

Himachal Pradesh High Court

Joginder Singh vs State Of Himachal Pradesh on 3 July, 2018

Bench: Honourable Mr. Chauhan, Honourable Mr. Barowalia

IN THE HIGH COURT OF HIMACHAL PRADESH AT SHIMLA Cr. Appeal No. 658 of 2017

Reserved on : 14.06.2018 Decided on: .07.2018 .

Joginder Singh

.....Appellant.

Versus State of Himachal PradeshRespondent.

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Hon'ble Mr. Justice Tarlok Singh Chauhan, Judge. The Hon'ble Mr. Justice Chander Bhusan Barowalia, Judge. 1 Whether approved for reporting? Yes.

For the

appellant: Mr. Vivek Sharma, Advocate.

For the respondent: Mr. Vinod Thakur, Additional Advocate General, with Mr. J.S.

Guleria and Mr. Bhupinder Thakur, Deputy Advocates General.

Chander Bhusan Barowalia, Judge.

The present appeal is maintained by the appellant/accused/convict (hereinafter referred to as "the accused"), laying challenge to judgment dated 26.07.2017, passed by learned Special Judge-III, Solan, District Solan, H.P., in Sessions Trial No. 31ASJ-II/7 of 2015, whereby the accused was convicted for the commission of the offence punishable under Section 20 of the Narcotic Drugs & Psychotropic Substances Act, 1985 (hereinafter referred to as "NDPS Act").

Whether reporters of Local Papers may be allowed to see the judgment? Yes.

2. The key facts necessary for adjudication of this appeal can tersely be summarized as under:

On 10.12.2014 a police party had laid a nakka on .

Parwanoo-Kamli road under the bridge of National Highway No. 5.

At about 10:00 p.m. police spotted a person coming from Parwanoo side, who was having a pithoo (bag) on his right shoulder. On being inquired by the police, the said person fled away towards Kamli village, but he was apprehended. The personal search of that person was conducted and a voter identity card was recovered, on which name Joginder Singh (accused) was written. The bag, which was being carried by the accused, was searched and black coloured substance, which was in the shape of sticks, was found wrapped in a polythene. On being smelt and on the basis of

experience, the recovered substance was found to be charas. Independent witnesses could not be associated, as the place was isolated. The contraband was weighed and it was found to be 1.470 kgs. The recovered contraband was put into the same bag alongwith other found items

- physical balance, three weights of 200, 100 and 50 grams. The bag was sealed with six seals having impression 'K', and NCB form in triplicate, was filled in. Sample seal was taken on a separate piece of cloth and handed over to HC Ashok Kumar. The case property was taken into possession and a rukka alongwith the case property, sample seal 'K', NCB form in triplicate, was sent through HC Raj Kumar, to police station, whereupon FIR was registered. On 10.12.2014 police prepared the spot map and the statements of the .

witnesses were also recorded. On 11.12.2014 the accused was arrested and on 12.12.2014 special report was sent to Deputy Superintendent of Police (Crime), State C.I.D., Bharari, through Lady Constable Manju Bala. SHO Managat Ram resealed the recovered contraband with seal impression 'S' and prepared the resealing certificate. Sample seal was taken on a separate piece of cloth and SHO Mangat Ram filled the relevant columns of the NCB form.

Resealed parcel was handed over to MHC Balbir for being deposited in the malkhana. The case property was sent to FSL, Junga, for chemical analysis and report thereof opined that quantity of purified resin was found in the exhibit and stated that charas is 25.91% w/w. The personal search of the accused was also conducted and a wallet, currency notes of `900/-, voter identity card, ESI card, Adhar Card, mobile phone, three sims and a watch were recovered and the same were also taken into possession. After completion of investigation, challan was presented in the Court.

3. The prosecution, in order to prove its case, examined as many as ten witnesses. Statement of the accused was recorded under Section 313 Cr.P.C., wherein he pleaded not guilty. The accused did not lead any evidence in his defence.

