



IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

Criminal Appeal No.415 of 2017

Reserved on : 11.4.2019

Date of Decision : 2.5.2019

Tilak Raj

...Appellant.

Versus

State of H.P.

...Respondent.

Coram:

The Hon'ble Mr. Justice Dharam Chand Chaudhary, Judge.

The Hon'ble Mr. Justice Vivek Singh Thakur, Judge.

Whether approved for reporting? Yes

For the Appellant : Mr. Virender Singh Rathore,
Advocate, as Legal Aid Counsel.

For the Respondent : Mr. Vikas Rathour, Mr. Narinder
Guleria, Additional Advocates
General, and Mr. Kunal Thakur &
Sunny Dhatwalia, Deputy
Advocates General.

Vivek Singh Thakur, Judge

Present appeal has been preferred by accused-convict-appellant Tilak Raj against the judgment dated 7.12.2016/13.12.2016, passed by learned Special Judge, Chamba, Division Chamba, Himachal Pradesh, in Sessions Trial No.27 of 2015, titled as *State of Himachal Pradesh v. Tilak Raj*, whereby accused has been convicted for committing an offence under Section 20(b)

¹Whether reporters of the local papers may be allowed to see the judgment?

(ii)(c) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the NDPS Act) and sentenced to undergo rigorous imprisonment for a period of 12 years and to pay a fine of Rs.1,50,000/-, and to undergo further simple imprisonment for a period of six months in case of default of payment of fine.

2. We have heard learned counsel for the accused, learned Additional Advocate General, and also gone through the record.

3. In brief, case of the prosecution is that on 16.5.2015 at 2.15 p.m., a police party headed by HC Kartar Singh (PW-13), consisting of Constable Surinder Singh (PW-1), Constable Subhash Chand (PW-2) and Constable Pawan Kumar (PW-3), left Police Post, Banikhet for patrolling towards Bathri, Devi Dehra Bazaar, etc., District Chamba, alongwith Investigation Kit, Photography and Videography Camera, Electronic Weighing Machine, etc., after recording Rapt No.7 in Daily Diary Register (Ex.PW-6/A) in Police Post Banikhet. From Banikhet to Bathri, the police party travelled in HRTC Bus, wherefrom they went on patrolling, on foot, to Devi Dehra Bazaar and on the way challaned two vehicles under the Motor Vehicles Act. At about 3.45 p.m., when the police party was near Rock Garden Bridge, Devi Dehra and PW-13 HC

Kartar Singh was talking with Pankaj Kumar (PW-4) and Shashi Kumar (PW-5), a person appeared on the road from the stairs of Jalpa Mata Temple, having a package parcel of shawl in his hand. The said fellow got perplexed on noticing the police on the road. On inquiry, the accused disclosed his identity and address whereafter he was also inquired about the material being carried by him in the package parcel. After his reply that it contained his personal belongings, PW-13 Kartar Singh asked him to open it for checking. On opening of the package parcel by the accused, a blue coloured carry bag, containing therein an envelope of polythene, was found therein. In the polythene envelope, black coloured solid stick shape substance was found. Whereupon at about 4 p.m., PW-1 Surinder Singh was sent by the Investigating Officer PW-13 HC Kartar Singh to the Police Post for bringing Drug Detection Kit, who returned with the said kit at 5 p.m. On checking the black coloured substance, with the help of Drug Detection Kit, it was identified to be as Charas. Thereafter, Identification Memo (Ex.PW-2/A) was prepared, which was thumb impressed by the accused as well as PW-2 Constable Subhash Chand, and independent witnesses PW-4 Pankaj Kumar and PW-5 Shashi Kumar. On weighing the recovered contraband, on electronic

