

(2015) 12 SHI CK 0108
In the High Court Of Himachal Pradesh
Case No : Criminal Appeal No. 87/2015

Vinay Kumar

APPELLANT

Vs

State of Himachal Pradesh

RESPONDENT

Date of Decision : 10-12-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 18, 20, 50, 50(1)

Citation : (2015) 12 SHI CK 0108

Hon'ble Judges : Rajiv Sharma and Sureshwar Thakur, JJ.

Bench : Division Bench

Advocate : G.R. Palsra, Advocate, for the Appellant; P.M. Negi, Deputy Advocate General, for the Respondent

Judgement

Rajiv Sharma, J.—The instant appeal has been instituted against Judgment dated 28.2.2015 rendered by learned Special Judge, Mandi, District Mandi, Himachal Pradesh in Sessions trial No. 12/2011, whereby appellant-accused (hereinafter referred to as "accused" for convenience sake), who was charged with and tried for commission of offence under Sections 18 and 20 of the Narcotic Drugs & Psychotropic Substances Act, 1985 (hereinafter referred to as "Act" for convenience sake), has been convicted and sentenced to undergo rigorous imprisonment for ten years and to pay a fine of Rs. 1.00 Lakh and in default of payment of fine, to further undergo simple imprisonment for six months under Section 20 of the Act. He has also been convicted and sentenced to undergo imprisonment for five years and to pay a fine of Rs. 50,000/- in default of payment of fine, to further undergo simple imprisonment for six months, under Section 18 of the Act. Both the sentences shall run concurrently.

2. Case of the prosecution, in a nutshell, is that on 17.2.2011 at about 11.30 am, ASI Sohan Lal PW-8, Constable Tulsi Ram PW-5 and Constable Prem Singh were present at Larji for patrolling duty. Accused was spotted coming from Larji side holding a bag on his left shoulder. On seeing the police party, he turned

around and tried to escape. Accused was apprehended. Search of the bag was carried out. One cotton bag containing two packets was recovered. On opening of the packets, Charas was recovered from one packet and from another packet opium was recovered. Charas weighed 2.5 kgs and opium weighed 500 gms. Charas alongwith polythene packets, cotton bag and bag was put in a parcel which was sealed with seal impression "B". Case property was sealed and NCB form was filled in. On the basis of Rukka Ext PW-6/A, FIR Ext PW-6/B was registered. Site map was also prepared. Case property was produced before Inspector Dorje Ram. He resealed the same with 9 seals of impression "T". Case property was deposited with PW-7 HC Raj Mal MHC Police station. Necessary entries were made by him in the Malkhana register. Case property was sent to Forensic Science Laboratory through PW-3 Constable Rajneesh Kumar. Investigation was completed and Challan was put up in the Court after completing all codal formalities.

3. Prosecution has examined as many as 8 witnesses to prove its case against the accused. Accused was also examined under Section 313 Cr.P.C. He denied the case of the prosecution. Trial Court convicted and sentenced the accused as noticed herein above. Hence, this appeal.

4. Mr. G.R. Palsra, Advocate, has vehemently argued that the prosecution has failed to prove its case against the accused.

5. Mr. P.M. Negi, Deputy Advocate General, has supported the judgment of conviction dated 28.2.2015.

6. We have heard the learned counsel for the parties and also gone through the record carefully.

7. PW-3 H.C. Rajnish Kumar deposed that on 18.2.2011, he was deputed to take case property to FSL Junga. He was given one parcel sealed with 6 impressions of seal "B" and 9 impressions of seal "T" alongwith NCB form in triplicate and sample seals "B" and "T" vide RC No. 18/10-11. Copy of RC is Ext. PW-3/A. He deposited the case property at FSL Junga.

8. PW-4 HHC Hoshier Singh deposed that on 22.3.2011, He was deputed by SI/SHO Dorje Ram to bring the case property from FSL Junga. He went to FSL Junga and brought back the case property. The FSL report is Ext. PW-4/A.

