

Deepak Kumar and anr. and Simone Nobili and anr. Vs. State of H.P.

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Court : Himachal Pradesh

Decided On : Dec-03-2009

Judge : Surjit Singh and; Surinder Singh, JJ.

Appellant : Deepak Kumar and anr. and Simone Nobili and anr.;state of H.P.

Respondent : State of H.P.;deepak Kumar and ors.

Judgement :

Surjit Singh, J.

1. These three appeals, particulars whereof appear in the title of the judgment, are being disposed of by a common judgment, as all of them are directed against the same judgment, i.e. judgment dated 22nd August, 2008, of learned trial Court, whereby appellants Deepak Kumar, Gopal Dass (appellants in Cr.A No. 498 of 2008), Simone Nobili and Angelo Falcone (appellants in Cr.A No. 550 of 2008), who were charged with and tried for an offence, under Section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985, for allegedly jointly possessing 20 kgs Charas, have been convicted and sentenced to undergo rigorous imprisonment for ten years and to pay fine of Rs. 1,00,000/- each, in default of payment of fine to undergo rigorous imprisonment for a further period of two years, each.

2. Besides the aforesaid two appeals by the convicts-appellants, an appeal, i.e. Cr. Appeal No. 658 of 2008, has been filed by the State for enhancement of sentence

awarded to the convicts-appellants by the trial Court.

3. Prosecution's story, as it emerges from the record, is as follows. PW-11 Rajesh Kumar, SHO Police Station Sadar, Mandi, went towards Katindi-Kamand side, late in the evening on 9th March, 2007, for routine patrolling and detection of crime. Around 10.30 p.m., when he was at a point beyond Katindi, but 1 km short of Kamand, he received secret information from some reliable source that a Santro Car bearing registration No. DL-3CAB-2774 was coming from Katola side and in that car convict-appellant Deepak Kumar alongwith his three accomplices had been bringing Charas. He reduced that information into writing, copy Ex. DC, and sent the same to Deputy Superintendent of Police, Headquarters, Mandi, through HC Sanjeev Walia (PW-2), who alongwith several other police officials was accompanying him. Thereafter, he organized a Naka at the site where the information was received.

4. Around 11.45 p.m., a Santro Car bearing the aforesaid registration number appeared from Katola side. It was got stopped and checked. It was found that convict- appellant Deepak Kumar, who was occupying the front seat, adjacent to driver's seat, had placed on his thighs a red coloured bag. Another black coloured bag was found kept on the rear seat placed between convicts-appellants Simone Nibili and Angelo Falcone, who were occupying the said rear seat. Red bag, on search, was found to contain 20 packets, in which there were small sticks and discs of Charas, wrapped in transparent paper. The other bag, i.e. black one, contained 16 similar packets. The contents of both the bags were heaped together. The entire stuff weighed 18 kgs. Two samples, each weighing 25 grams, were separated and made into two separate parcels and sealed with a seal that produced the impression of letter 'H' of English alphabet. The parcels were marked A-1 and A-2. Remaining stuff was put into a big sized cloth bag. That too was sealed with the same seal and it was marked 'A'. The stuff was seized and NCB form, in triplicate, was filled in.

5. A written report of the matter was drawn, which is Ex. PW-11/B, and sent to the Police Station, through HHC Het Ram (PW-5). Case was formally registered on the basis of the said report, vide FIR No. 130 of 2007, copy Ex. PW-6/A. Case

property was deposited with the MHC, Nand Lal (PW-10), alongwith NCB form and specimen impressions of the seal. One of the two samples was sent to the Chemical Examiner, who vide report Ex. PX opined that the sample was of Charas, as it contained cannabis resin, to the extent of 30.99 per cent. On the receipt of the report, challan was filed against all the convicts-appellants in the trial Court.

6. During the investigation of the case Additional Chief Judicial Magistrate, Mandi, was approached by the SHO, vide application Ex. PW-4/A for taking a sample of the case property and issuing certificate, in terms of Section 5-A of the Narcotic Drugs and Psychotropic Substances Act. The application had inventory Ex. PW-4/B tagged with it. The application and inventory alongwith the case property were presented before the said Magistrate by ASI Bhim Sen (PW-4). The said Magistrate took out sample Ex. P-1 from the parcel of bulk stuff. Sample was sealed with the seal of the Additional Chief Judicial Magistrate. Certificate Ex. PW-13/C was issued by the said Additional Chief Judicial Magistrate.

