

Raj Pal Vs. State of H.P.

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Court : Himachal Pradesh

Decided On : Jan-10-2003

Reported in : 2004CriLJ695

Judge : M.R. Verma, J.

Acts : [Narcotic Drugs and Psychotropic Substances Act, 1985](#) - Sections 20, 43, 50 and 51

Appeal No. : Crl. Appeal No. 536 of 2002

Appellant : Raj Pal

Respondent : State of H.P.

Advocate for Def. : J.S. Guleria, Law Officer

Advocate for Pet/Ap. : Sunil Goel, Adv.

Disposition : Appeal dismissed

Judgement :

ORDER

M.R. Verma, J.

1. This appeal is directed against the judgment dated 1-8-2002 passed by the learned Sessions Judge, Kullu whereby the appellant/accused (hereafter referred

to as 'the accused') has been convicted under Section 20 of the NDPS Act (hereinafter referred to as 'the Act') and has been sentenced to rigorous imprisonment for three years and to pay a fine of Rs. 10,000/- and in default of payment of fine to suffer further imprisonment for two months.

2. Prosecution case against the accused in brief is that on 19-1-2002 A.S.I. Gian Chand of Police Station, Banjar (P.W.

6) along with HHC Sham Singh (P.W. 5), Constable Sunil Kumar (P.W.

4) and HC Sunil Kumar had laid Naka at a place near Bihali. At about 7.30 a.m. they saw the accused coming from Sainj side. On inquiries, the accused revealed his name and address. Getting suspicious that accused might be in possession of 'Charas'. P.W. 5 gave option to the accused as to whether he would like to be searched in the presence of a Magistrate or a Gazetted Officer vide Memo Ext.P.W. 4/A and the accused opted to be searched by the police present on the spot. P.W. 6 then gave his search to the accused and nothing incriminating was found on such search Memo Extt. P.W. 4/B. Thereafter P.W, 6 conducted personnel search of the accused and on such search a cloth bag concealed under his left armpit covered with pullover was found. The packet so found contained a polythene bag containing 'Charas' in the shape of stricks and tablets. 'Charas' so recovered on weighing was found 700 grams. After separating two samples of 25 grams each from the recovered 'Charas'. the samples and the bulk 'Charas' were packed and sealed in separate packets with seal 'D'. NCB form Ext.P.W.3/A in triplicate was prepared. Seal after use was handed over to P.W.

5. The sample packets and packet containing the remaining 'Charas' were taken in possession vide Memo Ext.P.W. 4/D, a copy whereof was supplied to the accused. The accused was then apprised of the offence committed by him and the punishment provided therefor vide Memo Ext.P.W. 4/E. Whole of the aforesaid process was carried out in the presence of P.W. 4 and P.W. 5 by P.W.

6. Ruka Ext. P.W. 6/A was drawn by P.W. 6 and sent to Police Station, Banjar through P.W. 4 and on the basis of such Ruka formal F.I.R. Ext. P.W. 2/A was recorded at the said Police Station. P.W. 6 brought the case property and accused

to the Police Station and produced them before S.H.O. Balwant Singh (P.W.

3) who re-sealed the case property with seal 'E' and also affixed his seal impression on NCB form Ext. P.W. 3/C and signed the same. The case property was deposited by P.W. 3 with MHC Sandeep Kumar {P.W.

2) who kept it in the Malkhana vide entry Ext. P.W. 2/B of the Malkhana Register. On 20-1-2002 P.W. 2 sent a sealed sample packet along with NCB form to CTL Kandaghat vide RC Ext. P.W. 2/C through P.W. 4 who deposited the same in the CTL. P.W. 6 also prepared a special report Ext. P.W. 1/A which was delivered in the office of DSP (Headquarters) Kullu who, endorsed the same and was entered in the relevant Register vide entry Ext. P.W. 1 /B. On analysis the sample was found to contain contents of 'Chares' vide report Ext. P.W. 3/D. On completion of the investigation and being satisfied of the commission of an offence punishable under Section 20 of the Act by the accused the concerned officer Incharge of the Police Station submitted a chargesheet against the accused.

