

Gopal Vs. State of H.P.

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Court : Himachal Pradesh

Decided On : Feb-28-2006

Reported in : 2006(2)ShimLC97

Judge : Deepak Gupta, J.

Acts : [Narcotic Drugs and Psychotropic Substances Act, 1985](#) - Sections 20, 36B, 41, 42, 42, 43, 50(5) and 50(6); ;Criminal of Procedure Code , 1973 - Sections 100, 100(4), 100(5) and 313; ;[Constitution of India](#) - Article 21; ;[Narcotic Drugs and Psychotropic Substances \(Amendment\), 2001](#)

Appeal No. : Criminal Appeal No. 174 of 2005

Appellant : Gopal

Respondent : State of H.P.

Advocate for Def. : J.S. Guleria, Adv. and; Ajay Kuchher, Amicus Curiae

Advocate for Pet/Ap. : Rahul Mahajan, Adv.

Disposition : Appeal dismissed

Judgement :

Deepak Gupta, J.

1. The present appeal under Section 36-B of the [Narcotic Drugs and Psychotropic Substances Act, 1985](#) (hereinafter referred to as the NDPS Act) is directed against the judgment dated 18.3.2005 passed by the learned Additional Sessions Judge (Fast Track), Kullu, H.P. in Sessions Trial No. 112 of 2003 (RBT. S.T. No. 011 of 2004) whereby the appellant-accused has been convicted for the offence punishable under Section 20 of the NDPS Act and sentenced him to undergo rigorous imprisonment for a period of 5 years and to pay fine of Rs. 50,000/-. In default of payment of fine, the accused has been sentenced to undergo simple imprisonment for a period of six months.

2. Briefly stated the prosecution story is that on 7th July, 2003, PW-9 SI Balwant Singh alongwith PW-1HHC Om Prakash, PW--2 HHC Jai Krishan, HHC Nand Lai were on patrol duty. They had gone to set-up a 'naka' at Kasol and were returning from police post Kasol to Manikaran. It is further the prosecution case that at about 8.30 a.m. when they were near the NHPC Colony one person was spotted coming from the opposite side i.e. Manikaran towards Kasol. He was wearing a shawl. That person was the appellant. On seeing the police he became perplexed. Therefore, a suspicion arose in the mind of the police party, which caught hold of him and inquired his name etc. The accused stated that his name was Gopal. As the Investigating Officer had some suspicion he gave his own search to the accused and thereafter searched the accused. On personal search of the accused, one wrapping paper with a khaki tape was found tied to the waist of the accused. On checking the wrapping paper it was found that it contained one polythene bag inside and inside the polythene bag there was a 'Charas'. The 'Charas' was weighed and found to be 800 gms.

3. Out of the recovered 'Charas' two samples of 25 gms. each were prepared and packed and sealed with seal-B. The remaining 'Charas' alongwith its wrapping were separately packed and sealed with seal-B. NCB form Ext. PW-6/C was filled in. The seal expression Ext. PW-9/A was retained and the 'Charas' packets and sample packets were taken into possession vide seizure memo Ext. PW-1/A. Copy of the seizure memo was supplied to the accused. The accused was apprised of the offence committed and the punishment provided for the offence vide memo Ext. PW-I/B. The Investigation Officer (PW-9) thereafter sent a 'ruka' Ext. PW-9/B

through PW-2 HHC Jai Krishan for registration of the case to Police Station, Kullu, on the basis of which PW-7 S.I. Smt. Kamla registered the FIR Ext. PW-7/A after making her endorsement PW-7/B on the 'ruka'.