7. Prosecution examined PW-2 HC Sanjeev Walia to prove the compliance of Section 42 of the Narcotic Drugs and Psychotropic Substances Act, PW-1 HC Anand Kishore, PW-5 HC Het Ram and PW-11 SHO Rajesh Kumar to prove the search and seizure of the vehicle of the convicts- appellants and the recovery of Charas there from, PW-4 ASI Bhim, PW-12 Kulwant Singh and PW-13 Bahadur Singh, Additional Chief Judicial Magistrate, to prove that the case property was produced before the Additional Chief Judicial Magistrate for obtaining certificate Ex. PW-13/C, in accordance with the provision of Section 52(a) of the Narcotic Drugs and Psychotropic Substances Act, and PW-6 ASI Kesar Singh, the then MHC and PW-10 HHC Nand Lal, Incharge Malkhana, to link Chemical Examiner's report Ex. PX with one of the samples allegedly taken from the recovered stuff by PW-11 SHO Rajesh Kumar.

8. Convicts-appellants took the plea that they all were at the residence of convict-appellant Deepak Kumar in village Nandli and were taking dinner, when around 9.30 p.m., a police party headed by an Inspector came there and searched the premises of convict-appellant Deepak Kumar, in the presence of his neighbours

and nothing incriminatory having been found in their house they were taken to the Police Station, on the pretext that passports and other papers of the foreigners, namely convicts-appellants Simone Nobili and Angelo Falcone, were to be checked, where they were falsely implicated in the present case. They examined the mother of convict- appellant Deepak Kumar, namely DW-1 Pushpa Devi, wife of Deepak Kumar DW-2 Pamita, a neighbour of Deepak Kumar, DW-3 Nand Lal and Shyam Lal, Deputy Forest Range Officer (DW-4), to prove their plea.

9. Trial Court did not believe the defence plea. It believed the prosecution evidence and held that all the four convicts-appellants were caught, while travelling by vehicle No. DL-3CAB-2774, with two bags containing Charas, weighing 18 kgs, and that they were in joint possession of the said Charas and consequently convicted and sentenced them, as aforesaid.

10. We have heard the learned Counsel for the convicts-appellants as also the learned Deputy Advocate General and perused the record.

11. Coming to the evidence regarding interception of Santro Car bearing registration No. DL-3CAB-2774 and its search and recovery of 18 kgs Charas, even though PW-1 HC Anand Kishore, PW-5 Het Ram and PW-11 Rajesh Kumar, testified that Santro Car appeared at the site of the Naka, which was between villages Katindi and Kamand, about 1 km short of Kamand, a Santro Car bearing registration No. DL-3CAB-2774 appeared from Katola side and that all the four convicts-appellants were travelling by the said Car and two bags, one red coloured and another black coloured, containing 20 and 16 packets, respectively, of Charas, were recovered, which weighed 18 kgs and that two samples, each weighing 25 grams, were separated there from and those samples and the bulk Charas were made into separate parcels and sealed with a seal that produced impression of English letter 'H', yet the testimony of DW-4 Shyam Lal, Deputy Forest Range Officer, and some lacunae in the prosecution evidence render the entire story of the prosecution quite doubtful.

12. DW-4 Shyam Lal, Deputy Forest Range Officer, testified that there is a forest barrier at village Kantindi and all the vehicles passing through the barrier are entered in a register maintained at the said barrier. He appeared alongwith the

register and stated that it contained no entry about the crossing of the vehicle by which the convicts- appellants were allegedly travelling, i.e. Santro Car No. DL-3CAB-2774, or the vehicle by which the police party allegedly crossed the barrier and went towards village Kamand, where the said Santro Car was intercepted or its return. Police party allegedly went by vehicle No. HP-336202. A suggestion was thrown to the witness that the vehicles of the convicts-appellants and the police were not entered in the register deliberately, which he denied. He also denied the suggestion that the vehicles had crossed the barrier. Police vehicle bearing registration No. HP-33-6202 supposedly crossed the barrier twice, once when it went towards Kamand and second time when it returned from that side. Vehicle No. DL-3CAB-2774 was supposed to have crossed the barrier, after it was intercepted and Charas was recovered from it and the police took it to Police Station Sadar, Mandi.