4. The learned Trial Court, vide impugned judgment dated 26.07.2017, convicted the accused for the commission of the offence .

punishable under Section 20 of the NDPS Act, and sentenced him to undergo rigorous imprisonment for ten years and to pay fine of rupees one lac and in default of payment of fine the accused was further ordered to undergo simple imprisonment for a year, hence the present appeal is preferred by the accused.

5. The learned counsel for the accused/appellant has argued that the learned Trial Court has wrongly appreciated the facts and law and the conviction has been based only on surmises and conjectures. He has further argued that there is nothing against the accused and he has been falsely implicated. The learned Trial Court has also failed to appreciate the fact that the police did not comply with the mandatory provisions of Section 42(1) of the Act. He has argued that there are major lacunae in the material available on record and the accused cannot be deprived the benefit of doubt, so the appeal be allowed and the accused be acquitted by setting aside the judgment of the learned Trial Court. Conversely, the learned Additional Advocate General has argued that the

learned Trial Court has correctly appreciated the material, which has come on record and the judgment, as rendered by the learned Trial Court, is after appreciating the facts and law to their right and true perspective. He has further argued that there is ample evidence against the accused and he has been rightly convicted by the learned Trial Court, so the .

judgment of acquittal needs no interference and the appeal be dismissed.

6. In rebuttal, the learned counsel for the accused has argued that after re-appreciating the evidence, the accused be acquitted by setting aside the judgment of the learned Trial Court, as the prosecution has failed to prove the guilt of the accused.

7. In order to appreciate the rival contentions of the parties we have gone through the record carefully.

8. PW-1, HC Ashok Kumar, deposed that on 10.12.2014, at about 10:00 p.m., he alongwith SI Vijay Kumar, SI Raj Kumar and HHC Rakesh Kumar was present at Kamli Bridge, NH 5 Bye Pass, Kamli Road. They saw a person coming from Parwano to Kamli road and he was carrying a pithoo bag on his right shoulder. He has further deposed that SI Vijay Kumar intercepted that person, but he ran away and was captured from his back. The pockets of the person were checked and a voter card was recovered, whereon his name was mentioned as Joginder Singh (accused). The bag, which was being carried by the accused, was also checked and it contained a polythene bag, which contained black coloured substance. On the basis of experience and smell, the black substance was found to be charas. The contraband alongwith polythene and bag was weighed and it was found to be 1.470 kgs. There was iron physical balance .

with three weights, 200 grams, 100 grams and 50 grams inside the pithoo bag. The charas and physical balance alongwith weights were put inside the same bag and sealed with seal impression 'K'. NCB form, in triplicate, was prepared and impression of seal 'K' was embossed thereon. He has further deposed that facsimile seal was separately taken and seal after its use was handed over to him. The case property was taken into possession vide memo, Ex. PW-1/A, and he signed the same. Rukka alongwith NCB forms, copy of seizure memo and sample seal was sent through HC Raj Kumar, to Police Station, State CID, Bharari. SI Vijay Kumar prepared the spot map, and an 'on the spot investigation' was carried out under emergency light and the light of the vehicle. The personal search of the accused was conducted qua which memo, Ex. PW-1/B, was prepared. He alongwith HHC Rakesh Kumar and accused signed the memo, Ex. PW-1/B. Sample seal, Ex. PW-1/C, bears his and the signatures of HHC Rakesh Kumar and the accused. This witness, in his cross-examination, has deposed that the accused was searched by SI Vijay Kumar and they were with him. He has further deposed that the distance from the spot, where the accused was nabbed, to Kasauli Chowk is about 1.5 kilometers.

