

(2015) 04 SHI CK 0043

In the High Court Of Himachal Pradesh

Case No : Criminal Appeal Nos. 141, 219 and 221 of 2012

Vikas Sharma and Others

APPELLANT

Vs

State of Himachal Pradesh

RESPONDENT

Date of Decision : 18-04-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313

Motor Vehicles Act, 1988 — Section 181, 196

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

Citation : (2015) 04 SHI CK 0043

Hon'ble Judges : Rajiv Sharma, J; Sureshwar Thakur, J

Bench : Division Bench

Advocate : R.K. Gautam, Senior Advocate, Gaurav Gautam, Ajay Kochhar, Rajiv Jiwan and Varun Chandel, for the Appellant; P.M. Negi, Dy. Advocate General, Advocates for the Respondent

Final Decision : Allowed

Judgement

Rajiv Sharma, J.

1. Since common questions of law and facts are involved in these appeals, all these appeals were taken up together for hearing.

2. These appeals are directed against the common judgment dated 30.3.2012, rendered by the learned Special Judge (II), Kinnaur at Rampur, H.P, in RBT No. 64-AR-3 of 2011, whereby the appellants-accused (hereinafter referred to as the "accused", namely, Bhupender Singh, Gaurav Singh, Vikas Sharma), who were charged with and tried for offences punishable under Section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the N.D. and P.S. Act) and under Sections 181 and 196 of the Motor Vehicles Act, 1988, have been convicted and sentenced to undergo rigorous imprisonment for a period of 10 years each and to pay fine of Rs. 1,00,000/- each and in default of payment of fine, they were further ordered to undergo simple imprisonment for one year each under Section 20(ii)(C) of the N.D. and P.S. Act. Convict

Bhupender was further sentenced to pay fine of Rs. 500/- and in default to undergo S.I. for one month under Section 181 of the MV Act, 1988. He was further sentenced to pay fine of Rs. 1000/- and in default to undergo S.I. for one month under Section 196 of the M.V. Act, 1988. Accused Bahadur Singh was acquitted by the learned trial Court.

3. The case of the prosecution, in a nut shell, is that on 2.2.2011, the police party headed by SI Gurbachan Singh PW-9, HHC Kashmi Ram PW-3, HHC Roshan Lal PW-4, HC Chaman Lal and Const. Jaswant Gupta was present at place called Baliowl in connection with routine patrol duty. At about 5:45 AM, one Alto car bearing regn. No. HP-69-1295 came from Gugra side which was being driven by accused Bhupender Singh. The car was stopped by the police for checking. Accused Bhupender Singh could not produce the documents of the vehicle and his driving licence. On checking, it was found that accused Vikas Sharma and Gaurav Singh were sitting on the rear seat of the car. The place where the vehicle was stopped was an isolated and secluded place. There was no habitation nearby. SI Gurbachan Singh, PW-9 sent HHC Kashmi Ram PW-3 and HHC Roshan Lal PW-4 in search of independent witnesses but they came back after 10 minutes and told him that they could not find any independent witnesses. SI Gurbachan Singh, PW-9 joined PW-3 and PW-4 as witnesses and thereafter, he informed the accused persons that the police intended to conduct their personal search along with the car. The accused persons opted to be searched by the police vide consent memo Ext. PW-3/A on the spot. The accused were searched. During search one bag was recovered from the back seat of the car which was lying in between accused Gaurav and Vikas Sharma. On opening the bag, charas in the shape of small balls was found lying in the bag. It was weighed. It weighed 4 kg 500 gms. The charas was put back into the same bag which was put in parcel and sealed with seal bearing impression "C". NCB form Ext. PW-9/A was updated in triplicate and after drawing sample of seal Ext. PW-3/D, the seal was handed over to HHC Roshan Lal PW-4. The case property was taken into possession vide memo Ext. PW-3/E. The rukka was prepared. It was sent to the Police Station Ani. SI Gurbachan Singh, PW-9 deposited the case property with HC Amar Singh PW-5 in the malkhana of PS Ani. On 3.2.2011, PW-5 HC Amar Singh sent the case property to FSL, Junga through Const. Chet Ram PW-6 vide RC No. 12/2011 Ext. PW-5/B on the same day. The report of the chemical examiner is Ext. PW-9/L. The investigation was completed and the challan was put up after completing all the codal formalities.

4. The prosecution, in order to prove its case, has examined as many as 9 witnesses. The accused were also examined under Section 313 Cr.P.C. They have denied the prosecution case. According to them, they were falsely implicated. The learned trial Court convicted accused Bhupender Singh, Gaurav Singh and Vikas Sharma, as noticed hereinabove. Accused Bhadur Singh was acquitted. Hence, these appeals on behalf of the accused.