3. To prove the charge against the accused, prosecution examined seven witnesses. Statement of the accused under Section 313, Cr.P.C. was recorded wherein he denied the prosecution case as a whole and claimed that the case was false. The accused, however, did not lead any defence.

4. On the basis of the evidence on record, the learned Sessions Judge held the accused guilty of the commission of an offence under Section 20 of the Act and accordingly convicted and sentenced him as aforesaid. Hence, this appeal.

5. I have heard the learned Counsel for the appellant and the learned Law Officer for the respondent/State and have also gone through the records.

6. The learned Counsel for the appellant has assailed the impugned conviction and sentence on the following grounds :

i) The documents allegedly prepared by the Investigating Officer on the spot had in fact been prepared at the Police Station after the registration of the F.I.R.

ii) The Investigating Officer failed to join independent witnesses to witness the search of the accused and the statements of police officials being interested witnesses are not reliable in this regard;

iii) The accused was not asked as to whether he was willing to be searched by the police party present on the spot; and

iv) The Investigating Officer being the complainant carried out the investigation of the case raising doubt about the fairness of investigation.

Ground No. (i) :

7. It was contended by the learned counsel for the accused that it is case of the prosecution that the consent memo Ex.P.W. 4/A, search memo Ext.P.W. 4/B, recovery memo Ext.P.W. 4/D. memo of information Ext.P.W. 4/E were prepared before drawing the Ruka Ext. P.W. 6/A on the basis of which formal F.I.R. Ext. P.W. 2/A was recorded. Therefore, at the time of preparing the aforesaid documents F.I.R. No. could not be available with the Investigating Officer whereas on the aforesaid documents bear the F.I.R. No. which suggests that in fact all these documents were not prepared on the spot as is the case of the prosecution but were prepared after the registration of the case at the Police Station, therefore, the prosecution case is utterly unreliable and the accused deserves to be acquitted. To substantiate his contention, the learned counsel relied on Amar Singh v. State of H. P. (Criminal Appeal No. 303 of 1998 decided by a Division Bench of this Court on March 22, 2002).

8. The aforesaid documents had been prepared by P.W. 6. It has not been specifically put to P.W. 6 that he had prepared these documents after the F.I.R. had been lodged and that is why these documents contain the F.I.R. No. and other particulars thereof. It has though been suggested to him that all the documents in the case were prepared by him at the Police Station which has been denied by the witness. A similar suggestion has been put to P.W. 5 who has signed these documents as witness and he has also denied the suggestion. Another witness of these documents P.W. 4 has also been cross-examined on this aspect. He has, however, clearly and unambiguously stated that all memos were prepared when

he left with Ruka and the seal impression was taken on the spot but F.I.R. No. thereon was added subsequently. It is common version of P.W. 4, P.W. 5 and P.W. 6 that all the aforesaid document had been prepared before sending Ruka for registration of the case. From these statements, it is clear that the F.I.R. No. in the aforesaid documents was subsequently added. Even a bare look on these documents it is evident that sufficient space at the top of each of these documents was left to insert the particulars of the F.I.R. at a later stage and the difference in space between the main body of the document and the contents containing the particulars of the F.I.R. is suggestive of the fact that such space was left blank for inserting the F.I.R. at a later stage.

9. There cannot be any doubt that the documents like search and seizure memos etc. prepared during the investigation had to be so prepared and maintained that they are capable of being identified and referable as the documents relating to the case in which these were prepared. The best mode to do so is to indicate the F.I.R. No. on such documents and this is the procedure adopted by the Investigating Agencies in the State of Himachal Pradesh. In view of the above discussion, it appears that some space at the top of each document was left blank to insert the particulars of the F.I.R. therein to make such document identifiable and referable to the F.I.R.

