

Moti Ram. Vs. State of H.P.

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Court : Himachal pradesh

Decided On : Nov-07-2010

Judge : Kuldip Singh, .

Acts : [Narcotic Drugs and Psychotropic Substances Act, 1985](#) - Sections 20, 42, 50; Code of criminal Procedure (Cr.P.C) - Sections 428, 313

Appeal No. : Cr. Appeal No. 81 of 2010

Appellant : Moti Ram.

Respondent : State of H.P.

Advocate for Def. : Ms. Ruma Kaushik, Addl. Adv.

Advocate for Pet/Ap. : Mr. Rakesh Jaswal, Adv.

Judgement :

1. This appeal has been directed against judgment dated 17.2.2010 passed by learned Special Judge, Chamba, Chamba Division, in Sessions Trial No.23 of 2009, convicting and sentencing the appellant under Section 20 of the [Narcotic Drugs and Psychotropic Substances Act, 1985](#) (for short Act) for four years and to pay fine of `30,000/-, in default of fine further imprisonment for six months with benefit of Section 428 Cr.P.C.

2. The prosecution case in brief is that on 23.3.2009 PW-11 HC Dev Raj and others proceeded from Police Station, Sadar, Chamba for patrolling duty. At about

3.30 A.M. on 23.3.2009 at place Gunnu Nalla, appellant came on foot from Kainthli side carrying a bag in his hand. On seeing the police party the appellant tried to run back but was apprehended on suspicion. He was given option vide memo Ex.PW1/A to be searched by Magistrate, Gazetted Officer or by the Police. The appellant had consented to be searched by the police. There upon, search was conducted and from the bag, which the appellant was carrying, charas in the shape of sticks and small balls weighing 1 Kg. 200 grams was recovered. 3. The further case of the prosecution is that two samples each weighing 25 grams were separated from the bulk quantity. Sampling and sealing was done on the spot with seal impression A. NCB form in triplicate Ex.PW-7/C was prepared. Ruka Ex.PW-11/A was prepared and sent to the police station through PW-2 Yakub Mohd. On this, FIR Ex.PW-7/A came to be registered at Police Station, Sadar, (Chamba). The copy of ruka was also sent to Superintendent of Police, Chamba through PW-2. The appellant was arrested vide memo Ex.PW-11/C.

4. The case property alongwith sample seal, NCB form were produced by PW-11 HC Dev Raj before PW-7 ASI Kuldeep Singh who resealed all the parcels with seal impression H. The case property alongwith NCB form, seizure memo etc. were deposited with PW-10 HC Kailash Chand, the then MHC, Police Station, Sadar, (Chamba) and entry to this effect was made in malkhana register, the abstract of which is Ex.PW-10/A.

5. On 25.3.2009 one sample parcel alongwith specimen seal impressions, NCB form, seizure memo, copy of FIR were sent to FSL, Junga through PW-3 HC Uttam Singh, who deposited the same with FSL, Junga and report of the Chemical Examiner Ex.PX was received. The sample on analysis was found to be cannabis and sample of charas. The special report Ex.PW-5/A was prepared and was sent to Superintendent of Police, Chamba through PW-9 Neeraj Kumar. On conclusion of investigation, charge sheet was submitted in the Court and the appellant was charged under Section 20 of the Act. The appellant pleaded not guilty and claimed trial. The prosecution has examined 11 witnesses. The appellant in his statement under Section 313 Cr.P.C. denied the prosecution case but led no evidence in defence. The learned Special Judge has convicted and sentenced the appellant as noticed above, hence this appeal.

6. I have heard learned counsel for the appellant and learned Addl. Advocate General for the State and have also gone through the record. The learned counsel for the appellant has submitted that it is the case of the prosecution that charas recovered was in the shape of sticks and small balls. The samples taken from the contraband were not representative in nature and therefore, it cannot be said that the entire quantity 1 Kg. 200 grams was charas allegedly recovered from the appellant. The Investigating Agency did not join any independent witnesses and no plausible explanation has been given for not joining the independent witnesses at the time of alleged recovery of charas from the appellant. The seals have not been produced in the Court. The Section 55 of the Act has not been complied. The case of the prosecution is highly suspicious. The learned counsel for the appellant has submitted that in the facts and circumstances of the case, appeal may be accepted, conviction and sentence of the appellant may be set aside. The learned Addl. Advocate General has supported the impugned judgment and has submitted that the learned Special Judge has appreciated the entire material on record in convicting and sentencing the appellant. She has prayed for dismissal of the appeal.

