
(2012) 02 SHI CK 0001

In the High Court Of Himachal Pradesh

Case No : Criminal Appeal No. 582 of 2003

State of Himachal Pradesh

APPELLANT

Vs

Surjit Singh @ Shinda

RESPONDENT

Date of Decision : 28-02-2012

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 154, 313

Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 2, 20, 27, 50

Penal Code, 1860 (IPC) — Section 191, 192

Citation : (2012) 02 SHI CK 0001

Hon'ble Judges : V.K. Ahuja, J;Deepak Gupta, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Deepak Gupta, J.—This appeal by the State is directed against the judgment dated 03.09.2003, passed by the learned Additional Sessions Judge, Una, in Sessions Trial No. 4 of 2003, whereby he acquitted the accused of having committed an offence punishable u/s 20 of the Narcotics Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the NDPS Act). Briefly stated, the prosecution case is that on 22.09.2002, PW-1, Constable Suresh Kumar, received secret information in Lower Arniala that the accused, Surjit Singh, is dealing in the illicit trade of opium. According to the information, in case the house of the accused was raided, ample quantity of opium could be recovered. PW-1 immediately came towards Una and on the way, he met a police party headed by PW-12, ASI Harbans Lal, and informed him about the information. PW-12 recorded the statement of PW-1, Ex. PW-1/A, u/s 154 Cr.P.C. and the same was sent to Police Station Una for registration of the FIR. The report regarding receipt of the secret information was also prepared and sent through Constable Suresh Kumar to the Superintendent of Police, Una.

2. Thereafter, PW-12 alongwith other police officials including PW-11, HHC Sher Bahadur, proceeded towards Lower Arniala. There they associated PW-2, Paramjit

Kaur, who was the Pradhan of the area and one Ram Singh with the search and seizure operations. They went to the house of the accused, who was present there. The accused was informed that it was suspected that he dealt in the trade of opium and was in possession of the opium. He was informed that the police intended to conduct a search including the personal search and he had a right to get himself searched either before the police or before any Gazetted Officer or Magistrate. The memo, Ex. PW-2/A, was prepared in this behalf, which was duly signed by the accused and the witnesses. The accused in his own handwriting wrote that he was willing to be searched by the police party. Thereafter, search of the accused was conducted and on his personal search, one plastic packet was recovered from the pocket of the kurta worn by the accused. On opening the said plastic packet, opium was found, which was found to be weighed about 100 grams. A sum of ` 3860/- was also recovered from the accused. Two samples of 20 grams each were drawn and, thereafter, these samples and the bulk opium were sealed in three separate parcels with seal impression "A". The money was also similarly separately sealed. The entire case property was taken into possession vide memo, Ex. PW-2/D in the presence of the independent witnesses. Other codal formalities were completed at the spot and the accused was arrested.

3. After the accused was arrested, he was interrogated by the police. According to the prosecution, during the course of interrogation, the accused made a disclosure statement and stated that he had kept concealed opium adjoining to his house in a thatched chappar and the same has been buried in the earth and he could get recovered the same. The said statement was recorded as Ex. PW-2/F and the same witnesses signed the said memo. Thereafter, the accused led the witnesses and the police party to the thatched hut and he dug the soil with his hands and brought out a polythene packet, which on opening was found to contain opium. The opium was weighed and found to be 4 kg 350 gms. Two samples of 50 gms. each were separated and put into separate parcels and, thereafter, two samples as well as the remaining bulk opium was sealed in three separate parcels bearing seal impression "A". The accused also produced ` 14,140/- from a steel almirah kept in his house and according to the prosecution, he stated that the same was the sale proceed of the opium. All the case property was taken into possession vide memo, Ex. PW-2/G. After completing the codal formalities on the spot, the accused and the case property were taken to Police Station Sadar, Una. All the case property was handed over to PW-8, SI Jagdish Ram, who resealed all the parcels with his own seal bearing impression "N". Then, the entire case property was deposited with PW-6, MHC Ved Parkash, who recorded the FIR, Ex. PW-4/A. He states that the entire case property was kept in the Malkhana and remained there and, thereafter, on 24.09.2002, he sent the two sample parcels to CTL Kandaghat through PW-7, Constable Jagan Nath, vide RC No. 231 of 2002. Vide report of the Chemical Examiner, Ex. PW-12/E, the samples were found to be those of opium and on this basis, the accused was sent to face trial for the commission of the aforesaid offence.

4. After trial, the accused was acquitted by the learned trial Court on three grounds. Firstly that there was noncompliance of Section 50 of the NDPS Act because the independent witness had not supported the version of the prosecution. Secondly that the recovery of the opium pursuant to the disclosure statement could not be said to be from the exclusive possession of the accused and lastly that the prosecution failed to prove beyond the reasonable doubt the case against the accused.

