
(2015) 09 SHI CK 0094

In the High Court Of Himachal Pradesh

Case No : Criminal Appeal Nos. 71, 267 and 268 of 2015

Vishawjit and Others

APPELLANT

Vs

State of Himachal Pradesh and Others

RESPONDENT

Date of Decision : 24-09-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313

Evidence Act, 1872 — Section 27, 65B

Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 20, 29, 50

Penal Code, 1860 (IPC) — Section 416, 419

Citation : (2015) 09 SHI CK 0094

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

Bench : Division Bench

Advocate : Anoop Chitkara, for the Appellant; Ramesh Thakur, Assistant Advocate General, Advocates for the Respondent

Judgement

Rajiv Sharma, J—Since these appeals have arisen out of the common judgment, dated 29.12.2014, the same were taken up together for hearing and are being disposed of by this common judgment.

2. Criminal Appeal No. 71 of 2015 is instituted against the judgment and order, dated 29.12.2014, rendered by the learned Special Judge-II (Additional Sessions Judge), Kullu, Himachal Pradesh in Sessions Trial No. 44 of 2014, whereby the appellant-accused, namely, Vishwajit (hereinafter referred to as "the accused" for short), who was charged with and tried for the offences punishable under Section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 and Section 419 of the Indian Penal Code was convicted and sentenced to undergo rigorous imprisonment for a period of ten years with fine of Rs. 1,00,000/- and in default of payment of fine, to further undergo simple imprisonment for one year for the offence punishable under Section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985. He was further sentenced to undergo rigorous imprisonment for a period of one year and to pay a fine of Rs. 2000/- and in default of payment of fine, to undergo simple imprisonment for one month for

the offence punishable under Section 419 of the Indian Penal Code. The sentences were ordered to run concurrently. The co-accused, namely, Beli Ram alias Chhotu was acquitted. The State of Himachal Pradesh has filed an appeal bearing Criminal Appeal No. 268 of 2015 against his acquittal. The State has also filed an appeal bearing Criminal Appeal No. 267 of 2015 for enhancement of sentence of respondent-accused, namely, Vishwajit.

3. Case of the prosecution, in a nut-shell, is that on the intervening night of 23/24.01.2014 from 1:00 a.m. to 9:00 a.m., a police party headed by PW-12 ASI Dhiraj Singh comprising of Head Constable Krishan Lal, Constable Nitish Kumar, Constable Sanjay Kumar and HHG Nitish Kumar, was on checking duty at Forest Check Post Bajaura in connection with the investigation of case FIR No. 28/2014 and around 6:30 a.m., when the aforesaid police officials were checking the vehicles coming from Bhuntar and Mandi side, one bus came from Bhuntar side and was stopped by the driver at a distance of about 15 metres away from the place when police party was standing. One of the passenger alighted from the rear door of the bus carrying bag and started fleeing towards Garsa. On suspicion that the said passenger had been carrying some contraband with him, PW-12 ASI Dhiraj Singh alongwith other police officials nabbed the passenger. He disclosed his identity. The accused was taken to Forest Check Post by the police officials for interrogation. Thereafter, PW-12 ASI Dhiraj Singh associated Head Constable Krishan Lal and Anuj Kumar, Beat Guard as witnesses in whose presence the Investigating Officer gave his personal search to accused Vishwajit regarding which memo Ex. PW1/A was prepared. Thereafter, the bag which accused Vishwajit was carrying at that time was searched and during search, 20 packets wrapped with Khakhi colour cello tape (Ex. P-6) were found and when the said packets were checked, black colour substance in pan cake and rectangular shape was found and on checking the said black colour substance, it was found to be charas/cannabis. It weighed 9 kg. 790 grams. Sealing proceedings were completed on the spot. The NCB-1 form was filled up. The case property was taken into possession vide memo Ex. PW1/C. The Investigating Officer prepared the rukka Ex. PW1/D, which was sent through PW-1 Head Constable Krishan Lal to Police Station for registration of case, in pursuant to which, FIR Ex. PW-11/A was registered. The spot map was prepared. Accused was arrested vide memo Ex. PW1/E and on his arrival at Police Station, the Investigating Officer handed over the case property alongwith relevant documents and sample of seal to SI/SHO Lal Chand (PW-11) for resealing, who resealed the case property with six seals of seal impression "A". The specimen of seal Ex. PW11/C was separately obtained on a piece of cloth and after filling up NCB-1 form, he handed over the case property alongwith sample seals and relevant documents to MHC Gian Chand (PW-9) for depositing the same in the Malkhana, who made an entry in the Malkhana register vide Ex. PW9/A and after filling column No. 12 of NCB-1 form, PW-9 MHC Gian Chand sent the case property alongwith relevant documents and docket Ex. PW10/A through Constable Umesh Kumar to FSL Junga for chemical analysis vide R.C. No.