9. PW-5 Constable Tulsi Ram deposed that on 17.2.2011, police party headed by ASI Sohan Lal, C. Prem Singh, driver Himmat Ram and him, proceeded from the Police Station at about 11 am in a government vehicle for setting Naka towards Larji Dam Aut. They reached at Larji Dam and set up Naka there and at about 11.30 am, a person was seen coming from Larji Dam side carrying a bag on his right shoulder. Said person became perplexed on seeing the police party and started moving back. He was apprehended by ASI Sohan Lal with the help of other police officials. His name and address were ascertained. On suspicion of having some contraband, ASI Sohan Lal gave his search to the accused vide

memo Ext. PW-5/A. Search of the bag of accused was carried out. On search of bag of accused another grey bag containing two polythene packets was recovered. In one polythene bag black substance in the shape of sticks was recovered which was found to be charas. It weighed 2.5 kg. From another polythene packet, grey coloured adhesive substance was recovered which was weighed and found to be 500 gms. It was found to be opium. Search, seizure and sealing process was completed on the spot. Since place of incident was secluded one, no independent witnesses were available. He alongwith Prem Singh were associated as witnesses. He was handed over Rukka mark A. He handed over the same at the Police Station. Case property was produced by the Public Prosecutor while examining PW-5, Constable Tulsi Ram. In his cross-examination, he has admitted that Police Station was situate at Aut Bazaar. There remained hustle and bustle in the Bazaar. There are many shops and Tehsil office is also at Aut bazaar. Spot was about 4 kms. from the Police Station Aut. He admitted that there is office of security branch. Road from Larji Dam leads towards Larji, Bali Chowki and Banjar. It is a motorable road. Vehicles pass on that road in day time. No vehicle passed at that time from the alleged spot. They have reached the spot at about 11.10 am. No vehicle was stopped by them. In his cross-examination, he has admitted that prior to personal search of the accused, 10 gave option to be searched in his presence or any Gazetted Officer or Magistrate. Accused consented to be searched by the police party present at the spot. Option memo was written by the 10 on the spot in his presence and Constable Prem Singh. Option memo witnessed by him, was not shown to him, in the Court.

10. PW-6 Inspector Dorje Ram deposed that at about 3.30 pm, IO ASI Sohan Lal produced one parcel sealed with impression "B" at six places alongwith NCB form in triplicate, sample seal and accused. He resealed the parcel with impression T" at 9 places. He also filled in column Nos. 9 to 11 of NCB form Ext. PW-6/D.

11. PW-7 HC Raj Mal deposed that SI/SHO Dorje Ram handed over to him one parcel sealed with impression "B" at six places and "T" at 9 places alongwith NCB form in triplicate. He entered the same vide entry No. 486 of Malkhana Register. He proved abstract of Malkhana register Ext. PW-7/A.

12. PW-8 ASI Sohan Lal deposed the manner in which accused was apprehended and codal formalities of seizure and sampling were completed at the spot. He, with the help of other police officials apprehended the accused. He, on suspicion that the accused might be carrying some narcotic substance, asked for his search vide memo Ext. PW-5/A. Since place of occurrence was secluded, no independent witnesses were available there. So he associated Prem Singh and Tulsi Ram as witnesses. Search of the bag was carried out in their presence. In his cross-examination, he has admitted that in between 11.15-11.30 am, he has checked 12-15 vehicles at the spot. After 11.30 am, vehicles continuously plied from that place. He had not stopped any vehicle for associating the occupants of the vehicles in the investigation. He had sent Constable Prem Singh to arrange for

local witnesses from nearby place but he could not arrange for the same. He has asked the accused to be searched vide memo Ext. PW-5/A. Memo was witnessed by Constable Tulsi Ram and Constable Prem Singh.

