

Tulsi Ram Vs. State of H.P.

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Court : Himachal Pradesh

Decided On : Apr-24-2007

Reported in : 2007CriLJ3332,2007(2)ShimLC189

Judge : Dev Darshan Sud and; Rajiv Sharma, JJ.

Appellant : Tulsi Ram

Respondent : State of H.P.

Disposition : Appeal allowed

Judgement :

Dev Darshan Sud, J.

1. The appellant has filed this appeal against his conviction and sentence imposed upon him for offences under Section 20 of the Narcotic Drugs & Psychotropic Substances Act, 1985, (hereinafter referred to as the 'Act'). The appellant has been sentenced to undergo rigorous imprisonment for ten years and fine of Rs. one lac, in case of failure to pay the fine, rigorous imprisonment for a further period of two years.

2. The case of the prosecution in brief is that on 1.1.2004 a police party comprising of Kanwar Singh Guleria, SI/SHO, Police Station, Arki, (PW-4), had gone to village Battal with some police officials on routine patrolling duty. At around 11.00 a.m.,

when he was present near the Panchayat Ghar, he was informed that a man whose left arm was amputated and had put up 'Pattu' (shawl) around his body was carrying charas. According to the information, this man was coming from the side of village Domehar.

3. This information was reduced into writing by PW-4 and sent to Superintendent of Police, Solan through Head Constable Ram Lal (PW-3). At around 11.30 the appellant was noticed coming from Domehar side. He had a 'Pattu' (shawl) around his shoulders. He was stopped and questioned, whereupon he disclosed his name to be Tulsi Ram. He was searched and it was found that his left arm was amputated. He was again informed that the police had information that he was carrying charas with him and that he was required to be searched and he was informed that his personal search could be conducted in the presence of Magistrate or a Gazetted Officer. The appellant consented to be searched by the police. PW-4, Kanwar Singh, gave his personal search and thereafter the accused was searched. On his body search it was found that he had tied a piece of cloth around his waist in which he had concealed charas, which was discovered after he was searched and the cloth untied from his waist and again searched, 1.950 grams Charas was found. The prosecution alleges that two samples weighing 25 grams each were separated and the bulk was made up into a separate parcel. A personal search memo Ex. PB followed by memo Ex. PC, which is the memo of personal search of PW-4, S.I. Kanwar Singh, were prepared, a report of search and seizure was drawn up and sent to the police station through HC Amar Lal (PW-10). The contraband was seized vide Memo Ex. PD and deposited in the Malkhana and on the following day sent to the Chemical Examiner alongwith the NCB Form Ex. PJ which had been filled-in on the spot: The report Ex.PJ/1 states that the contraband which was sent, was charas. The appellant was sent for trial for offences under Section 20 of the Act. On considering the totality of the evidence, he was convicted by the learned trial Court for offences under Section 20(c) of the Act and sentenced to undergo ten years rigorous imprisonment, fine of Rs. one lac and in default rigorous imprisonment for a further period of two years.

4. We have heard learned Counsel for the parties and have gone through the record of the case.

Learned Counsel for the appellant has submitted that there are material contradictions in the evidence of the prosecution. He submits that there was violation of the provisions of the Act as there is non-compliance of Sections 42 and 50 of the Narcotic Drugs and Psychotropic Substances Act. Learned Counsel has further submitted that the entire evidence on the record cannot be used against the appellant as important incriminating circumstances have not been put to him under Section 313 of the Code of Criminal Procedure; namely; after Ex. PJ which is the NCB Form filled-in on the spot, all incriminating circumstances have not been put to the accused. He refers to the factum of the deposit of the contraband in the Malkhana, its entry in the Malkhana Register, safe custody of the contraband during this period, the contraband being sent for chemical analysis and the report having not been put to the appellant. He submits that when read with the other evidence regarding the alleged seizure on the record of the case, there can be no conclusion except that the evidence does not establish the guilt of the appellant.