18/2014 and he deposited the same at FSL Junga. During investigation, it was unearthed that on the relevant date, time and place, accused Vishwajit was found in exclusive and conscious possession of 9 kg. 790 grams charas, which was purchased by him from accused Beli Ram alias Chhotu for Rs. 4,50,000/-. The investigation was completed and the challan was put up in the Court after completing all the codal formalities.

4. The prosecution has examined 14 witnesses to support its case. The accused were also examined under Section 313 of Cr. P.C. According to them, they were falsely implicated. Accused Vishwajit was sentenced, as noticed hereinabove, for the commission of offence punishable under Section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 and Section 419 of the Indian Penal Code on 30.12.2014. Co-accused, namely, Beli Ram, was acquitted. Hence these appeals.

5. Mr. Anoop Chitkara, learned counsel has vehemently argued that the prosecution has failed to prove the case against his client.

6. Mr. Ramesh Thakur, learned Assistant Advocate General, has strenuously argued that the prosecution has proved the case against the accused. He also argued that the sentence imposed upon accused Vishwajit should be enhanced.

7. We have heard the learned counsel for the parties and gone through the judgment and records, carefully.

8. PW-1 Head Constable Krishan Lal deposed that on the intervening night of 23/24.1.2014 from 1:00 a.m. to 9:00 a.m., he alongwith ASI Dhiraj Singh, Constable Nitish Kumar 369, Constable Sanjay Kumar 256 and HHG Nitish Kumar was on Nakabandi duty at Forest Check Post, Bajaura in connection with the investigation of case FIR No. 28/2014, dated 22.01.2014. During their Nakabandi duty in the morning of 24.01.2014, when he alongwith other aforesaid police officials was intercepting the vehicles for checking, a Punjab Roadways bus coming from Bhuntar side was heading towards Aut. It was stopped by the driver 15 metres before the Check Post at By Pass Garsa Road. The moment bus stopped, one passenger alighted from the bus and started fleeing towards other side of the road from the rear side of the bus. He was nabbed. The person disclosed his identity. He alongwith Forest duty Guard Anuj was associated as witness by ASI Dhiraj Singh. The police recovered the bag black and blue in colour with three strips which was found in possession of accused. The same was opened and twenty packets in khakhi colour wrapped with cello tape were found. When the said packets were opened, the black coloured substance in pan cake and rectangular shapes were found. It contained charas. It weighed 9 kg. 790 grams. The sealing proceedings were completed on the spot. NCB-1 form was filled up. The contraband was taken into possession vide memo Ex. PW1/C. Rukka Ex. PW1/D was prepared by the Investigating Officer, which was handed over to him for delivering to SHO. He handed over the same to SI/SO Lal Chand. Thereafter, FIR was registered. In his cross-examination, he admitted that they were checking the vehicles coming from Mandi side as well as from

Bhuntar side. Police Officials including ASI Dhiraj Singh, Constable Nitish Kumar, Constable Sanjay Kumar and HHG Nitish Kumar were checking the vehicles coming from both sides and some time, the vehicles were being checked by him and other police officials and some times, the same were being checked by ASI Dhiraj Singh and other police officials. He admitted that the check post was situated between both barricades. Some of police officials were standing on the left side of the road and some of the police officials were standing on the right side of the road on the Highway leading towards Mandi. He also admitted that on both sides of Garsa Road, residential houses were in existence. He categorically admitted that no attempt was made to call any person from the said houses before making search of accused.

