



IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA.

Cr. Appeal No. 101 of 2012

Reserved on: March 18, 2015.

Decided on: March 20, 2015.

The Narcotics Control Bureau, Chandigarh.

.....Appellant.

Versus

Tek Chand

.....Respondent.

Coram

The Hon'ble Mr. Justice Rajiv Sharma, Judge.

The Hon'ble Mr. Justice Sureshwar Thakur, Judge.

Whether approved for reporting? Yes.

For the appellant: Mr. Ashwani Pathak, Advocate.

For the respondent: Mr. Anoop Chitkara, Advocate.

Justice Rajiv Sharma, J.

This appeal is instituted against the judgment dated 31.12.2011, rendered by the learned Special Judge, Mandi, H.P, in Sessions Trial No. 26 of 2009, whereby the respondent-accused (hereinafter referred to as the accused), who was charged with and tried for offence punishable under Section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the ND & PS Act), has been acquitted.

2. The case of the prosecution, in a nut shell, is that on 24.7.2005 a team of Narcotics Control Bureau of Chandigarh was on routine surveillance/checking. The team of NCB was headed by O.P. Sharma, Superintendent, NCB Chandigarh. At about 4:00 PM, Sh. P.K.Sharma, received a secret information that some persons of village Jamachh were engaged in drugs trafficking and were likely to make a deal at the road nearby village Jamachh in Bali Choki area of Distt. Mandi, during the night intervening 24th and 25th July, 2005. The team

associated the local police and left Mandi at 7:30 PM and reached village Khaneti at 11:00 PM. They tried to associate independent witnesses but no person was available due to late hours. Resultantly, local police officials HC Ashok Kumar and HC Narender Kumar were associated in the raiding party. At about 1:00 AM on 25.7.2005, they noticed three persons coming from upper hill side carrying jute bags on their heads. The NCB team proceeded towards them on the path from village Jamachh. Sh. P.K.Sharma, Intelligence Officer enquired from them and those persons became furious and perplexed and tried to escape. Two persons were nabbed and third one fled away from the spot. The persons, who were apprehended, when inquired, disclosed their names as Dharam Dass and Abhishek Kumar, both residents of Village Jhamachh. Both of them disclosed that the third person with them was Tek Chand resident of Village Jhamachh, PS Aut, Sub Tehsil Bali Chowki, Distt. Mandi, H.P. Thereafter, search was carried out and contraband was recovered. It was weighed. It weighed 68 kgs. The codal formalities were completed. The accused named third accomplice as Tek Chand. Accused Dharam Dass and Abhishek Kumar were tried separately and the notice was issued to the accused under Section 67 of the Act. When notice was issued against accused Tek Chand, he was not found at his residence. Sh. P.K.Sharma, himself visited his residence in order to serve the notice under Section 67 of the Act. Warrants were also obtained against him but despite of the best efforts made by the NCB, he could not be traced. Later on,

proceedings under Section 81 and 82 of the Act were initiated against the accused and he was declared proclaimed offender.

3. The I.O. Ganesh Balooni received secret information regarding the presence of accused Tek Chand who was declared absconder in crime case No. 6 of 2005 at Gohar. The information was reduced into writing and was produced before Sh. H.S.Gill, who directed Ganesh Balooni to constitute a team and to take necessary steps as per law. Consequently, Ganesh Balooni alongwith Gurdass Ram, Gurdev Singh driver and Ramesh Kumar sepoy proceeded from Chandigarh to Gohar. They also associated two witnesses from Gohar Police Station. The two persons were also requested to identify accused Tek Chand. On 15.2.2009, at about 8:00 PM Sh. Ganesh Balooni noticed a person at Taxi Stand Gohar. The team introduced them and inquired about his address. He disclosed his name as Tek Chand and admitted that he knew Dharam Dass. Thereafter notice under Section 67 of the Act was served upon him and his statement was recorded in the police station by Sh. Ganesh Balooni in the presence of the independent witnesses. Prima-facie accused was found involved in the case under Section 20 of the ND & PS Act.

