

Pawan Kumar and Another Vs. State of H.P.

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Court : Himachal Pradesh

Decided On : Jun-14-2011

Judge : Surinder Singh

Appeal No. : Cr. Appeal No.285 of 2010 with Cr. Appeal No.405 of 2010

Appellant : Pawan Kumar and Another

Respondent : State of H.P.

Judgement :

Surinder Singh, J (Oral):

1. Both the above titled appeals are arising from a common judgment of conviction and sentence passed by the learned Special Judge Chamba in Sessions Trial No.31 of 2009, on 9.6.2010/ 6.7.2010, for the offence punishable under Section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985, in short 'the Act', whereby the appellants hereinafter referred to as 'the accused persons', were convicted and sentenced to imprisonment for a period of three years each and to pay a fine of Rs.25,000/- each with default clause.

2. Precisely, the prosecution case as emerges from the evidence of the prosecution can be stated thus. On 17.4.2009, PW11 ASI Santosh Kumar alongwith PW1 ASI Jeet Singh and PW3 HC Neeraj Kumar were on patrolling duty in police Gypsy being driven by Constable Sham Lal (PW4). They reached the place known as 'Lahadu' around 12.30 p.m., where they laid a Naqa. They spotted

two persons coming from the side of forest barrier. Each of them was carrying bags with them. On seeing the police party they tried to run back, but were overpowered and on suspicion, their identity was asked. Each one of them was carrying separate bags.

(ii) PW11 ASI Santosh Kumar entertained suspicion of having with them some narcotic substance. First of all, he informed accused Pawan Kumar that it was his right to be searched before the Magistrate or a Gazetted Officer, as such gave option in writing Ext.PW1/A in terms of Section 50 of the Act. Accused Pawan Kumar opted to be searched by the police party present, to this effect he made the endorsement on the option document. PW11 aforesaid and the police officials rendered themselves to be searched by the accused, but nothing incrimination was found in their possession and thereafter search of accused Pawan Kumar was carried out. On checking his bag, police recovered 2 Kgs. of Charas, out of which two samples of 50 grams each were separated, packed and sealed with seal impression "SK" but at three places on each parcel. The remaining bulk was also packed in the same envelope and sealed with the same seal at three places. Specimen of seal impression Ext.PW1/C was retained and seizure memo Ext.PW1/B was prepared which was signed by PW1 ASI Jeet Singh and PW10 Rajesh Kumar and also by the accused aforesaid. Seal after use was handed over to Rajesh Kumar aforesaid. Case property was taken into possession vide memo Ext.PW1/B. NCB forms in triplicate were prepared.

(iii) Similarly, the second accused Jarmu was given an option in terms of Section 50 of the Act in writing Ext.PW1/D. He exercised his option and he also opted to be searched by the police party by making his endorsement in his hand and under his signatures. Thereafter, the police on the search of his bag found 1.900 Kgs. Charas, out of which two samples of 50 grams each were separated, packed. The seal was allegedly taken back from PW10 Rajesh Kumar and samples were sealed with seal impression "SK" at three places each. The remaining bulk was also packed and sealed in a parcel with the same seal at three places. Specimen of seal impression Ext.PW1/F was retained and seizure memo Ext.PW1/E was prepared in the presence of the witnesses and also the accused aforesaid. The seal was again handed over back to PW10 Rajesh Kumar. The case property was

taken into possession vide memo Ext.PW1/E. NCB forms in triplicate were prepared.

(iv) The accused persons were arrested and grounds of arrest were informed to them.

(v) PW11 ASI Santosh Kumar prepared Ruqa Ext.PW11/A and sent through PW4 Constable Sham Lal for the registration of the case to the Police Station and its copy was also sent through PW3 HC Neeraj Kumar to the Superintendent of Police, Chamba, for information.

(vi) Site plan Ext.PW11/B of the place of alleged recovery was also prepared.

(vii) Case property of both accused alongwith the specimen seal impressions were produced before PW2 ASI/SHO Yudhvair Singh for the purpose of resealing.

