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**(2004) 06 SHI CK 0018**  
**In the High Court Of Himachal Pradesh**  
**Case No : Criminal Appeal No. 579 of 2003**

State of H.P.

APPELLANT

Vs

Hanacho Alias Stewart

RESPONDENT

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**Date of Decision :** 11-06-2004

**Acts Referred:**

Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 13, 20

**Citation :** (2004) 2 ShimLC 200

**Hon'ble Judges :** V.K. Gupta, C.J;M.R. Verma, J

**Bench :** Division Bench

**Advocate :** C.B. Singh, Dy. A.G., for the Appellant; Sanjay Karol and Rakesh Jaiswal, for the Respondent

**Final Decision :** Dismissed

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## Judgement

M.R. Verma, J.—This appeal has been preferred by the Appellant-State (hereafter referred to as the State) against the judgment dated 14.2.2003 passed by the learned Sessions Judge, Kullu, whereby the Respondent/accused (hereafter referred to as the accused) has been acquitted of the head of charge u/s 20 of the Narcotic Drugs and Psychotropic Substances Act (hereafter referred to as the NDPS Act).

2. Case of the prosecution in brief is that on 20.4.2002, SI Vikas (PW-11) alongwith HC Naresh Chand (PW-8), HC Pritam Chand, HHC Narpat and constable Gurdial Singh (PW-9) was present near Shivalik Hotel at Manikaran on routine patrolling. At about 4 p.m. the accused was noticed near Shivalik Hotel coming from Barshani side carrying a Pitthu (bag) and a pillow. Since the accused was a foreigner, therefore, the police officials thought it essential to take her search. Narinder (PW-6) and Sher Singh (PW-7) were joined to witness the proposed search. The accused was given the option of being searched before a Gazetted Officer or a Magistrate vide Memo. Ext. PW 6/A and she consented to be searched by the Police present on the spot. Thereafter, SI Vikas (PW-11), the Investigating Officer in the case, gave personal search vide Memo. Ext. PW 6/B

and then conducted the search of the bag and the pillow carried by the accused. On such search, Charas was found concealed in the cotton of the pillow. The recovered Charas weighed 5.5 kgms. Out of the recovered Charas two samples of 25 grams each were separated. The bulk Charas and the samples were made into separate parcels and were sealed with seal impression "A" NCB forms were filled in triplicate by the Investigating Officer and seal impression Ext. PW 6/C was separately retained. Panchnama Ext. PW-6/D about the search and seizure was prepared and a copy thereof furnished to the accused. The accused was apprised of the offence committed by her and the punishment provided therefor vide Memo. Ext. PW 6/E. It was also found that the passport of the accused had expired on 14.4.2002 which was taken in possession vide Memo. Ext. PW 11/A and the accused was thus found over staying in India without a passport (Visa?). PW-11 prepared the Ruka Ext. PW 11/B and sent it for registration of a case and as a consequence formal FIR Ext. PW 10/A was recorded at Police Station, Kullu, by Insp. Jindu Ram (PW-10). PW-11 produced the case property before PW-10 who resealed the same with seal "H" and deposited the same with MHC Bhagat Ram (PW-4) who after making entries Ext. PW 4/A deposited the same in the Malkhana. One of the sealed samples alongwith NCB form and other documents was handed over by PW-4 to constable Dalip Kumar (PW-2) on 21.4.2002 who handed over the sample and accompanying documents in CTL, Kandaghat on 22.4.2002. Special Report Ext. PW 1/A was prepared and handed over by PW-11 to the Deputy Superintendent of Police (Headquarters). As per the report of the Chemical Examiner, Ext. PW 10/E, the sample was found that of Charas.

3. Inspector Sanjay Kumar (PW-5) moved an application Ext. PW 5/ A annexing therewith the inventory, Ext. PW 5/B for taking sample and photographs of the Charas in the presence of the learned Chief Judicial Magistrate, Kullu, who allowed the application vide order Ext. PW 5/D and issued the certificate Ext. PW 5/C. On completion of the investigation and being satisfied of the commission of the offences by the accused a charge-sheet was submitted against the accused who came to be tried by the learned Sessions Judge, Kullu, on a charge u/s 20 of the NDPS Act and Section 14 of the Foreigners Act.