weighing machine, it was found to be 1.8 kgs. Thereafter, the recovered Charas was again put in the bags in the same manner as it was earlier and the same was taken into possession, after sealing it in a parcel of cloth with seal impression "S". Sample of the seal was taken on a piece of cloth (Ex.PW-2/D), whereupon the accused had put his thumb impression and PW-2, PW-4 and PW-5 had signed the same. Relevant columns of NCB Form (Ex.PW-10/C) were also filled in triplicate and impression of the seal was also taken on the NCB form. The seal, after use, was handed over to PW-4 Pankaj Kumar. Shawl, which was used for package parcel, was also taken into possession. Seizure Memo (Ex.PW-2/E), duly thumb impressed by the accused and signed by PW-2, PW-4 and PW-5, was prepared on the spot. Thereafter, notice under Section 50 of the NDPS Act (Ex.PW-2/B) was given to the accused, whereby he was informed of his legal right for opting his personal search before some Magistrate or Gazetted Officer. As accused had claimed that he is illiterate, meaning of "Gazetted Officer" and "Magistrate" was also explained to him. However, accused opted for his personal search by HC Kartar Singh. The accused had put thumb impression on the notice (Ex.PW-2/B) and PW-3 and PW-4 had also signed the same. Before conducting

the search of the accused, the police officials and the witnesses also gave their personal search to accused vide memo (Ex.PW-2/C), which was signed by PW-2, PW-4 & PW-5, and thumb impressed by the accused.

4. During personal search of the accused, no suspicious substance/article was recovered, except the clothes worn by him and his personal articles. The aforesaid search and seizure process was also photographed and videographed by PW-1 Constable Surinder Singh with the help of official camera, and such photographs are Ex.PW-1/A-1 to Ex.PW-1/A-8. The aforesaid details were reduced into writing in Ruka (Ex.PW-10/A), which was sent to Police Station, Dalhousie, through PW-1 Constable Surinder Singh, at about 7.55 p.m. and carbon copy of the Ruka (Ex.PW-9/A) was also sent from the spot to the Superintendent of Police, District Chamba, through PW-2 Constable Pawan Kumar.

5. It is further case of the prosecution that PW-1 Constable Surinder Singh had handed over the Ruka to PW-10 ASI Hans Raj, who, on the basis of the same, after registering FIR No.51/15, dated 16.5.2015 (Ex.PW-10/A) and thereafter after making endorsement (Ex.PW-10/B) on the ruka, regarding registration of FIR, had handed over the case file to PW-1 to further hand it over to PW-13

HC Kartar Singh. Copy of the ruka sent to the Superintendent of Police, through PW-3, was seen by him at his residence at 10 p.m. on 16.5.2015.

6. As per prosecution case, the accused was arrested at about 10.30 p.m. on 16.5.2015, after informing him vide memo of information of arrest (Ex.PW-2F), whereupon the accused had put his thumb impression and had expressed his desire to inform his real sister Sudesh Rani on her mobile phone about his arrest. After giving information, as desired by the accused, which was endorsed upon memo Ex.PW2/F, whereupon the accused had put his thumb impression and was witnessed by PW-2 and PW-4. At the time of arrest, personal search (Jamatalashi) of the accused was also re-conducted and a memo (Ex.PW-2/G), duly acknowledged by the accused and witnessed by PW-2 & PW-4, was also prepared.

7. The accused alongwith the case property was brought to Police Station, Dalhousie and case property was handed over by HC Kartar Singh to PW-10 ASI Hans Raj, who after resealing the same with seal 'H', in presence of PW-8 Constable Lakish Kumar and facsimileing the seal impression on NCB form and filling its relevant columns, had handed over the case property

alongwith documents to PW-11 MHC Deepak Kumar at 11.50 p.m. In this regard, DD entries No.43 (Ex.PW-7/A) and 44 (Ex.PW-7/B) were also recorded, through PW-7 Constable Yogesh Gurang. PW-10 ASI Hans Raj also prepared Resealing Certificate (Ex.PW-8/A) and handed over the seal to PW-8 Constable Lakish Kumar. PW-13 HC Kartar Singh had also deposited one Shawl (Ex.P-5) with PW-11 at 11.30 p.m., which was entered by him at Sr. No.99 of the Malkhana Register (Ex.PW-11/B). Deposit of case property by PW-10 with PW-11 was also entered in the Malkhana Register at Sr. No.100. The accused was subjected to medical examination in Civil Hospital, Dalhousie on 17.5.2015 and thereafter lodged in lock-up. Recovered contraband (Ex.P-1) was sent to the State Forensic Science Laboratory, Junga, for chemical analysis/examination on 17.6.2015, through PW-8 Lakish Kumar, vide RC No.54 (Ex.PW-11/C), dated 17.5.2015, who after depositing the same with the FSL, on 18.5.2015, had handed over receipt thereof to PW-11 Deepak Kumar. The case property alongwith report of FSL (Ex.PX) was brought to the Police Station by Constable Rajinder Kumar.