5. Learned Deputy Advocate General, appearing for the respondent-State, submits that circumstances not put to the accused do not cause any prejudice to the appellant and therefore, would have no effect on the conviction of the appellant.

6. On the question of recovery of the contraband, the evidence of the witnesses may be considered. PW-1 is Geeta Ram who is a Pradhan of Gram Panchayat, Debra. He states that on 1.1.2004 around 10 or 10.30 a.m. when he was present in the Panchayat office at Battal where he was supervising repair works in the Panchayat office, some people in plain clothes, who stated that they were police personnel, brought the appellant to the Panchayat Ghar and told him that he was to be kept there for sometime. He was asked to ring up the police station and accordingly, he went to a chemist shop nearby and made a call to the Arki Police Station. After about 15-30 minutes police personnel arrived from the Police Station, Arki. Some material was lying in piece of a cloth which had been placed on the top of the table in the Panchayat office. After weighing, he was told that this is 'sulfa'. He did not support the prosecution case, although he was declared hostile and was cross-examined at length, but nothing material could be elicited from him to render his testimony unworthy of credence. He admits in his cross-

examination that he is an illiterate person.

7. PW-2 is Dalip Kumar, who also states that on the date of occurrence he was passing by the Panchayat Ghar and saw the accused having been caught hold of by some persons in plain clothes. He inquired from those persons as to what was the matter and they told him that the accused had been caught with sulfa. He was also declared hostile and cross-examined at length, but nothing material has been found in the record to appreciate his statement to which he had made in-chief.

8. The other witness PW-4 SHO Kanwar Singh Guleria has supported the prosecution case. He states that he had associated PW-1 and PW-2 as independent witnesses after he had received information that the accused was carrying contraband. PW-10 Shri Amar Lal, Head Constable, who was also a witness to the recovery, has reiterated the prosecution case except for the fact that according to him the accused was coming from the side of Battalghati.

9. Learned Counsel for the appellant submits that this evidence suggests only one conclusion of fact and that is that the appellant was not in conscious possession of charas. He submits that the independent witnesses PW-1 and PW-2, namely; S/Shri Geeta Ram and Dalip Kumar have not supported the prosecution case and PW-4 and PW-10, namely; SI Kanwar Singh and HC Amar Lal, have contradicted each other on material particulars inasmuch as the case of the prosecution as put was that the appellant-accused was coming from Domehar side while PW-10 says that he was coming from Battalghati. Both these villages are in opposite directions which would be apparent from the site-plan Ex. PL. We do find that there is weight in the submissions made by the learned Counsel appearing for the appellant. It is true.

10. We find from the record that the finding of the learned trial Court that PW-4 and PW-10 have been supported on material particulars regarding recovery of the contraband and the place of apprehension of the accused by PW-1 and PW-2 is not correct. Rather, if the evidence is considered in its totality, PW-1 and PW-2 did not support the testimony of PW-4 and PW-10 and even the testimony of PW-4 and PW-10 is contradictory on a very important point regarding place from where the accused was approaching. The learned trial Court was not correct in assuming

corroboration for the purposes of convicting the accused.

11. Learned Counsel for the appellant submits that the provision of Section 50 of the Act, which is mandatory, has not been complied with. He has drawn our attention to Ex.PB.

12. He places reliance on a number of judgments of the Hon'ble Supreme Court. He submits that according to Sub-section (1) of Section 50 of the Act when an officer duly authorised under Section 42 is about to search any person under the provisions of Sections 41, 42 or 43, he shall, if such person so requires, take such person without unnecessary delay to the nearest Gazetted Officer of any of the departments as contemplated under Section 42 or to the nearest Magistrate. It is the right of the accused to be searched in the presence of a Gazetted Officer or the nearest Magistrate. Such right can be exercised only if Searching Officer gives an option to the person who was about to be searched. He places reliance on *Vinod v. State of Maharashtra* : (2002)8SCC351 and *Beckodan Abdul Rahiman v. State of Kerala* : 2002 CriLJ2529 , where it has been held that merely giving an option to the person about to be searched whether he would like to be searched in presence of a Magistrate or a Gazetted Officer without informing him that he has a right to be searched in the presence of such officers is no compliance with Section 50. In *Vinod's case supra*, the Hon'ble Supreme Court held that merely asking whether he wants the search to be taken in the presence of an Executive Magistrate or a gazetted officer does not amount to communicating to him that he has right under law to such search. Their Lordships have held as under:

