

(2012) 06 SHI CK 0146

High Court of Himachal Pradesh

Case No: Criminal Appeal No. 436 of 2005 and Cr. Appeal No. 518 of 2005

Naresh Kumar @ Lucky

APPELLANT

Vs

State of Himachal Pradesh

State of H.P. Vs Naresh Kumar @
Lucky

RESPONDENT

Date of Decision: June 26, 2012

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 161, 313
- Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) - Section 20

Hon'ble Judges: Rajiv Sharma, J; Deepak Gupta, J

Bench: Division Bench

Advocate: N.K. Thakur and . Surender Kumar, for the accused in both the Appeals, for the Appellant; Vivek Singh Thakur, Addl. A.G. and Mr. Rajesh Mandhotra, Dy. A.G. for the State in both the appeals, for the Respondent

Final Decision: Dismissed

Judgement

Deepak Gupta, J.

These two appeals are being disposed of by one judgment since they both arise out of a common judgment of the learned Sessions Judge, Hamirpur in Sessions Trial No. 27 of 2004 whereby the accused has been convicted of having committed an offence punishable u/s 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the Act) and sentenced to undergo rigorous imprisonment for one year and to pay fine of Rs. 10,000/-. In default of payment of fine, the accused was directed to undergo simple imprisonment for four months. Criminal Appeal No. 436 of 2005 has been filed by the accused challenging his conviction and the Criminal Appeal No. 518 of 2005 has been filed by the State praying for enhancement of the sentence.

2. The prosecution story, in brief, is that on 26th October, 2003, PW-9 ASI Desh Raj who was Incharge of Police Post Jahu alongwith PW-1 Const. Pawan Kumar and PW-2 Const. Ishwar Dass had gone on routine patrol duty of the township of Jahu and entry in this behalf was made at Sr.No.14 of the Daily Diary Register Ext.PW-1/D. When these police officials were present at the Bus Stand Jahu, the accused person was noticed to be standing there. On seeing the police officials the accused ran towards the other side. The police officials intercepted the accused person. The behaviour of the accused aroused the suspicion of the police officials. Therefore, it was decided to check the haversack (Pithu) Ext.P-3 being carried by the accused on his shoulders. PW-9 asked the accused to disclose his name, parentage and address which he disclosed. PW-9 Desh Raj also asked the accused person to take off his haversack which he was carrying. When PW-9 in the presence of PW-1, PW-2 and the accused person was going to search the haversack, the accused again ran away. He jumped into the nearby Seer Khad which was dry and ran away. The police officials could not catch hold of him. Thereafter, PW-9 alongwith two officials took the haversack Ext.P-3 to the nearby hotel of PW-3 Som Dutt and checked the same. Clothes belonging to the accused were found in the haversack. Besides the clothes there was one small bag of green colour in the haversack. When this bag was opened, charas was found inside it. This charas was weighed in the presence of PWs 1, 2 and 3 and found to be 400 gms. Two samples of 25 gms each were drawn. Thereafter, the two sample packets and the remaining bulk charas were packed separately in three packets and sealed with seal "H" and were taken into possession vide recovery memo Ext.PW-1/A. The haversack Ext.P-3, small bag of green colour and clothes of the accused were separately sealed in one packet with seal "H" and taken into possession vide recovery memo Ext.PW-1/C. Ext.PW-1/B is the specimen impression of seal "H". Thereafter, PW-9 prepared report Ext.PW-2/A and sent the same to the Police Station Bhoranj for registration of FIR Ext.PW-2/B. Other codal formalities were completed at the spot and PW-9 produced the sealed case property before PW-8 Sh. Mehar Chand, SHO who re-sealed the same with his seal "M". The police searched the accused person but could not find him. The accused applied for anticipatory bail in this Court which was granted to him on 30.10.2003. One sample packet of charas was sent to the Chemical Examiner at Kandaghat who, vide report Ext. PX, opined that the sample was of charas. On this the accused was charged for having committed the offence as aforesaid. After trial the accused was found guilty. Hence, the aforesaid two appeals.

3. We have heard Sh. N.K. Thakur, learned senior counsel for the accused as well as Sh. Vivek Singh Thakur, learned Additional Advocate General on behalf of the State.

4. The main grounds raised by Sh. N.K. Thakur, learned senior counsel for the accused, are that the prosecution has miserably failed to establish the recovery from the conscious and exclusive possession of the accused. It is argued that when the search of the haversack was being done the appellant-accused ran away and the bag was searched in the Hotel of PW-3 Som Dutt who did not support the

prosecution story which makes the recovery doubtful. Another ground raised by Sh. N.K. Thakur is that in the documents, especially the seizure memo, the name and complete address of the accused have been given even though the accused absconded before the search. Other grounds have been raised such as mentioning of the number of the FIR and non deposit of the NCB form and sample seal in the malkhana. It is also alleged that the link evidence has been missing.

5. On the other hand, on behalf of the State it is urged that the judgment of the learned trial Court is absolutely correct but the sentence imposed is on the lower side and deserves to be enhanced.