13. It is not the case of the prosecution that all the vehicles crossing the barrier are not entered in the register maintained at the said barrier. It was suggested to the witness, namely DW-4 Shyam Lal, that the vehicles of the convicts-appellants and the police were deliberately not entered in the register. That means the prosecution admits that the vehicles are not entered in the record maintained at the barrier. Why should the forest officials have not registered the vehicles, in case they actually crossed the barrier, especially when one of the vehicles crossing the barrier twice was a police Van and the other vehicle also supposedly crossed the barrier, after its seizure by the police. Unexplained non-entry of the vehicles at the forest barrier improbably proves the prosecution version that Santro Car bearing registration No. DL-3CAB-2774 was intercepted beyond Katindi barrier, 1 km short of Kamand and that Charas was recovered on the search of the said Car.

14. Parcel containing the bulk Charas, as per report Ex. PW-11/B sent by PW-11 Rajesh Kumar from the spot to the Police Station, for registration of the case, as also the seizure Memo Ex. PW-1/B, was marked 'A', but while in the witness-box he testified that it was marked 'A-3'. Other witnesses, namely PW-10 MHC Nand Lal, with whom the case property and the samples were deposited, also stated that the parcel was marked 'A-3', per entry, copy Ex. PW-10/A, in the Malkhana Register. PW-4 ASI Bhim Sen, who produced the parcel containing bulk before the

Additional Chief Judicial Magistrate, with an application for certification, under Section 52(a) of the Narcotic Drugs and Psychotropic Substances Act, also stated that the parcel was marked 'A-3'. However, in the inventory Ex. PW-4/B submitted to the Additional Chief Judicial Magistrate alongwith the application Ex. PW-4/A, the parcels containing bulk and the samples taken by the Investigating Officer are not shown to bear any mark, leave alone Mark A-3 on the parcel of bulk and A-1 or A-2 on the sample parcel.

15. PW-11 Rajesh Kumar, when cross-examined by the defence that in report Ex. PW-11/B and the seizure Memo Ex. PW-1/B, he himself had written that the parcel was marked 'A' and that in the Court he was saying that it was marked 'A-3', he stated that in fact the parcel was marked 'A-3', but in the aforesaid two documents he, by mistake, happened write it as Mark 'A'. Learned Additional Chief Judicial Magistrate, namely PW-13 Bahadur Singh, was examined by the prosecution. He did not say that the parcel containing the bulk, which was produced before him, for the purpose of certification, under Section 52(a) of the Narcotic Drugs and Psychotropic Substances Act, was bearing any mark, leave alone his testifying any specific mark.

16. Parcel containing the bulk sealed with the seal of Additional Chief Judicial Magistrate, was produced before us during the course of hearing of the appeals on our direction. It had two big holes, which had been mended by manual stitching. Police official, who produced the parcel, stated that the holes had been made by termites and he manually stitched them to avoid spilling of the sticks and discs of Charas. We got the stitching done by the witness, for mending the holes, undone. A large portion at the site of one of the holes was completely missing and the hole might have been made by termites or moth. However, in the case of the other hole, it was a tear, with no portion of the cloth missing, and its edges not damaged by termites or moth, which suggested that the hole had not been made by termites or moth. It was somewhat semi-circular tear. Both the holes were wide enough and the sticks and discs of Charas could have been easily put into the parcel cover through them. Thus, there was a scope for replacing the case property or tampering with it, through these holes.

17. We got the parcel opened and besides the sticks and discs of Charas a cloth cover, in which the case property was made into a parcel by PW-11 Rajesh Kumar, came out from that parcel. This cover of cloth indicated that the parcel was marked 'A' and not 'A-3'. Now, when PW-11 Rajesh Kumar had marked the parcel containing the bulk Charas as 'A', but deposited a parcel (containing bulk Charas) marked 'A-3', with PW-10 MHC Nand Lal, per his testimony, and also a parcel Mark 'A-3' was produced before the Additional Chief Judicial Magistrate, at the time of certification, per testimony of PW-4 ASI Bhim Sen, for certification, under Section 52(a) of the Narcotic Drugs and Psychotropic Substances Act, it cannot be said with certainty that the stuff, which was deposited with PW-10 MHC Nand Lal and then produced before the Additional Chief Judicial Magistrate for certification, under Section 52(a) of the Narcotic Drugs and Psychotropic Substances Act, was the same, which was allegedly recovered from the convicts-appellants.