9. PW-2 Constable Hitesh Kumar deposed that on 30.01.2014, accused made a statement under Section 27 of The Indian Evidence Act before SI/SHO Lal Chand that the place and the person from where and whom he purchased 10 kg. cannabis for Rs. 4,50,000/- could be got identified by him, which was recorded vide Ex. PW2/A. The accused took the police party to 2 1/2 storeyed house at village Banasha. Accused took them in a room on the first floor adjoining to the verandah and had disclosed that he purchased the 10 kg. cannabis from accused Beli Ram alias Chhotu for an amount of Rs. 4,50,000/- in the said room. At that time, accused Beli Ram was not in the house, though his sister Heti was there. In his cross-examination, he has admitted that adjoining to Police Station, residences of doctors or other inhabitants also in existence. He also admitted that the house of accused Beli Ram was never visited by the police.

10. PW-4 Shri Raj Kumar deposed that he was called by the police officer at village Banasha near the house of Beli Ram where his signatures were obtained on some documents and nothing was seized by the police in his presence. He was declared hostile and was cross-examined by the learned Public Prosecutor. In his cross-examination, he deposed that the house of Beli Ram was three storeyed. He denied that the accused had taken the police to the first floor and had disclosed that in the room which was adjoining to verandah, he had purchased 10 kg. Charas from Beli Ram for an amount of Rs. 4,50,000/- He also denied that on that day, police had taken into possession diary and ration card produced by Heti Devi. In his cross-examination by the learned defence counsel, he admitted that accused Vishwajit had not made any statement before the police in his presence nor he got identified any house in his presence.

11. PW-8 Head Constable Hitesh Kumar deposed that on 24.01.2014, he was officiating as MHC in Police Station Bhuntar as MHC Gian Chand was on leave. On 24.01.2014, at 2:50 p.m., SI/SHO Lal Chand deposited with him case property. He made an entry at Sr. No. 94 of the relevant register. He proved the abstract of register vide Ex. PW8/A.

12. PW-9 Head Constable Gian Chand deposed that on 26.01.2014, he sent one parcel and case property of the case for chemical analysis alongwith samples to FSL Junga through Constable Umesh Kumar vide RC No. 18/14. PW-10 Constable

Umesh Kumar testified that on 26.01.2014, MHC Gian Chand handed over the case property to him. He deposited the same at FSL, Junga. He also obtained the receipt and handed over the same to MHC Gian Chand.

13. PW-11 Lal Chand deposed that on 24.1.2014, one rukka Ext. PW1/D was received at Police Station through HC Krishan Lal for registration of case, on the basis of which, he registered FIR Ex. PW-11/A. On the aforesaid date at 2:30 p.m., ASI Dheeraj Singh handed over two parcels, out of which, big parcel was sealed with seal impression "O" and small parcel containing three seals alongwith two sample seals which were on separate piece of cloth and relevant papers. He filled up the relevant column of NCB form. He resealed both the parcels with seal impression "A". He has also taken into possession the bill Ex. PW11/G and call details of accused Ex. PW11/H. During investigation, he found that accused Vishwajit has purchased charas from accused Beli Ram alias Chhotu.

14. PW-12 ASI Dhiraj Singh was the Investigating Officer. He deposed the manner in which the accused was arrested, search, seizure and sealing proceedings were completed on the spot. According to him, the person was taken to forest check post by them for interrogation. Since it was early morning, no shop was open nor any local witness was available and accordingly he associated Head Constable Krishan Lal and Anuj Kumar, Beat Guard as witnesses. Rukka Ex. PW1/D was prepared and was sent through Head Constable Krishan Lal to the Police Station. He further testified that after arrest of accused, his personal search was done at Police Station Bhuntar regarding which memo Ex. PW1/F was prepared and the articles recovered from him were also handed over to SHO. In his cross-examination, he admitted that personal search of accused was conducted at check post at Bajaura. He has not made any effort to call the local witnesses from the nearby houses. One ticket was found from the person of accused when he was personally searched. Anuj Kumar was on the check post when they had taken the accused inside the check post.