4. To prove the charge against the accused prosecution examined as many as 11 witnesses. The accused was examined u/s 313, Cr.P.C. wherein she denied the prosecution case and claimed to be innocent, however, admitted the expiry of the visa and non-extension thereof on the ground of illness.

5. On consideration of the material on record, the learned Sessions Judge convicted and sentenced the accused u/s 14 of the Foreigners Act but acquitted her of the head of charge u/s 20 of the NDPS Act. The accused did not prefer an appeal against her conviction and sentence u/s 14 of the Foreigners Act. However, the State has preferred this appeal against the said order of acquittal.

6. We have heard the learned Deputy Advocate General for the State and the learned Counsel for the accused and have also gone through the records.

7. It was contended by the learned Deputy Advocate General that despite the fact that independent witnesses have not supported the prosecution case, it is fully and firmly established in view of the statements of PW-8, PW-9 and PW-11 that the accused was in possession of 5.5 kg. of the contraband which, as per the opinion of the Chemical Examiner, was "Charas". The trial Court, therefore, erred in acquitting the accused of the head of charge u/s 20 of the NDPS Act. It was further contended that the trial Court wrongly held that mandatory provisions regarding giving of a copy of seizure memo to the accused were not complied with whereas such a copy was furnished to the accused. Moreover, it is not a mandatory requirement to furnish such a copy to the accused which if not complied with, will vitiate the conviction. It was also contended for the State that police officials are as competent witnesses as any other witness and their statements could not be ignored simply because they are police officials. Therefore, urged the learned Deputy Advocate General, the impugned order of acquittal is bad in law and liable to be set aside and the accused is liable to be convicted and sentenced u/s 20 of the NDPS Act.

8. On the other hand, the learned Counsel for the accused, while supporting the reasoning and conclusions of the trial Court for the impugned acquittal, contended that apart from the reasons for acquittal of the accused, recorded by the trial Court, the acquittal order is supportable by additional reason of absence of reliable link evidence. It was further contended that even if it is held that copy of seizure memo was given to the accused that would not have the effect of reversal of the impugned order of acquittal.

9. The fate of this case hinges on the answers to the following questions:?

(i) Whether the statements of the official witnesses regarding search and seizure are reliable and confidence inspiring; and

(ii) Whether the link evidence in the case is complete and trustworthy?

Question No. (i)

10. It is well settled that conviction can be based on the evidence of police officials provided that such evidence is trustworthy and confidence inspiring. The police officials undoubtedly are competent witnesses but the Court has to be cautious and careful while scrutinizing their statements.

11. In the case in hand, the prosecution version from its very inception starts in suspicious circumstances. PW-11, the Investigating Officer in the case has stated that since the accused is a foreigner, therefore, he thought it appropriate to take her search. Evidently, when the search is to be taken in the given circumstance, it would be u/s 102 of the Code of Criminal Procedure and there was no necessity to take recourse to the provisions of Section 50 of the NDPS Act which, admittedly was taken to conduct the search of the accused. There is no explanation what-so-ever coming forth as to what led the Investigating Officer to take recourse to the provisions of Section 50 of the NDPS Act whereas the only

cause for him to take search of the accused as per his own evidence was that she is a foreigner.