8. During investigation, Site Map (Ex.PW-13/B) was prepared and the statements of the witnesses under

Section 161 of the Code of Criminal Procedure were also recorded. Special Report (Ex.PW-9/B) was also prepared by the Investigating Officer PW-13 HC Kartar Singh, which was sent to the Superintendent of Police, Chamba, District Chamba, through PW-3 Constable Pawan Kumar on 18.5.2015, which was seen by the Superintendent of Police in his office on the same day at 1 p.m. Thereafter, copy of ruka (Ex.PW-9/A) and Special Report (Ex.PW-9/B) were handed over by the Superintendent of Police to his Assistant Reader HHC Rajesh Kumar (PW-9), who entered the same in the Receipt Register at Sr. No.5399 & 5400.

9. On receipt of the report of the Chemical Examiner and completion of investigation, PW-13 HC Kartar Singh handed over the case file to PW-12 HC Bhajan Singh, Incharge of Police Post, Banikhet, who further handed it over to SI Bhupinder Singh, SHO, Police Station, Dalhousie, who presented the challan in the Court for trial.

10. Trial Court, having found a prima facie case against the accused, charged him for having committed an offence under Section 20(ii)(C) of the NDPS Act. The accused pleaded not guilty to the charge and claimed trial.

11. To prove the case against the accused, the prosecution has examined as many as 13 witnesses. Statement of the accused under Section 313 of the Code of Criminal Procedure was also recorded, in which he pleaded innocence and false implication. No evidence in defence was led.

12. On conclusion of the trial, the accused stands convicted and sentenced, as aforesaid.

13. Learned counsel for the accused has submitted that in the present case PW-4 Pankaj Kumar and PW-5 Shashi Kumar are two independent witnesses, but they have not lent support to the prosecution case by resiling from their earlier statement and contrary to the claim of the prosecution, they have categorically stated that forms were filled in the shop and nothing was recovered in their presence, which reflects that a false case has been foisted upon the accused and he deserves to be acquitted. It is also argued that before checking the package parcel, wherefrom contraband substance is alleged to have been recovered, no notice under Section 50 of the NDPS Act was served upon the accused and therefore also for failure of compliance of mandatory provision the accused deserves to be acquitted. Lastly, learned counsel, in alternative, submits that in case his

plea for acquittal does not find favour then he has prayed for reduction of sentence of imprisonment as well as fine to the minimum prescribed, especially keeping in view material on record and other mitigating circumstances.

14. Learned Additional Advocate General, for the reasons scribed in the impugned judgment, has supported the conviction of the accused.

15. Learned counsel for accused has submitted that recovered contraband from the accused in the present case is 1 kg 800 gram and he has been sentenced to undergo rigorous imprisonment for 12 years and to pay fine of Rs.1,50,000/-. He has referred judgments passed in the Cr. Appeal No.554 of 2016 titled as **Khem Chand Versus State of H.P.** decided on 31.08.2018; **Mohar Singh Versus State of H.P.** reported in **2018 (2) Shim.LC 1090**; **Raju Versus State of H.P.** reported in **2018 (2) Shim. LC 702**; **State of H.P. Versus Gian Chand** reported in **2016 (3) Shim. LC 1195**; **Joga Singh Versus State of H.P.** reported in **ILR 2016 (IV) HP 403**, wherein for recovery of quantity of charas weighing 2.100 kg, 1.700 kg, 1.650 kg and 1.300 kg, sentence of rigorous imprisonment of 10 years along with fine to the tune of Rs.1,00,000/- has been imposed and has canvassed for reduction of sentence with further

plea that family dependent of the accused/convict is facing grave hardship for his imprisonment. He has also referred judgement in case titled as **State of H.P. Versus Virender Singh**, reported in **ILR 2016 (IV) HP 381** wherein for recovery of 3.5 Kg. charas the accused was sentenced to undergo 10 years imprisonment and to pay fine of Rs.1 lac only. Another case referred by learned counsel for the accused appellant is **State of H.P. Versus Pardeep Kumar Etc.** reported in **Latest HLJ 2018 (SC) 555** wherein for recovery of 19 Kg. charas sentence of 12 year imprisonment was imposed.

