

Dev Raj Vs. State of H.P.

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Court : Himachal Pradesh

Decided On : May-11-2005

Reported in : 2005CriLJ4580

Judge : Lokeshwar Singh Panta and; K.C. Sood, JJ.

Acts : [Narcotic Drugs and Psychotropic Substances Act, 1985](#) - Sections 20, 41, 41(1), 42, 42(1) and 42(2)

Appeal No. : Crl. A. No. 234 of 2002

Appellant : Dev Raj

Respondent : State of H.P.

Advocate for Def. : Som Dutt Vasudeva, Addl. Adv. General and; D.S. Nainta, Dy. Adv. General

Advocate for Pet/Ap. : Seema Sood, Adv.

Disposition : Appeal allowed

Judgement :

K.C. Sood, J.

1. This appeal arises out of the judgment of learned Sessions Judge, Kullu dated March 14, 2002 whereby the respondent, hereinafter referred to as the accused'

has been convicted for an offence punishable under Section 20 of the [Narcotic Drugs and Psychotropic Substances Act, 1985](#) (Act for short) and sentenced to suffer rigorous imprisonment for ten years and to pay a fine of rupees one lakh. In case of default in the payment of fine, the accused is to suffer further imprisonment for one year.

Prosecution case.

2. On September 10, 2001, a Police Party headed by then Sub-Inspector S.H.O. Sanjay Kumar of Police Station, Banjar consisting of Assistant Sub-Inspector Narairi Singh (PW-8), Head Constable Narain Singh (PW-7), Head Constable Chaman Lal (PW-1), Constable Tek Singh (PW-2) and Uttam Singh, Lance Head Constable Hari Singh was on routine patrol duty in an official vehicle. A naka was set one km, short of yilr lage Barnagi. At about 5.45 in the morning hours, accused was spotted coming from Bather side. Accused on seeing the Police naka turned back and started walking towards opposite direction. Head Constable Narain Singh became suspicious. Accused was intercepted, overpowered and taken into custody. As the place was isolated and remote, therefore, no witness could be associated. Head Constable Narain Singh informed the accused that he suspects him in possession of charas and whether he would opt to be searched in the presence of a Magistrate or a Gazetted Officer. However, accused consented to be searched by the Police by Memorandum Exhibit PA. Head Constable Narain Singh after giving his own search to the accused, searched the person of the accused and found a packet containing Charas in the form of tablets and small sticks under the armpit of the accused. The accused was wearing a pull over. The Charas so recovered was weighed and found to be one kg. Three samples of 25 grams each were drawn from the recovered Charas. All the three samples were sealed separately. The remaining Charas was also packed and sealed in another packet. All the parcels were sealed with three seals of impression 'T'. Seizure memo Exhibit PC was prepared. N.C.B. Form Exhibit PW7/A was filled in triplicate. A seal impression was also affixed 011 the N.C.B. Form. Accused was informed of the offence committed by him and the punishment provided. Ruka Exhibit FW7/ A was prepared by Head Constable Narain Singh and sent to the Police Station, Banjar through Constable Tek Singh (PW-2) for registration of the case which lead

to the re-cording of the FIR Exhibit PW5/A in the Police Station by M.H.C. Mohan Lal (PW-5). The case property consisting of three samples and the remaining Charas, N.C.B. Form, sample seal were deposited with M.H.C. Mohan Lal for keeping it in safe custody in the malkhana. Special Report was sent to the Deputy Superintendent of Police, .Kullu. One of the samples was sent to the Chemical Examiner CTL Khandaghat, who by his report on the N.C.B. Form Exhibit PW7/E opined that the sample contained contents of Charas.

3. Learned Sessions Judge by the impugned judgment found that the recovery of Charas was in fact made, as claimed by the prosecution from a bag carried by the accused under his armpit and accordingly convicted and sentenced the accused.

4. Dissatisfied, the accused is in this appeal.

5. Heard Ms. Seema Sood, learned Counsel for the appellant and Mr. S. D. Vasudeva, learned Additional Advocate General.

6. The entire evidence was reappraised and examined with the assistance of the learned Counsel for the accused and the learned Additional Advocate General.