12. It is admitted case of the prosecution that two independent witnesses, i.e. PW-6 and PW-7, were joined by the Investigating Officer to be present at the time of the search and allegedly the search and seizure vide memo. Ext. PW-6/A were made in their presence. The independent witnesses have not supported the search, recovery and the seizure. It may be pointed out here that joining of independent witnesses to be present at the search by a police official is not an empty formality but is intended to ensure the fairness in conducting the search and finally, if need be, to corroborate the version of the searching officer about the search and seizure. It is also indisputable that the persons who had been joined to witness the search in exercise of his discretion to choose such persons by the Investigating Officer, cannot basically be unreliable persons and at the time of their joining in the search, the Investigating Officer himself had the belief that they would state the truth as and when required to so state. PW-6 and PW-7 who were required to be present at the time of search, have not supported the case of the prosecution regarding search and seizure and have unambiguously and specifically denied the search and seizure vide memo. Ext. PW-6/D in their presence. It is not the case of the prosecution that PW-6 and PW-7 are persons of tainted character and basically unreliable persons. It has not been suggested to them in their cross-examination by the prosecution that for certain extraneous considerations they have not spoken the truth. The accused is a foreigner and PW-6 and PW-7 are local persons, therefore, cannot be said to be interested in unduly helping the accused. The accused right from the time of search and seizure remained in custody and, thus, had no occasion to meet these witnesses so that she could win them over. It is also not suggested to the witnesses that some other person interested in the accused, might have contacted them and persuaded them to deny the search and seizure in their presence with a view to help the accused. There is no explanation, what-so-ever, to suggest that these independent witnesses have made false statements with a view to support/help the accused. Thus, the independent witnesses having not supported the prosecution case without any probable reason, cast doubt about the veracity of the police officials and the version of the prosecution.

13. PW-8 and PW-11 have by and large supported the prosecution version about the search and seizure vide memo. Ext. PW-6/D. It is, however, case of the prosecution itself that Constable Gurdial Singh (PW-9) was also a member of the police party which apprehended the accused and was admittedly present on the spot at the time of the search and seizure. He has made a cryptic statement about the arrival of the accused on the spot and the search and seizure. What he has stated is that at about 4.00 p.m. one lady foreigner was spotted and on checking, the Charas was recovered from her. This is all this witness has stated about the apprehension of the accused, her search and seizure of the contraband. There is no explanation forthcoming as to why this witness could not state about the search and seizure in detail as stated by PW-8 and PW-11. In his

cross- examination PW-9 has clearly and unambiguously admitted that the proceedings on the spot were carried out in his presence, however, he is not in a position to state as to which document was prepared first or whether the search of the accused was taken first and the documents prepared thereafter and also could not state about the seal used for sealing the case property. The inability of this witness to state about such facts raises doubts about the search and seizure having been made as stated by PW-

14. There is contradiction in the statements of PW-8 and PW-11 about the preparation of the site plan and marginal notes therein. According to PW-8, the site plan was prepared by him and the marginal notes therein are in his handwriting, whereas according to PW-11, the site plan Ext. PW- 11/C was prepared by him. It is evident from this contradiction that

15. PW-9 and PW-11 have not spoken the whole truth. It is case of the prosecution itself that after the search and seizure, Ruka Ext. PW-6/A was prepared by PW-11 and sent to the Police Station through PW-9 who has specifically stated that he proceeded to Kullu by taking lift in a private vehicle and reached Kullu at about 8.30 or 8.45 p.m. About this statement, the prosecution has not re-examined/cross-examined the witness. On the contrary, PW-4 has also stated at one stage that the Ruka was received by him at 8.30 p.m. which lends corroboration to the statement of PW-9. The admitted distance between the spot and the Police Station is 45 kms., the road, admittedly leading through the hilly terrain, therefore, it is not improbable that PW-9 must have reached Kullu around 8.30 or 8.45 p.m. as he admittedly started from the place of occurrence at 7.00 p.m. and must have taken the intervening time to reach Kullu. A perusal of the formal FIR, recorded on the basis of Ruka Ext. PW-6/A, shows that it was recorded at the police station at 8.00 p.m. The FIR shown as having been recorded at 8.00 p.m. is thus ante-timed which also cast doubt about the fairness in conducting the investigation of the case and on the veracity of PW-8 and PW-11.

