

**Ashok Kumar Vs. State of H.P.**

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**Court :** Himachal Pradesh

**Decided On :** Apr-29-2008

**Reported in :** 2008(2)ShimLC140

**Judge :** Surjit Singh and; Surinder Singh, JJ.

**Appellant :** Ashok Kumar

**Respondent :** State of H.P.

**Judgement :**

**Surjit Singh, J.**

1. Appellant has been convicted of an offence under Section 20(C) of the Narcotic Drugs and Psychotropic Substances Act, for allegedly being in possession of 3.100 kgs. of Charas and sentenced to undergo rigorous imprisonment for ten years and to pay a fine of Rs. 1,00,000/-, in default of payment of fine to undergo imprisonment for a further period of four years.

2. Case of the prosecution may be summed up thus. On 9th January, 2003, a bus, which left Kullu at 2.30 p.m. and was bound for Mandi, was got stopped for checking at Bajaura by PW-12 HC Om Prakash. He went inside the bus accompanied by two other Head Constables and found the appellant sitting on seat No. 35. The seat was part of a three-seater bench. There was no other person sitting on that bench. Also, no person was sitting either on the bench

ahead of the bench having seat No. 35 or the seat behind that bench. The appellant was having rucksack type bag with him. On seeing the police, he got perplexed. That aroused the suspicion of PW-12 HC Om Prakash. He asked the name of the appellant and told him that it was intended to search his bag as also his person. The aforesaid rucksack was searched in the presence of the conductor and the driver of the bus, namely PW-10 Daya Ram and PW-11 Beli Ram and also one Ramesh and Charas was found in that bag. On weighment, the stuff was found to be 3.100 kgs. Two samples, each weighing 25 grams, were separated. Samples and bulk were made into separate parcels. NCB form was filled in. Search and seizure memo was prepared. A written report was sent to the Police Station for the formal registration of the case. The parcels containing samples and the bulk stuff were produced to the SHO, who affixed his own seals on the parcels and then deposited the case property with the Moharrar Head Constable. One sample was sent to the Chemical Examiner, who, vide report Ex. PA, opined that the sample tested positive for beams alkaline and cystolithic hairs were also present and it had resin content to the extent of 30.78 per cent.

3. Trial Court charged the appellant with the offence, under Section 20(C) of the Narcotic Drugs and Psychotropic Substances Act and on the conclusion of the trial convicted and sentenced him, as aforesaid.

4. We have heard the learned Counsel for the appellant and gone through the record.

5. Learned Counsel took us through the testimony of PW-9 Inder Dev, a Head Constable, who was accompanying PW-12 HC Om Prakash, at the time of the search, PW-10 Daya Ram, the conductor of the bus, PW-11 Beli Ram, the driver of the bus, and PW-12 HC Om Prakash, who investigated the case.

6. We find no material contradiction in the testimony of PW-9 HC Inder Dev, PW-10 Daya Ram, the conductor, PW-11 Beli Ram, the driver, and PW-12 HC Om Prakash. It has come in the statements of the witnesses that during the search of the bag, besides the contraband stuff, a conductor's licence in the name of the appellant was also recovered. The statements of the witnesses with regard to the recovery of the said licence from the bag were not challenged in the cross-

examination. The presence of conductor's licence of the appellant, in the bag clearly shows that the bag belonged to him. The stuff, which was recovered from the bag had contents of Charas, as reported by the Chemical Examiner, vide report Ex. PA.

7. Learned Counsel representing the appellant argued that there was contradiction in the statement of the conductor of the bus, namely PW-10 Daya Ram, on one side, and PW-12 HC Om Prakash and PW-9 HC Inder Dev, on the other, about the place where the bag was lying when it was spotted first. PW-9 HC Inder Dev and PW-12 HC Om Prakash testified that the bag was lying in the lap of the appellant while the conductor stated that it was lying on the bench occupied by the appellant. This contradiction, in our considered view, makes no difference when PW-10 Daya Ram, the conductor, very categorically stated that not only the two other seats of the bench on which the appellant was sitting were unoccupied but all the seats on the bench ahead of him as also the bench behind him were also unoccupied, which fact leaves no doubt that the bag belonged to the appellant.

8. Learned Counsel further argued that PW-12 HC Om Prakash did not comply with the provisions of Section 50 of the Narcotic Drugs and Psychotropic Substances Act, even though he suspected that the appellant was carrying some narcotic drug and also searched his person. He urged that the Hon'ble Supreme Court in *Dilip and Anr. v. State of M.P.* : 2007 CriLJ880 , where opium was recovered from the dickey of a scooter has held that provision of Section 50 was applicable, because before searching' the dickey of the scooter from which opium had been recovered, person of the accused had also been searched.

9. The precedent is not applicable to the facts of the present case, because the evidence on record does not show that the person of the appellant was also searched. Even though in the search and seizure memo Ex. PW-10/A, it is mentioned that after giving an option, the rucksack and the person of the appellant were searched but from an overall reading of the said memo as also the testimony of the Investigating Officer and witnesses of search, it is clear that only the bag was searched.

10. Learned Counsel argued that there was another memo Ex. DA, which indicated that the person of the appellant had also been searched. Ex. DA is the memo, which was prepared at the time of the statutory search of the appellant, under Section 51 of the Code of Criminal Procedure, after his arrest, on account of Charas having been found from his rucksack.

Lastly, the learned Counsel submitted that the quantity of Charas recovered from the appellant was not commercial but between commercial and small. He stated that the resin content in the sample, which was sent to the Chemical Examiner, was found to be only 30.78 per cent and that in view of Division Bench judgment of this Court in Dharam Pal v. State of H.P. and Anr. appeal Latest HLJ 2007 (HP) 827, the quantity of Charas based on the quantity of resin was required to be reworked.

11. In the aforesaid judgment, it has been held that only the resin content of the stuff is Charas and that in the absence of the report of the Chemical Examiner about the rest of the contents of the stuff, the quantity of the Charas, based on the percentage of the resin found therein by the Chemical Examiner, is required to be worked out and the appellant-accused is to be held responsible for possessing Charas only to the extent, the stuff contained the resin content in it.

12. As noticed hereinabove, the total quantity of stuff recovered from the appellant was 3.100 kgs. The Chemical Examiner has found resin content in it to the extent of 30.78 per cent. That means the Charas/resin content in the recovered stuff was 954.18 grams. This quantity is less than the commercial quantity, as specified vide Notification No. S.O. 1055(E), dated 19th October, 2001, issued by the Central Government, even though more than the upper limit of the small quantity fixed by the same Notification. Thus, the appellant is liable to be punished not under Section 20(C) of the Narcotic Drugs and Psychotropic Substances Act, as done by the trial Court, but under Section 20(B) of the said Act for which no minimum sentence is prescribed. The offence under Section 20(B) is punishable with imprisonment that may extend to ten years and fine which may extend to Rs. 1,00,000/-. Looking to the quantity of resin/Charas found in the stuff recovered from the appellant, we feel that the ends of justice would be met in case his

sentence is reduced from ten years rigorous imprisonment and a fine of Rs. 1,00,000/- to five years rigorous imprisonment and a fine of Rs. 50,000/-, in default of payment of fine rigorous imprisonment for a further period of six months. We order accordingly.

13. Appeal stands disposed of.

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