4. The prosecution, in order to prove its case, has examined as many as 10 witnesses. The accused was also examined under Section 313 Cr.P.C. The learned trial Court acquitted the accused, as noticed hereinabove.

5. Mr. Ashwani Pathak, Advocate, appearing on behalf of the NCB, has vehemently argued that the prosecution has proved its case against the accused. On the other hand, Mr. Anoop Chitkara, Advocate, for the accused has supported the judgment of the learned trial Court dated 31.12.2011.

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

7. Suptd. Harcharan Singh PW-1 deposed that he was working as Superintendent in the office of NCB, Zonal Unit Chandigarh. Ganesh Balooni was working as Intelligence Officer in their office. On 15.2.2009, Ganesh Balooni put up before him a written information that Sh. Tek Chand who was absconder in NCB case of 68 kgs. charas could be found at Gohar.

8. HC Khem Chand, PW-2 deposed that on 15.2.2009, he alongwith Const. Virender Kumar were present in Gohar Bazar on patrol duty. They met a team of NCB, Chandigarh headed by Ganesh Balooni Intelligence Officer. He showed him his identity card and informed that their team had come from Chandigarh in connection with case No. 06/05 under ND & PS Act and that the accused, namely Tek Chand involved in that case was to be arrested. They went towards the bus-stand. The accused was present there. The I.O. asked him about his name and address. He disclosed that he was Tek Chand and also stated that he was involved in a case under ND & PS Act and was proclaimed offender. The

team members were having the photographs of that person. On the basis of the photographs, the team members identified the accused present in the court to be the same person and then on questioning him the fact was confirmed. He was asked to accompany the team to the Police Station Gohar. At the Police Station, he again admitted that he was Tek Chand. He gave his statement Ext. PW-2/B. It was signed by him and Const. Virender and Ganesh Balooni. The accused was arrested vide memo Ext. PW-2/C. His wife was telephonically informed. In his cross-examination, he deposed that the team met them at taxi stand at 7:30 PM.

9. ASI Kesar Singh PW-3 deposed that according to rapat No. 22 dated 24.7.2005, HC Ashok Kumar, HC Narender Kumar and Const. Dev Raj were sent to assist the team of NCB by the order of Addl. S.P. Mandi. Accused Dharam Dass and Abhishek Kumar reached at PS Sadar Mandi at 4:00 AM on 25.7.2005.

10. Inder Singh PW-4 is a formal witness.

11. Suptd. Ganesh Balooni, PW-5 testified that accused Tek Chand present in the court was declared proclaimed offender in NCB Crimes case No. 6/05. On 15.2.2009, he received secret information regarding the presence of accused Tek Chand at Gohar. He considered the information as authenticated and as such reduced it into writing and presented the same before Suptd. H.S.Gill, his superior. The team was constituted and they started from Chandigarh in official vehicle. They reached Gohar at about 7:00 PM. The police officials from PS Gohar, who

were on patrolling, were also associated by him in the said police party. The notice given to HC Khem Chand was Ext. PW-2/A. Thereafter, he apprised both of them regarding the secret information which he had received that day. The police party reached at Taxi Stand Gohar. It was already dark. At about 8:00 PM, he noticed a person standing in the rain shelter. His resemblance was matching with the information which was given to him. Consequently, he enquired from that person regarding his name and address. On enquiry, he disclosed his name as Tek Chand. He served notice under Section 67 of the Act upon accused Tek Chand. He gave his statement Ext. PW-2/B under Section 67 of the Act. In his cross-examination, he admitted that he was having the photograph of the accused. Self stated that the same was not clearly visible as it was a dim photograph. It was taken from the old file. The photograph has not been attached with the complaint. There was no reference regarding the said photograph in the old file. Similarly, he had not given any reference regarding the said photograph. He has not prepared the site plan of that place from where the accused was nabbed.

12. Const. Balwinder Singh PW-6 testified that on 26.7.2005 Sh. O.P. Sharma, Suptd. NCB, handed over to him four samples which were marked as A1, B1, C1 and D1 of crime case No. 6 of 2005 alongwith the covering letter Ext. PW-6/A. He deposited the same with CRCL, Delhi on 27.5.2005. The receipt was Ext. PW-6/B.