16. PW-11 has specifically and unambiguously stated that he had filled in all the columns of NCB form Ext. PW-10/C except column No. 7(a) on the spot. He had admittedly reached at Kullu from the spot at about 9.00 p.m., meaning thereby he had not received the FIR on the spot. A perusal of NCB form Ext. PW-10/C reveals that column No. 1 which according to PW-11 was filled in on the spot, contains the FIR number which, as stated here-in-above, had not even come into being before he left the spot. Similarly, entry against column Nos. 5 and 6 could not be made on the spot because they reflect the events which occurred subsequent to his having reached at the police station and one of them on the next day of the alleged seizure. This is yet another circumstance suggestive of the fact that the investigation in the case has not been fair in so far as the preparation of the material documents is concerned.

17. In view of the above discussion, the statements of official witnesses, cannot be said to be untainted, reliable and confidence inspiring. We answer the

question accordingly.

Question (ii)

18. The link evidence in this case is of highly doubtful nature. As per the seizure memo. Ext. PW-6/D, the parcels of two samples of 25 gms. each and the remaining bulk Charas were sealed with three seal impressions of seal "A" and it is so stated by the Investigating Officer (PW-11). In the NCB form Ext. PW-10/C the description of the drug (Charas) has been given as "Charas 25 gms." and weight of the samples has also been given as "25 gms.", none of which is in conformity with the version of the prosecution that the recovered Charas was 5.5 kgs. and the net weight of the samples drawn was 50 gms. Moreover, as already stated hereinabove, the statement of PW-11 regarding having filled in all the columns of the NCB form except column No. 7(a) on the spot, has already been found to be improbable. PW-10, before whom the case property was produced by PW-11, has stated that he did not fill in anything in the NCB form Ext. PW-10/C except putting his signatures and the seal impression of the seal used by him for re-sealing the samples and the bulk Charas. If so, there is no explanation as to how the entries against column Nos. 1, 5, 6 and 7(a) of Ext. PW-10/C came into being. In the absence of explanation, the only conclusion which can be arrived at is that the NCB form, a very important and vital piece of evidence, had been tempered with which not only destroys the value of Ext. PW-10/C as a piece of evidence but also shows gross unfairness in conducting the investigation.

19. It is admitted case of the prosecution that application dated 26.4.2002 was moved by the Station House Officer, Police Station, Kullu in the Court of the learned Chief Judicial Magistrate Kullu u/s 52A(2) of the NDPS Act "for the disposal of seized Narcotics Drug". It is averred in the application that due to the constraints of proper storage space, risk of substitution and high potential and vulnerability of abuse disposal of seized drug is urgently required. Therefore, a prayer was made that photographs of the seized Charas be permitted to be taken in the presence of the said Magistrate and certificate of correctness about the prepared inventory submitted with the application and photographs be issued and sample of the seized Charas be drawn as per the requirements of Section 52A(2) of the NDPS Act so that the case property could be disposed of as per law and procedure.

20. The inventory enclosed with the application is Ext. PW-5/B. In this inventory the description of the seal impressions and number thereof on each of the parcels produced, has not been mentioned so as to correlate the case property described in the inventory with the Charas seized on the spot. It does not even mention about the second sample of the Charas retained at the Police Station Malkhana. Even the certificate issued by the learned Chief Judicial Magistrate Ext. PW-5/C and the order Ext. PW-5/ D passed by him on the application do not mention as to which seal impression the parcels produced before him contained.

21. What add to the injury is that as per the certificate Ext. PW-5/ C, the two

white cloth parcels produced before the learned Chief Judicial Magistrate were found sealed with eight seals. It is not clarified in the certificate whether each of the parcel had eight seal impressions or they collectively had eight seal impressions. In either case, the parcels so produced are not proved to be the parcels of the bulk case property and the sample thereof which were seized vide memo. Ext. PW-6/D. It is case of the prosecution itself and is otherwise in the evidence of PW-10 and PW-11 read with seizure memo. Ext. PW-6/D that the bulk Charas and the samples were sealed with three seal impressions each of seal "A" by PW-11 and on production before PW-10, he re-sealed each of the parcels with three seal impressions of seal "H". Thus, each of the parcels of the case property would have six seal impressions and both parcels would have 12 seals impressions. Since the two parcels produced before the learned trial Magistrate had eight seal impressions, whether separately or collectively, these cannot be said to be the parcels of the case property which according to the prosecution, was seized on the spot and re-sealed by PW-10 at the time of its production before him. It is, thus, not established that the parcels which were produced before the learned Chief Judicial Magistrate were the parcels of the bulk Charas and one of the samples of the case property in this case.