15. PW-13 Sh. Shashi Kant Verma has proved the computer generated copy of CDR Ex. PW11/H. PW-14 Sh. Pawar Kumar testified that he never had mobile phone No. 97287-27790. Some body had misused his address for obtaining the aforesaid number without his knowledge.

16. The accused was nabbed at 6:30 a.m. in the morning on 24.1.2014, He was carrying a bag which was searched by the police officials. It contained charas. The sealing proceedings were completed on the spot, the rukka was prepared and the FIR was registered.

17. PW-1 Head Constable Krishan Lal has deposed that when the accused was nabbed, the police officials were checking vehicles. He further admitted that the check post was situated between both the barricades. He also admitted that on both sides of Garsa Road by pass, residential houses were in existence. However, no attempt was made to call any person from the said houses before making search of accused. Similarly, PW-12 ASI Dhiraj Singh has admitted that he has

not made any effort to call the local witnesses from nearby houses. The place where the accused was nabbed was neither isolated nor secluded. PW-2 Constable Hitesh Kumar has also deposed that adjoining to Police Station, residences of doctors or other inhabitants were in existence. The police officials should have associated independent witnesses by calling from nearby houses to inspire confidence the manner in which the accused was nabbed, search, seizure and sealing proceedings were completed on the spot. The police could always associate the drivers and the passengers travelling in the vehicles during the course of search, seizure and sealing proceedings, moreover, the police party was on patrol duty and number of vehicles were being checked.

18. The charas was recovered from the bag, but despite that personal search of the accused was also carried out as per the statement of PW-12 ASI Dhiraj Singh, Investigating Officer. PW-12 ASI Dhiraj Singh has categorically stated in his examination-in-chief that after the arrest of accused, his personal search was done at Police Station, Bhuntar. However, in his cross-examination, he has specifically stated that the personal search of the accused was conducted at Check Post, Bajaura also. Bajaura is the place where the accused was apprehended. Though personal search of the accused was carried out at Bajaura, but he was not apprised of his legal right to be searched either before the Executive Magistrate or any other gazetted officer. The provisions of Section 50 of the Narcotic Drugs and Psychotropic Substances Act, 1985 are mandatory.

19. Mr. Ramesh Thakur, learned Assistant Advocate General has vehemently argued that the accused was only searched after his arrest, but it is contrary to the record. We reiterate that the personal search of the accused was carried out at Bajaura as per the statement of PW-12 ASI Dhiraj Singh in his cross-examination and thereafter at Police Station, Bhuntar, regarding which a memo Ex. PW1/F was prepared. In the instant case, the prosecution has neither followed Section 50 of the Narcotic Drugs and Psychotropic Substances Act, 1985 nor the independent witnesses, though available, were associated at the time of search, seizure and sealing proceedings. The non-compliance of Section 50 of the Narcotic Drugs and Psychotropic Substances Act, 1985 has vitiated the trial.

20. Their Lordships of the Hon'ble Supreme Court in State of Rajasthan Vs. Parmanand and Another, AIR 2014 SC 1384 : (2014) AIRSCW 1578 : (2014) CriLJ 1756 : (2014) 5 JT 271 : (2014) 3 SCALE 303 : (2014) 5 SCC 345 have held that 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. However, if the bag carried by him is searched and his person is also searched, Section 50 of the Narcotic Drugs and Psychotropic Substances Act, 1985 would be attracted. 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."

21. Now, we would advert to the question whether case under Section 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 is proved against the accused or not.