He resealed each of the six parcels with his own seal impression "T" at two places each. Thereafter it was allegedly deposited in the Malkhana with PW6 MHC Hakam Singh. Its entry was made in the Malkhana register, the abstract whereof is Ext.PW6/A.

(viii) On 19.4.2009, PW3 HC Neeraj Kumar was officiating as MHC of the Police Station. He forwarded two samples without making for analysis vide RC No.7/2009 on the same day to State Forensic Science Laboratory, Junga through PW7 Constable Balwant Singh, who deposited the same in the Laboratory on 20.4.2009 and obtained receipt, which was handed over back to MHC on his return. Both the samples, which were received in the Laboratory were tested positive for Charas as it contained the resin contents of 28.59% and 28.94% weight-in-weight respectively of the Cannabis plant.

(ix) After completing the investigation, challan was presented in the Court for the trial of the accused persons. During the trial of the case, remaining case property consisting of four parcels which were marked as 'A', 'A-1', 'B' and 'B-1', allegedly recovered from each of the accused persons were also sent for forensic examination to FSL Junga through PW8 HHC Bir Singh and on analysis, it contained the resin contents to the extent of 29.80%, 28.93%, 30.36% and 29.26%

weight-in-weight respectively of Cannabis plant. The report is Ext.PX. Thereafter, the supplementary challan was also presented in the Court against the accused persons.

3. The accused persons were accordingly charge sheeted, for the offence aforesaid. They abjured their guilt and claimed to be tried. To prove its case, prosecution examined its witnesses and accused persons were also examined under Section 313 of the Code of Criminal Procedure. The circumstances, which were found attendant were put to each of them, to which they denied and pleaded their innocence and claimed false implication in the case. When called upon to enter into their defence, they did not lead any evidence in defence.

4. On analyzing the prosecution evidence, the learned trial Court believed the prosecution version, thus convicted and sentenced each of the accused as aforesaid.

5. Now both the accused persons have challenged the impugned judgment by filing above separate appeals. Learned counsel for the accused persons vehemently argued that the statements of the official witnesses are full of material contradictions, the so-called independent witness PW10 Rajesh Kumar did not support the case of the prosecution and the link evidence in the instant case is not complete. Thus, the result of the analysis is not linked with the alleged recoveries.

6. Contrary to the above arguments, Shri A.K.Bansal, learned Additional Advocate General, for the respondent-State supported the impugned judgment of conviction and sentence and forcefully argued that the link evidence in the instant case is complete and further that the statements of the official witnesses are worth inspiring confidence, therefore, the hostility of the independent witness would not in any way affect the merits of the case.

7. I have given my thoughtful consideration to the rival contentions of the parties and have carefully examined the evidence on record.

8. The facts on records do not make out a case of conspiracy where Section 29 of the Act would be attracted for the joint trial of the accused persons. There were

different recoveries from both the accused persons thus there should have been two separate FIRs and challans against each of them. Since no prejudice has been claimed by either of the accused persons for their joint trial, therefore, I proceed to examine the evidence on record.

9. Pertinently, his presence has not been stated by the Investigating Officer PW11 ASI Santosh Kumar at the time of alleged recovery. He simply stated that Rajesh Kumar aforesaid had signed memo Ext.PW1/B. He did not make any mention about signing of other papers by him, whereas, PW1 ASI Jeet Singh stated that when the accused persons were apprehended one Rajesh Kumar (PW10) was present at the spot, but he did not disclose that he was the owner of 'Rajesh Dhaba' where the 'Naqa' was put, from where the weights and measures were obtained for weighing the recovered stuff. PW10 Rajesh Kumar has turned hostile to the prosecution, though he admitted his signatures on the documents prepared by the police, but according to him he signed these papers merely on asking of the police. He disowned his statement under Section 161 of the Code of Criminal Procedure.

