Om Prakash went with rukka at 9.00 a.m. The Investigating Officer filled in columns 1 to 8 of N.C.B. form Ex. PW 4/C in his presence. The option given to the accused was in English. It took about 3/4 hours up to 11.30 a.m. to complete the proceedings.

14. PW-7 H.H.C. Om Prakash has stated that I.O. gave him rukka which he handed over to S.H.O. Mathru Ram, who after recording the FIR returned the case file to him. He was going to Manikaran, but I.O. met him on the way and the case file was handed over to him by the witness. In cross-examination, he has stated that he started with the rukka from the spot at 9.00 a.m. through bus and reached Police Station at 11.15 a.m. He remained in the Police Station for about half an hour. I.O. met him at 1.30 p.m.

15. PW-8 A.S.I. Mathru Ram has stated that on 03.01.2003 he was officiating S.H.O., Police Station, Kullu. At 11.15 a.m., a rukka of S.I. Balwant Singh was

received through constable Om Prakash and on that basis FIR Ex. PW 8/A was registered. Endorsement Ex. PW 8/B was made on the rukka and the case file was returned. At 2.00 p.m., on the same date, I.O. produced three parcels of case property sealed with seal "B" along with N.C.B. form and sample seal. He resealed the above case property with his seal "H", his sample seal is Ex. PW 8/C. He filled in columns 9 to 11 of N.C.B. form Ex. PW 4/C. On the same day at 2.30 p.m., he deposited the case property along with N.C.B. form, sample seals and other documents with M.H.C., P.S., Kullu.

16. PW-9 Balwant Singh S.I. has corroborated the statement of PW-6 A.S.I. Ram Chand. He has proved rukka Ex. PW 9/A which was sent by him for recording FIR through PW-7 H.H.C. Om Prakash. He has proved Ex. PW 9/C memo of personal search of accused. He has stated that PW-7 met him near Dhalpur ground, Kullu, who handed over the case file to him. He handed over special report of the case Ex. PW 3/B to Dy. S.P. headquarter. In cross-examination, he has stated that constable left the spot with rukka at 11.00 a.m. The accused was arrested at 11.00 a.m. He has admitted the suggestion that in a second case the accused is involved in commercial quantity of "Charas" and in that case also he is the Investigating Officer.

17. PW-2 H.H.C. Surat Ram has stated that on 03.01.2003 M.H.C. Narpat Singh gave him sample parcel of "Charas" sealed with seal impressions of "B" and "H" along with N.C.B. form, sample seals and other documents through R.C. 4/03. It was deposited by him at C.T.L., Kandaghat on 04.01.2003 and on return he deposited the R.C. with M.H.C. PW-3 constable Kashmi Ram, Reader to Dy. S.P. headquarter Kullu has proved special report Ex. PW 3/B which was entered in the register vide entry Ex. PW 3/A. The endorsement on special report is Ex. PW 3/C. PW-4 H.C. Narain Singh has stated that on 03.01.2003 A.S.I./S.H.O. Mathru Ram deposited with him three parcels of "Charas" with three seals "B" and three seals of "H" along with N.C.B. form, sample seals and other documents which he entered at Sr. No. 26 of the "Malkhana" register. On 03.01.2003, he sent one sample parcel of "Charas" along with N.C.B. form, sample seal and other documents vide R.C. 4/03 through PW-2 H.H.C. Surat Ram for depositing at C.T.L., Kandaghat, who on return deposited R.C. with him. He has proved copy of "Malkhana" register Ex. PW 4/A and R.C. Ex. PW 4/B. He filled up column No. 12 of N.C.B. form Ex. PW 4/C. In cross-examination, he has stated that case property was deposited by A.S.I. Mathru Ram at 2.00 p.m. on 03.01.2003. PW-5 Inspector Sanjay Kumar has proved chemical examination report Ex. PA. The accused in his statement u/s 313 Cr. P.C. has denied the prosecution case.