7. The law enunciated by this Court in *K. Mohanan* is clear as to the manner in which Section 50 of the Act has to be complied with. Before conducting the search the police officer concerned cannot merely ask the accused whether he would like to be produced before an Executive Magistrate or a gazetted officer for the purpose of the search but inform him of his right in that behalf under the law. The recital in Exhibit 38 and Exhibit 39 does not indicate the same. In that view of the matter, we set aside the findings recorded by the High Court that there was compliance with Section 50 of the Act. The view of the trial Court that non-compliance with Section 50 of the Act does not prejudice the accused cannot be

sustained for the requirement of the Section is mandatory. If Exhibit 38 and Exhibit 39 cannot be used to establish search of the person of the accused, his possession of brown sugar is not proved. Hence we set aside the order of the trial Court as affirmed by the High Court. The appeal is allowed accordingly.

13. Learned Counsel submits that the Hon'ble Supreme Court in *State of Rajasthan v. Bhanwar Lal* 2005 Cri. L.J. 2208, held that in case of a personal search compliance with Section 50 of the Act is mandatory and has held:

11. An incriminating article can be kept concealed in the body or clothings or coverings in different manner or in the footwear. While making a search of such type of articles, which have been kept so concealed, it will certainly come within the ambit of the word 'search of person'. One of the tests, which can be applied, is, where in the process of search the human body comes into contact or shall have to be touched by the person carrying out the search, it will be search of a person. Some indication of this is provided by Sub-section (4) of Section 50 of the Act, which provides that no female shall be searched by anyone excepting a female. The legislature has consciously made this provision as while conducting search of a female, her body may come in contact or may need to be touched and, therefore, it should be done only by a female. In the case of a bag, briefcase or any such article or container, etc. they would not normally move along with the body of the human being unless some extra or special effort is made. Either they have to be carried in hand or hung on the shoulder or back or placed on the head. They can be easily and in no time placed away from the body of the carrier. In order to make search of such type of objects, the body of the carrier will not come in contact of the person conducting the search. Such objects cannot be said to be inextricably connected with the person, namely, the body of the human being. Inextricable means incapable of being disentangled or untied or forming a maze or tangle from which it is impossible to get free.

14. He submits that the contraband recovered was kept concealed on the body of the appellant around his waist and as such the compliance is mandatory. According to him, even if the prosecution case is accepted, as it is, the contraband could not be discovered without a body search. There is no doubt that the

evidence led points to the fact that the contraband was concealed on the person of the appellant around his waist and was not discoverable except by body search. The provisions of Section 50 are thus to be complied with. We have gone through Ex. PB and cannot persuade ourselves that it conforms to the mandatory requirements of Section 50 of the Act. The evidence of PW-4 and PW-10, SI Kanwar Singh Guleria and HC Amar Lal also does not support the version of the prosecution that there was compliance. The learned trial Court was wrong in concluding and holding that such compliance had in-fact been made. The evidence, oral and documentary including Ex.PB, which is search memo, suggests otherwise in unequivocal terms.

15. Coupled with the other judgments, law laid down in Beckodan Abdul Rahiman's case, we hold that Ex. PB which is the search memo read with the testimonies of PW-4 and PW-10 does not show any compliance with the provision of Section 50 of the Act. We are further supported in arriving at its conclusion by the testimonies of PW-1 and PW-2 who have contradicted the entire evidence of the prosecution on the question of recovery and search.