7. The conviction is assailed by the learned Counsel for the petitioner on the grounds :

a) Glaring discrepancies in the evidence of the prosecution which renders the prosecution story unbelievable particularly when the independent witnesses were not associated with the search.

b) The Investigating Officer had prior information, yet such information was neither recorded nor sent to the superior Officer under Section 42 of the Act which vitiates the trial. .

c) The sample which was drawn from the alleged recovered Charas in fact was not sent to the Chemical Examiner and instead, some other sample was sent.

a) Glaring discrepancies in the evidence of the prosecution which renders the prosecution story unbelievable.

8. Ms. Seema Sood, learned Counsel for the appellant submits with considerable force that reading of the evidence as a whole does not prove the prosecution case beyond reasonable doubt. She contends that investigation in this case has been less than fair and, therefore, conviction, solely on the basis of evidence of the Police Officials, is not justified.

9. It is the case of the prosecution, as disclosed in the evidence of Head Constable Chaman Lal (PW- 1), that the patrol party left Pplice Station Banjar at about 2.50 in the morning. They reached 'Kliunan Mor' at about 3-30 a.m. The party was headed by Station House Officer Sanjay Sharma which included Assistant Sub-Inspector Narain Singh and Head Constable Narain Singh apart from other Police officials. It is his evidence that at about 4.30 a.m., they came towards Bathahar one km: short of village Barnagi. Station House Officer and Assistant Sub-Inspector asked them to put Naka at that place. The accused was seen coming from Barnagi side at about 5.45 a.m. In cross-examination this witness states that both S.H.O. and A.S.I, did not meet them at Naka near village Barnagi. It is his evidence that when accused was seen coming from Barnagi side, neither S.H.O. Sanjay Sharma nor Assistant Sub-Inspector Narain Singh were present. According to him, both of them had left in the official vehicle but official vehicle returned back empty when accused was apprehended. But Head Constable Tek Singh (PW-2) in his evidence is categorical that when accused was apprehended, both S.H.O. Sanjay Sharma and A.S.I. Narain Singh were present. It is his evidence, 'along with SHO Sanjay, ASI Narain Singh, H, C. Narain Singh, H. C. Chaman Lal, Const. Uttam, Hari Singh had gone towards Barnagi side for nakabandi. When we were short of Barnagi at 5.45. saw a person corning from Bathar side. On seeing police he turned back and started walking briskly. H. C. Narain Singh with our help overpowered him'.

10. Now if S.H.O. Sanjay Sharma was present on the spot and was in the party, it was for him to have investigated the case. He has not even been examined as a witness. In any event, Tek Singh materially contradicts the Investigating Officer Head Constable Narain Singh. It is the evidence of Narain Singh in cross-examination, that S.H.O. Sanjay Sharma and A.S.I. Narain Singh left them at the spot and went away in the official vehicle at 5.30 a.m. and thereafter neither

S.H.O. nor A.S.I, met him. According to him, 'SHO and ASI left the spot on official vehicle at 5.30 a.m. that day. Thereafter neither S.H.O. nor A.S.I, met me'. Narain Singh Assistant Sub-Inspector appearing as PW-8 states that they left the Police Station Banjar at 3.30 a.m. First naka was laid at Khunan Mor. They were at Khunan Mor upto about 4.30 a.m. and they reached village Barnagi at 5.20 a.m. He and S.H.O. Sanjay Sharma left Barnagi. However, the other members of the Patrol-Party remained there and returned back to the Police Station at 9.00 or 10.00 in the night. The evidence whether or not Sub-Inspector SHO Sanjay Sharma and Assistant Sub-Inspector Narain Singh were on the spot is indeed discrepant on this aspect of the case.