16. It is settled law that statement of a hostile witness is not to be brushed aside in toto and in case deposition of the hostile witness or any part thereof finds corroboration or is substantiated by other reliable evidence on record, the said portion of deposition can be taken into consideration in favour of either party.

17. As per prosecution case, the Investigating Officer PW-13 HC Kartar Singh, three police officials, namely PW-1 Constable Surinder Singh, PW-2 Constable Subhash Chand, PW-3 Constable Pawan Kumar, and two independent witnesses, i.e. PW-4 Pankaj Kumar and PW-5

Shashi Kumar, are spot eye-witnesses of recovery of contraband substance.

18. PW-13, PW-1, PW-2 and PW-3 have corroborated the prosecution case in its totality, without any mistake or material contradiction. In their cross-examination, nothing material could be elicited. However, as noticed above, independent witnesses PW-4 and PW-5 were declared hostile and subjected to cross-examination by the learned Public Prosecutor.

19. In our opinion, deposition of the hostile witnesses is of no help to the accused, rather the admissions made by them during cross-examination by the learned Public Prosecutor substantiate the prosecution case. In examination-in-chief, both of them have stated that when they were sitting in their shop (s) at Devi Dehra, police came and asked them to sign some papers and obtained their signatures on some documents. In cross-examination, both of them have admitted the presence of each other in Devi Dehra at the relevant point of time, i.e. 3.45 p.m., corroborating the claim of the prosecution. Though they have denied of having noticed the accused coming from the stairs of the temple, carrying a package parcel of shawl and becoming frightened, on noticing the police, but both of them have

admitted the snapping of photographs on the spot and their presence in Photograph Ex.PW-1/A-6, at the time of weighing the contraband. They have also admitted their signatures on parcel of contraband (Ex.P-1), Certificate of Identification of contraband (Ex.PW-2/A), Consent Memo (Ex.PW-2/B), Memo of Search by Police Party (Ex.PW-2/C), Sample seal (Ex.PW-2/D) and Seizure Memo (Ex.PW-2/E). PW-4 has also admitted his signatures on Arrest Memo (Ex.PW-2/F) and Jamatalashi Memo (Ex.PW-2/G). Though PW-4 has denied his presence during the investigation, however, admitted that when contraband substance was weighed by the police, he was standing with the police. He has also stated that his shop is in front of the place where they are shown standing in the photographs. This fact further corroborates the prosecution case, as in the Site Plan (Ex.PW-13/B), shop of PW-4 has been shown in front of Place-B, where the accused was noticed and Place-A has been indicated as a place where PW-13 was talking with PW-4 and PW-5. Shashi Kumar (PW-5) has admitted that recovered substance was checked with Drug Detection Kit and that the police had filled the forms in his shop. He has also admitted the sealing of the parcel by the police, but with further statement that he did not remember the seal, which was affixed on the

parcel and again he has admitted his signatures on the said parcel. PW-4 though, has admitted presence of Shashi Kumar on the spot, but contrary to PW-5 Shashi Kumar, has denied the sealing of the parcel by the police, but again has admitted obtaining his signatures thereon by the police.

20. From the scrutiny of evidence of PW-4 and PW-5, it is evident that they have admitted not only their presence on the spot at the relevant point of time, but also the presence of police party as well as of the accused. Further, detection, weighing and seizure of the contraband on the spot and preparation of documents related thereto has also been admitted by these witnesses, which substantiates the prosecution case established in deposition of official witnesses PW-1, PW-2, PW-3 and PW-14.

21. Mere fact that the independent witnesses were declared hostile for deviating from their earlier statements, recorded under Section 161 of the Code of Criminal Procedure, does not make any difference. It is also noticeable that their admissions in cross-examination, conducted by the learned Public Prosecutor, have not been questioned by the defence counsel as these witnesses were not cross-examined, despite

granting opportunity to the defence. It is not a case where a hostile witness has come with a story, which is altogether different from the prosecution case or has deposed in such a manner which falsifies the prosecution case, rather in the instant case the deposition of the independent witnesses, when read with the other evidence on record, fortifies the case of the prosecution.