5. At the outset, it may be stated that in the present case, there is sufficient compliance of Section 50 of the NDPS Act. No doubt, the sole independent witness examined, namely Paramjit Kaur, has not supported the prosecution case, but the police officials have specifically stated that the accused was informed of his right and this fact is also supported from the perusal of the memo, Ex. PW-2/A, in which the accused, in his own handwriting in Gurumukhi, has written that he is willing to be searched by the police officials. The learned trial Court rightly observed that the statement of PW-2, Paramjit Kaur, abound with contradictions. When she appeared in Court, she stated that nothing happened in her presence, but she only signed certain papers. She has, however, admitted her signatures on the consent memo, Ex. PW-2/A. According to her, she did not read the contents before signing the same.

6. Therefore, we are of the considered view that the learned trial Court was not justified in holding that Section 50 of the NDPS Act had not been complied with. Even with regard to the finding of the learned trial Court that the second recovery was not from the exclusive possession of the accused cannot be accepted. At this stage, we are not commenting on the veracity of the disclosure statement, but as per the prosecution, the stuff was recovered from a chappar adjoining to the residence of the accused. No doubt, in this residence, the accused resided with his other family members, but in this case, the stuff had been hidden under the earth and this fact would only be known to the persons, who had hidden the stuff and, therefore, the finding of the learned trial Court that the stuff was not recovered from the exclusive possession of the accused is not correct.

7. Having held so, we find that the prosecution case; otherwise cannot succeed. Paramjit Kaur, who was the Pradhan of the area, did not supported the prosecution. She was declared hostile and her version was that she signed all the documents without reading the contents. These documents are the consent memo, Ex. PW-2/A; memo, Ex. PW-2/C, relating to the search to the police officials; memo, Ex. PW-2/D, relating to the search of the accused which led to the recovery of 100 grams of opium; memo, Ex. PW-2/E, relating to the accused being informed about the grounds of arrest; disclosure statement, Ex. PW-2/F, u/s 27 of the Act; memo, Ex. PW-2/G, is memo regarding the identification of the spot where the second consignment of the opium was kept and the recovery thereof. The witness denied that the accused was interrogated in her presence or that he made a disclosure statement which led to the recovery of the opium.

According to her, no search was carried out in her presence. She also denied recovery of a sum of ` 14,140/- from the accused. Though, the accused, in his statement u/s 313 Cr.P.C., stated that money was taken from a trunk kept in his house and that this was the income of earning from a truck and sale of milk. This witness is a matriculate and can read and write Hindi. She also states that she was not pressurized by the police officials.

8. Unfortunately, despite the fact that Paramjit Kaur was declared hostile, the prosecution chose not to examine the other independent witness, PW-Ram Singh, and he was given up as having been won over, but no evidence in support of this fact was given. The police officials have totally supported the prosecution and both, PW-11 and PW-12 have stuck to their versions. When independent witnesses turn hostile, the statements of the official witnesses cannot be discarded unless it is shown that there are any material contradiction in the statements of the police officials.

9. This Court cannot shut its eyes to the fact that the practice of witnesses turning hostile is prevalent in this country. In such an eventuality, the statements of the official witnesses must be scrutinized with great care and caution and if on scrutiny, it is found that the statements of the prosecution witnesses inspire confidence, then there is no reason why the statements of the independent witnesses cannot be discarded and there is no reason why conviction cannot be based on the statements of the official witnesses if they are consistent and inspire confidence. In the present case, both the official witnesses having given a consistent version and there is no material contradiction in the same. Therefore, the recovery is proved beyond doubt.

10. Having held so, the appeal by the State still has to be dismissed on another ground. The prosecution has failed to prove that the stuff which was recovered from the accused was opium within the meaning of Section 2 Clause (xv) of the Act. The report of the Chemical Examiner, Ex. PW-12/E, reads as follows:

Result of:

(a) Test for meconic acid : Positive

(b) Test for morphine : Positive.

(c) General Observation of the chemist: I am of the opinion that the both exhibits marked here as 2348/1 and 2348/2 contain the contents of opium.

This report does not show that the stuff recovered from the accused was coagulated juice of opium poppy or that it was a mixture of coagulated juice with some other material having morphine content of more than 0.2 per cent.

11. Opium has been defined, as follows under Clause (xv) of Section 2 of the Narcotic Drugs and Psychotropic Substances Act, 1985:

opium" means----

- (a) the coagulated juice of the opium poppy; and
- (b) any mixture, with or without any neutral material, of the coagulated juice of the opium poppy, but does not include any preparation containing not more than 0.2 per cent of morphine.

From a bare reading of the definition of opium, it is clear that "opium" means coagulated juice of opium poppy or any mixture with or without neutral material of the coagulated juice of opium poppy having more than 0.2 per cent of morphine.

12. In the present case, according to the report of the Chemical Examiner, Ex. PW-12/E, the samples were tested for meconic acid and morphine. Report does not say that the substance which was tested was coagulated juice of opium poppy or it was a mixture of coagulated juice with or without any neutral material and the percentage of the morphine in the mixture was more than 0.2 per cent.