11. Exhibit 'PD' is the memo of arrest of the accused in which accused indicated that information regarding his arrest may be given to his wife Geeta Devi. However, there are signatures of one Girja Devi under the endorsement informed about arrest. It is true that after the words 'Gita Devi', there is 'alias Girja' on the memorandum but apparently, words 'alias Girja' have been added later in different ink. This part, it is the evidence of Head Constable Chaman Lal (PW-1) that Girja Devi appended her signatures on the memo of arrest Exhibit PD on the spot. It is admitted position that accused when apprehended was alone and not accompanied by any other person as is apparent from the evidence of Head Constable Chaman Lal (PW-1) and Investigating Officer, Head Constable Narain Singh (PW-7). It is nowhere the case of the prosecution that accused was accompanied by Girja Devi. This too makes the evidence of the Police witnesses suspect particularly in the absence of any independent witness.

12. It is true that conviction can be based on the evidence of the police officials alone if such evidence inspires confidence and is not tainted. In the present case, as noticed earlier, the evidence is discrepant and cannot be implicitly relied upon without corroboration.

b) The Investigating Officer had prior information yet such information was neither recorded nor sent to the superior Officer under Sections 41 and 42 of the Act which vitiates the trial.'

13. The case of the prosecution is that of chance recovery but the evidence suggests that recovery was made on prior information. The prosecution case is that the patrol party left the Police Station at 3.30 a.m. and laid naka, short of Barnagi, at 5.20 a.m. and at about 5.40 a.m., accused was seen coming from Barnagi side and was apprehended. It is the evidence of the Investigating Officer Head Constable Narain Singh (PW-7) as well as Head Constable Chaman Lal (PW-1) that accused was seen coming from Barnagi but Head Constable Chaman Lal tells us that he was seen coming from Bathred side. On seeing the police party, he took a U-turn and started walking briskly. He was overpowered and was informed that local police suspected him of carrying Charas in a bag and that he should give his consent if he wants to be searched in the presence of the Magistrate or some Gazetted Officer to which accused consented to be searched by the Police. The consent memo Ext. PA reads : The local Police suspects that 'you are having Charas in your possession inside the bag with you'. Unless the Police had a period information that accused was carrying Charas, they would not ask for the consent of the accused for searching him for Charas. Surely the Police Party did not dream that accused was carrying 'CHARAS' in a packet. By no stretch, it can be said to be a case of chance recovery. The consent memo clearly records that Police suspected that the accused was only carrying Charas and not any other contraband. How could the Police know that the accused was carrying charas unless it had prior information. More so when admittedly the Charas, according to prosecution case, was concealed in a polythene bag under the armpit. Both the Investigating Officer Head Constable Narain Singh (PW7) and Chaman Lal (PW1) tell us that accused was wearing a pullover and had concealed the polythene bag of Charas under the armpit. The Police could not have known that there was packet of Charas under the armpit they had searched the accused-appellant. The evidence clearly suggest that investigation was neither fair nor honest. The inevitable conclusion from this evidence is that the Police had prior information and they were bound to comply with the provisions of Sections 41 and 42 of the Act.

14. Sections 41 and 42 reads :

'41. Power to issue warrant and authorization.-- (1) A Metropolitan Magistrate or a Magistrate of the first class or any Magistrate of the second class specially empowered by the State Government in this behalf, may issue a warrant for the arrest of any person whom he has reason to believe to have committed any offence punishable under this Act, or for the search, whether, by day or by night, of any building, conveyance or place in which he has reason to believe any narcotic drug or psychotropic substance or controlled substance in respect of which an offence punishable under this Act has been committed or any document or other article which may furnish evidence of the commission of such offence or any illegally acquired property or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter V-A of this Act is kept or concealed.

(2) Any such officer of gazetted rank of the departments of the central excise, narcotics, customs, revenue intelligence or any other department of the Central Government including the para-military forces or the armed forces as is empowered in this behalf by general or special order by the Central Government, or any such officer of the revenue, drugs control, excise, police or any other department of a State Government as is empowered in this behalf by general or special order of the State Government if he has reason to believe from personal knowledge or information given by any person and taken in writing that any person has committed an offence punishable under this Act or that any narcotic drug or psychotropic substance or controlled substance in respect of which any offence under this Act has been committed or any document or other article which may furnish evidence of the commission of such offence or any illegally acquired property or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter V-A of this Act is kept or concealed in any building, conveyance or place, may authorize any officer subordinate to him but superior in rank to a peon, sepoy or a constable to arrest such a person or search a building, conveyance or place whether by day or by night or himself arrest such a person or search a building, conveyance or place.