18. The two bags, one red and the other black, in which Charas was allegedly being carried, were neither taken into possession nor produced in the Court. No explanation has been offered as to where those two bags have gone. It is not the case of the prosecution that the bags had been returned to the convicts-appellants, at the same time they had not been seized nor were they produced in the Court. This fact also creates a doubt about the prosecution version that Charas was being carried in two bags, one red and the other black in colour.

19. Report of the Chemical Examiner Ex. PX also does not stand connected with the stuff allegedly recovered from the convicts-appellants. According to the NCB form Ex. PW-3/A, the sample, which was sent to the Chemical Examiner, had no marking, though according to the statement of PW-11 Rajesh Kumar and PW-10 Nand Lal, the sample parcels had been marked A-1 and A-2. PW-10 Nand Lal stated that he sent one sample parcel with RC Ex. PW-7/A to the Chemical Examiner, through HC Manohar Lal. He did not say that the sample was marked A-1.

20. HC Manohar Lal was examined as PW-7. He stated that one sample marked A-1 and NCB form were handed over to him vide RC No. 82/07 Ex. PW-7/A for being carried to the Forensic Science Laboratory and that he went to the said

Laboratory and handed over the sample to the concerned official alongwith the NCB form. However, RC Ex. PW-7/A does not record that the sample, which was sent was marked A-1, nor does PW-10 Nand Lal himself say that the sample that was sent through PW-7 Manohar Lal was so marked. In the NCB form also there is no mention that the sample was marked A-1. Report Ex. PX, however, shows that the sample that was examined was marked A-1 and had been received vide Reference No. 1802/5-A dated 12th March, 2007. No communication bearing No. 1802/5-A dated 12th March, 2007, addressed to the Chemical Examiner, Forensic Science Laboratory, has been proved.

21. Suggestions were thrown to the witnesses of search and seizure, namely PW-11 Rajesh Kumar, PW-1 Anand Kishore and PW-5 Het Ram, that neither any Naka was organized near village Kamand nor did any vehicle, by which the convicts-appellants were travelling, appeared at the site of the Naka, on the night intervening 9th March, 2007 and 10th March, 2007, and that as a matter of fact a large number of police officials, including one Deputy Superintendent of Police and a lady IPS Probationer, swooped upon the house of convict-appellant Deepak Kumar in village Nandli, around 9.30 p.m. on 9th March, 2007, and carried out search in his house, but nothing was recovered on such search and then all the convicts- appellants, who were present at the house of convict- appellant Deepak Kumar were brought to Police Station Sadar, Mandi and framed, in connivance with one Chaman Lal, who was not on good terms with convict-appellant Deepak Kumar. Though these suggestions were denied by all the witnesses, yet all the witnesses stated that they went to the house of appellant Deepak Kumar in the wee hours of 10th March, 2007 and searched his house, suspecting that some more Charas could have been stacked there. PW-11 Rajesh Kumar stated that he reached the house of appellant Deepak Kumar at 5.30 a.m. Other witnesses also stated like that. However, the Special Report Ex. PW-8/B, which was sent to the Deputy Superintendent of Police, on 11th March, 2007, suggests that PW-11 Rajesh Kumar was on the spot atleast upto 5.50 a.m., because as per this report one of the appellants, named Falcano Angelo, was arrested at 5.50 a.m. and others were arrested at 5.20 a.m., 5.30 a.m. and 5.40 a.m. and thereafter their personal search was conducted and search Memos were prepared. That means he could not have been there at the house of Deepak Kumar at 5.30 a.m. in village

Nandli on 10th March, 2007.