13. PW-5 Constable Tulsi Ram has admitted in his cross-examination that the alleged place of occurrence was 4 kms. From the Police Station. The Police Station is situate in Aut Bazaar. There are shops and houses at the Bus Stand. Tehsil office is also situate at Aut Bazaar. Vehicles passed on the road. In his cross-examination, he has admitted that before personal search of the accused, 10 gave option to be searched in his presence or a Gazetted Officer/Magistrate. But he consented to be searched by the police party on the spot. Option memo was written by the 10 on the spot in his presence and Constable Prem Singh. However, alleged option memo witnessed by him was not shown to him. According to the statement of PW-5 Tulsi Ram, personal search of the accused was carried out. He was given option either to be searched by the police or a Gazetted Officer or a Magistrate. There are only two options which are required to be given to the accused either Gazetted officer or a Magistrate. There is no third option which is required to be given to the accused. According to PW-5, option memo was written by the 10 on the spot in his presence and Prem Singh. However, fact of the matter is that the memo was not shown to him. PW-8 Sohan Lal has admitted that he asked accused to be searched vide memo and that memo was witnessed by Constable Tulsi Ram and Constable Prem Singh. It is settled law that accused can be apprised of his right orally or in writing. However, in this case, as per statement of PW-5, Constable Tulsi Ram, memo was prepared whether accused wanted to be searched before a Gazetted Officer or a Magistrate, but the same has not been produced on record. It has also come in the statement of PW-8 ASI Sohan Lal that he has checked 12-15 vehicles at the spot. Vehicles continuously plied from that place after 11.30 am, he did not stop any vehicle to associate occupants of such vehicles in the investigation. Spot, where accused was apprehended was neither isolated nor secluded but despite that prosecution has not associated any independent witnesses. Distance between Police Station and alleged spot is only 4 kms. Aut bazaar is a fairly busy place. Occupants of vehicles who were crossing the alleged spot, could be easily asked to be associated as independent witnesses to inspire confidence in the manner in which accused was apprehended and search, seizure and sampling process was completed at the spot. PW-8 Sohan Lal has stated that he has sent Prem Singh to associate local witnesses from the vicinity but he could not arrange the same. PW-5 Tulsi Ram deposed that 10 himself has gone in search of the independent witnesses. Thus, no efforts were made at all by the prosecution to associate independent witnesses. Prem Singh, has not been examined by the prosecution. Since the contraband was recovered from the bag, personal search was not required to be carried out. However, fact of the matter is that as per the statement of PW-5 Constable Tulsi Ram, as discussed herein above, personal search of accused was carried out without following mandate of Section 50 of the Act.

14. Their Lordships of the Hon^{ble} Supreme Court in *State of Rajasthan Vs. Parmanand and Another*, , have held that there is a need for individual communication to each accused and individual consent by each accused under Section 50 of the Act. Their lordships have also held that Section 50 does not provide for third option. Their lordships have also held that if a bag carried by the accused is searched and his personal search is also started, Section 50 would be applicable. Their lordships have held as under:

"15. Thus, if merely a bag carried by a person is searched without there being any search of his person, Section 50 of the NDPS Act will have no application. But if the bag carried by him is searched and his person is also searched, Section 50 of the NDPS Act will have application. In this case, respondent No. 1 Parmanand's bag was searched. From the bag, opium was recovered. His personal search was also carried out. Personal search of respondent No. 2 Surajmal was also conducted. Therefore, in light of judgments of this Court mentioned in the preceding paragraphs, Section 50 of the NDPS Act will have application.

16. It is now necessary to examine whether in this case, Section 50 of the NDPS Act is breached or not. The police witnesses have stated that the respondents were informed that they have a right to be searched before a nearest gazetted officer or a nearest Magistrate or before PW-5 J.S. Negi, the Superintendent. They were given a written notice. As stated by the Constitution Bench in *Baldev Singh*, it is not necessary to inform the accused person, in writing, of his right under Section 50(1) of the NDPS Act. His right can be orally communicated to him. But, in this case, there was no individual communication of right. A common notice was given on which only respondent No. 2 - Surajmal is stated to have signed for himself and for respondent No. 1 - Parmanand. Respondent No. 1 Parmanand did not sign.