(3) The officer to whom a warrant under Sub-section (1) is addressed and the officer who authorized the' arrest or search or the officer who is so authorized under Sub-section (2) shall have all the powers of an officer acting under Section 42.

42. Power of entry, search, seizure and arrest without warrant or authorization.--

(1) Any such officer (being an officer superior in rank to a peon, sepoy or constable) of the departments of central excise, narcotics, customs, revenue intelligence or any other department of the Central Government including para-military forces or armed forces as is empowered in this behalf by general or special order by the Central Government, or any such officer (being an officer superior in rank to a peon, sepoy or constable) of the revenue, drugs control, excise, police or any other department of a State Government as is empowered in this behalf by general or special order of the State Government, if he has reason to believe from personal knowledge or information given by any person and taken down in writing that any narcotic drug, or psychotropic sub-stance, or controlled substance in respect of which an offence punishable under this Act has been committed or any document or other article which may furnish evidence of the commission of such offence or any illegally acquired property or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter V-A of this Act is kept or concealed in any building, conveyance or enclosed place, may between sunrise and sunset,--

a) enter into and search any such building, conveyance or place;

b) in case of resistance, break open any door and remove any obstacle to such entry;

c) seize such drug or substance and all materials used in the manufacture thereof and any other article and any animal or conveyance which he has reason to believe to be liable to confiscation under this Act and any document or other article which he has reason to believe may furnish evidence of the commission of any offence punishable under this Act or furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter

V-A of this Act; and

d) detain and search, and if he thinks proper, arrest any person whom he has reason to believe to have committed any offence punishable under this Act:

Provided that if such officer has reason to believe that a search warrant or authorisation cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place at any time between sunset and sunrise after recording the grounds of his belief.

(2) Where an officer takes down any information in writing under Sub-section (1) or records grounds for his belief under the proviso thereto, he shall within seventy-two hours send a copy thereof to his immediate official superior'.

(Emphasis given)

15. The argument of the learned Counsel for the petitioner is that the authorized Officer in this case Head Constable Narain Singh, had the information that the accused was carrying Charas and, therefore, it was obligatory for Head Constable Narain Singh to have recorded the information or his belief and send the same, within 72 hours, to his immediate superiors under the provisions of Sub-sections 42(1) and (2) of the Act. The provisions being mandatory, any contravention thereof vitiates the trial.

16. It is settled law and no longer res-integra that when an authorized Officer has reasons to believe from personal knowledge or information received by him, then such information or personal knowledge has to be 'reduced in writing before he detains, searches or arrests any person whom he has reason to believe to have committed an offence under the Act. Under the proviso to Sub-section (1) of Section 42 if the search is carried out between the hours of sunset and sunrise, the authorized Officer must record the grounds of his belief. In the present case, the search was carried out admittedly between the hours of sunset and sunrise at 5.45 a.m. The trial therefore is vitiated for want of compliance with Section 42(1) and (2) of the Act.

17. In *State of Punjab v. Balbir Singh*, (1994) 3 SCC 299 : (1994 Cri LJ 3702) it was held that provisions of Section 42(2) read with proviso to Section 42(1) are mandatory and non-compliance with the provisions vitiates the trial.

18. In *Balbir Singh* (1994 Cri LJ 3702), Their Lordships held that under Section 41(1) of the Act, if empowered Officer has prior information given by any person then that should necessarily be taken down in writing. But if he has reasons to believe from personal knowledge that offences under Chapter-IV have been committed or material which may furnish evidence of commission of such offences are concealed in any building etc. he may carry out the arrest or search without a warrant between sunrise and sunset, and this provision does not mandate that he should record his reasons of belief. Admittedly, the search was made between the hours of sunrise and sunset in this case. Their Lordships proceeded to observe :

'To this extent these provisions are mandatory and contravention of the same would affect the prosecution case and vitiate the trial'.