5. M/s. R.K. Gautam, Sr. Advocate with Mr. Gaurav Gautam, Ajay Kochhar, Rajiv

Jiwan and Varun Chandel, Advocates, appearing on behalf of the respective accused, have vehemently argued that the prosecution has failed to prove its case against the accused. On the other hand, Mr. P.M. Negi, Dy. AG, for the State has supported the judgment of the learned trial Court dated 30.3.2012.

6. We have heard learned counsel for both the sides and gone through the records of the case carefully.

7. HC Harbans Lal, PW-1 deposed that he was working as reader to Addl. S.P. Kullu, since April, 2010 to August, 2011. On 3.2.2011, special report of this case was sent by SHO Gurbachan Singh. It was sent in the office at 6:00 PM. The report was perused by Addl. S.P. Sh. Sandip Dhawan. The copy of the special report is Ext. PW-1/A.

8. HHC Kashmi Ram, PW-3 deposed that on 2.2.2011, he alongwith SI Gurbachan Singh, HC Chaman Lal, HHC Roshan Lal, Const. Jaswant Gupta left PS Ani in official vehicle towards Gogra side in connection with routine patrolling and nakabandi. At about 5:45 AM when they were present at Baliowl, one car came from Gogra side towards Shamshar which was stopped by them for checking. Accused Bhupender Singh was the driver of the car. They suspected that the accused persons were possessing contraband of narcotic substance. SI Gurbachan Singh sent him and HHC Roshan Lal in search of independent witnesses as the place where accused were intercepted was isolated and secluded place. There was no habitation nearby. He alongwith HHC Roshan Lal made search for the independent witnesses but could not find any witness and came back and apprised SI Gurbachan Singh about the same. Thereafter, SI Gurbachan Singh joined them as witnesses. The car was searched. One packet was recovered from the back side of the car. On opening the bag, charas in the shape of small balls was found therein. It weighed 4 kg. 500 gms. NCB form in triplicate was updated and sample of seal Ext. PW-3/D was drawn. Rukka Ext. PW-3/F was also prepared. It was delivered to MHC Amar Singh in the P.S. Ani, on the basis of which, FIR Ext. PW-3/G was registered. The case property was produced at the time of examination of HC Kashmi Ram PW-3. Three seals of FSL and "C" were found intact. However, the remaining seals were damaged. In his cross-examination, he deposed that first of all, they went to Ani side and thereafter they went towards Gogra side. They went up to a distance of 100 meters on both sides. He was aware about the topography of the area. There is temple at Shamshar.

9. HHC Roshan Lal, PW-4 deposed the manner in which the accused were apprehended, recovery was made and the codal formalities were completed on the spot. In his cross-examination, he deposed that he alongwith HHC Kashmi Ram went in search of the witnesses for a distance of 400 meters, first towards Ani side and thereafter towards Gogra side.

10. HC Amar Singh, PW-5 deposed that on 2.2.2011, at about 8:10 AM, HHC Kashmi Ram delivered rukka Ext. P W-3/F, on the basis of which FIR Ext. PW-3/G

was registered. SI Gurbachan Singh deposited the case property comprising one parcel sealed with seal bearing impression seal "C" alongwith samples of seal and NCB form in the malkhana of the Police Station. He incorporated the entries at Sr. No. 233. He sent the case property to FSL, Junga through Const. Chet Ram. In his cross-examination, he admitted that as per the entry contained in the malkhana register, when the case property was brought back from FSL, Junga, at that time 6 seals were broken.

11. Const. Chet Ram, PW-6 deposed that on 3.2.2011, MHC Amar Singh handed over the case property comprising of one sealed parcel sealed with seal bearing impression "C" alongwith sample seal and NCB form in triplicate and a docket vide RC No. 12/2011, dated 3.2.2011 which he delivered at FSL, Junga and handed over the receipt to the MHC.

12. Sh. Madan Lal, PW-7 was declared hostile.

13. Sh. Rajesh Kumar, PW-8 deposed that he was called by the police to Police Station to sign the documents. He signed only one document. Accused persons were present in the Police Station, Ani. Besides signing the document he did not do anything. The accused persons did not make any statement in his presence. He was also declared hostile.

14. SI Gurbachan Singh, PW-9 is the I.O. He also narrated the manner in which the accused were apprehended, contraband was recovered and seized. He prepared the rukka and sent the same to the Police Station. He deposited the case property with MHC Amar Singh in the malkhana of the Police Station. He also prepared the special report on 3.2.2011. In his cross-examination, he deposed that at the place where the accused were apprehended, there was no habitation nearby.