22. It was also suggested to the abovenamed witnesses of search and seizure that one Deputy Superintendent of Police was also with them, when they went to the house of appellant-convict Deepak Kumar to conduct search. PW-1 Anand Kishore and PW-5 Het Ram stated that search was conducted on 10th March, 2007 around 5 or 5.30 a.m. and Deputy Superintendent of Police of Mandi was also with them, but PW-11 Rajesh Kumar did not state that Deputy Superintendent of Police was also there. He stated that the Police party stayed at the house of Deepak Kumar only for 10 or 15 minutes, but PW-1 Anand Kishore stated that Deputy Superintendent of Police came to Nandli at the house of appellant Deepak Kumar about 30-35 minutes after the police party, headed by PW-11 Rajesh Kumar, reached there. In the Special Report, Ex. PW8/B, which was sent to the Deputy Superintendent of Police on 11th March, 2007, there is no mention that the house of appellant Deepak Kumar was searched on 10th March, 2007 or that at the time of the search Deputy Superintendent of Police also reached there.

23. It has come in the evidence, per testimony of PW-1 Anand Kishore that the vehicle, by which the convicts- appellants were allegedly travelling, was a private Car. That means it was not a public conveyance and, hence, the search and seizure was not under Section 43 of the Narcotic Drugs and Psychotropic Substances Act, 1985, but under Section 42(1) of the said Act. Though PW-11 Rajesh Kumar, who was heading the police party, did record the information, which he allegedly received on the spot, that the convict-appellant Deepak Kumar and his accomplices were coming with Charas in a Car from Katola side and sent that information to the Deputy Superintendent of Police through PW-2 HC Sanjeev Walia, he did not record the grounds of his belief that he had a reason to believe that search warrant or authorization could not be obtained, without affording opportunity for the concealment of evidence or facility for the escape of an offender, before searching the Car, as per requirement of proviso to Section 42(1) of the Narcotic Drugs and Psychotropic Substances Act, despite the fact that the search was conducted after sunset and before sunrise. It may be stated that the search was conducted soon after the vehicle reached the site of the Naka at 11.45 p.m., per testimony of PW-11 Rajesh Kumar, PW-1 Anand Kishore and PW-5 Het

Ram.

24. Compliance of Section 42(1), including the proviso to it, is mandatory, as held by the Hon'ble Supreme Court in *State of Punjab v. Baldev Singh* : (1999) 6 SCC 172. The view has been reaffirmed by another Full Bench of the Hon'ble Supreme Court in : 2009(10) SCALE 255 (*Karnail Singh v. State of Haryana*), with a slight dilution that where on account of the concerned Police Officer being not at the Police Station, he cannot record the information, under Section 42(1) of the Narcotic Drugs and Psychotropic Substances Act, before taking the action, the requirement of Section 42(1) of the Act can be complied with, after the search is conducted.

25. In the present case, PW-11 Rajesh Kumar did not record the grounds, in terms of the proviso to Sub-section (1) of Section 42 of the Narcotic Drugs and Psychotropic Substances Act, even after conducting the search after sunset and before sunrise, despite the fact that the vehicle searched was a private Car and, therefore, provision of Section 42 of the Narcotic Drugs and Psychotropic Substances Act was attracted.

26. Also, we find that even though PW-11 Rajesh Kumar and other witnesses, namely PW-1 Anand Kishore and PW-5 Het Ram, testified that house of convict-appellant Deepak Kumar was searched and that search was also conducted before sunrise on 10th March, 2007, yet neither the provision of Section 42(1) nor the provision of proviso to Section 42(1) of the Narcotic Drugs and Psychotropic Substances Act had been complied with not only before conducting the search but even thereafter. Not only this, even in the Special Report, Ex. PW-8/B, which was sent to the Superior Officer, i.e. Deputy Superintendent of Police, Headquarters, Mandi, on 11th March, 2007, there is no reference to the search of the house of convict-appellant Deepak Kumar, on 10th March, 2007, before sunrise.

27. In view of the above discussed position, we are of the considered view that the case of the prosecution does not stand established, beyond reasonable doubt. Hence, both the appeals filed by the convicts-appellants, i.e. Criminal Appeals No. 498 of 2008 and 550 of 2008, are allowed, judgment dated 22nd August, 2008, of the trial Court, convicting the convicts-appellants, in these two appeals, of offence

under Section 20 of the Narcotic Drugs and Psychotropic Substances Act and sentencing them for the said offence, is set aside and they are acquitted. Incidentally, appeal filed by the State, i.e. Criminal Appeal No. 658 of 2008, for enhancement of sentence, is dismissed.

28. The convicts-appellants being in jail, serving the sentence awarded by the trial Court, are ordered to be set at liberty forthwith, in case their detention is not required in any other case.

All the three appeals stand disposed of.

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