13. HC Narender Kumar PW-7 deposed that at about 7:00 PM, police party headed by Sh. O.P. Sharma proceeded to village Khanethi. Sh. P.K. Sharma was also with the police party being the I.O. They reached at Khanethi at 11:00 PM and then they laid picketing. At about 1:00 AM, in the mid night, they noticed three persons coming on foot on the *kachha* road leading to village Khanethi carrying something on their heads. On seeing these persons, members of the team warned them to stop. Consequently, two of them stopped while one fled away from the spot after throwing his jute bag on the spot. I.O. as well as Sh. O.P. Sharma, had disclosed their identity to said two persons and they also enquired about their antecedents. On enquiry, one of them disclosed his name as Dharam Dass and the other as Abhishek. On search, contraband was recovered. It weighed 68 kgs. charas. The sealing process was completed. In his cross-examination, he admitted that he has never met Tek Chand prior to the alleged incident. No identification parade was conducted in his presence. He had the opportunity to see accused Tek Chand for 3-4 minutes at that time. He had not got recorded in his statement to the police regarding the age as well as height of the accused. The accused were nabbed on the spot between 1:00 AM to 2:00 AM. The arrest memo was also witnessed by him.

14. Suptd. O.P. Sharma, PW-8 deposed that they were on routine surveillance in Mandi. I.O. P.K. Sharma, received secret information regarding the involvement of some people of village Jhamachh, Distt.

Mandi in drug trafficking and they were likely to make some deal. The information was Ext. PW-4/A. He had given direction to the I.O. in writing Ext. PW-8/A and also made written request to S.P. Mandi Ext. PW-4/B. Thereafter, some police officials were also associated in the NCB team, including one was Addl. S.P., Mandi. The team reached the spot at about 11:00 PM. At about 1:00 AM, they noticed three persons coming from hill side to the road. They were moving towards the NCB team and were carrying jute bags on their heads. On seeing the team, these persons tried to flee away. However, two of them were nabbed by the team. One Tek Chand, present in the Court was about to flee away. They were searched and contraband was recovered. It was sealed. He also deposed that some people who were hiding in the forest started pelting stones on the NCB team due to which they were compelled to leave the spot. Consequently, they returned to the Police Station. He admitted in his cross-examination that on the way to village Khanethi, number of thickly populated villages fall on the way. No efforts were made by him as well as other members of the NCB team to associate independent witnesses. He also admitted in his cross-examination that when the police was doing surveillance, there was pitch dark. The features of accused Tek Chand were noted down by him. Voluntarily deposed that he remembered those features at that time he was thin and now he put on some weight. At that time, he was having a French beard. He did not produce any photograph

of the accused. He did not remember whether any photograph of the accused Tek Chand was put in lateron or not.

15. Intelligence Officer P.K.Sharma, PW-9 also deposed the manner in which the secret information was received on 24.7.2005, the NCB team alongwith the police officials proceeded to the spot, accused Dharam Dass and Abhishek Kumar apprehended, the contraband was recovered and sealing process was completed. In his cross-examination, he deposed that number of persons started gathering there and they started pelting stones upon them which caused hurdle in further investigation. He admitted that while going to Khanethi, number of thickly populated villages fall on the way. No efforts were made by him as well as other members of the NCB team to associate independent witnesses. He also admitted in his cross-examination that when the police was doing surveillance, there was pitch dark. The persons, who had gone to chase the third accused, returned back after 15-20 minutes. The policemen disclosed to him that they could not nab the accused due to darkness. The policemen who were deputed to chase the third accused disclosed to him that the person who fled away from the spot was thin in physique and also having a French beard. The beard was black in colour. He did not procure any photograph of the accused. They have not lodged any report against the persons who were pelting stones on them. According to him, accused Dharam Dass and Abhishek were arrested at 2:00 PM and the time has been mentioned on the arrest memo. He has

not met accused prior to the incident nor after that. He did not remember whether he procured the photographs of accused Tek Chand or not. He visited the house of accused Tek Chand during investigation. ◊