18. The learned Sessions Judge has observed that PW 7 has not supported the case of the prosecution for obtaining consent. The attesting witness PW-7 has contradicted consent memo Ex. PW 6/A. The learned Sessions Judge has also observed that PW-9 S.I. Balwant Singh I.O. has stated that constable left with rukka at 11.00 a.m. In FIR Ex. PW 8/A the distance of the spot from the Police Station has been mentioned 52 kilometres. In case constable left the place of

recovery at 11.00 a.m., how FIR could be registered at 11.15 a.m. after covering a distance of 52 kilometres. The learned Sessions Judge has also observed that rukka Ex. PW 8/B was prepared at 9.00 a.m. and, therefore, the accused was arrested at either 9.00 a.m. or earlier to that. But, PW-6 has stated that accused was arrested at 11.30 a.m. This creates suspicion in the prosecution case. The learned Sessions Judge has also observed that in Ex. PA report of chemical examiner weight of sample was found 21.1231 grams, the sample was received in the laboratory less in weight to the extent of 3.8 grams. This shows either the sample was tampered or sample was not of the case. According to learned Sessions Judge the documents have been fabricated subsequently. The learned Sessions Judge has suspected the prosecution case. On noticing the aforesaid discrepancies, the learned Sessions Judge has acquitted the accused.

19. The rukka Ex. PW 9/A was prepared at 9.00 a.m. In Ex. PW 8/A itself, it has been stated that place Kukri Kelo is at a distance of 52 kilometres from the Police Station. No doubt, PW-9 has stated that constable left with the rukka from the spot at 11.00 a.m. PW-7 H.H.C. Om Prakash has stated that he started with the rukka from the spot at 9.00 a.m. and travelled by bus to Kullu. The statement of PW-9 as to when constable with rukka left the spot cannot be over-stretched. The statement of PW-9 in the Court was recorded after 9 months and his statement that constable left at 11.00 a.m. from the spot is nothing but slip of tongue when PW-7 himself has stated that he left the spot at 9.00 a.m. The statement of PW-7 gets support from rukka Ex. PW 9/A which was prepared at 9.00 a.m. Therefore, it can be reasonably inferred that PW-7 along with rukka Ex. PW 9/A left the spot around 9.00 a.m. and thereafter FIR Ex. PW 8/A was registered at Police Station at 11.15 a.m. Similarly, statement of PW-6 that accused was arrested at 11.30 a.m. is not of much significance. The accused was arrested by PW-9 Investigating Officer. In the rukka Ex. PW 9/A prepared at 9.00 a.m., it has been stated that accused was informed of his arrest. In other words, the accused was arrested at least before preparing rukka Ex. PW 9/A. Simply, PW-6 has opined that accused was arrested at 11.30 a.m. does not mean that the documents were fabricated and prepared later on.

20. The learned Sessions Judge suspected the prosecution case on the ground of difference in weight of sample when weighed in the laboratory. The difference in weight was noticed to the extent of 3.8 grams. The learned Sessions Judge has not recorded a finding that any link evidence is missing from the point of recovery of "Charas" to the point when sample was delivered in the laboratory. The difference in weight could be due to error in scales and without a finding of defect in link evidence, it is not possible to approve the finding of learned Sessions Judge that merely because weight of sample was found 3.8 grams less in the laboratory, therefore, sample packet was not of the sample of the case or it was tampered. The accused has not shown any prejudice due to less weight of the sample to the extent of 3.8 grams.

21. The learned Sessions Judge has held that there is non compliance of Section

50 of the Act merely on the ground that PW-7 has stated that I.O. had asked the option of the accused whether he wanted to be searched before the Magistrate or the competent officer. In the consent memo Ex. PW 6/A expression used is Magistrate or any Gazetted Officer. PW-9 has stated that option of the accused was taken in writing whether he wanted to be searched either before the Magistrate or Gazetted Officer. PW-6 has also stated that accused was intimated that he had a right to be searched either before the Magistrate or the Gazetted Officer vide memo Ex. PW 6/A. PW-7 is not a witness of consent memo Ex. PW 6/A. Thus, the statement of PW-7 that the accused was asked to be searched before the Magistrate or competent officer cannot be over-emphasized.

22. In *Dehal Singh Vs. State of Himachal Pradesh*, the contention was that though the option was given to the appellant to be searched before the Gazetted Officer or nearest Magistrate, but they were not apprised of their right to be searched in their presence and hence the procedure followed does not fulfill the requirement of Section 50 of the Narcotic Drugs and Psychotropic Substances Act, 1985. In para-19 of the report, the Supreme Court has held as follows:-

19. Section 50(1) of the Act, which is relevant for the purpose, reads as follows:

50. Conditions under which search of persons shall be conducted. -(1) When any officer duly authorized u/s 42 is about to search any person under the provisions of Section 41, Section 42 or Section 43, he shall, if such person so requires, take such person without unnecessary delay to the nearest gazetted officer of any of the departments mentioned in Section 42 or to the nearest Magistrate.

