

(2014) 10 SHI CK 0087

## High Court of Himachal Pradesh

Case No: Cr. Appeal Nos. 524 of 2010 and 272 of 2011

Yash Pal

APPELLANT

Vs

State of H.P.

RESPONDENT

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**Date of Decision:** Oct. 20, 2014**Acts Referred:**

- Criminal Procedure Code, 1973 (CrPC) - Section 173, 313
- Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) - Section 20, 29

**Hon'ble Judges:** Sureshwar Thakur, J; Rajiv Sharma, J**Bench:** Division Bench**Advocate:** Ajay Kochhar and Imran Khan, Advocate for the Appellant; M.A. Khan, Anup Rattan, Addl. A.Gs. and Ramesh Thakur, Asstt. A.G, Advocate for the Respondent

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**Judgement**

Sureshwar Thakur, J.

These appeals are being disposed of by a common judgment as they arise from a common judgment. The aforesaid appeals are preferred by the appellants/accused against the judgment, rendered on 23.10.2010, by the learned Special Judge, Kinnaur Sessions Division at Rampur Bushehr, H.P., in NDPS Act Case No. 06 of 2009, whereby they have been convicted and sentenced to 10 years rigorous imprisonment and to pay a fine of Rs. 1,00,000/- for theirs having committed offence punishable under Section 20 read with 29 of the Narcotic Drugs & Psychotropic Substances Act, 1985 (herein-after referred to as "NDPS Act"). In default of payment of fine, they have been sentenced to further undergo rigorous imprisonment for two years.

2. Brief facts of the case are that on 11.10.2008, the police party headed by SI/SHO Gurbachan Singh, while patrolling at Chalohan Nalla, Police Station, Ani, a person was intercepted carrying a bag over his shoulder. On inquiry, he disclosed his name to be Raj Kumar alias Raju. The police after seeking his option for his personal search either before the Magistrate or the Gazetted Officer, he opted for his search

before the police. Thereafter, the police also offered their search to the accused. On checking the bag of Raj Kumar, charas kept in a polythene was found and on weighing the same, it was found to be 4 kgs. Two samples of 25 grams each were taken out of the same and were sealed separately in separate packets. The remaining charas was put into a separate sealed packet and took into possession after filling up NCB form in the presence of the witnesses. FIR was registered on the basis of rukka sent to the police station. During the course of investigation, it was found that accused Yashpal had engaged accused Raj Kumar for carrying the charas as the call details to the mobile phone recovered from accused Raj Kumar disclosed the frequent calls between both of them immediately before the occurrence.

3. After completion of the necessary investigation, into the offences, allegedly committed by the accused/appellants, challan was filed under Section 173 of the Code of Criminal Procedure.

4. The accused/appellants were charged for theirs having committed offence punishable under Sections 20 and 29 of the NDPS Act, by the learned trial Court, to which he pleaded not guilty and claimed trial.

5. In proof of the prosecution case, the prosecution examined as many as 15 witnesses. On closure of the prosecution evidence, the statements of accused under Section 313 Cr.P.C. were recorded by the Court, in which they claimed false implication and pleaded innocence. In defence, the appellants/accused did not choose to examine any witness.

6. On appraisal of the evidence on record, the learned trial Court convicted the accused for theirs having committed offence punishable under Sections 20 and 29 of the NDPS Act.

7. The appellants/accused are aggrieved by the judgment of conviction, recorded by the learned trial Court. The learned counsel for the accused, has concertedly and vigorously contended that the findings of conviction, recorded by the learned trial Court, are not based on a proper appreciation of the evidence on record, rather, they are sequelled by gross mis-appreciation of the material on record. Hence, he contends that the findings of conviction be reversed by this Court, in the exercise of its appellate jurisdiction and be replaced by findings of acquittal.

8. On the other hand, the learned Additional Advocate General, appearing for the respondent-State, has, with considerable force and vigour, contended that the findings of conviction, recorded by the Court below, are based on a mature and balanced appreciation of evidence on record and do not necessitate interference, rather merit vindication.

9. This Court with the able assistance of the learned counsel on either side, has, with studied care and incision, evaluated the entire evidence on record.

10. The first witness, who, stepped into the witness box to prove the prosecution case, is, ASI Prem Lal (PW-1). He, in his deposition, has deposed a version which is in square tandem with the genesis of the prosecution version, as referred to herein-above. During his cross-examination, this witness admits the suggestion that accused Raj Kumar is illiterate and denies that nothing was read over and explained to accused Raj Kumar before obtaining his thumb impression. He also denies the suggestion, put to him, that no vehicle had passed during the period he, along with other police officials, remained at the spot, however, deposes that no vehicle had passed when the proceedings were conducted on the spot.