16. I.O. Virender Singh is a formal witness.

17. Sh. Inder Singh DW-1 has proved Ext. DW-1/A.

18. Panchayat Asstt. Munshi Ram, DW-2 has proved certificate Ext. DW-2/A.

19. The case of the prosecution, in a nut shell, is that secret information was received by Sh. P.K. Sharma PW-9, on 24.7.2005 at about 4:00 PM at Mandi Rest House. He informed his superior officer PW-8 Sh. O.P. Sharma. The local police assistance was provided. They proceeded to the spot at 7:30 PM alongwith the local police party. They reached village Khanethi at about 11:00 PM. The spot was near village Khanethi. The accused were seen coming from the upper hill side. They tried to run away from the spot. Two of them were nabbed. One of them managed to escape. He was lateron apprehended and put to trial.

20. The seizure memo is Ext. PW-4/H. It is not shown that charas was recovered from three persons. It gives the names of Dharam Dass and Abhishek Kumar. In test memo Ext. PW-4/J, there is no reference of involvement of 3rd person. HC Narender Kumar PW-7, in his cross-examination, has admitted that he has never met accused Tek Chand prior to the alleged incident. No identification parade was conducted in his presence. He had the opportunity to see accused Tek

Chand for 3-4 minutes at that time. He had not got recorded in his statement to the police regarding the age as well as height of the accused. Suptd. O.P. Sharma, PW-8 has admitted in his cross-examination that on the way to village Khanethi, number of thickly populated villages falls on the way. No efforts were made by him as well as other members of the NCB team to associate independent witnesses. He further admitted in his cross-examination that when the police was doing surveillance, there was pitch dark. The features of accused Tek Chand were noted down by him. He further voluntarily deposed that he remembered those features at that time he was thin and now he put on some weight. At that time, the accused was having a French beard. He did not produce any photograph of the accused. He did not remember whether any photograph of the accused Tek Chand was put in lateron or not. Similarly, Sh. P.K. Sharma PW-9 deposed that while going to Khanethi, number of thickly populated villages fall on the way. No efforts were made by him as well as other members of the NCB team to associate independent witnesses.

21. The identification of the accused as the person who has fled away from the spot is not free from suspicion, as noticed by the learned trial Court. They have not produced any record to establish the identity of the accused. It was pitch dark at the time when the accused had run away from the spot. No identification parade has been conducted by the police. We have already noticed hereinabove that neither in Ext. PW-4/H or in Ext. PW-4/J, there is any reference regarding the involvement of the

accused Tek Chand. In recovery/seizure memo Ext. PW-4/H, there is no reference that the charas was recovered from three accused persons.

22. According to the prosecution, Ganesh Balooni PW-5 after reaching Gohar, associated two police officials from Police Station, Gohar. He has not associated any independent witnesses though available from the locality. The statement of the accused recorded under Section 67 of the Act is Ext. PW-2/B. The statement runs into three pages. The accused has put his signatures on left side instead of the right side. Sh. Ganesh Balooni PW-5 has not warned the accused that he was not bound to make the statement and bound to remain silent. Neither notice was served nor produced on the case file. Similarly, HC Khem Chand PW-2 has not testified that any warning was given to the accused by the I.O. or the accused was cautioned that he was bound to make statement and in case statement was made, the same was to be used against him. HC Khem Chand PW-2 has also not deposed that the accused was personally known to him. Similarly in Ext. PW-1/A written information, there is no reference to the physical features of the accused. Sh. Ganesh Balooni PW-5 has tried to explain that the features of the accused were supplied to him by the informant. However, it is not so stated in Ext. PW-1/A. Sh. Ganesh Balooni, PW-5 has not associated any person of the raiding party which was constituted on 24.7.2005 at the time of apprehending the accused. Mr. Ashwani Pathak, Advocate, has placed strong reliance upon two statements made by the accused Ext. PW-4/L and Ext. PW-4/N.

However, in view of the facts enumerated hereinabove, no credence can be given to the statements. It is also doubtful, whether the statements were voluntarily made or not. There is also lack of evidence at what time accused Dharam Dass and Abhishek Kumar were arrested and statement under Section 67 was recorded. It is also not clear whether the accused Dharam Dass and Abhishek Kumar were arrested at Mandi or on the spot.