4. The Investigating Officer also prepared the site plan Ext. PW-9/ C of the spot. On return to the Police Station, Investigating Officer produced the case property before PW-7 SHO, Police Station, Kullu who resealed the same with her own seal-H and deposited it with PW-6 MHC Dharam Chand. PW-6 made entry in this regard in the Malkhana register copy of which is Ext. PW-6/A. On 8.7.2003 PW-6 MHC Dharam Chand sent one sample of 'Charas' vide road certificate Ext. PW-6/B alongwith other documents to the CTL, Kandaghat through PW-3 constable Dalip Singh. The Chemical Examiner opined that the sample was that of 'Charas' vide his report Ext. PA. On receipt of the report the challan was filed.

5. The accused was charged for having committed an offence under Section 20 of the NDPS Act. He pleaded not guilty and claimed trial. The prosecution examined 9 witnesses in support of its case. The case of the accused in his statement under Section 313 Cr PC was of denial simplicitor. No defence evidence was led by the accused.

6. The learned trial Court on the basis of the evidence recorded before it came to the conclusion that the prosecution has succeeded in proving its case that the 800 gms. of 'Charas' had been recovered from the accused and, therefore, he was guilty of having committed an offence under Section 20 of the NDPS Act. He was sentenced as aforesaid. Hence, the present appeal by the accused.

7. I have heard Sh. Rahul Mahajan, learned Counsel for the appellant, Sh. J.S. Guleria, learned Law Officer for the State and Sh. Ajay Kochhar, Amicus Curiae.

The main points raised by' Rahul Mahajan are that no independent witnesses were associated with the search and as such the search itself was not proper. He further submits that this is not a case of chance recovery and the police was acting on prior information as is apparent from the fact that the police party was carrying weighing scales. He submits that admittedly the police did not comply with the provisions of Section 50 of the NDPS Act and as such this is fatal to the

prosecution case. He further submits that even if it is held that it was a case of chance recovery and Section 50 was not applicable, in that event the police should have associated some independent witnesses especially since the recovery took place near the NHPC colony. He also submits that there are many contradictions in the statements of the witnesses and since the recovery itself is doubtful the conviction of the appellant cannot be sustained.

8. On the other hand, Mr. J.S. Guleria, learned Law Officer submits that this was a case of chance recovery, therefore. Section 50 of the NDPS Act was not applicable. He further submits that mere non-association of independent witnesses is not a sufficient ground to totally discard the evidence of the official witnesses. He submits that the evidence of the official witnesses inspires confidence and, therefore, the appeal should be dismissed.

9. Admittedly, this is a case of personal search. The contraband allegedly recovered was taped to the waist of the accused inside his clothes. Therefore, the question that arises is whether the police should have followed the procedure prescribed under Section 50 of the NDPS Act. Section 50 of the NDPS Act reads as follows:

50. Conditions under which search of persons shall be conducted.(1) When any officer duly authorized, under Section 42 is about to search any person under the provisions of Section 41, Section 42 or Section 43, he shall if such person so requires, take such person without unnecessary delay to the nearest Gazetted Officer of any of the departments mentioned in Section 42 or to the nearest Magistrate.

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

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

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

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

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

10. A reading of this Section clearly shows that any officer empowered under Section 42 can search any person and if such person so requires take such person without unnecessary delay to the nearest gazetted officer of any of the Department mentioned under Section 42 of the NDPS Act or to the nearest Magistrate for search. Sub-section (5) was inserted in Section 50 of the NDPS Act by the Amendment Act 9 of 2001 w.e.f. 2.10.2001. It provides that when an officer has reason to believe that it is not possible to take the person to be searched to the nearest Gazetted Officer or Magistrate without the possibility of the person parting with the possession of the Narcotics Drugs and Psychotropic Substances he may instead proceed to search the person as provided under Section 100 Cr PC Section 100 of the Cr PC in fact deals with search of a place but by virtue of Sub-section 5 aforesaid an empowered officer is required to search the person in accordance with Section 100.