10. In Amar Singh's case (supra) a Division Bench of this Court took the view that in a case where the contents of such documents are in the same pen and ink and there is nothing to suggest that F.I.R. No. and other particulars thereof had been inserted therein subsequently, the prosecution case will be rendered suspicious and it will reflect on the veracity of the prosecution version and the benefit of this lapse in the case has to be given to the accused. There was nothing on record to suggest that the F.I.R. No. had been subsequently inserted on the documents therein. On the contrary, in the case in hand, the cogent and reliable statements of P.W. 4, P.W. 5 and P.W. 6 clearly show that all these documents were prepared on the spot. A bare look on the documents further suggests that sufficient space on the upper portion of each document was left and the spacing of the writings therein is such that it can be visualized that the particulars of the F.I.R. had been inserted therein at later stage. Further P.W. 4 has stated that F.I.R. No. was given

in the document at a later stage. Thus, the ratio in the aforesaid case is not attracted to the facts and circumstances of this case. Therefore, the contention urged for the accused is unsustainable.

Ground No. (ii) :

11. It was contended by the learned counsel for the accused that the Investigation Officer had failed to Join independent witness to witness the search and seizure which also renders the prosecution case suspicious. It was further contended that the case of the prosecution is based entirely on the statements of police officials, who are evidently interested in the success of the case, therefore, their version could not have been accepted to convict the accused.

12. According to the prosecution, the Naka was laid in the early hours at 7.30 a.m. in the month of January. It has been explained by P.W. 5 that the place where the accused was apprehended was isolated having no population near by. He has further stated that nearest locality from the place was 3 kilometres away and no vehicle passed from the spot when the proceedings were being conducted. Evidently in such a situation joining of independent witness(s) to witness the search and seizure was not possible and non joining of independent witness cannot be said to be a deliberate and mala fide act on the part of the Investigating Officer. Therefore, non-joining of the independent witness(s) to witness the search and seizure is of no help to the accused.

13. It is true that the evidence of the prosecution to prove the search of the accused and the recovery of 'Charas' from his possession consists of the statements of P.W. 4, P.W. 5 and P.W. 6 who are all police officials. However, there is no Rule of law that the police officials are incompetent witnesses and their statements should not be relied upon to convict a person. On the contrary, if the statements of the official witnesses are cogent, reliable, trustworthy and confidence inspiring their statements can be acted upon and conviction can be based thereon.

14. In *Fredrick George v. State of Himchal Pradesh*, 2002 Cri LJ 4600, a Division Bench of this Court while dealing with the question of reliability of the official

witnesses held as under (at p. 4609 of Cri LJ) :

'37.Similarly, there is no rule of law that testimony of official witnesses should not be given any credence. It is also well settled that confidence inspiring evidence cannot be rejected on the grounds of minor contradictions arising out of individual perception and conception.'

15. In *State of Kerala v. M. M. Mathew*, 1978 Cri LJ 1690 : (AIR 1978 SC 1571), the Apex Court held as under (Para 3) :

'It is true that Courts of law have to judge the evidence before them by applying the well recognized test of basic human probabilities and that some of the observations made by the Sessions Judge especially one to the effect that the evidence of officers constituting the inspecting party is highly interested because they want that the accused are convicted cannot be accepted as it runs counter to the well recognized principle that prima facie public servants must be presumed to act honestly and conscientiously and their evidence has to be assessed on its intrinsic worth and cannot be discarded merely on the ground that being public servants they are interested in the success of their case.'

16. In *Amarjit Singh v. State of Orissa*, 1997 Cri LJ 1988. it has been held as under (p. 1990 of Cri LJ) :

'Nothing has been brought out from the witnesses to show that they are in any way inimical towards the appellants. Therefore, only because of the fact that other independent witnesses have not supported the prosecution case, the evidence of the official witnesses including P.W. 3 who can be treated as an independent witness cannot be discarded. There is no reason to suspect the evidence adduced by an official witness only because of the fact that he is an officer of the department. His evidence can very well be accepted to maintain a conviction. If the same is otherwise found reliable.'

17. In view of the above settled position in law, what emerges is that the statements of the police officials if cogent, reliable, trustworthy and confidence inspiring, they can be relied upon. However, if such statements are contradictory

and are devoid of reliability and do not inspire confidence those cannot be made basis to convict the accused.

18. In the case in hand, the learned counsel for the accused could not point out any major contradiction or inherent defect in the statements of P.W. 4, P.W. 5 and P.W. 6. Their statements fully corroborate the prosecution version about the lawful search of the person of the accused and recovery of 'Charas' from his possession. Their statements are natural and confidence inspiring, therefore, have rightly been relied upon by the learned Sessions Judge in convicting the accused.

