

James Albert Vs. State of Hp

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Court : Himachal Pradesh

Decided On : Jun-20-2011

Judge : Surinder Singh

Appeal No. : Cr. Appeal No. 458 of 2010

Appellant : James Albert

Respondent : State of Hp

Judgement :

SURINDER SINGH, J (Oral).

1. Appellant has challenged the judgment of his conviction and sentence passed by the learned Special Judge in Sessions Trial No.46/2008, decided on 18th September, 2010, for the offence punishable under Section 20 of the Narcotic Drugs Psychotropic Substances Act, 1985, in short “the Act”, for allegedly keeping in his possession 820.64 grams of Charas in the recovered stuff weighing 2 Kgs.

2. In short, the prosecution story as emerges from the evidence on record can be stated thus. On 27th July, 2008, PW11 Sub Inspector Pawan Kumar was Incharge of Police Post, Mani Karan. He alongwith PW1 Constables Joginder Singh, Vijay Kumar, PW2 Arun Kumar and Govind Krishan were on traffic checking between villages Goj and Kasol. Around 7.00 pm, taxi bearing registration No.HP-01K-0344 came from the side of village Kasol. Police stopped it for checking and asked about the name of the driver. After disclosing his name, he (PW4) informed the

police that he was plying the taxi under 'Kasol Taxi Union' for the last about four years. Police noticed the appellant a foreigner, hereinafter to be referred as 'the accused', sitting on rear seat of the said vehicle. The taxi driver informed police that this taxi was engaged for two days, i.e., 26th and 27th July, 2008 by the accused. He picked-up the accused from 'Sandhya' Hotel at Kasol. The identity of the accused was asked. He disclosed his name and nationality. He was found traveling with a bag in his lap on which words "North Face" were written. PW11 Sub Inspector Pawan Kumar asked him as to what it contained, but he stated that there was nothing objectionable item in the bag. It was an isolated place and no independent witness could be associated as no person was passing through the road at that time.

(ii) Suspecting that the accused might be having some offensive substance in his bag, thus PW11 aforesaid checked his bag and recovered 2 Kgs. Charas in flat pieces, which was found contained, in four polythene bags. The quantity of Charas in all the four packets was mixed-up together and two samples of 25 grams each were separated and sealed in the separate packet with seal impression "P" and the remaining bulk was also sealed with the same seal.

(iii) Sample of seal was taken on a piece of cloth Ext.PW1/B. Police also filled-up NCB forms in triplicate, one of which is Ext.PW3/B. The seal after its use was handed to PW1 Constable Joginder Singh.

(iv) Case property was taken into possession vide seizure memo Ext.PW1/A. Its copy was supplied to the accused.

(v) It had grown dark. Accused alongwith case property was brought to the Police Post, Mani Karan.

(vi) Constable Vijay Kumar was sent to Hotel 'Sandhaya' where the accused was staying for verification.

(vii) Ruqa Ext.PW11/A was sent for the registration of the case through PW2 Constable Arun Kumar, which culminated into FIR Ext.PW12/A. Site plan of the recovery Ext.PW11/B was prepared.

(viii) The accused was arrested and informed about the grounds of arrest vide memo Ext.PW11/C.

(ix) On 28th July, 2008 the accused and the case property were produced before PW3 Inspector/SHO Partap Singh. He resealed each of the parcels with his seal "X". He also drawn the sample of seal separately on a piece of cloth Ext.PW3/A and thereafter filled-up columns No.9 to 11. The facsimile of the seal was also appended thereon. Thereafter case property was deposited with PW7 MHC Manoj Kumari in the Malkhana and the accused was sent up to the lock-up, for further production before the concerned Magistrate.

(x) Special report was sent to the officer superior within the stipulated period.

(xi) On 29th July, 2008, a sample parcel alongwith sample of seals, NCB forms in triplicate and photocopies of FIR and seizure memo were sent to the Forensic Science Laboratory, Junga for analysis through PW6 Constable Diwan Chand vide Road Certificate Ext.PW6/A. After its deposit, he obtained receipt Ext.PW7/B and handed it over to the MHC aforesaid.

(xii) On analyzing the sample parcel in the laboratory vide report Ext.PA the entire mass of the exhibit was found to be of Charas containing the resin contents of the Cannabis plant to the extent of 41.32% Weight-in Weight.

3. After completing the investigation, Challan was presented in the Court for the trial of the accused. The accused was charge-sheeted for the aforesaid offence. He abjured his guilt and claimed trial.