11. Section 100 (4) of the Criminal Procedure Code, reads as follows:

100. Persons in charge of closed place to allow search.(1) to (3)....

(4) Before making a search under this Chapter, the officer or other person about to make it shall call upon two or more independent and respectable inhabitants of the locality in which the place to be searched is situate or of any other locality if no such inhabitant of the said locality is available or is willing to be a witness to the search, to attend and witness the search and may issue an order in writing to them

or any of them so to do.

12. The Apex Court in *State of Punjab v. Balbir Singh* : 1994 CriLJ3702 , while dealing with the question of the applicability of Section 50 of the NDPS Act clearly held that in case of chance recovery the provisions of Section 50 are not applicable. The relevant observations of the Apex Court are as follows:

25. The questions considered above arise frequently before the trial Courts. Therefore we find it necessary to set out our conclusions which are as follows:(1) If a police officer without any prior information as contemplated under the provisions of the NDPS Act makes a search or arrests a person in the normal course of investigation into an offence or suspected offences as provided under the provisions of Cr PC and when such search is completed at that stage Section 50 of the NDPS Act would not be attracted and the question of complying with the requirements there under would not arise. If during such search or arrest there is a chance recovery of any narcotic drug or psychotropic substance then the police officer, who is not empowered, should inform the empowered officer who should thereafter proceed in accordance with the provisions of the NDPS Act. If he happens to be an empowered officer also, then from that stage onwards, he should carry out the investigation in accordance with the other provisions of the NDPS Act.

13. A Constitution Bench of the Apex Court again considered this matter in *State of Punjab v. Baldev Singh* : (1999)6SCC172 . In this judgment the Apex Court held that the accused has been given a very valuable right under Section 50 of the Act of being informed that he has a choice to get himself searched either before the Police Officer or before a Gazetted Officer or before a Magistrate. The Court held that Section 50 embodies the principles of reasonableness, fairplay and just procedure which must be honoured as they are in consonance with Article 21 of the [Constitution of India](#). However, the Apex Court while dealing with the question of the applicability of Section 50 in cases of chance recovery held as follows:

12. On its plain reading, Section 50 would come into place only in the case of a search of a person as distinguished from search of any premises etc. However, if the empowered officer, without any prior information as contemplated by Section

42 of the Act makes a search or causes arrest of a person during the normal course of investigation into an offence or suspected offence and on completion of that search, a contraband under the NDPS Act is also recovered, the requirements of Section 50 of the Act are not attracted.

14. The aforesaid two judgments of the Apex Court have clearly laid down that though Section 50 is applicable in case of personal search, as in the present case, the same are not applicable in case of chance recovery.

15. The argument raised on behalf of the appellant is that after the aforesaid two judgments were delivered the NDPS Act was amended and Sub-sections (5) and (6) were incorporated as detailed hereinbefore. It is contended that now by deemed fiction an Authorised Officer, when he has reasons to believe, that the person to be searched may part with the possession of any drug in case he is taken to the nearest Gazetted Officer or Magistrate he may search the person in accordance with Section 100 of the Code of Criminal Procedure. He is also required to record the reasons in this behalf and convey the same to his immediate superior officer. It is, therefore, contended on behalf of the appellant that by deemed fiction Section 100 is made applicable to all searches and, therefore, even in case of chance recovery the police should follow the procedure laid down under Section 100 Cr PC at the time of search. In this behalf Mr. Rahul Mahajan contends that in the present case it stands proved on record that closed to the place where the appellant was searched there was a NHPC colony. Therefore, the police was bound to follow the procedure under Section 100 (4) and should have called upon two or more independent and respectable inhabitants of the locality. This contention cannot be accepted. The amendment made does not in any way indicate that Section 50 is applicable to chance recoveries also. If the objects and reasons for bringing about the amendment Act 9 of 2001 are referred to it is clear that the amendment has not been made with a view to get over the judgments of the Apex Court referred to above but for removing certain inadequacies in the Act to make it a more effective and rigorous Act. It is in this context that the amendment to Section 50 was brought about and it is only in case where a person has a right to be searched and has a right to claim that he should be searched by a Gazetted Officer or Magistrate that the amended portions would

come into play. Even if a person has such a right the authorized officer may come to the conclusion that it is not possible to take such person to the nearest Magistrate or Gazetted Officer since the person to be searched may have a chance to flee or the place where the recoveries is to be made is such that it is not possible to take the person to the nearest Magistrate without there being a chance of his parting with the contraband. Some examples in this behalf can be of searches carried out on the sea or in big rivers or in remote areas and forests. In my humble opinion Section 50 would still remain inapplicable to chance recovery.