10. It is also important to note that PW1 Jeet Singh stated that after the search of accused Pawan Kumar, police searched one Neeraj Kumar, who was at that time in the custody of PW3 HC Neeraj Kumar and stated to have been given an option Ext.PW1/D and he consented to be searched by the police party and the police conducted the search of said Neeraj Kumar and on opening his packet, it contained 1.900 Kilo grams of Charas. He did not make any reference with respect to making of recovery from accused Jarmu at all in examination-in-chief. Although in cross-examination, he stated that Jarmu was in the custody of Rajesh Kumar but he did not remember the time of recovery from accused Jarmu. Had he been an actual witness to the recovery then there was no question that he would have forgotten this important fact. He further stated that the entire proceeding was drawn in the light from the Dhaba of Rajesh Kumar, where 2-3 servants of the Dhaba were present. Further according to PW1 aforesaid the entire proceedings were drawn in the light coming from the Dhaba of Rajesh Kumar, whereas PW4 Sham Lal stated that all the documents were prepared on the road near the Dhaba of Rajesh Kumar, whereas PW11 ASI Santosh Kumar stated that the entire

proceedings completed in the Gypsy in the electric light in front of the Dhaba. This variance in their statements assumes importance in the light of other circumstances discussed hereinafter.

11. PW3 HC Neeraj Kumar stated that they left the Police Station around 9.00 p.m. and reached the spot of alleged recovery at 9.30 p.m. whereas PW11 ASI Santosh Kumar stated that they proceeded from Police Station Chowari in the morning at 9.00 a.m. and not in the evening, as stated by PW3 aforesaid.

12. According to PW3 HC Neeraj Kumar, he had left the spot with copy of 'Ruqa' on the motorcycle and reached Chamba around 12.00 midnight, whereas according to PW11 ASI Santosh Kumar, PW3 aforesaid left the spot alongwith Ruqa in a bus.

13. PW3 also stated that on reaching the spot, a 'Naqa' was laid. In cross-examination he stated that he apprehended accused Pawan Kumar, whereas accused Jarmu was apprehended by PW1 ASI Jeet Singh, whereas PW11 ASI Santosh Kumar and PW4 Constable Sham Lal stated that Jarmu was under the supervision of PW3 HC Neeraj Kumar. These contradictions make the prosecution case a suspect.

14. Further the seal "SK" which was used by PW11 ASI Santosh Kumar on the spot was his ring as stated by PW3 HC Neeraj Kumar, whereas, PW11 aforesaid stated that he was having 3-4 impressions of the seal "SK" which were made of brass in a ring shape. None of the witnesses examined in the Court stated anything about handing over of the seal either to Rajesh Kumar PW10 nor this fact has been admitted by him, this shakes the very foundation of the prosecution case.

15. PW6 HC Hakam Singh admitted in cross-examination that there was no entry in the Malkhana register regarding deposit of NCB forms. He was also confronted with his statement recorded under Section 161 of the Code of Criminal procedure with respect to deposit of NCB forms and the sample of seals wherein it was not so found recorded. He also stated that he did not remember the date, time when the case property was deposited with him.

16. The above position apart, there is no reference with respect to the depositing of the sample of seal and NCB forms in the Malkhana, the abstract of Malkhana entry is Ext.PW6/A. Although PW6 HC Hakam Singh states about the deposit of these documents but entry aforesaid does not substantiate it. In all there were six parcels, which were allegedly deposited in the Malkhana i.e. two parcels of remaining recovered stuff and four sample parcels, but the abstract of the Malkhana register only makes the reference of only five instead of six items without any reference to depositing of NCB forms or the sample of seals. Even the Road Certificate Ext.PW3/A does not make mention of sending of NCB forms. There is only mention of sending of sample of seals separately, but when it reached in the Laboratory on 20.4.2009, the sample of seals were also stated to have been compared with the NCB forms, whereas NCB forms Ext.PW2/C pertains to accused Pawan Kumar it does not show the date of despatch of the sample with the Road Certificate, but NCB forms Ext.PW2/D with respect to accused Jarmu shows the date of despatch of the sample as 19.4.2009 vide RC No.7/2009 (Ext.PW3/A), which surprisingly depicts the date, time and place of seizing on 17.7.2009 at 2.10 p.m. so also Ext.PW2/C, whereas, case of the prosecution is that the alleged recovery was made from accused Pawan Kumar at 12.30 p.m. as stated above. The story does not end here. If the recovery was made at 12.30 p.m., then the case property could not have been deposited on 17.4.2009 at 11.30 p.m. even prior to its recovery with PW6 MHC Hakam Singh as shown against column No.10 of the NCB forms aforesaid. In these circumstances, the story of its deposit and entry in the Malkhana register and its resealing etc. all are false.

