
(1994) 07 SHI CK 0017
In the High Court Of Himachal Pradesh
Case No : Criminal Appeal No. 126 of 1993

Tawarsu alias Kancho Baba	Vs	APPELLANT
State of Himachal Pradesh		RESPONDENT

Date of Decision : 05-07-1994

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 20, 41(2),
42(2), 50(1), 52(1)

Citation : (1996) CriLJ 1543 : (1994) 2 ShimLC 451

Hon'ble Judges : L.S. Panta, J; Bhawani Singh, J

Bench : Division Bench

Advocate : Chhabil Dass and Anand Sharma, for the Appellant; Shayma Dogra, D.A.G., for the Respondent

Final Decision : Allowed

Judgement

Bhawani Singh, J.—Accused Tawarsu alias Kancho Baba has challenged the judgment of Additional Sessions Judge, Kullu, in Sessions trial No. 8 of 1993, dated 22-7-1993, convicting him u/s 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as "the Act") and sentencing him to undergo rigorous imprisonment for 10 years and to pay a fine of rupees one lakh. In default of payment of fine, the accused has been ordered to undergo further simple imprisonment for a period of 3 years. The prosecution case, briefly, is as under:

2. On 10-12-1992 at about 4.30 p.m., Inspector Saju Ram Rana (P. W. 6) of Police Station, Manali, was on routine patrol duty at Manalsu bridge, Manali, along with S. I. Prem Singh and Constables Shashi Kapoor and Mast Ram (P. W. 3). Secret information that the accsued was busy in making the rolls of charas in his Khokha and could be caught redhanded was received. This information was sent through Constable Mast Ram (P. W. 3) to the police station for registration of a case (Ex. PE). Since warrants could not be obtained as the Court was located at

Kullu, far away from this place, and the apprehension being that the accused might dispose of the charas in the meantime, Inspector Saju Ram Rana joined Pradhan Jindu Ram and retired S. D. M. Sbri Chaman Lal (P. W. 1) in the raiding party near Club-house, Manali, and proceeded to the Khokha of the accused.

3. The accused was apprised of the purpose of the visit. He consented for the search. The raiding party subjected themselves to be searched by the accused. Thereafter Inspector Saju Ram Rana conducted the search of the Khokha of the accused and recovered 4 kgs. and 400 grams of Charas from the earthen pot (Ex. P. 1). Out of it, sample of 23 grams was separated. The remaining charas was sealed in the same pitcher. The sample was sealed with seal impression "R" and after taking over the sample seal on the piece of cloth, it was handed over to one of the witnesses. The case property was taken into possession in the presence of independent witnesses through recovery memo. Ex. PC.

4. The accused was arrested and was apprised of the grounds of arrest orally as well as in writing. The special report of arrest and seizure (mark-PG) was sent to the immediate superior officer within 48 hours. The sample was sent for chemical analysis. Report (Ex. PK) revealed that the sample was of charas. Ultimately, on completion of investigation, the matter came before the Court for the trial of the accused. The charge was read over and explained to the accused in vernacular. He pleaded not guilty and claimed trial. In his examination u/s 313 of the Code of Criminal Procedure, the accused denied the circumstances appearing against him. He also denied the ownership and possession of the khokha. During the trial, the prosecution examined Chaman Lal (P.W. 1), M. H. C. Mangat Ram (P. W. 2), Constable Mast Ram (P. W. 3), L. H. C. Nup Ram (P. W. 4), L. H. C. Rattan Chand (P. W. 5) and Inspector Shri Saju Ram Rana (P. W. 6). The accused examined Kishan Chand (D. W. 1) and Budh kam (D. W. 2) in support of his case in addition to M H. C. Sunder Singh (D. W. 3). The trial concluded in the conviction and sentence of the accused, as already slated in the preceding part of this judgment. The trial Court found that the investigating agency had complied with the mandatory provisions of the Act and the offence had been proved against the accused beyond all reasonable doubts. These findings of the trial Court are under challenge before us in this appeal.

5. Shri Chhabil Dass, learned counsel for the accused, contended that the mandatory provisions of Section 42(2) of the Act have not been complied with, therefore, the judgment is liable to be set aside. It was also contended that the accused has been involved in this case falsely. The accused has renounced the world and could not be expected to be in possession of this extent of charas in a dilapidated left-out khokha neither owned nor possessed by him. The charas may have been kept by someone else and the police has involved the accused in this case without any justification. These submissions have been opposed by Ms. Shyama Dogra, learned Deputy Advocate General, appearing for the State. According to her, the prosecution has complied with all the mandatory requirements of the Act and the case has been proved against the accused

beyond all reasonable doubts.

6. Various provisions of the Act have been discussed by this Court and other High Courts in India from time to time. It is not necessary to deal with all of them. However, we would like to refer to the first decision of this Court reported in *State of Himachal Pradesh Vs. Sudarshan Kumar and etc.*, Sections 41(2), 42(2), 50(1) 52(1) and 57 have been held mandatory while Sections 52(2), 52(3) and 55 have been held directory unless failure of justice has to be proved by the accused. It has been held that in case the mandatory provisions are not complied with, the trial stands vitiated and in the latter case, it would be vitiated only if failure of justice is proved to the satisfaction of the Court. Since learned counsel for the parties concentrated their submissions on Sub-section (2) of Section 42 of the Act, it would be relevant to quote the view of the Bench on this question (Para 10, item (g), p. 1419):

"(g) Where advance information is available, it must be passed on to the designated officer who has to reduce to writing the said information. (See Sub-section (2) of Section 41 and Section 42). It has also been enjoined upon him to send forthwith a copy of his report to his immediate superior officer, as provided u/s 42(2). These provisions are mandatory in nature inasmuch as sufficient material would become available to the accused to assist him in demolishing the prosecution case through material contradictions and infirmities. The infraction of these provisions would, therefore, per se be fatal to the prosecution."