6. As far as the official witnesses are concerned, they have fully supported the prosecution case. The version of the prosecution is that on seeing the police, the accused tried to run away but was apprehended. Thereafter, the accused was asked about his name parentage and complete address which he disclosed. He was also asked to hand over the haversack which he was carrying. It was only when the haversack was about to be searched that the accused ran away for the second time.

7. PW-9 states that he alongwith other police officials remained in the Hotel till 5.45 a.m. and has denied that five police officials raided and searched the house of the accused person and used third degree method on the parents of the accused person. A suggestion was put to the witness that the haversack was unclaimed property lying in the bus stand and the father of the accused was present at the Bus Stand to receive the accused who had allegedly gone to Jabalpur for some interview. However, the accused in his statement u/s 313 Cr.P.C. has not stated anything about going to Jabalpur and his case was of denial simpliciter.

8. PWs 1 & 2 who were the official witnesses have supported the prosecution story and their statements are by and large consistent with the statement of PW-9. PW-1 in cross examination has specifically stated that on interrogation by PW-9 the accused person had disclosed his name, parentage and other particulars. He however states that at 2 a.m. on 26.10.2003 they had visited the house of the accused as the police was combing the area for arresting the accused but he was not found. He however denied that the police had raided and searched the house of the accused on 26.10.2003 at 2 a.m. and used third degree method on the parents of the accused.

9. PW-2 Ishwar Dass had given a similar version. He however denies that he alongwith five other police officials had raided and searched the house of the accused at 2 a.m. on 26.10.2003.

10. PW-3 Som Dutt did not support the prosecution. He runs a Dhaba at Jahu. According to him, neither the police came to his Dhaba nor any bag was searched in his presence nor any charas was recovered therefrom. This witness was declared hostile and cross examined by the public prosecutor. He admits that he can read and write Hindi. He has also admitted his signatures on seizure memos Ext.PW-1/A

& PW-1/C. However, he denied that any recovery was made in his presence. He also denied making any statement u/s 161 Cr.P.C. to the police. He admits that on 8.12.2004 i.e. after the incident in question the police allegedly recovered 10 bottles of IMFL from his dhaba and a case was registered against him. He however denied the suggestion that he was suppressing the truth and making false statement since a case has been registered against him. He admits that he normally signs documents after verifying the correctness thereof.

11. PW-8 Mehar Chand stated that he re-sealed the case property and he was not cross examined at all. PW-8 also deposited the case property with PW-4 MHC Kuldip Singh. PW-4 stated that report Ext.PW-2/A was brought to the police station and on this basis he registered the FIR under the signatures of PW-8 Mehar Chand. He also states that the case property was handed over to him and he entered the same in the Malkhana register and kept the same in the Malkhana. On 28.10.2003 he sent one of the samples of charas alongwith NCB forms through Constable Raj Kumar to CTL Kandaghat. This witness has not been cross examined with regard to the deposit of the case property or the sending of the sample. The cross examination is only with regard to the timing when he received the ruqua Ext.PW-2/A.

12. PW-5 Raj Kumar took the sample to Kandaghat and this witness has not been cross examined. Similar is the case of other witnesses who are formal in nature and have not been cross examined.

13. The defence examined one witness DW-1 Nek Ram who is the Pradhan of the Gram Panchayat and the accused is the resident of his Panchayat. According to him, the accused and his father had appeared before DW-1 on 26.10.2003 at 10-11 a.m. and complained that the police without any rhyme and reason had harassed the accused persons. The distance of the house of the accused to that of DW-1 is 7 k.m.s.

14. The only issue is whether the contraband was recovered from the conscious possession of the accused. The other witnesses have not been cross examined on the other issues sought to be raised by the learned counsel for the accused. The law by now is well settled that when independent witnesses turn hostile then the Court has to scrutinize the statements of the official witnesses with greater care and caution. There is no law which prohibits the conviction of the accused only on the basis of the statements of the official witnesses. It is only a rule of prudence that the statements of the official witnesses should be scrutinized with great care and caution.

15. The statements of PWs 1, 2 and 9 are consistent in material aspects. When the statements of the witnesses are recorded after a long time minor contradictions are bound to creep in. There is no enmity of the police officials with the accused and there was no reason why they would falsely implicate him in such a case. The only discrepancy is with regard to the house of the accused being searched. Whereas

one witness states that they had gone to the house of the accused searching for him the other witnesses have denied this fact. This discrepancy is not so material as to discredit the evidence against the accused. The police officials knew the name and address of the accused. There was nothing wrong if they in search of the accused had gone towards his house. PW-9 obviously did not go to the house since he was conducting the investigation and completing the formalities at the spot. It may be, that one of the constables alongwith some officials from the police post may have gone to the house of the accused. Be that as it may, this contradiction by itself is not sufficient to hold that the contraband was not recovered from the conscious possession of the accused.

16. In view of the above discussion we find no merit in the appeal of the accused which is dismissed. As far as the appeal of the State is concerned, we find that the resin content in the charas was only about 29% which would mean that the contraband was about 130 gms. Therefore the sentence is reasonable and the appeal filed by the State is also rejected. As a result, both the appeals are dismissed. Bail bonds, if any, furnished by the accused are ordered to be cancelled.