17. It is also the prosecution case that the remaining entire bulk was recovered from both the accused persons alongwith two samples were also sent on 28.7.2009 vide RC No.68/2009 through PW8 HC Bir Singh for its examination to the Forensic Science Laboratory, Junga, but they refused to accept it raising an objection of non-tagging NCB forms with the same, as such it was returned. Though he stated that on return he handed over the same parcels to PW9 HC Ashok Kumar, thereafter objections were removed and the case property was again given to him on 31.8.09 for its deposit in FSL Junga to which he deposited next day i.e. on 1.9.2009, but surprisingly, in his cross-examination, he materially

contradicted this statement with respect to depositing of the case property with MHC on his return. He specifically stated that the case property remained with him w.e.f. 28.8.2009 to 31.8.2009. Why the case property was handed over to him on 28.8.09 is not known and what was the reason to retain with him remains unanswered. This fact assumes importance in view of the fact that the seals which were used for sealing the case property by PW11 ASI Santosh Kumar on the spot was not only one seal, which was allegedly handed over to PW10 Rajesh Kumar, but he was having 3-4 such seals as admitted by him. On the top of it, the seal which was used for its resealing by PW2 ASI Yudhvair Singh also remained with him. There is also nothing on record to show as to how the objections raised by the State Forensic Science Laboratory were removed and by whom.

18. In the above circumstances as discussed above, the possibility of tampering the case property cannot be ruled out. Further the Road Certificate against which PW8 Bir Singh had taken the case property consisting of four parcels for its analysis also did not find the light of the day during the trial of the case. PW8 HC Bir Singh stated that the report of the analysis of the said case property is Ext.PX, the perusal of which shows that after its analysis, it was resealed with seal impression FSL-II and this specimen of seal has been appended on the said report, but when it was exhibited for the first time during the trial of the case in the statement of PW1 ASI Jeet Singh, as per observation of the trial Court, it contained the seal impression 'SK' 'E' and 'FSL'. It is not understood from where the seal of 'E' appeared on all the parcels when initially it was sealed on the spot with seal impression 'SK' and resealed by PW2 SHO with seal impression 'T' and after its examination, it was returned with the seal impression FSL-II. Thus, there is no question of appearing 'E' seal thereon.

19. Further Rapat No.26 alleged to have been recorded on 17.4.2009 making the reference to the date of bringing producing the case property before PW2 ASI Yudhvair Singh for the purpose of resealing is absolutely irreconcilable.

20. The entire discussion of the aforesaid evidence lead me to the conclusion that the learned Public Prosecutor was not vigilant while conducting the case to seek the indulgence of the Court to get clarified the ambiguity aforesaid and the learned

trial Court also remained a silent spectator and a passive onlooker in the entire show. No one made sincere efforts to clear the above ambiguities which are serious in nature going to the root of the case.

However, in view of the above material contradictions, exaggerations and embellishments, the statements of the official witnesses and also the hostility of the independent witness, makes the case of prosecution a suspect. Further the alleged recovery from each of the accused persons could not be connected with either of the reports of analysis, therefore, the accused persons are entitled to the benefit of doubt. Therefore, both the appeals are allowed. The judgment of conviction and sentence passed by the learned trial Court in Sessions trial No.31 of 2009 decided on 9.6.2010/ 6.7.2010, are hereby set aside. Consequently, both the appellants stand acquitted. Both appellants being in jail, serving out the sentence, are ordered to be set free, forthwith, if not required in any other case. The fine amount, if deposited, shall be refunded to them forthwith. Release warrants be issued by the Registry accordingly.

21. Send down the record.

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