16. It was also argued on behalf of the appellant that this is not a case of chance recovery since the police party was carrying the weighing scales. This argument has been made only to be rejected. The police party in its wisdom may carry weighing scales in all cases especially in a District like Kullu which is notorious for drug smuggling.

17. Lastly it was contended by Mr. Rahul Mahajan that the recovery itself is very doubtful. He submits that as per the evidence on record it stands proved that the NHPC colony was only at a distance of about 250 meters and, therefore, police party should have associated some independent witnesses from the said colony. In my view to a limited extent the contention of the appellant is justified that when independent witnesses are available then the prosecution should try and associate such independent witnesses during the course of investigation especially with regard to the search and seizure. In the present case the search has taken place during the day time at about 8.30 a.m. near the NHPC Colony. Therefore, the police should have made efforts to associate independent witnesses. However, the non-association of independent witnesses by itself is not a sufficient ground to acquit the accused. The evidence of official witnesses cannot be discarded just because they are police officials. However, their evidence must be scrutinized with greater caution and care. this Court has dealt with this point in detail in *Rajesh Basniyat v. State of Himachal Pradesh* Latest HLJ 2004 (HP) 875, where this Court has held as follows :

(9) ...Therefore, effect of the non-joining the independent witnesses has to be examined in view of the circumstances of each and every case. In case the

omission to join independent witnesses is not deliberate and mala fide but because of circumstances beyond control the lapse will have least effect on the prosecution case. In any case, the Court will have to be more careful and cautious in appreciating the evidence. The omission to join independent witnesses if so facto will not be fatal to the case of prosecution.

XXX XXX XXX XXX XXX13. There is no rule of law to support the contention that testimony of police officials associated in the investigation or investigated the case should not be acted upon or believed. The police officials are as competent witnesses as any other witnesses. It is a rule of caution that while appreciating their evidence the Court has to be more cautious and careful and will look into other corroboratory circumstances if any to assess their evidence. In case such evidence is corroborated by other corroborative evidence and inspires confidence, there is no reason to discredit an official witness simply because he is official witness.

18. In the present case though it is apparent that no efforts were made to associate independent witnesses, from the statements of the witnesses especially PW-1, PW-2 and PW-9 it is clear that the accused-appellant was apprehended by the police party between Manikaran and Kasol at about 8.30 a.m. It is also evident from their evidence that when search was carried on one paper bag was found taped to the waist of the accused with cellotape. From this bag 800 gms. of Charas was recovered. The accused appended his signatures on the recovery memo. This fact has been clearly stated by PW-1 Om Prakash, PW-2 Jai Kishan and PW-9 SI Balwant Singh. There is no effective cross-examination with regard to this. 800 gms. of Charas have been recovered and it cannot be said that the same has been planted by the police. Therefore, in my opinion the prosecution has proved its case beyond reasonable doubt. The accused has rightly been convicted and judgment of the learned trial Court is tip held.

19. It was lastly contended by Mr. Rahul Mahajan that the sentence imposed is excessive. In my opinion the sentence imposed is just and reasonable and calls for no interference.

20. No other point was urged.

21. In view of the above discussion the appeal is without any merit and is dismissed.

22. Before parting with the case I must place on record my appreciation for the valuable assistance rendered by Mr. Ajay Kochher, amicus curiae.

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