11. PW-2 (HC Pushp Dev) in his deposition deposed a version in corroboration to the deposition of PW-1 as also in square tandem with the genesis of the prosecution version, as referred to herein-above.

12. PW-3 and PW-4, since, during their examination-in-chief, having not supported the prosecution version, they were declared hostile and were requested by the learned Public Prosecutor to be cross-examined. On his request, having come to be acceded to, they were cross examined by the learned Public Prosecutor but no incriminating material against the accused could be elicited from their cross-examination.

13. PW-5 Devinder Verma deposes that on application Ex. PW-5/A, he supplied the call details of mobile numbers, 98164-07069 comprised in Ex. PW-5/B and 98165-80239 comprised in Ex. PW-5/C. During his cross-examination he deposes that he did not supply any details of the ownership of these numbers. It is stated to be incorrect that the call can be misdirected as shown in the details of call. It is also stated to be incorrect that the details of call comprised in Ex. PW-5/B and Ex. PW-5/C are not authentic and true from the record maintained by the service provider.

14. PW-6 HC Anup Kumar deposes that on receipt of rukka, he recorded an FIR Ex. PW-6/A. He further deposes that after registration of FIR the file was handed over to Constable Bhup Singh. He continues to depose that the case property along with duly sealed sample parcels, specimen impression of the seal and NCB form were produced and deposited in the malkhana. The extract of Malkhana register of the entry of deposit is Ex. PW-6/E. One Nokia mobile 1260, bearing Number 98164-07069 and one currency note of Rs. 100/- were also deposited in the Malkhana as per the entry in the malkhana register. Mobile phone Ex. P8 and currency note of Rs. 100/- Ex. P-9 are deposed by this witness to be the same as were deposited in the malkhana. He continues to depose that during his custody no interference was caused to the sealed exhibits.

15. PW-7 HC Harbans Kumar deposes that special report, copy of which is Ex. PW-7/A, was handed over to him by Dy. S.P. Amarnath. He further deposes that an entry with regard to it, was incorporated by him in the register.

16. PW-8 Constable Chande Ram deposes that he was handed over a special report comprised in Ex. PW-7/C by SI Gurbachan Singh for its onwards transmission to Dy. S.P. He further deposes that he handed over the said report on the same day. Reader to Dy. S.P. has been deposed by this witness to have supplied him a photocopy of special Report, extract of the same is Ex. PW-7/B, which he handed over to SI Gurbachan Singh. During the course of his cross-examination, he stated that he does not know whether there was any photocopy of the report or not.

17. PW-9 HHC Roshan Lal deposes that he was handed over by MHC one sealed sample parcel along with NCB form, specimen impression of the seal, copy of FIR, copy of seizure memo and a docket, to be delivered at State Forensic Science Laboratory, which were delivered by him on the next day along with RC. He continues to depose that he brought the receipt and handed over the same in the police Station. He continues to depose that during his custody, no interference was caused to the sealed exhibits. During the course of his cross-examination, he deposes that on 12.10.2008, he stayed at Junga along with sealed exhibits.

18. PW-10 Shri Chet Ram deposes that he did not hand over his sim card of Airtel to any Yashpal. Since, during his examination-in-chief, having not supported the prosecution version, he was declared hostile and was requested by the learned Public Prosecutor to be cross-examined. On his request, having come to be acceded to, he was cross examined by the learned Public Prosecutor. During the course of his cross-examination, it is stated to be incorrect by him that he was having his mobile sim 98165-80239. It is also stated to be incorrect that he sold his sim card bearing No. 98165-80239 to Yash Pal for a sum of Rs. 500/-, however he deposes that it had lost. It is also stated to be incorrect that he narrated to the police that he had sold for a sum of Rs. 500/- his sim card No. 98165-80239 to Yash Pal and since then he had been using the same.

19. PW-11 HHC Bhoop Singh, in his examination-in-chief, has deposed a version which is in square tandem with the genesis of the prosecution version, as referred to herein-above. During the course of his cross-examination, he deposes that he handed over the rukka at about 8.15 a.m. at the police station. He continues to depose that the seal after use was handed over to ASI Prem Lal. He does not remember as out of which number of ball the samples were drawn. He further deposes that he cannot say as to whether the rukka was written first or the NCB form were filled in before the rukka. He continues to depose that he does not remember whether any mobile phone was also recovered from Raj Kumar. He further deposes that no inquiry was conducted about the source of contraband in his presence. He further deposes that he does not remember whether accused Raj Kumar after his arrest had received or made any call from his mobile.