22. Plea raised on behalf of the accused with regard to non-compliance of mandatory provision of Section 50 of the NDPS Act is misconceived. As is evident from the facts of the case, the contraband substance, i.e. Charas, was recovered from the package parcel of shawl, during informal checking of belongings of the accused, without suspicion of transportation of contraband substance. Therefore, it was a chance recovery of contraband that too was not from the person of the accused but from the package parcel carried by him.

23. So far as personal search is concerned, it is a categorical case of the prosecution that after the identification of recovered contraband substance, through Drug Identification Kit, as Charas, the Investigating Officer had proposed personal search of the accused for further investigation to find out about any

other suspicious substance or narcotic or psychotropic substance beneath the clothes worn by him, and therefore, for that purpose, a notice under Section 50 of the NDPS Act (Ex.PW-2/B) was given to him, and when the accused expressed that he is an illiterate person, not only that the said notice was explained to him but the meaning of "Magistrate" and "Gazetted Officer" was also explained, and thereafter he opted to be searched by the police officials present on the spot. We find that there is no illegality or irregularity in the Consent Memo (Ex.PW-2/B), as before personal search of the accused, the police officials alongwith witnesses had also given not only their personal search but also of their belongings, including the IO Kit, to the accused vide memo Ex. PW-2/C. Therefore, argument advanced on behalf of the accused, with respect to non-compliance of Section 50 of the NDPS Act, is not sustainable.

24. From the material on record, it is evident that the prosecution has proved its case, beyond reasonable doubt, by leading cogent, reliable, tangible and convincing evidence on record that 1 kg 800 gram charas was recovered from exclusive and conscious possession of the accused and there is no scope for interference with the conviction of the accused.

25. It is also noticeable in this case that the Investigating Officer has not made any effort to find out that wherefrom the recovered Charas was procured and whereto it was being transported. Drug addiction is a menace, which is causing destruction of entire youth of the country. The Investigating Officer has opted for a casual approach, limiting his investigation only to the recovery of contraband substance and preparation of challan against the accused, without investigating the source and destination of the contraband substance. The accused, from his background and the manner and means of his defence, as during trial as well in present appeal, he has been defended by legal aid counsel, appears to be a carrier only. Anyhow, we leave it to the High-ups in the executive to look into this aspect of the matter and ensure that the investigation conducted in such like cases cover up all aspects including the source from where the contraband i.e. charas was procured by the accused and where the same was being taken including the person who has sold the same to the accused and in the case of the accused merely a carrier the name of the person for whom he was working.

26. So far as plea of the accused that his family is facing a great hardship on account of his imprisonment in

jail is concerned, the same is not tenable and in such like cases normally should not be considered to reduce the sentence as in that event it would be nothing but a misplaced sympathy having no place in law for the reasons that large number of families of those persons having ruined on account of consumption of the contraband being transported by the persons like the appellant-convict is also a relevant factor for imposition of sentence. However, with regard to sentence imposed in the judgments referred aforesaid on behalf of the accused, there is no dispute. Considering sentence imposed in these judgments, we feel that all convicts should be treated uniformly in the matter of imposition of sentence. Hence, on the basis of these judgments, the sentence imposed upon the accused/appellant deserves to be reconsidered. Therefore, the sentence of rigorous imprisonment of 12 years and payment of Rs.1.5 lacs as fine deserves to be reduced as this Court did in Khem Chand's case cited supra. While upholding the judgment of conviction passed by the learned Special Judge, Chamba against the accused, we modify the sentence imposed upon him, by reducing the same from 12 years rigorous imprisonment to 10 years rigorous imprisonment

and the amount of fine is also reduced from Rs. 1,50,000/- to Rs.1,00,000/-.

27. Therefore, in modification of the impugned judgment, the appellant-convict is sentenced to undergo rigorous imprisonment for a period of ten years and also to pay Rs.1,00,000/- as fine.

28. Consequently, in partial modification of the impugned judgment as indicated hereinabove, the appeal is partly allowed and stands disposed of.

29. We place on record our appreciation for the assistance rendered by Mr.Virender Singh Rathore, learned Legal Aid Counsel.

30. An authenticated copy of this judgment be supplied to the Chief Secretary to the government of Himachal Pradesh and also the Director General of Police, Himachal Pradesh, for compliance.

(Dharam Chand Chaudhary),
Judge.

(Vivek Singh Thakur),
Judge.

May 2nd, 2019_(sd)