9. PW-2, HC Raj Kumar, deposed that on 12.12.2014, at about 10:00 p.m., he alongwith SI Vijay Kumar, HC Ashok Kumar, .

HHC Rakesh Kumar had laid a nakka at Parwanoo Kamli Road, below the bridge. The accused was spotted, who was carrying a pithoo bag on his right shoulder and he, after seeing the police, tried to flee. The accused was captured by SI Vijay Kumar and he searched his pocket. A voter card was recovered from the pocket of the accused, whereon name of the accused was written. The pithoo bag of the accused was searched and the same contained carry bag and inside this carry bag there was a white polythene bag, which contained black substance in the shape of strips. The recovered material, on the basis of smell and experience, was found to be charas. The place was isolated. Thereafter, the bag was weighed with the help of electronic scale and was found to be 1.470 kgs. As per this witness, a physical balance with weights of 200 grams, 100 grams and 50 grams were also recovered from the pithoo bag. The contraband alongwith weights etc. was put inside the pithoo bag and the bag was sealed with six seals having impression 'K' and seal, after its use, was handed over to HC Ashok Kumar. Facsimile seal was also taken on a separate piece of cloth. SI Vijay Kumar filled in the NCB form. Seizure memo was signed by the accused and the witnesses. Rukka was prepared and the same was sent, through him, to State Police Station, CID, Bharari, alongwith the case property, NCB form, seizure memo and sample of seal. He handed .

over the case property alongwith the rukka to Inspector Mangat Ram, who gave him the case file, which he handed over to the Investigating Officer. This witness, in his cross-examination, has deposed that on 10.12.2014 he, about 11:30 p.m., proceeded to the police station with the rukka. As per this witness, there is no population near the spot of recovery of contraband.

10. PW-3, LC Sanju Bala, deposed that, on 12.12.2014 SI Vijay Kumar gave her Special Report, which she submitted before the Deputy Superintendent of Police, who made endorsement thereon and photocopy of the report was handed over to her by Reader of the Deputy Superintendent of Police. She handed over the photocopy of the report to SI Vijay Kumar.

11. PW-4, HHC Bhagat Ram, deposed that on 12.12.2014 MHC Balbir Singh, CID Police Station Bharari, vide RC No. 254/14 gave him a parcel, which was sealed with six seals of impression 'K' and 'S', alongwith NCB form in triplicate, copy of FIR, seizure memo and sample of the seal, for being deposited in FSL, Junga. He deposited the above case property in FSL, Junga, and handed over copy of RC to MHC. As per this witness, the case property remained intact under his custody.

12. PW-5, Shri Balbir, Reader to Deputy Superintendent of Police (Crime), CID, Shimla, H.P., deposed that on 11.12.2014 HC .

Raj Kumar handed over rukka to SHO, who handed over the same to him. He registered FIR, Ex. PW-5/A, on the basis of the rukka. He has further deposed that on the same day, at about 07:55 a.m., SHO Mangat Ram handed over to him a parcel, which was sealed with six seals of impression 'K' and 'S', alongwith NCB form in triplicate, resealing certificate, sample of seals 'K' and 'S', and copy of seizure memo for being deposited in the malkhana. He deposited the case property alongwith the other documents etc. in the malkhana qua which entry at Sr. No. 367 in register No. 19 was made, copy of which is Ex. PW-5/B. He has further deposed that on 12.12.2014, vide RC No. 254/14, he handed over the case property alongwith documents etc. to HHC Bhagat Ram, who after depositing the case property in FSL Junga, handed over the RC to him and he obtained the

signatures of HHC Bhagat Ram on the RC register. As per the version of this witness, on 07.01.2015 the case property was received in State Police Station CID, Bharari, and an entry to this effect is Ex.PW-5/B. This witness has appended his signatures in column No. 13 of the NCB form. He has also issued CIPA certificate, Ex. PW-5/D, which bears his signatures. Resealing certificate, Ex.

PW-5/E, also bears his signatures.

13. PW-6, LC Archana, deposed that on 11.12.2014 she recorded rapats, Ex. PW-6/A and Ex. PW-6/B. On 12.12.2014, she .

recorded rapat, Ex. PW-6/C.