20. PW-12 SI/SHO Gurbachan Singh deposes that on 11.10.2008, he was accompanied by ASI Prem Lal, HC Pushap Dev, Constable Bhup Singh and two Home Guards, while patrolling from Ani and reached near Chalon nullah during Kullu

Dussehra at about 6.00 a.m., one person came from the opposite direction carrying a bag on his shoulder who got perplexed after seeing the police and on suspicion and inquiry, he disclosed his name as Raj Kumar, resident of Champaran Bihar. He further deposes that since there was no habitation in and around the spot and there was no vehicular traffic, so he sought the option of the accused disclosing right of his personal search either before a Magistrate or a Gazetted Officer but the accused opted his search before the police as per memorandum Ext. PW-1/A, which has been deposed by this witness to be signed by the witnesses. He further deposes that he searched the bag of the accused and a polythene packet was found containing charas in the shape of balls. On weighing the same it was found 4 Kgs. charas out of which two samples of 25 grams each were taken and separately put into a separate packet duly sealed with seal T and the remaining charas was again put into a separate packet alongwith polythene. The bag was also sealed with seal "T" and specimen impression of the seal was also drawn. He continues to depose that the samples were drawn after the whole charas was made homogenous. The seal after use was handed over to ASI Prem Lal. The sample and the remaining Charas were taken into possession vide memo Ex. PW-1/C. He further deposes that he prepared the spot map comprised in Ex. PW-12/B. He continues to depose that he recorded the statements of PW Kanya Kumari comprised in Ext. PW-12/C and PW Surinder Kumar comprised in Ext. PW-12/D. This witness proceeds to depose that he sent the special report Ext. PW-7/C to Deputy Superintendent of Police and the report of State Forensic Science is Ext. PW-12/E which was received along with NCB Form Ext. PW-12/F. During his cross-examination, he deposes that the accused Raj Kumar did not try to run away though he attempted but was overpowered. He further deposes that accused Raj Kumar received a call on his mobile, during the period the accused remained with them on the spot but he cannot say about any call made by the accused from his mobile during this period. He admits that the charas Ex. P-3 was in the shape of hard balls and one of the balls was broken. He continues to depose that he filled in the NCB form on the spot. He further deposes that accused Raj Kumar told him that he was asked by one Yash Pal to take away the bag from his house and thereafter deliver the same at Sainj. He further deposes that he had offered his personal search to the accused and no other member of the police offered their search before the search of the accused. It is stated to be incorrect that no bag was recovered from accused Raj Kumar. It is also stated to be incorrect that no charas was recovered from accused Raj Kumar in his personal search and no statements of witnesses were recorded. He further deposes that accused Raj Kumar had disclosed the name of Yashpal on 11.10.2008 during investigation. He further deposes that name of Yashpal had been disclosed before sending the special report Ex. PW-7/C. He further deposes that he did not take into possession the sim number and mobile phone used by accused Yashpal, as accused Yashpal had disclosed to him that he had lost the mobile phone including sim number while traveling in the train. He further deposes that he did not preserve the mobile phone recovered from Raj Kumar alongwith finger prints to the user of mobile phone Ex. P-8. it is further

deposed that he did not obtain the call details to the sim used by Yashpal from 12.10.2008 till his arrest on 4.2.2009. He further deposes that he cannot say that Chet Ram had filed an affidavit before the police about missing of his sim number. It is stated to be incorrect that he got the statement of PW Chet Ram recorded before the Court after putting him under fear and pressure by impleading him in excise cases.

21. PW-13 HC Anup Kumar deposes that he handed over two sealed parcels along with docket vide RC No. 109/09 through Constable Puran Chand to be deposited at State Forensic Science Laboratory, who brought the receipt over the RC after depositing the same. The copy of RC is Ex. PW-13/A which is true and correct copy of the original.

22. PW-14 Constable Puran Chand deposes that MHC Anup Kumar handed over to him two sealed exhibits duly sealed along with docket for depositing the same in the State Forensic Science Laboratory vide RC No. 107/09. He continues to depose that he deposited the same on the next date and brought the receipt over the reverse of RC. He continues to depose that during his custody no interference was caused to these sealed exhibits.

23. PW-15 Constable Jaswant Gupta deposes that on 27.3.2010, he brought the report of State Forensic Science Laboratory comprised in Ex. PW-15/A alongwith NCB form Ex. PW-15/B and handed over the same to MHC Anup Kumar.