23. In the case of ***Kanhaiyalal vrs. Union of India***, reported in **(2008) 4 SCC 668**, their lordships of the Hon'ble Supreme Court have held that the bar under Sections 24 to 27 of the Evidence Act would not operate nor would the provisions of Article 20(3) of the Constitution, unless the statement is made under threat or coercion. Their lordships have held as under:

42. Of course, this Court has also held in Pon Adithan's case that even if a person is placed under arrest and thereafter makes a statement which seeks to incriminate him, the bar under Article 20(3) of the Constitution would not operate against him if such statement was given voluntarily and without any threat or compulsion and if supported by corroborating evidence.

43. The law involved in deciding this appeal has been considered by this Court from as far back as in 1963 in Pyare Lal Bhargava's case (supra). The consistent view which has been taken with regard to confessions made under provisions of Section 67 of the NDPS Act and other criminal enactments, such as the Customs Act, 1962, has been that such statements may be treated as confessions for the purpose of Section 27 of the Evidence Act, but with the caution that the Court should satisfy itself that such statements had been made voluntarily and at a time when the person making such

statement had not been made an accused in connection with the alleged offence.

24. In the case of **Raju Premji vrs. Customs, Ner, Shillong Unit with connected matter**, reported in **(2009)16 SCC 496**, their lordships of the Hon'ble Supreme Court have held that even if confession under the Act may not be hit by S. 25 of Evidence Act, but yet such confession should be strictly scrutinized by Court as to whether it was made voluntarily. Their lordships have also held that enquiry under Section 67 of the Act shall be made in terms of the enquiry as held under Cr.P.C. Their lordships have further held that the confession must be judged from the facts and circumstances of each case. It has been held as follows:

"19. The application of the provisions of Section 67 of the Act is required to be considered in the aforementioned factual backdrop. It reads as under :-

"Section 67 - Power to call for information, etc. Any officer referred to in section 42 who is authorised in this behalf by the Central Government or a State Government may, during the course of any enquiry in connection with the contravention of any provisions of this Act,--

- (a) call for information from any person for the purpose of satisfying himself whether there has been any contravention of the provisions of this Act or any rule or order made thereunder;
- (b) require any person to produce or deliver any document or thing useful or relevant to the enquiry;
- (c) examine any person acquainted with the facts and circumstances of the case."

An empowered officer, therefore, is entitled to examine any person acquainted with the facts and circumstances of the case, inter alia during the course of any enquiry in connection with the contravention of any provision of the Act.

As the term 'enquiry' is not defined under the NDPS Act, its meaning assigned in Section 2(g) of the Code of Criminal Procedure as also in an etymological sense and the manner may be held to be applicable. ◇

23. We would, for this purpose, assume that such confessions are not hit with Section 25 of the Evidence Act, 1872 but even then they must receive strict scrutiny. This Court in [Kanhaiyalal v. Union of India](#), [(2008) 4 SCC 668], upon taking into consideration number of decisions, held as under :-

"43. The law involved in deciding this appeal has been considered by this Court from as far back as in 1963 in Pyare Lal Bhargava case. The consistent view which has been taken with regard to confessions made under provisions of Section 67 of the NDPS Act and other criminal enactments, such as the Customs Act, 1962, has been that such statements may be treated as confessions for the purpose of Section 27 of the Evidence Act, but with the caution that the court should satisfy itself that such statements had been made voluntarily and at a time when the person making such statement had not been made an accused in connection with the alleged offence."

25. The view expressed by the Hon'ble Supreme Court in the case of ***Kanhaiyalal vrs. Union of India (supra)***, was doubted and not followed in the case of ***Nirmal Singh Pehlwan vrs. Inspector, Customs, Customs House, Punjab***, reported in **(2011) 12 SCC 298**. It has been held as follows:

"8. The second argument is based on the judgment of this Court in [Noor Aga vs. State of Punjab & Anr.](#) (2008 (16) SCC 417) in which this Court had deviated from the earlier position in law that a Customs Officer was not a police officer and a confession made to him under Section 108 of the Customs Act, was admissible in evidence. In this case it has been held that as a Custom Officer exercised police powers and a confession made by an accused could result in a conviction and sentence, such a confession was hit by the

embargo placed by Section 25 of the Evidence Act, 1872, and was, therefore, not admissible in evidence.