Ground No. (iii) :

19. It was further contended by the learned counsel for the accused that the Investigating Officer did not give the option to the accused as to whether he wanted to be searched by the police present on the spot. Relevant portion of Section 50 of the Act requiring giving option to the suspect about his search reads as under :

'50. Conditions under which search of persons shall be conducted.--(1) When any officer duly authorized under Section 42 is about the 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.

20. It is evident on a bare reading of the aforesaid provisions that when an authorized officer is about to search any person under the provisions of Sections 41, 42 and 43 of the Act, if so required by the person to be searched, he shall take such person to the nearest Gazetted Officer or the Magistrate for being searched. In other words, the requirement of the aforesaid provisions is that before himself conducting the search of the person of the suspect the authorised officer will give such person the option of being searched in the presence of a Gazetted Officer or the Magistrate. Once such an option is given to the suspect and he does not opt to be searched in the presence of the Gazetted Officer or the Magistrate his consent for search by the authorized officer is not required. It is implicit that once the

suspect has refused to get himself searched in the presence of a Gazetted Officer or the Magistrate, the authorized officer will proceed to search his person and there is no legal obligation on such officer to get consent of the suspect to search his person.

21. In the case in hand, the authorised officer (P.W. 6) vide memo Ext.P.W.-4/A put the accused to notice that he was suspected of being in possession of some narcotic/ psychotropic substance and it was necessary to conduct his search, therefore, he could opt to be searched by a Gazetted Officer or a Magistrate and give his consent to the same. The accused declined to be searched by the Magistrate or any Gazetted Officer vide an endorsement made on the memo Ext.P.W. 4/A. He further showed his willingness to be searched by the police on the spot by another endorsement on the said memo. The version about the accused having been given the option, as aforesaid, is duly supported by P.W. 4, P.W. 5 and P.W. 6. There is nothing on the record to suggest that no option as contemplated under Section 50 of the Act (supra) was given to the accused. Therefore, the contention raised for the accused in this regard is unsustainable.

Ground No. (iv) :

22. It was contended by the learned counsel for the accused that P.W. 6 who has drawn up the Ruka Ext. P.W. 6/A is a complainant in the case, therefore, he ought not to have proceeded with the investigation of the case and since he investigated the offence, therefore, the investigation cannot be said to be fair.

23. It is true that the F.I.R. was lodged on the basis of Ruka Ext.P.W. 6/A drawn by P.W. 6 who investigated the case. Ordinarily a police officer who is a complainant in the case should avoid further investigation of the case lest suspicion may be raised about the fairness of the investigation. However, it will depend on the facts and circumstances of each case whether investigation of a case by a police officer who had sent a Ruka for registration of a case is fatal to the case or not. However, the Court will have to be more cautious in appreciating the evidence. If the case of the prosecution is supported by cogent, reliable, trustworthy and confidence inspiring evidence, it cannot be thrown out simply because the police officer who suspected the accused, conducted his search and found some contraband in his

possession and seized it and then sent Ruka for registration of a case has investigated the case. In the case in hand, there are cogent, consistent, reliable and trustworthy statements of P.W. 4, P.W. 5 and P.W. 6 to prove beyond any reasonable doubt that the accused was apprehended and searched in accordance with law and was found in possession of 700 grams of 'Charas'. There is no suggestion that the police party or the Investigating Officer had any thing personal against the accused. Therefore, the mere fact that the investigation in the case was conducted by P.W. 6 on the basis of whose Ruka the F.I.R. was recorded is of no help to the accused and the prosecution case cannot fail on this ground.

24. No other point was pressed nor there is any other reason to hold that the conviction of the accused is bad in law and unsustainable. Therefore, the impugned judgment does not call for any interference.

25. As a result, this appeal merits dismissal and is accordingly dismissed.

26. Before parting with the case, I would like to place on record my appreciation for the assistance rendered by Mr. Sunil Goel, learned Advocate, who argued the case for the accused.