22. It may be pointed out that the bulk case property and one of the samples retained by the police for production in the Court or the samples drawn in the presence of the learned Chief Judicial Magistrate vide certificate Ext. PW-5/C had not been produced in the Court. Admittedly, after the proceedings of alleged taking of samples in the presence of the learned Chief Judicial Magistrate, the case property was returned to PW-4. However, PW-4 in his statement has nowhere stated as to what happened to the case property thereafter or what happened in the presence of the learned Chief Judicial Magistrate when he produced the case property before him. He simply admits that the property was returned to him. PW-5 states about the issue of certificate by the learned Chief Judicial Magistrate and return of the case property to PW-4. He has further stated that the case property was thereafter destroyed by Drug Disposal Committee. He is not shown to be a Member of the said Committee. None has been examined from the Drug Disposal Committee nor any destruction certificate issued by the Committee has been produced to show that in fact there was same case property which was actually destroyed.

23. The matter regarding destruction of the case property also assumes importance for the reason that in the certificate Ext. PW-5/C issued by the learned Chief Judicial Magistrate, it is mentioned that after drawal of the samples and re-sealing the case property produced before him in two separate parcels with his seal "the big packets and the representative sample packed of 25 gms. to be retained as case property returned to H.C. Bhagat Ram, MHC, P.S. Kullu in the Court". It means that the parcels returned by the learned Chief Judicial Magistrate, were to be retained as the case property. Thus the said parcels have been disposed of contrary to the orders passed by the learned Chief Judicial Magistrate.

24. By virtue of the provisions of Section 52A of the NDPS Act the narcotic drug or psychotropic substance can be disposed of after its seizure. The section provides that the officer receiving the case property shall prepare an inventory thereof containing the details relating to its description, quantity, mode of packing, marks, numbers and other identifying particulars and make an application to any Magistrate for the purpose of certifying the correctness of the inventory so prepared or taking the photographs of such drug or substance in the presence of the Magistrate and certifying such photographs as true or allowing to draw representative sample of such drug or substance in the presence of the Magistrate who will certify the correctness of the list of samples so drawn. If it is so done, the trial Court shall treat the inventory, photographs of the narcotic drug or psychotropic substance and any list of samples drawn and certified by the Magistrate as primary evidence in respect of such offence. However, to attract the provisions of the aforesaid Section, prosecution has to show that the case property was correctly described in the inventory so as to connect it with the case property seized, the certificate issued by the Magistrate must also show that the property produced before him, in fact, was the seized case property and there must be a list describing the samples which might have been drawn in his presence. These requirements are not complied with in this case and, as already stated hereinabove, the description of the case property having the distinguishing marks/seal impressions has not been described in the inventory or in the certificate issued by the Magistrate and there is difference in the number of seal impressions which were affixed on the property seized in the case and those found on the property produced before the Magistrate and, thus, there is no evidence that whatever was produced before the Magistrate, was the case property which was seized vide Ext. PW-6/D.