19. Similarly, under Section 42(2) of the Act, such empowered officer who takes down any information in writing or records the grounds under proviso to Section 42(1) should forthwith send a copy thereof to his immediate official superior. Non-compliance of this provision affects the prosecution case and to that extent, it is mandatory.

20. This view was reiterated by the Constitution Bench of the Apex Court in *State of Punjab v. Baldev Singh*, 1999 (6) SCC 172: (1999 Cri LJ 3672). Their Lordships construing the provisions of Sections 41 and 42 in para 25 held (para 17 of Cri LJ) :

'Under Section 42(1) the empowered officer if has a prior information given by any person, that should necessarily be taken down in writing. But if he has reason to believe from personal knowledge that offences under Chapter IV have been committed or materials which may furnish evidence of commission of such offences are concealed in any building etc. he may carry out the arrest or search without, a warrant between sunrise and sunset and his provision does not mandate that he should record his reasons of belief. But under the proviso to

Section 42(1) if such officer has to carryout such search between sunset and sunrise, he must record the grounds of his belief.

To this extent these provisions are mandatory and contravention of the same would affect the prosecution case and vitiate the trial.

Under Section 42(2) such empowered officer who takes down any information in writing or records the grounds under proviso to Section 42(1) should forthwith send a copy thereof to his immediate official superior. If there is total non-compliance of this provision the same affects the prosecution cases. To that extent it. is mandatory. But if there is delay whether it was undue or whether the same has been explained or not, will be a question of fact in each case'.

21. In the present case, we are of the view, as observed earlier, accused was searched on prior information and there is total non-compliance to the provisions of Section 42(1) and 42(2) of the Act. This vitiates the trial.

c) The sample which was drawn from the alleged recovered Charas in fact was not sent to the Chemical Examiner and instead, some other sample was sent.

22. Learned counsel for the accused strenuously urged that the sample other than drawn from the alleged recovered cha-ras was sent to the Chemical Examiner. Learned counsel refers to the testimony of Head Constable Chaman Lal (PW1) who categorically states that the samples were individually packed in separate packets arid sealed with seal 'T'. In his words, 'Charas packets and sample packets were put three seals of seal 'T'. To a similar effect, is the evidence of PW2 Tek Singh who states that three samples drawn from the recovered charas were 'individually packed and sealed with seal 'T' by putting three seals on each sample packet'. The Investigating Officer Head Constable Narain Singh (PW7) tells us that the recovered charas was weighed and found one kg. and three samples of 25 grams were separated. It is his evidence that all the samples were packed separately and sealed with seal 'T' by putting three seals on each packet. Now Exhibit PW7/D is the NCB form which contains the particulars of the sample sent to the Chemical Examiner for analysis by the Station House Officer, Police Station, Banjar and report of the Chemical Examiner. Column 7 of First Part records :

(a) Description of seal : 'T'

(b) No. of seals put on the sample : One..

23. Now this is the sample which was examined by the Chemical Examiner contained one seal of impression 'T'. There is categorical statement in this certificate that the seals on the sample tallied with the specimen seal/seals sent separately. There is nothing in this report to suggest that the sample contained three seals. Thus, the possibility of another sample having been sent to the Chemical Examiner for analysis cannot be entirely ruled out. This aspect of the case also renders the prosecution case open to doubt.

24. Reading of the entire evidence as contended by the learned Counsel for the appellant shows that the investigation of the case has not been fair and honest. The conviction cannot be based on the evidence of the Police Officials without corroboration in view of the infirmities noticed above. There is also infraction of Section 41 and 42 of the Act which vitiates the trial. The accused in this view of the evidence on record is entitled to acquittal.

25. In result, the appeal is allowed. The conviction and sentence imposed on the accused is set aside. He shall be set at liberty at once. The fine, if realized shall be refunded back to the accused. The case property shall stand confiscated to the State as directed by the learned Sessions Judge.

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