13. The Apex Court in *State of Punjab Vs. Prem Sagar and Others*, , dealt with the question as to whether the analyzed substance was opium or not. The Apex Court referred to various provisions of the Act including the definition of opium and opium derivative and held as follows:-

11. The appellant was found in possession of 920 grams of black liquid which prima facie smelt of opium. The FSL report indicates that the substance recovered from the appellant was "opium as described in the NDPS Act" containing 2.8% anhydride morphine, apart from pieces of poppy (posedoda) flowers found in the sample.

14. There does not appear to be any acceptable evidence that the black substance found with the appellant was "coagulated juice of the opium poppy" and "any mixture, with or without any neutral material, of the coagulated juice of the opium poppy". FSL has given its opinion that it is "opium as described in the NDPS Act". That is not binding on the court."

In the said case, the Apex Court has clearly held that the Forensic Science Laboratory (FSL) should not only give its opinion as to what is the substance but should indicate that the substance is a contraband by indicating what was contained in the substance.

14. Following the aforesaid judgment of the Apex Court, a Division Bench of this Court in *Daulat Ram versus State of H.P.*, 2007 (2) Shim. L.C. 82, wherein these reports were virtually identical, held as follows:-

11. In the case before us, as already noticed, the report does not say that the substance is coagulated juice or is a mixture of coagulated juice with some other material having morphine content more than 0.2 per cent. Therefore, the report is held to be unacceptable and not binding. Now, if the report is excluded, there remains no evidence in support of the prosecution allegation that the stuff

recovered from the appellant is opium.

15. We are bound by the judgment of the Supreme Court as well as the earlier judgment delivered by a Division Bench of this Court. The report, Ex. PW-12/E, in the present case, also does not disclose that the substance which was analyzed was coagulated juice of the opium or it was a mixture with or without some other material. There is no mention as to what were the morphine contents. It is only mentioned in the report in respect of the morphine is that sample tested positive for morphine but does not show what was the percentage of morphine. The morphine content should have been at least 0.2%. The report is totally silent on this aspect. This report, therefore does not help the prosecution. There is no other evidence in the matter with regard to the identity of the substance.

16. In view of the above discussion, the appeal is dismissed on the ground that the prosecution has failed to prove that the substance, which was recovered, was opium.

17. Before parting with the case, we are constrained to make some adverse observations about the manner in which PW-2, Smt. Paramjit Kaur, w/o Santosh Kumar, has conducted herself in the present case.

18. According to the prosecution, both the recoveries took place in the presence of the two independent witnesses, namely Ram Singh and Paramjit Kaur (PW-2) and that she had signed a number of documents in the process of search and recovery. These documents are the consent memo, Ex. PW-2/A; memo, Ex. PW-2/C, relating to the search to the police officials; memo, Ex. PW-2/D, relating to the search of the accused which led to the recovery of 100 grams of opium; memo, Ex. PW-2/E, relating to the accused being informed about the grounds of arrest; disclosure statement, Ex. PW-2/F, u/s 27 of the Act; memo, Ex. PW-2/G, is memo regarding the identification of the spot where the second consignment of the opium was kept and the recovery thereof. The witness, while appearing in the witness box, denied the fact that any search or seizure operation was carried out in her presence. She, however, admitted her signatures on the aforesaid documents. She stated that she had signed the same without reading them, but she also admits that she was not under any pressure by the police.

19. We are dealing here with a person, who was the Pradhan of Gram Panchayat Arniala. She is a matriculate and not an illiterate, unlettered person. Such a person commands respect in the society and it is not expected of a person of the stature of this witness to sign documents without reading them and without realizing the implication of her acts. The documents, which this witness signed, could have led to the conviction of an innocent person. If what the witness is saying in Court is correct then an innocent person could have been sent behind bars for more than ten years. The callous attitude of this witness is apparent from the fact that they became part of a conspiracy to create forged evidence against the accused.

20. Either the statement of this witness in Court is false, in which event she would, prima facie, be liable of having committed an offence punishable u/s 191 of the Indian Penal Code or she is party to fabricating false evidence in which event she would be also, prima facie, liable of having committed an offence punishable u/s 192 of the Indian Penal Code. The statement of this witness made on oath in Court cannot co-exist with the documents signed by her. Both cannot be correct. One of them is obviously false.

21. A person holding the post of Pradhan is not expected to sign any document without verifying the contents thereof. The signing of such documents without verifying facts can lead to total mis-carriage of justice and conviction of an innocent person. This is an offence against the administration of justice. Giving or fabricating false evidence with an intention to procure conviction is an offence falling under Chapter - II of the Indian Penal Code. Making a false statement in Court is also an offence.

22. We are, prima facie, of the opinion that PW-2, Paramjit Kaur, w/o Santosh Kumar, r/o Lower Arniala, District Una, H.P., is liable to be tried for committing an offence either of fabricating false documents or of committing perjury. However, before initiating any action against her, we deem it fit that notice be issued to the said witness to show cause why action be not initiated against her as detailed hereinabove. The Registry is directed to register the said notice as a separate petition. Copy of this judgment be sent alongwith the notice and the respondent be directed to file her reply positively before the next date. List the matter before this Bench on 30th April, 2012. Record of the Criminal Appeal shall not be sent back and retained in this Court and be attached with the new petition.