14. PW-7, HC Anil Kumar, deposed that on 12.12.2014 Lady Constable Sanju Bala handed over a special report, Ex.PW-7/A, to him, which was endorsed by Deputy Superintendent of Police (Crime). He entered the special report at Sr. No. 366, dated 12.12.2014, in the receipt register and photocopy of the report was handed over to Lady Constable Sanju Bala. As per this witness, extract of register is Ex. PW-7/B.

15. PW-8, Inspector Mangat Ram, deposed that on 11.12.2014, HC Raj Kumar came with the rukka and the case property, viz., a parcel, which was sealed with six seals of impression 'K', NCB forms, sample of seal and copy of seizure memo. He handed over the rukka to MHC for registration of the FIR. He resealed the parcel with six seals having impression seal 'S' and the facsimile seal was taken on a separate piece of cloth, which is Ex.

PW-8/A, and the same bears his signatures. He has further deposed that he filled in columns No. 9 to 11 of the NCB form, Ex. PW-8/B, and signed the same. He issued resealing certificate, Ex. PW-5/E.

His endorsement on the rukka is Ex. PW-8/C. As per this witness, FIR, Ex. PW-5/A, bears his signatures.

16. PW-9, Inspector Virender Chauhan, deposed that on 29.01.2015, SI Vijay Kumar handed him the case file pertaining to .

this case and he prepared the challan on the same day and thereafter handed the case file to SI Vijay Kumar for being presented in the Court.

17. In the case in hand, the testimony of PW-10, SI Vijay Kumar, Investigating Officer, is very important. He has deposed that on 10.12.2014, at about 10 p.m., he alongwith HC Ashok Kumar, HC Raj Kumar, HHC Rakesh Kumar, had laid a nakka on Parwanoo Kamli road, under the National Highway bridge. He has further deposed that they saw a person coming from Parwanoo and he was carrying a bag on his right shoulder. On seeing the police, the said person fled away towards Kamli, however, he was nabbed by him.

From the search of the pocket of that person a voter identity card was recovered, whereon his name was written as Joginder Singh (the accused). Thereafter, the bag of the accused was searched and a polythene packet, which was coca cola colour, was recovered. The said polythene packet contained another white polythene packet and some substance, which was in the shape of sticks, was found therein. The said substance, on being smelt, was found to be charas. On weighing with the electronic scale the recovered contraband was found to be 1.470 kgs. Inside the bag there were three weights, viz., 200 grams, 100 grams and 50 grams. He has further deposed that the charas alongwith physical weights was put .

in the same bag in the manner it was kept and the bag was sealed with six seals having impression 'K'. He has further deposed that NCB form, in triplicate, was filled in. Seizure memo, Ex. PW-1/A, was prepared, which was signed by witness HC Ashok and the accused. Facsimile seal was taken on a separate piece of cloth, which is Ex. PW-1/C, and impression of sample seal was embossed on NCB form, Ex. PW-8/B, and seizure memo, Ex. PW-1/A. As per this witness, seal 'K' was handed over to HC Ashok. He has further deposed that rukka, Ex. PW-10/A, was prepared and the same alongwith the case property, NCB form, seizure memo and sample of seal, was sent, through HC Raj Kumar to Police Station, State CID, Bharari. On the basis of rukka, Ex. PW-10/A, FIR, Ex. PW-5/A, was registered. He prepared spot map, Ex. PW-10/B and on 11.10.2012 recorded the statements of HC Ashok and HHC Rakesh. This witness has categorically deposed that accused was arrested and his personal search was conducted and to this effect memo, Ex. PW-

1/B, was also prepared. Two ESI cards, Adhar card and currency notes of `900/- were recovered. On 12.12.2014, special report, Ex.

PW-7/A, under Section 57 of the ND & PS Act was sent, through Lady Constable Sanju Bala, to Deputy Superintendent of Police (Crime), Shimla. He recorded the statements of HC Raj Kumar, HC Balbeer Singh, HC Bhagat Ram and Inspector Mangat Ram. This .

witness, in his cross-examination, has deposed that seizure memo was prepared on the road and the accused was also there.