16. The last submissions made by the learned Counsel for the appellant is that the evidence, documents and circumstances which have not been put to the accused under Section 313 of the Code of Criminal Procedure cannot be used against him. He has placed reliance on Sharad Birdhichand Sarda v. State of Maharashtra : 1984 CriLJ1738 . In this case the Hon'ble Supreme Court has held as under:

142. Apart from the aforesaid comments there is one vital defect in some of the circumstances mentioned above and relied upon by the High Court, viz., circumstances Nos. 4, 5, 6, 8, 9, 11, 12, 13, 16 and 17. As these circumstances were not put to the appellant in his statement under Section 313 of the Criminal Procedure Code they must be completely excluded from consideration because the appellant did not have any chance to explain them. This has been consistently held by this Court as far back as 1953 where in the case of Hate Singh Bhagat Singh v. State of Madhya Bharat : AIR 1953 SC468 , this Court held that any circumstance in respect of which an accused was not examined under Section 342 of the Criminal Procedure Code cannot be used against him. Ever since this

decision, there is a catena of authorities of this Court uniformly taking the view that unless the circumstance appearing against an accused is put to him in his examination under Section 342 or Section 313 of the Criminal Procedure Code, the same cannot be used against him. In *Shamu Balu Chaugule v. State of Maharashtra* : 1976 CriLJ492 this Court held thus:

The fact that the appellant was said to be absconding, not having been put to him under Section 342, Criminal Procedure Code, could not be used against him.

143. To the same effect is another decision of this Court in *Harijan Megha Jesha v. State of Gujarat* : 1979 CriLJ1137 , where the following observations were made:

In the first place, he stated that on the personal search of the appellant, a chadi was found which was bloodstained and according to the report of the serologist, it contained human blood. Unfortunately, however, as this circumstance was not put to the accused in his statement under Section 342, the prosecution cannot be permitted to rely on this statement in order to convict the appellant.

144. It is not necessary for us to multiply authorities on this point as this question now stands concluded by several decisions of this Court. In this view of the matter, the circumstances which were not put to the appellant in his examination under Section 313 of the Criminal Procedure Code have to be completely excluded from consideration.

Learned Counsel for the appellant seeks support from the judgment of the Hon'ble Supreme Court in *Kuldip Singh v. State of Delhi* AIR 2004 SC 771, wherein the Court has held as under:

9. ...That apart as rightly pointed out by learned Counsel for the appellants if this piece of evidence as to re-employment of Kuldip was true then it becomes a material piece of evidence as a link in the chain of circumstances relied on by the prosecution therefore this link evidence which indicates the likely involvement of the appellant in the crime ought to have been put to the accused while he was being examined under Section 313 Cr.P.C. which was admittedly not done. That

being the case the prosecution has disentitled itself from placing reliance on this piece of evidence. We do not agree with the learned Counsel for the respondent that either it is not necessary for the prosecution to have put this circumstance to the accused in his examination under Section 313 Cr.P.C. or that he should plead and establish a prejudice caused to him by such default on the part of the prosecution. As stated above this is an incriminating circumstance upon which, in our opinion, the prosecution is relying to indicate the involvement of the appellant. Therefore, the question of establishing prejudice does not arise as that is quite apparent, apart from the fact that the prosecution has not proved the fact that Kuldip was re-employed to work in the house of the deceased. If this circumstance is also to be excluded from consideration then what remains as to the employment of Kuldip with the deceased is only his past employment. Prosecution has not relied on his past employment solely or independent of his re-employment to establish appellant-Kuldip's knowledge as to the valuables owned by the deceased as also the knowledge where the same were kept. The prosecution relies upon this circumstance of re-employment of appellant-Kuldip with the deceased for not only proving the factum of knowledge of the valuables but also to prove the factum of his access to the house of the deceased since he was in her employment at the time of her death. If this proximity in the employment goes because of the failure of the prosecution to prove the re-employment of appellant-Kuldip then in our opinion his previous employment will not be of any assistance to the prosecution....