22. PW-2 Constable Hitesh Kumar has deposed that the accused has made a statement under Section 27 of the Indian Evidence Act vide Ex. PW2/A. He has taken the police to the house of accused Beli Ram. Accused Beli Ram was not present in the house. His sister was present in the house. PW-4 Shri Raj Kumar has not supported the case of the prosecution. According to him, he was called by the police officer at village Banasha near the house of Beli Ram, where his signatures were obtained on some documents and nothing was seized by the police in his presence. He was declared hostile. He has denied the suggestion that the accused had taken police to the first floor and had disclosed that in the room which was adjoining to verandah, he had purchased 10 kg. charas from Beli Ram for a sum of Rs. 4,50,000/-. He also denied that handwriting of Beli Ram was identified by him on the diary. But, he did not know what was written on Ex. PW4/B.

23. Mr. Ramesh Thakur, learned Assistant Advocate General has drawn the attention of the Court to Ex. PW11/H. It is a Computer generated copy of call details report. However, the same has not been proved as per Section 65B of The Indian Evidence Act, 1872. It has not come in the statement of PW-11 SI Lal Chand that the computer was used regularly and the information so contained was derived, which was regularly fed into the computer and the computer was operating properly. No certificate has been placed on record as required under Sub-section (4) of Section 65B of The Indian Evidence Act, 1872. Thus, no reliance can be put on call details report Ex. PW11/H. The Trial Court has rightly acquitted accused Beli Ram alias Chhotu.

24. The prosecution has also failed to prove the case against the accused under Section 419 of the Indian Penal Code. The prosecution has placed strong reliance on Adhar Card Ex. PW3/B. PW-3 Constable Anil Kumar has deposed that one Adhar Card in the name of Vishwajit was taken into possession by the Investigating Officer, which was thrown on the ground below the road on its western side and the same was taken into possession through seizure memo Ex. PW3/A. In his cross-examination, he deposed that they have gone to the spot in the official vehicle, but he did not remember the number of the vehicle. He has admitted that near the alleged place from where the Adhar Card was taken into possession, houses and shops were existing, but no person had come at the place from where the Adhar Card was taken. The Adhar Card was taken into possession from the spot which was opposite to Shiv Mandir. The prosecution

should have joined independent witnesses, since the houses, shops and Shiv Mandir were adjoining the spot allegedly from where the Adhar Card was recovered.

25. Personation is defined in Section 416, I.P.C. and the charging section is Section 419, I.P.C. In order to bring home an offence under Section 419, the elements of Section 416, I.P.C are to be proved. The person said to be deceived must be shown to have been cheated by the personation. The essential ingredients of an offence under Section 419 are; (i) that the accused cheated someone; and (ii) that he did so by impersonation. The prosecution has to lead evidence to prove firstly that accused pretended himself to be some other person or imaginary person, or he knowingly substituted one person for another, or represented that he or any other person is a person other than he or such person other than what he really is and secondly by such process, he cheated some innocent person. The prosecution has not led any evidence how and in what manner the Investigating Officer was cheated by the accused by impersonation. The prosecution has failed to prove the case against the accused under Section 419 of the Indian Penal Code.

26. The case property was produced before the Court while examining PW-1 Head Constable Krishan Lal and PW-12, ASI Dhiraj Singh. Who has brought the case property from Malkhana to the Court has not been proved. The entry in the Malkhana register to this effect that who has taken the property to the Court, is necessary as per Punjab Police Rules. 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 store-room 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)."

27. 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 redeposited 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 redeposited 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.

28. Accordingly, in view of the observations and discussion made hereinabove, the Criminal Appeal No. 71 of 2015 is allowed and the judgment and order, dated 29.12.2014 & 30.12.2014 are set aside. The accused/appellant, namely, Vishwajit is acquitted of the charges framed against him. He be released forthwith, if not required in any other case. Fine amount, if already deposited, be refunded to him. The Registry is directed to prepare the release warrant and send the same to the concerned Superintendent of Jail. The Criminal Appeal No. 267 of 2015 has become infructuous in view of the acquittal of the accused in Criminal Appeal No. 71 of 2015. The Criminal Appeal No. 268 of 2015 filed against the acquittal of accused Beli Ram alias Chhotu is also dismissed.