18. The above is the entire prosecution evidence and the same now needs to be tested on the touchstone of its credibility and truthfulness, but before analyzing the same, in order to decide the innocence or guilt of the accused, we would like to deal with the law as cited by the learned counsel for the accused. The learned counsel for the accused has placed reliance on a judgment of this Court, dated 04.01.2018, rendered in Criminal Appeal No. 138 of 2015, titled State of H.P. vs. Rakesh, wherein it has been held as under:

"18. In fact Section 50 of the NDPS Act has a purpose and communication of the said right, which is ingrained in Section 50, to the person who is about to be searched is not an empty formality. Offences under the NDPS Act carry severe punishment, so the mandatory procedure, as laid down under the Act, has to be followed meticulously.

Section 50 of the Act is just a safeguard available to an accused against the possibility of false involvement. Thus, communication of this right to the accused has to be clear, unambiguous and to the individual concerned. The purpose of this Section is to make aware the accused of his right and the whole purpose behind creating this right is effaced if the accused is not able to exercise the same for want of knowledge about its existence. This right cannot be ignored, as the same is of utmost importance to the accused."

The judgment (supra) is the result of settled legal position by the Hon'ble Supreme Court, as enunciated in State of Rajasthan vs. .

Parmanand & another, (2014) 5 SCC 345 and correct interpretation of Section 50 of the NDPS Act.

19. Section 50 of the NDPS Act is extracted hereunder for ready reference:

"50. Conditions under which search of persons shall be conducted.- --

(1) When any officer duly authorised under section 42 is about to search any person under the provisions of section 41, section 42 or section 43, he shall, if such person so requires, take such person without unnecessary delay to the nearest Gazetted Officer of any of the departments mentioned in section 42 or to the nearest Magistrate.

(2) If such requisition is made, the officer may detain the person until he can bring him before the Gazetted Officer or the Magistrate referred to in sub-section (1).

(3) The Gazetted Officer or the Magistrate before whom any such person is brought shall, if he sees no reasonable ground for search, forthwith discharge the person but otherwise shall direct that search be made.

(4) No female shall be searched by anyone excepting a female.

(5) When an officer duly authorised under section 42 has reason to believe that it is not possible to take the person to be searched to the nearest Gazetted Officer or Magistrate without the possibility of the person to be searched parting with possession of any narcotic drug or psychotropic substance, or controlled substance or article or document, he may, instead of taking such person to the nearest Gazetted Officer or Magistrate, proceed to search the person as provided under section 100 of the Code of Criminal Procedure, 1973 (2 of 1974).

(6) After a search is conducted under sub-section (5), the officer shall record the reasons for such belief which necessitated such search and within seventy-two hours send a copy thereof to his immediate official superior.]"

20. Now, it is to be seen that Section 50 of the NDPS Act has application in the present case or not. As per the prosecution story, on the relevant day they spotted the accused and when the accused, .

on seeing the police, tried to flee, SI Vijay Kumar nabbed him and charas was recovered from him. The symmetrical analysis of the official prosecution witnesses shows that the police prior to checking the bag of the accused conducted his personal search. This fact is fortified by the statement of PW-1 HC Ashok Kumar. He has categorically deposed that accused was nabbed, then his pockets were searched and from his pocket a voter ID card was recovered.

Thereafter, the pithoo of the accused was checked. Similarly, PW-2, HC Raj Kumar, has deposed that initially pockets of the accused were searched and a voter card was recovered, thereafter, pithoo of the accused was checked. The fact that the personal search of the accused was conducted prior to checking his bag is even supported by Investigating Officer, SI Vijay Kumar (PW-10). He has also clearly deposed that on 10.12.2014, at about 10:00 p.m., he alongwith HC Ashok Kumar, HC Raj Kumar, HHC Rakesh Kumar had laid nakka on Parwanoo Kamli road under the National Highway bridge and they saw a person coming on foot from Parwanoo side. That person was carrying a bag on his right shoulder and after seeing the police he tried to flee from Kamli, however, was captured by him. He conducted search of his pockets and recovered a voter ID card. Subsequently, the bag, which was carried by that person (accused), was searched and the same contained charas. Thus, the testimonies of the official .