24. Even though the prosecution witnesses have deposed in tandem and in harmony qua each of the links in the chain of circumstances commencing from the proceedings relating to search, seizure and recovery till the consummate link comprised in the rendition of an opinion by the FSL on the specimen parcels sent to it for analysis, portraying proof of unbroken and unsevered links, in the entire chain of the circumstances, hence it is argued that when the prosecution case stood established, it would be legally unwise for this Court to acquit the accused.

25. Besides when the testimonies of the official witnesses, unravel the fact of theirs being bereft of any inter-se or intra-se contradictions hence, consequently they too enjoy credibility.

26. Accused Raj Kumar was carrying and handling the contraband allegedly seized from his conscious and exclusive possession as purportedly delivered to him by accused Yashpal. The arrest of accused Yashpal, the owner of the contraband, carried by co-accused Raj Kumar from whose conscious and exclusive possession it has been proven to have been recovered by the prosecution, was in consequence to the existence of evidence unraveling the factum of both preceding the occurrence having had conversations over their mobile phones respectively possessed by each. Tritely, the prosecution evidence as comprised in the depositions of the official witnesses foreclose, when portraying the non-existence of any inter-se or intra-se contradictions in their respective testimonies, so as to render them to be suffering

from the vice of prevarication or untruthfulness, an inference that they are credible. As such, they both acquire the hue of truthfulness. Apart there-from a thorough scanning of the evidence on record of the official witnesses when further omit to divulge the factum of there existing any flagrant discrepancies so as to render the version deposed by them to be concocted or unreliable, as such they acquire full tenacity.

27. The unfoldment of evidence on record comprised in the depositions of PW-1 and PW-2 unflinchingly proves the factum of recovery of mobile phone Ex. P-8 from the personal search of co-accused Raj Kumar on his arrest. The mobile phone possessed by co-accused Raj Kumar bore No. 98164-07069 the call details proceeding there-from to the mobile phone of Yashpal carrying No. 98165-80239 has been proved by the apposite record comprised in Exts. PW-5/B and PW-5/C. The said calls proceeding from the mobile phone recovered from the possession of accused Raj Kumar to the mobile phone possessed by co-accused Yashpal are preceding the occurrence, hence, truth is to be imputed to the prosecution story of accused Raj Kumar from whose exclusive and conscious possession the contraband was recovered, being its carrier, whereas co-accused Yashpal being its owner, hence, both being liable to be tried and aptly convicted for theirs having committed an offence punishable under Sections 20 and 29 NDPS Act.

28. The counsel for the accused/appellant contends that since the mobile phone of accused Yashpal over which accused Raj Kumar had preceding the occurrence conversations. When omitted to be recovered, as also besides when its sim, too was not recovered and besides when its owner was PW-10 Chet Ram, as a corollary it is urged that the factum of Yashpal possessing mobile phone bearing No. 98165-80239 is belied, with the concomitant effect of the prosecution case of both accused Raj Kumar and Yashpal preceding the occurrence having had a telephonic call with each other, too stands falsified. On strength thereof an argument is strived to be built that the prosecution case of each having respectively had conversations inter-se them preceding the occurrence other their mobile phones gets benumbed. As an obvious and as a natural corollary, it is further argued that the implication of co-accused Yashpal with his being the owner of the contraband carried by accused Raj Kumar from whose conscious and exclusive possession it has been proved to be recovered by efficacious evidence adduced by the prosecution, too, falters and staggers. The entire force of the above submission gets eroded, for the simple reason that accused Yashpal when arrested had claimed that the mobile phone bearing No. 98165-80239 was lost while traveling, obviously it sequels an inference that, hence he was possessed of the mobile carrying the number aforesaid. With the factum of his possessing the mobile phone carrying the number aforesaid gathering momentum and strength, the factum of the prosecution having not established him to be the owner remains inconsequential and carries no effect or weight in the making a formidable conclusion that he preceding the occurrence had from his mobile conversations with co-accused Yashpal over the latter's mobile phone as

proved by Ex. PW-5/B and PW-5/C. When both the exhibits aforesaid have remained un-rebutted, as a sequel then a firm and tenable conclusion which is to ensue is that there is efficacy in the fact of disclosures in Exhibits aforesaid of both the accused having preceding the occurrence had conversations with each other over their respective mobile phones possessed by them at the apposite time. On a formation of the aforesaid conclusion, the concomitant deduction is that the prosecution has been able to prove the guilt of both the accused.

29. In view of above, we find that the findings of conviction, recorded by the learned trial Court below, are based on a mature and balanced appreciation of evidence on record. Hence, the findings do not necessitate irreverence. Accordingly, both the appeals are dismissed being devoid of any merit and the findings, rendered by the learned trial Court, are affirmed and maintained. Records of the learned trial Court be sent down forthwith.