7. Thereafter, this view was approved by the Full Bench of this Court in *State Vs. Vidya Devi and etc.*, *State v. Vidya Devi*. Finally, the question has been decided by the Apex Court in *State of Punjab Vs. Balbir Singh*, it has been held that where the empowered officer has prior information given by any person, that should necessarily be taken down in writing and a copy thereof should forthwith be sent to his immediate superior officer. Non-compliance of this provision affects the prosecution case.

8. After noticing the legal position as it stands today, we turn to examine whether there has been compliance of Section 42(2) of the Act.

9. Inspector Saju Ram (P. W. 6) has stated that on 10-12-1992, he was on patrol duty along with S. I. Prem Chand and constables. During the patrolling, they got a secret information that the accused was dealing in charas. On this, he sent a Constable to call witnesses Chaman Lal and Jindu Ram, Pradhan, Gram Panchayat, Manali, and were associated in the raiding party. On getting the secret information, ruqua (Ex. PE) was sent for the registration of a case through Constable Mast Ram. He had directed M. H. C. Mangat Ram to send the special report (Ex. PG) to Dy. S. P. Headquarters early in the morning. Since ruqua (Ex. PE) was a flying ruqua, it was sent for the registration of a case immediately and Shashi Kapoor Constable was immediately sent thereafter to associate these witnesses who were brought by him along with him. Special Report (Ex. PG) was prepared on the spot. He did not send the copy of the flying ruqua (Ex. PA) to

the superior officer, however, after the registration of the FIR, its copy is sent to the Superintendent of Police.

10. M. H. C. Mangat Ram (P. W. 2) states that on 10-12-1992 ruqua (Ex. PE) was received through Constable Mast Ram, No. 63, on the basis of which First Information Report (Ex. PF) was formally registered. The special report (Ex. PG) was sent through Constable Mast Ram, No. 63, to the Deputy Superintendent of Police, Headquarters, on 11-12- 1992 in the morning.

11. Constable Mast Ram (P. W. 3) states that on 10-12-1992 a ruqua was handed over to him by Inspector Saju Ram Rana (Ex. PE) for registration of a case which was handed over by him to M. H. C. Mangat Ram. After the registration of the case, the file of the case was handed over to him which was further handed over by him to Inspector Saju Ram Rana. The special Report (mark-PG) was handed over to him by Mangat Ram for handing over the same to Deputy Superintendent of Police, Headquarters, and it was handed over to the Reader of the Deputy Superintendent of Police on 11-12-1992. Ruqua (Ex. PE) was handed over to him by Inspeotr Saju Ram Rana in the khokha of the accused. Chaman Lal and Jindu were also there. They reached near the Khokha of the accused at 4.30 p.m.

12. Head Constable Nup Ram (P. W. 4) states that he was Reader to the Deputy Superintendent of Police, Headquarters, on the relevant day. On 11-12- 1992, special report in F. I. R. No. 189/92 was brought by constable Mast Ram, No. 63 (Ex. PG). He produced it before Deputy Superintendent of Police, Headquarters at 10 a.m. It was seen and initialled by the Deputy Superintendent of Police. The special report goes to the officer concerned. It is not received in the receipt register.

13. There is material contradiction in the statements of Inspector Saju Ram Rana (P. W. 6) and Constable Mast Ram (P. W. 3). The former has stated that the secret information was received when they were patrolling in old Manali village over a small bridge and the ruqua (Ex. PE) was written over there and sent through Constable Mast Ram (P. W. 3) for registration of a case and Constable Shashi Kapoor was sent to associate witness Chaman Lal and Jindu Ram in the case. Constable Mast Ram states that ruqua (Ex. PE) was handed over to him by Inspector Saju Ram Rana for registration of a case in the khokha of the accused where Chaman Lal and Jindu Ram were present. This means, nothing was written at old Manali bridge where the secret information was received.

14. It appears from the statements of the prosecution witnesses that ruqua (Ex. PE), wherever it may have been written, was sent to the police station for registration of the case and the case was accordingly registered. Copy of this ruqua (Ex. PE) was never sent to the superior officer. Special report (mark-PG) sent to the Deputy Superintendent of Police, Headquarters on 11-12-1992 at 10 a.m. through Constable Mast Ram is absolutely different from the copy of information taken down in writing by the officer receiving information u/s 42(2) of the Act. Special report is a detailed account of the case by any person making

any arrest or seizure under the Act containing full report of all particulars of such arrest or seizure to his immediate superior officer to be sent within 48 hours next after such arrest or seizure whereas copy of information to be sent forthwith to the immediate superior officer relates to the information taken down in writing by the officer receiving prior information about the contraband. Section 42(2) of the Act has been held mandatory, non-compliance of which vitiates the trial. Inspector Saju Ram has admitted that he did not send the copy of the flying ruqua to the immediate superior officer. He only sent copy of the FIR after registration of the case to the Superintendent of Police. Non-compliance of Section 42(2) is, therefore, established. The trial Court has not kept in mind this distinction between the two provisions when it found the sending of First Information Report to the superior officer the same thing as is envisaged u/s 42(2) thereby committing gross error in the trial of this case.

15. In view of the aforesaid conclusion, we did not examine other questions raised and involved in this case. The result, therefore, is that the trial stands vitiated for the non-compliance of Section 42(2) of the Act and the accused is entitled to acquittal. Accordingly, the appeal is allowed. The accused is acquitted of the charge. He is on bail pursuant to our order dated 20-9-1993 passed in Cr. M. P. (M) No. 809/93. His bail bond and surety bond are hereby cancelled.