19. We also notice that PW-10 SI Qureshi informed the respondents that they could be searched before the nearest Magistrate or before a nearest gazetted officer or before PW-5 J.S. Negi, the Superintendent, who was a part of the raiding party. It is the prosecution case that the respondents informed the officers that they would like to be searched before PW-5 J.S. Negi by PW-10 SI Qureshi. This, in our opinion, is again a breach of Section 50(1) of the NDPS Act. The idea behind taking an accused to a nearest Magistrate or a nearest gazetted officer, if he so requires, is to give him a chance of being searched in the presence of an independent officer. Therefore, it was improper for PW-10 SI Qureshi to tell the respondents that a third alternative was available and that they could be searched before PW-5 J.S. Negi, the Superintendent, who was part of the raiding party. PW-5 J.S. Negi cannot be called an independent officer. We are not expressing any opinion on the question whether if the respondents had voluntarily expressed that they wanted to be searched before PW-5 J.S. Negi, the search would have been vitiated or not. But PW-10 SI Qureshi could not have given a third option to the respondents when Section 50(1) of the NDPS Act does

not provide for it and when such option would frustrate the provisions of Section 50(1) of the NDPS Act. On this ground also, in our opinion, the search conducted by PW-10 SI Qureshi is vitiated.

20. We have, therefore, no hesitation in concluding that breach of Section 50(1) of the NDPS Act has vitiated the search. The conviction of the respondents was, therefore, illegal. The respondents have rightly been acquitted by the High Court. It is not possible to hold that the High Court's view is perverse. The appeal is, therefore, dismissed."

15. Case property was produced by the Public Prosecutor during the examination of PW-5 Tulsi Ram. Who has brought the case property from Malkhana to the Court has not been examined. Entry in the Malkhana register to the effect that who has taken the property to the Court, is necessary as per Punjab Police Rules, 1934. Para 22.70 of the Punjab Police Rules, 1934, as applicable to the State of H.P., reads as under:

"22.70. Register No. XIX - This register shall be maintained in Form 22.70.

With the exception of articles already included in register No. XVI every article placed in the storeroom shall be entered in this register and the removal of any such article shall be noted in the appropriate column.

The register may be destroyed three years after the date of the last entry."

The register is to be maintained in Form 22.70. It reads as under.

"FORM No. 22.70.

POLICE STATION_____

____DISTRICT

Register No. XIX.-Store-Room

Register (Part-I)

Column 1.- Serial No.

2. No. of first information report (if any), from whom taken (if taken from a person), and from what place.

3. Date of deposit and name of depositor.

4. Description of property.

5. Reference to report asking for order regarding disposal of property.

6. How disposed of and date.

7. Signature of recipient (including person by whom dispatched).

8. Remarks.

(To be prepared on a quarter sheet of native paper)."

16. It is necessary that as and when case property is taken out from Malkhana, necessary entry is required to be made in the Malkhana Register and also at the time when case property is re-deposited in the Malkhana. Case property in NDPS cases is required to be kept in safe custody from the date of seizure till its production in the Court. It is also necessary that when case property is taken out from Malkhana, DDR is made and also at the time when case property is re-deposited in the Malkhana. Thus, it casts doubt whether it is the same case property which was recovered from the accused and sent to FSL or it was case property of some other case. The prosecution has failed to prove case against the accused under Sections 18 and 20 of the Act.

17. In view of the discussion and analysis made hereinabove, the present appeal is allowed. Judgment dated 28.2.2015 rendered by learned Special Judge, Mandi, District Mandi, Himachal Pradesh in Sessions trial No. 12/2011 is set aside. Accused is acquitted of the commission of offence under Sections 18 and 20 of the Act. He is ordered to be released forthwith, if not required by the police in any other case. Fine amount, if any paid by the accused, be refunded to him. Registry is directed to prepare the release warrant of the accused and send the same forthwith to the Superintendent of Jail concerned forthwith.