prosecution witnesses leaves no doubt in the mind of this Court that after nabbing the accused, initially his personal search was conducted followed by search of his bag. One vital fact also stands proved that on seeing the police the accused tried to flee and he was captured by PW-10, SI Vijay Kumar. Therefore, police had reasons to believe that the accused might be having or carrying narcotic drugs or psychotropic substances or controlled substance, but even then the provisions of Section 50 of the NDPS Act were not adhered to.

21. It is imperative to highlight the law, as enunciated by the Hon'ble Supreme Court in State of Rajasthan vs. Parmanand & another, (2014) 5 SCC 345, The Hon'ble Supreme Court has 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 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 the light of the judgments of this Court mentioned in the preceding paragraphs, Section 50 of the NDPS Act will have application."

The judgment (supra) is fully applicable to the facts of this case, as the personal search of the accused was conducted prior to checking .

his bag. Thus, provisions of Section 50 of the NDPS Act have not been complied with. The real aim and purpose of Section 50 is to inform the person, who is to be searched, of his vital right to be searched by a magistrate or by a gazetted officer. Compliance of Section 50 cannot at all be given go

by, as crimes under the NDPS Act provide stiffer punishments and, therefore, the procedure provided under the Act has to be followed meticulously. Indeed, Section 50 of the Act works as safeguard for the accused against false involvement. Therefore, it is incumbent upon the police to clearly communicate the accused of his valuable right to be searched by a magistrate or by the gazetted officer and in a case where this vital right of the accused is diluted, the very purpose of creating this right in the NDPS Act is defeated. The objective of this Section is to make aware the accused of his right, and the whole purpose behind creating this right is effaced if the accused is not able to exercise the same for want of knowledge about its existence. The right ingrained under Section 50 of the Act is of utmost importance to the accused and failure of the police to communicate the same to the accused, entails fatal consequences on the roots of the prosecution case.

22. In the case in hand, after examining the testimonies of the key prosecution witnesses, it is more than certain that police did not comply the provisions of Section 50 of the NDPS Act and in the .

wake of this, we are indeed unable to hold the accused guilty. Even we deem it proper to not examine the prosecution evidence any further, as the rigors of Section 50 are fully applicable to the facts of the present case and the prosecution case fails on the anvil of Section 50 of the NDPS Act.

23. In State of Himachal Pradesh vs. Desh Raj & another, 2016 (Suppl.) Himachal Law Reporter (DB) 3088, this Court has relied upon the law laid down in Parmanand's case (supra). Relevant para of the judgment of this Court is extracted hereunder:

"18. Their Lordships of the Hon'ble Supreme Court in State of Rajasthan v. Parmanand reported in (2014) 5 SCC 345, 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."

Again, in the present set of facts and circumstances, the judgment (supra) is fully applicable to the present case, as the right provided under Section 50 of the NDPS Act in no way can be diluted and its compliance is mandatory in nature.

24. In view of the settled legal position, as discussed hereinabove, and on the basis of testimonies of the official prosecution witnesses, which clearly show that mandatory .

compliance of Section 50 of the NDPS Act has not been made, so it is more than safe to hold that the prosecution has failed to prove the guilt of the accused beyond the shadow of reasonable doubt and the findings of guilt, as recorded by the learned Trial Court, needs to be set aside. Accordingly, the appeal is allowed and the judgment of the learned Trial Court is set aside. The accused is acquitted and ordered to be released forthwith. Fine amount, if already deposited, be refunded to the accused. Since the accused is in jail, he be released forthwith, if not required in any other case.

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

26. In view of the above, the appeal, so also pending application(s), if any, stand(s) disposed of.

(Tarlok Singh Chauhan) Judge (Chander Bhusan Barowalia) Judge 3rd July, 2018 (virender) .