15. We have gone through Ext. PW-5/A. There is no entry of deposit of NCB form in the malkhana at Sr. No. 233. The case property was handed over by PW-5 Amar Singh to Const. Chet Ram, PW-6. According to him, he has taken the case property to FSL, Junga vide RC No. 12/2011 dated 3.2.2011. According to Ext. PW-9/L, FSL report, after examination of the exhibit, the original cloth parcel containing remnants of the exhibit has been sealed with the seal of FSL-II and returned. The parcel was received in the malkhana through HHC Gulab Singh No. 202 with six seals of FSL Junga and nine seals of "C" in which six seals were broken and three seals were legible. The prosecution has not examined HHC Gulab Singh, who has brought the parcel from FSL Junga to be deposited in the malkhana. The prosecution has not explained how six seals out of the nine were broken. The police has not made any daily diary report about the six seals being found broken as per Ext. PW-5/A.

16. According to Amar Singh, PW-5, SI Gurbachan Singh PW-9 has deposited the case property alongwith NCB forms. SI Gurbachan Singh, PW-9 also deposed that he has deposited the case property with MHC Amar Singh in the malkhana after coming to the Police Station, Ani. He did not depose that he has deposited

the NCB forms alongwith the case property. There is no entry of NCB forms deposited in the malkhana alongwith the contraband at Sr. No. 233, though in RC there is mention of NCB forms in triplicate. If, no form was deposited at Police Station, how the same could be sent to FSL, Junga. Who has tampered with six seals during the transit of the parcel from FSL Junga to malkhana, has not been explained by the prosecution. Though the case property was also sealed with seals of FSL but the possibility of the case property being tampered with cannot be ruled out entirely. We could ignore if only two or three seals were broken. But, in the instant case, six seals were found broken immediately after the receipt of the case property from FSL, Junga. The seals are put to ensure the safety of the case property. In case the seals are broken, the possibility of the case property being tampered with cannot be ruled out. There is also no corresponding entry when the case property was taken out from the malkhana to be produced before the Court. The procedure required is that entry is made when the case property is taken out from the malkhana and daily diary report is also prepared. The case property is handed over to the Naib Court to be produced in the Court and thereafter the same is returned and required to be re-deposited in the malkhana. At that time too, entry is required to be made and daily diary report is also prepared. There is no daily diary report, as noticed above, when the case property was taken out and produced before the Court and received back in the malkhana.

17. We have also noticed that when the case property was produced in the Court, it was ordered to be resealed with the seal of Tehsildar Rampur Mahasu. It was handed over to Ganga Ram Naib Court, as per the order of the learned trial Court dated 21.10.2011. Naib Court Ganga Ram was also required to keep the case property in safe custody. There is no evidence on record as to where Ganga Ram has kept the case property since there is no entry in the malkhana register when it was again taken out and produced in the Court at the time of recording of the statement of SI Gurbachan Singh, PW-9.

18. The accused Bhupinder Singh has also been convicted under Section 181 and 196 of the M.V. Act, 1988 by the learned trial Court. Though, HHC Kashmi Ram PW-3, HHC Roshan Lal, PW-4 and Const. Chet Ram PW-6 have deposed that Bhupinder Singh could not produce the documents. However, HHC Kashmi Ram, PW-3 in his cross-examination has stated that the accused was not even separately challaned under the provisions of M.V. Act. Thus, it casts doubt whether the police party has asked the accused to produce the documents of the vehicle bearing registration No. HP-69-1295. The learned trial Court has convicted the accused Bhupinder Singh under these sections by referring to the statements of HHC Kashmi Ram PW-3, HHC Roshan Lal, PW-4 and SI Gurbachan Singh PW-9 without taking into consideration the deposition of HHC Kashmi Ram, PW-3 in his cross-examination that the accused persons were not separately challaned under the provisions of M.V. Act, 1988.

19. The prosecution has failed to prove that the contraband was recovered from

the exclusive and conscious possession of the accused. Thus, the prosecution has failed to prove the case against the accused beyond reasonable doubt for the commission of offence under Section 20 of the N.D and P.S., Act. The prosecution has also failed to prove the case against accused Bhupinder Singh under Sections 181 and 196 of the M.V. Act, 1988.

20. Accordingly, in view of the analysis and discussion made hereinabove, the appeals are allowed. Judgment of conviction and sentence dated 30.3.2012, rendered by the learned Special Judge(II), Kinnaur at Rampur, H.P., in RBT No. 64-AR-3 of 2011, is set aside. Accused are acquitted of the charges framed against them by giving them benefit of doubt. Fine amount, if any, already deposited by the accused is ordered to be refunded to them. Since the accused are in jail, they be released forthwith, if not required in any other case.

21. The Registry is directed to prepare the release warrants of the accused and send the same to the Superintendent of Jail concerned, in conformity with this judgment forthwith.