7. The prosecution case in brief is that appellant was found at place Gunnu Nalla at 3.30 A.M. on 23.3.2009 and he was searched at that place. It is not a case of prior information; therefore, Section 42 of the Act is not applicable. It is not a case of personal search inasmuch as the contraband was recovered from the bag of the appellant; therefore, Section 50 of the Act is also not applicable. It is a fact that independent witnesses were not associated by the Investigating Agency when search was conducted. The joining of independent witnesses depends upon the facts and circumstances of the case. The plan Ex.PW-11/B indicates that there are no houses or shops near the place where appellant met the police party and the search was conducted. PW-1, PW-2 and PW-11 members of the police party have proved that independent witnesses were not available at the place and time when appellant was apprehended. It is not the case of the appellant that he was not searched at about 3.30 A.M. The appellant was apprehended at a lonely place at odd hours and at that time and place the presence of independent witnesses could not be expected. It is not the requirement of law that unless independent witnesses are joined, then search is to be rejected in every case. The effect of not

joining independent witnesses during search depends upon the facts and circumstances of the case. In the present case, the independent witnesses were not available at the time of search; therefore, the prosecution case cannot be thrown out on the ground of none joining of independent witnesses at the time or recovery.

8. It has been contended by learned counsel for the appellant that representative sample of the contraband was not taken and therefore, it cannot be said that the entire quantity of contraband recovered from the appellant was charas. The learned counsel for the appellant has relied Gaunter Edwin Kircher v. State of Goa, AIR 1993 SC 1456 and Javed A. Bhat v Union of India, AIR 2007 Cr.L.J 3145 in support of his this submission. Ex.PW-1/D is seizure memo wherein it has been specifically stated that the contraband was mixed and thereafter the sample was taken. PW-11 HC Dev Raj has stated that after mixing the contraband the sample was taken. On behalf of the appellant no specific stand has been taken in the cross examination of the relevant witnesses of the prosecution that no representative sample was taken. It means the appellant has not disputed that sample in fact was not representative sample. In his statement under Section 313 Cr.P.C. appellant has not stated specifically that sample was not representative. In these circumstances, it cannot be said that the Investigating Agency has not taken the representative sample from the bulk quantity of charas. Therefore, the judgments i.e. Gaunter Edwin Kircher v. State of Goa, and Javed A. Bhat v Union of India relied by learned counsel for the appellant are not applicable on the facts of the present case.

9. The learned counsel for the appellant has stated that both the seals were not produced in the Court and therefore, adverse inference is to be drawn against the prosecution. The learned Addl. Advocate General has submitted that on facts the prosecution has proved the entire case. The mere non-production of seals in the Court is not fatal to the prosecution case which has been otherwise proved beyond reasonable doubt against the appellant. The learned Addl. Advocate General has relied Fredrick George vs. State of H.P. 2002 Cr.L.J. 4600 (HP) in support of her submissions regarding non-production of seals in the Court. The prosecution has proved the case against the appellant. It is not the case of the appellant that

tampering was done with the samples or with the bulk quantity after seizure by removing the seals. In absence of this stand of the appellant, it cannot be said that non-production of seals in the present case has any serious consequence.

10. The learned counsel for the appellant has submitted that there is non-compliance of Section 55 of the Act. In Babubhai Odhavji Patel and others vs. State of Gujrat (2005) 8 SCC 725, it has been held that Sections 52, 55 and 57 are not mandatory and are only directory. Therefore, even if, Section 55 of the Act has not been complied by the prosecution in letter and spirit, still it cannot be said that on this ground the prosecution case should be discarded. Thus seen from any angle, the appellant has failed to make out any case. The learned Special Judge has rightly appreciated the evidence on record and no fault can be found with the view taken by the learned Special Judge in convicting and sentencing the appellant.

11. No other point was urged.

12. The result of above discussion, the appeal fails and is accordingly dismissed.

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