From a plain reading of the aforesaid provision it is evident that it comes into play only when search of a person other than vehicle, etc. is taken. Further the authorized officer is to apprise the person about to be searched to be taken to the nearest gazetted officer or to the Magistrate, if the person about to be searched so requires. Such an option was given to the appellants and, in our opinion, it is nothing but apprising them of their right. Option to choose is given to an accused when he has the right to choose. It is communication of the right either to accept or reject. Therefore, in our opinion giving the appellants option to be searched satisfied the requirement of Section 50 of the Act.

23. The contraband recovered from the respondent was 550 grams "Charas". In chemical examiner report Ex. PA the resin content is 29.53% and it has been opined that exhibit contains the contents of *Dharam Pal and Vidya Sagar Vs. State of H.P.*, grams of "Charas" was recovered. In para-9 of the report, it has been held as follows:-

9. In the instant case the stuff has been reported by the Chemical Examiner vide report Ext. PL to contain contents of "Charas" and not "Charas". This is because of the presence of the resin in the stuff. The percentage of the resin in the stuff is 28.92 percent. About the rest of the contents of the stuff, report of the Chemical Examiner is silent. That means the entire quantity of the recovered stuff was not "Charas". It is not the case of the prosecution or in any case the

appellants were not tried on the charge that they had the cannabis in the form of mixture. The charge, as already noticed, was that they had in their possession "Charas" which means resin extracted from cannabis plants and the resin content in the recovered stuff was only 28.92 per cent. That means the "Charas" content in the recovered stuff was 28.92 per cent. In terms of weight, the "Charas" content of the recovered stuff was 462.72 grams, which is more than the small quantity but lesser than the commercial quantity as fixed vide Entry No. 23 of the aforesaid notification of the Central Government.

24. The perusal of consent memo Ex. PW 6/A and the other evidence on the record is clear to the effect that Section 50 of the Act was complied before personal search of the accused. In view of Dharam Pal (supra) the "Charas" contents in the recovered stuff comes to $550 \times 29.53/100 = 162.41$ grams, which is more than small quantity and less than commercial quantity of "Charas" which was recovered from respondent. The learned Sessions Judge has misconstrued and misinterpreted the evidence and has erred in acquitting the respondent after highlighting very minor discrepancies in the statements of prosecution witnesses. The occurrence took place on 03.01.2003, the statements of witnesses were recorded in the Court on 11.09.2003 and 31.10.2003. Therefore, minor discrepancies in the statements of witnesses are natural as against parrot like version of the witnesses. The discrepancies are not so fundamental so as to reject the case of the prosecution. The prosecution has proved the case against the respondent beyond reasonable doubt that he has committed an offence punishable u/s 20 (b)(ii)(B) of the Narcotic Drugs and Psychotropic Substances Act, 1985. It has been proved that on 03.01.2003 the respondent was carrying 550 grams contraband containing 162.41 grams "Charas". The impugned judgment is liable to be set aside.

25. The respondent through his counsel was already heard on the quantum of sentence also. The learned counsel for the respondent had submitted for taking lenient view taking into consideration that respondent is a foreign national and he has faced trial and appeal for the last about 10 years. The respondent remained in custody during trial.

26. The menace of drugs and psychotropic substances has increased considerably. The Kullu area has more cases under the Act. It is common knowledge that more and more foreign nationals are involved in the cases under the Act, but simultaneously it is also to be considered that in the recovered stuff from the respondent "Charas" quantity was 162.41 grams. The respondent remained in custody from 03.01.2003 to 07.02.2004. It will be very harsh to send the respondent again in jail for committing the offence after ten years. In view of above, the appeal is allowed, judgment dated 07.02.2004 of learned Sessions Judge, Kullu, in Sessions Trial No. 58-03, acquitting the respondent, is set aside. The respondent/accused is convicted u/s 20 (b)(ii)(B) of the Narcotic Drugs and Psychotropic Substances Act, 1985, and is sentenced to undergo period already undergone and to pay fine of Rs. 1,00,000/- (Rupees One Lac) -,

in default of payment of fine to undergo simple imprisonment for six months.