9. On the other hand, Mr. R.P. Bhatt, the learned senior counsel for the respondent - Department, has pointed out that Ext. P.A. the consent memo in fact conveyed information to the appellant that he had a right to be searched in the presence of a Magistrate or a Gazetted Officer and that this amounted to full compliance with Section 50 of the Act. He has also pointed out that although Noor Aga's case did say that a confession made to a Custom Officer was hit by Section 25 of the Evidence Act and was therefore not admissible in the evidence, yet a judgment of a coordinate Bench of this Court in *Kanahiya Lal vs. Union of India* case (2008 (4) SCC 668) had reiterated the earlier position in the law as given in *Raj Kumar vs. Union of India* - 1990(2) SCC 409 that Officers of the Revenue Intelligence and ipso facto of the Customs Department could not be said to be police officers and a confession before them would not be hit by Section 25 of the Evidence Act.

15. We also see that the Division Bench in *Kanahiya Lal's* case had not examined the principles and the concepts underlying Section 25 of the Evidence Act vis.-a- vis. Section 108 of the Customs Act the powers of Custom Officer who could investigate and bring for trial an accused in a narcotic matter. The said case relied exclusively on the judgment in *Raj Kumar's* case (Supra). The latest judgment in point of time is *Noor Aga's* case which has dealt very elaborately with this matter. We thus feel it would be proper for us to follow the ratio of the judgment in *Noor Aga's* case particularly as the provisions of Section 50 of the Act which are mandatory have also not been complied with.

16. In view of what has been held above we find that the conviction of the appellant must be set aside. Accordingly we allow this appeal and order his acquittal.”

26. Their lordships of the Hon'ble Supreme Court in the case of ***Tofan Singh vrs. State of Tamil Nadu***, reported in (2013) 16 SCC 31, have referred the following issues to the Larger Bench:

“(A) (i) whether IO (an NDOP) officer under S. 53 would qualify as a “police officer” thereby attracting the provisions of Ss. 24 to 25 of Evidence Act, 1872 and Art. 20(3) of Constitution to a retracted confession; (A)(ii) whether the statement under S. 67, NDPS Act can be treated as a confession if the NDPS officer is not treated a “police officer”; and (A)(iii) whether statements under *pari materia* provisions like 108 of the Customs Act, 1962 and S. 14 of the Excise Act are akin to or are qualitatively different from S. 67 statement under NDPS Act-The issues that were raised in the submissions were: (B)(i) whether confessions under S. 67 NDPS Act can be treated as substantive evidence when no oath is administered, when person recording confession is allegedly discharging duties of a police officer (i.e. prevention and detection of crime involving offences triable in a criminal court and having penal consequences), thereby making the statements under S. 67, NDPS Act no better than S. 161 CrPC statements; (B)(ii) whether NDPS officers under S. 53, NDPS Act who are recording confessions under S. 67, NDPS Act can be held as “persons in authority” under S. 24 of Evidence Act, thereby making them similar to police officers; (B)(iii) whether the reasons for holding Customs Officers as police officers in some cases like Abdul Rashid, (2001) 9 SCC 578 and Noor Aga, (2008) 16 SCC 417 would also apply to NDPS officers; (B)(iv) whether an officer under S. 42 of the NDPS Act is distinct and different from an officer under S. 53 of NDPS Act; (B)(v) whether trial was vitiated due to non-compliance with S. 57, NDPS Act in present case; and (B)(vi) whether conviction of A-3 could have been made without the confessional statement.”

27. 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 & P.S., Act.

28. Accordingly, in view of the analysis and discussion made hereinabove, there is no occasion for this Court to interfere with the well reasoned judgment of the learned trial Court. Accordingly, there is no merit in this appeal and the same is dismissed.

(Rajiv Sharma),
Judge.

March 20, 2015,
(karan)

(Sureshwar Thakur),
Judge.

High Court