4. To prove its case the prosecution examined its witnesses and the accused was also examined under Section 313 of the Code of Criminal Procedure. He took up the stand that he was waiting for the bus at bus-stand, Mani Karan. Police came to him and asked about the documents, being a foreigner and foisted a false case against him. However, he did not speak out any reason what malice police entertained against him for framing him in a false case.

5. On the scrutiny of the evidence, learned trial Court, disbelieved the defence taken and while believing on the prosecution evidence held him guilty of the

offence charged thus convicted and sentenced him to undergo rigorous imprisonment for a period of three years and to pay a fine of Rs.30,000/-. In default of making the payment of fine to further undergo simple imprisonment for a period of six months for keeping in his possession 820.64 grams Charas, in the recovered stuff of 2 Kgs., which has been challenged by him in the present appeal.

6. Shri Anup Chitkara, learned Counsel for the accused vehemently argued that the seizure in question was not witnessed by any independent witness despite the fact that it was seized at a quite busy place which was a thoroughfare. He also ventilated that the sole independent witness, i.e., the taxi-driver (PW4 Bimal Kumar) did not support the case of the prosecution and there has been material discrepancy in the statements of official witnesses with respect to the using of the scale which was allegedly used for weighing the recovered stuff, which casts a serious doubt on the prosecution version. He further argued that the samples from each of the packets were not taken and the recovery of the bag containing alleged contraband is itself in question, therefore, the prosecution case lacks probity. As such, the benefit of doubt should have been given to the accused.

7. On the other hand, Shri A.K. Bansal, learned Additional Advocate General supported the impugned judgment of conviction and sentence and further argued that the minor contradictions in the statements of the prosecution witnesses will not shake the foundation of the case in any manner, if otherwise the statements of the official witnesses are found to be consistent and confidence inspiring. He also submitted that the witness (PW4), who turned hostile, is won-over by the accused. He tried to favour the accused for obvious reasons. He also referred to the unchallenged testimony of the Investigating Officer with respect to taking of sample by mixing all the four packets together and then taking the samples. He also argued that there is nothing on record to show that at the time of alleged recovery there was any person of the public who was passing through the said place and that it was also not a legal requirement or rule of law to associate any independent witness, when the recovery is made at an open place in a routine checking.

8. I have given my thoughtful consideration to the rival contentions of the parties and have closely and cautiously examined and reappraised the evidence on record.

9. Certainly, there is no principle of law that without corroboration by the independent witnesses the testimonies of the official witnesses cannot be relied upon. The presumption that person acts honestly applies as much in favour of police personnel as of other person. The learned trial Court quite aptly relied upon the judgment of Apex Court rendered in *Karamjit Singh v. State*, AIR 2003 SC 1311 that it is not proper judicial approach to distrust and suspect them without good corroboration. Therefore, the testimonies of the official witnesses are required to be scrutinized fairly and dispassionately like the statement of other witness in order to find out whether the same inspire confidence and can be safely relied upon.

10. In the instant case, the learned Defence Counsel made an endeavour to elicit from the prosecution witnesses that 'Mani Karan' is a busy place where there are religious institutions as well as government offices and also the offices of the hydel projects nearby, but none of the witnesses in their statements stated that at the relevant time any-person was passing through the place of incident. Whereas, the Investigating Officer (PW11) categorically stated that the spot being isolated place, no independent witness could be associated nor any person was passing through the road, which statement remained unchallenged in his cross-examination. Therefore, non-association of the independent witness against the above background, will not affect prosecution case in any manner, nor it is a rule of law which mandates the police to associate the independent witness to corroborate their version. Therefore, this argument of the learned Counsel for the accused does not hold any water, hence rejected.

11. Further, I also find that PW4 Bimal Kumar did not support the case of the prosecution and stated that he did not remember that on 27th July, 2008 he was driving his taxi from Kasol to Bhunter. He is matriculate. He can read and write Hindi as well as English. He admitted his signatures on the cloth parcels and the documents prepared on the spot from the time of recovery till the arrest of the