25. The manner used for drawing the sample of the case property produced before the Magistrate was also not in conformity with the law. The retained sample of the case property could not be and should not have been tampered with but the samples ought to have been drawn from the bulk case property and the samples so drawn and one of the samples retained out of the earlier samples ought to have been retained and ultimately produced at the trial to enable the court to appreciate whether the sample retained out of the samples taken at the time of the seizure satisfied the description as was given in the seizure memo and as it would have been by virtue of the re-sealing done by PW-10. The prosecution has no explanation to offer to reconcile in any manner the lack of description of the case property in the inventory, the difference in the number of seal impressions as would have been in the seized case property and the parcels which were produced before the learned Chief Judicial Magistrate for withdrawal of samples etc. Once the learned Magistrate had directed retaining of the packets returned to PW-4 as case property, evidently it should not have been disposed of before it was produced and exhibited in the trial Court and ought to have been dealt with in accordance with the orders of the trial Court. Thus, the very material evidence stood destroyed if at all destroyed contrary to the orders of the



learned Chief Judicial Magistrate and an adverse inference against the prosecution can legitimately be drawn.

26. Some of the flaws in maintaining the NCB form Ext. PW-10/ C have already been pointed out hereinabove. It may be added here that PW-10 has specifically stated that except signing and affixing impression of the seal used by him for re-sealing the case property, he did not fill in anything in the NCB form. This form Ext. PW-10/C was admittedly handled by PW-10 and PW-11 and remained in possession of PW-4 and was taken to the CTL Kandaghat by Dalip Kumar (PW-2). Out of these witnesses, as already stated hereinabove, PW-8 could not have made the entries as they appear against column Nos. 1, 5 and 6 of Ext. PW-10/ C. None of the remaining aforesaid witnesses in whose possession this form remained, has stated that they made the entries against the aforesaid columns and column No. 7(a) of the NCB form. The learned Deputy Advocate General has no explanation to offer as to how, when and by whom these entries were made in Ext. PW-10/C. The NCB form Ext. PW-10/C is a very vital piece of evidence to connect the recovered Charas with the sample which was analysed by the Chemical Examiner. However, the unexplained entries made in Ext. PW-10/C raises grave doubts about its genuineness and this document appears to have been tampered with and it has been concealed as to who tampered with this document. Therefore, Ext. PW-10/ C is incapable of connecting the case property with the sample analysed. It is more so when the NCB form gives the description of the case property only as 25 gms. of Charas and the net weight of the sample drawn on the spot as 25 gms. only instead of 50 gms. as is the case of the prosecution and does not contain anything to suggest that two samples of Charas were drawn at the time of the seizure.

27. In view of the above discussion, it is evident that there is no reliable and confidence inspiring link evidence to connect the analysed sample with the bulk case property. This question is also, therefore, answered in the negative.

28. One of the conclusions drawn by the trial Court, which weighed in favour of the acquittal, is that copy of the seizure memo, was not furnished to the accused. This conclusion of the trial Court is not supportable on the basis of the material on record. Moreover, requirement of giving a copy of the search/seizure memo, to the person searched is not a mandatory requirement of law. Therefore, giving or not giving such copy to the person searched, is inconsequential in so far as the fate of the case on merits is concerned. The deciding factor, however, will be the nature of the evidence and compliance of the mandatory procedural laws.

29. In view of our answers to questions (i) and (ii) supra, the trial Court has rightly concluded that the evidence of the police officials could not be relied upon being not trustworthy and confidence inspiring, there was variation of time qua recording of the FIR and the NCB form Ext. PW-10/C was not a reliable piece of evidence. Therefore, the consequential order acquitting the accused is based on proper appreciation of the material on record and does not call for any interference by this Court.

30. As a result, this appeal merits dismissal and is accordingly dismissed.

31. This Court vide its order dated 20.4.2004 directed that the Passport of the accused which was lying in the Security Office of the Superintendent of Police, Kullu, be deposited in the Court of the learned Sessions Judge, Kullu who would keep the same in safe custody and would not release the same to the accused or any other person, save the except, as ordered by this Court. This order is stated to have been complied with. In view of the dismissal of the appeal, the Passport of the accused, as prayed for, is ordered to be returned to the accused through Mr. Martin Fitzpatrick, Counsellor (Administration) and Council-General, Australian High Commission, Australian Compound, No. 1 /50 G Shantipath, Chanakyapuri, New Delhi.