17. To similar effect, he places reliance to the judgments of this Court in *Suresh Chand v. State of Himachal Pradesh* 2003 (1) Shim. L.C. 211 and *State of Himachal Pradesh v. Y.V. Mehra and Ors.* 1999 (1) Shim. L.C. 352.

18. We find from the evidence on record that no circumstance after filling in of the NCB Form has been put to the accused. Such incriminating circumstances are written report Ex. PK sent for registration of the case, the registration of the First Information Report Ex. PR, the photographs Ex. P-1 to Ex. P-8, the preparation of the site plan, the special report sent to the Superintendent of Police, Solan Ex. PN and the entry made in the Roznamcha regarding departure for patrolling of the police party for village Battal, the entire sequence after the filling in of the Ex. PJ, the contraband being kept, in safe custody in the police Malkhana, the report of

chemical analysis of the contraband Ex. PJ/1, the receipt by the laboratory of the contraband, etc., the safe custody of the seals affixed on the bundles, the Road Certificate used for sending the samples for analysis having not been put to the accused, cannot be used against the appellant. We have not been told as to under what circumstances this has been excluded from the questions under Section 313 of the Code of Criminal Procedure. If it is held that these are not incriminating circumstances, the entire prosecution case must fail. If they are as we hold, then the reason for not putting them to the accused have not been brought on record. They must thus be excluded and cannot be used against the appellant.

19. The submissions of the prosecution that this has caused no prejudice to the accused-appellant cannot be accepted, more so, when we find that the circumstance regarding the recovery of the contraband, its safe custody and the analysis by the chemical examiner has not been established. The evidence of PW-1 and PVV-2, S/Shri Geeta Ram and Dalip Kumar, does not support the case of the prosecution. Why, how and under what circumstances the incriminating evidence against the appellant have not been put to him has not been explained. The contention of the learned Deputy Advocate General that the evidence supporting the prosecution must be accepted and even from the statements of PW-1 and PW-2, the prosecution case is corroborated in material particulars, is rejected for the reasons that both these witnesses have not supported the factum of recovery of the contraband. They being independent witnesses, produced by the prosecution have not supported the case. True that the maxim 'falsus in uno falsus in omnibus' does not apply in India, but as held by their Lordships of the Hon'ble Supreme Court in *Shakila Abdul Gafar Khan (Smt.) v. Vasant Raghunath Dhoble and Anr.* : 2003 CriLJ4548 , the truth has to be ferreted from the statements. We find nothing in the statements which would warrant a conclusion that the entire evidence has to be rejected or that any part supports the prosecution.

20. Admittedly, the place where the seizure was made is near a Panchayat Ghar and there would be people present in and around the place. Why independent witnesses were not associated is not clear. The two witnesses PW-1 and PW-2, as noticed by us, do not support the case of the prosecution. The learned trial Court

has missed important links in the chain of evidence. Why incriminating circumstances after the seizure were not put to the accused is not clear. The deposit of the contraband in the Malkhana, its entry in the register, its despatch for analysis, and the report of the chemical analysis are very vital links which have not been put to the accused. On the appreciation of the evidence, we have noticed that the evidence of PW-1 and PW-2 S/Shri Geeta Ram and Dalip Kumar has not been considered in its proper perspective and even the evidence of PW-4 and PW-10, SI Kanwar Singh Guleria and HC Amar Lal, contradicted the place from where the appellant was coming has not been considered.

21. In the facts and circumstances of the case, we hold that the prosecution has not been able to prove its case beyond reasonable doubt. We, therefore, accept this appeal, acquit the appellant of the offences and direct that he shall be set at liberty forthwith in case he is not wanted in some other case.