

(2011) 11 SHI CK 0089
In the High Court Of Himachal Pradesh
Case No : Criminal A. No. 109 of 2003

State of Himachal Pradesh

APPELLANT

Vs

Vijay Kumar

RESPONDENT

Date of Decision : 17-11-2011

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 378

Evidence Act, 1872 — Section 27

Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 20, 42, 50

Citation : (2011) 11 SHI CK 0089

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

Bench : Division Bench

Final Decision : Dismissed

Judgement

V.K. Ahuja, J.

1.This is an appeal filed by State of Himachal Pradesh u/s 378 of the Cr.P.C. against the judgment of the court of learned Sessions Judge, Una, dated 16.11.2002, vide which the respondent was acquitted of the charge framed against him u/s 20 of the Narcotic Drugs and Psychotropic Substances Act, hereinafter referred to as the NDPS Act.

2. Briefly stated, the facts of the case are that on 30.1.2002, PW-1 Constable Upnesh Kumar was present at Bus Stand Jhalera, who received a secret information that the respondent was indulging in the sale and purchase of Charas at his house. He went back to Una to inform his seniors and ASI PW-9 ASI Akshay Kumar met him near Police Lines, Jhalera. He made statement Ext.PA before the ASI Akshay Kumar, which was sent to Police Station as a special report u/s 42 of the Act. Thereafter, PW-9 Akshay Kumar proceeded towards Jhalera including two police officials and also associated three independent witnesses. The respondent was found present in his house and he gave him option as to whether he wanted to give his search in presence of a Magistrate or a Gazetted Officer. The accused gave consent to be searched by the police in his

own handwriting. The memo was signed by the accused as well as by the independent witnesses. Thereafter, the police party took the search of the accused and from the personal search of the accused, from the right pocket of his trousers, some Charas in the form of pencils was recovered which was contained in a polythene envelope. On weighment, the same was found to be 100 grams. Two samples of 25 grams were separately taken which were sealed at the spot. Thereafter, on interrogation, the respondent gave disclosure statement that he has kept concealed Charas in the locker of his almirah and he could get the same recovered. This disclosure statement was recorded in the form of memo Ext.PJ signed by the witnesses. Thereafter, the respondent took the witnesses and the police to a room where one Godrej almirah was lying. After taking back the key of almirah from ASI Akshay Kumar, the accused opened the almirah and from the search of the almirah, 1 kg. Charas was recovered. Two samples of 50 grams each were taken from the Charas and the samples were taken in possession as per the procedure. On completion of the investigation, the challan was filed before the learned trial Court.

3. The learned trial Court tried the respondent u/s 20 of the NDPS Act and on completion of the trial, acquitted him of the charge framed against him.

4. We have heard Mr.Rajesh Mandhotra, learned Deputy Advocate General for the appellant and Mr.N.K. Thakur, Advocate, for the respondent, and have gone through the record of the case.

5. The submissions made by the learned Deputy Advocate General appearing for the appellant-State were that the guilt of the respondent was established beyond any reasonable doubt and the findings to the contrary are not sustainable and as such are liable to be set aside.

6. On the other hand, the learned counsel for the respondent had supported the impugned judgment for the reasons recorded therein.

7. The learned trial Court, while referring to the provisions of Section 50 of the Act, has referred to the decision of the Apex Court in State of Punjab versus Baldev Singh, 1993 (3) RCLR 533 and had observed that the accused had to be apprised of his legal right that if he so requires he can be taken to a Gazetted Officer or a Magistrate for his search. Reference was also made to the earlier decision in K.Mohanan versus State of Kerala 2000 SCC (Criminal) 1228 in this regard. Thus, it was observed that in the present case, the Investigating Officer has not stated that the accused was apprised of his legal right to be taken to a Magistrate or a Gazetted Officer for the search and they had only given option that if the accused wanted, he could be taken to a Gazetted Officer or a Magistrate. The learned trial Court had concluded that the accused was not apprised that he was having a legal right to be taken to a Gazetted Officer or a Magistrate and, therefore, there was non-compliance of the provisions of Section 50 of the Act.

8. The learned trial Court had not made a reference to the notice issued to the

accused in this regard giving him an option. A perusal of Ext.PG, consent memo, shows that the accused was told that since he is suspected to be having Charas, he should inform if he wants that his search be taken before a Gazetted Officer or a Magistrate or police. He was also told that he has got a legal right in this regard. The accused had been apprised of in this regard that he was having a legal right to get his search before a Magistrate or a Gazetted Officer. However, the manner in which the option has been given that it was a consent memo and the option had also been given to get the search either before a Magistrate or a Gazetted Officer or police for which he has a legal right. In our view, this cannot be said to be exactly in the nature of the option which has to be given to the accused since no option is required to be given, if he wants his search to be taken by the police also. The only thing to be told is that he can be searched before a Gazetted Officer or a Magistrate and in case he refused to go to a Magistrate or a Gazetted Officer, then the search can be taken by the police. The accused was apprised of his right, but technically the notice issued cannot be said to be correct in view of the decision of the Apex Court referred to by the learned trial Court. The other view could have been taken in the facts and circumstances of the case, but the view taken by the learned trial Court cannot be said to be perverse calling for an interference by this Court.

9. In regard to the second part of the recovery of more than 1 kg of Charas from the locker of the almirah, no witness has stated that the accused made any disclosure statement at that time u/s 27 of the Evidence Act leading to the recovery. The said statement has been proved in evidence as Ext.PJ in which he has clearly stated that he had kept the Charas in the Godrej almirah about which he only knows and get the same recovered. This statement was recorded in the presence of Parveen Kumar and Naresh Kumar. The said Naresh Kumar was not examined to prove this statement. Parveen Kumar was examined as PW-2, who clearly stated that the accused did not make any disclosure statement and he only had accompanied the police party for the search of the house of the accused. He also stated that the accused had never given in writing to the police about the search and simply stated that the Charas was recovered from the person of the accused and thereafter from his almirah also. He can be said to be interested witness since the accused was his tenant earlier and had vacated his house thereafter. There is also contradiction in regard to the fact as to whether the police had taken in possession the key of the alimrah alongwith the recovered Charas before recording his statement, but there is nothing that the said key which had already been sealed by the police and was in possession of the police party, it was made available to the accused to open the almirah. The Investigating Officer PW-9 Akshay Kumar has stated that the accused disclosed that he has concealed more charas in his almirah locker and he could get the same recovered since he alone is having the keys of his almirah. However, there was no corroboration to his statement since PW-8, who was also with the police party and has proved the statement Ext.PA never stated that any statement was made by the accused. Keeping in view this fact, the statement u/s 27 of the

Evidence Act cannot be said to have been legally proved and the statement of PW-9 Akshay Kumar was not such which could be explicitly relied upon in the absence of corroboration by other police officials or independent witnesses. Therefore, the recoveries in question cannot be linked with the accused and the conclusion derived by the learned trial Court in this regard cannot be said to be perverse calling for an interference by this Court.

10. In view of the above discussion, the final findings recorded by the learned trial Court cannot be termed as perverse calling for an interference by this Court. Therefore, we hold that there is no merit in the appeal filed by the appellant-State, which is dismissed accordingly. The bail bonds furnished by the respondent shall stand discharged.