accused and stated that he did not make any complaint to any body regarding obtaining his signatures by the police. Admittedly, his signatures also finds mentioned on the parcels of case property, but could not tell why he appended his signatures over it without asking what it contained. He also admitted that he was not a famous artist and that his autographs were required on all these items. Though, in cross-examination he stated that he was called by the police from bus-stand, Mani Karan to the Police Post for his signatures on various documents and was asked by the police to sit down, but left the place on the ground that a passenger was waiting in the vehicle. His statement to this effect stands falsified by PW10 Randhir, Clerk of Parvati Valley Taxi Operator Union, Kasol. He brought the summoned record, i.e., receipt book and daily demand register of taxi. This taxi was booked through 'Swagtam Tour and Travel Agency' on 26th July, 2008 from their office. This demand was entered into day-book register Ext.PW10/C in its daily course of business, abstract of which is Ext.PW10/A. On such demand the vehicle aforesaid was marked and receipt Ext.PW10/B was issued, which was taken into possession by the police during investigation of the case. The receipt book is Ext.PW10/D. In cross-examination, both these documents are challenged on the ground that these were not containing the name of the person who had booked this taxi. But, however, it is a fact that the taxi in question was engaged at Kasol through the said Union. Thus, there is no question of presence of PW4 Bimal Kumar at bus-stand, Mani Karan, as stated by him and it is his taxi which was intercepted by the police wherein the accused was sitting and found carrying narcotic. This witness has no axe to grind against the accused or for that matter against the taxi-driver. He denied specifically that the entries were fabricated by him in connivance with the police. The reason for preparing a false record by the police is also not shown. Therefore, it is clear that PW4 aforesaid has suppressed the truth with respect to the recovery of the narcotic from the accused who was traveling in his taxi for obvious reasons and his hostility against the prosecution will not in any way affect its probity. Rather, his testimony can be relied upon to the extent it helps the prosecution case.

12. It is stands established that during the aforesaid time the accused was staying in Hotel 'Sandhaya' at Kasol. The taxi was engaged for two days from Kasol Taxi Union itself and the accused was traveling with the bag containing Charas in the

taxi aforesaid, which was intercepted by the police.

13. In the next sequel of argument of the learned Counsel, is the discrepancy as pointed out in the statements of PW1 Constable Joginder Singh and PW2 Constable Arun Kumar with respect to the use of electronic or a traditional scale for weighing the recovered stuff. Although, in his cross-examination PW1 stated that the scale was electronic, whereas PW2 stated that it was traditional one, but this question was not asked from PW11 Pawan Kumar, who infact weighed the contraband. Otherwise also, this discrepancy is of no consequence in view of the fact of recovery of the narcotic in the above quantity from the accused which as stated above stands proved. Therefore, the case cannot be thrown out on this score.

14. As far as the taking of sample is concerned, there is a reference in the document that from the recovered stuff PW11 had taken two samples of 25 grams each and in his examination before the Court he categorically stated that after mixing the entire Charas requisite samples were taken as per procedure and this statement has not been challenged in the cross-examination on this score. Therefore, the learned Counsel can not derive any benefit from the judgment of this Court rendered in Nathu Ram v. State of H.P. 2008 (2) Shim LC 1 also for the reasons as in that case, the very fact of recovery of the Charas could not be proved by the prosecution, because the bag was recovered from the shelf of the bus, over seats No.25 and 26, where two Gorkhas were sitting and further that at the time of conducting the proceedings the accused was kept outside the tent whereas the proceedings were going inside the tent in his absence.

15. Learned Counsel also argued that the entire dicky of the taxi was empty and there was no question of carrying bag by the accused in his lap. Well this argument looks attractive, but has no bearing on this case. It depends upon the wish and psyche of every person in which way he would like to travel. Therefore, this point raised by the learned Counsel is of no consequence in the present facts and circumstances of the case where the recovery of the narcotic stands proved from the bag of the accused to which he was carrying and the contents of the four packets were proved to have been mixed together before taking its samples. The

accused and the case property were produced before the Inspector/SHO (PW3). He resealed the case property with his own seal. The seal which was used by the Investigating Officer (PW11) was handed over to PW1 Constable Joginder Singh, which fact has been endorsed by him in his statement. The facsimiles of both the seals above, mentioned were taken on the NCB forms. The case property was deposited in the Malkhana. The sample parcel was sent for analysis, which tested positive for Charas.

16. Further, the accused when produced before PW3 Inspector/SHO Partap Singh did not allege any false implication nor it has been so suggested in his cross-examination. Once the recovery of the narcotic stands proved from the accused, the presumption of culpable mental state can be safely drawn, as per provisions of Section 35 of the Act. The accused has failed to account satisfactorily for its possession. Therefore, he is proved held to have committed the offence charged in view of Section 54 of the Act.

17. No other pointed urged or pressed.

18. For the reasons aforesaid, I do not find any illegality in the impugned judgment of conviction and sentence passed by the learned trial Court. The appeal sans merit and is dismissed accordingly.

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