

(2015) 10 SHI CK 0013

High Court of Himachal Pradesh

Case No: Criminal Appeal No. 155 of 2015

Surat Singh

APPELLANT

Vs

State of Himachal
Pradesh

RESPONDENT

Date of Decision: Oct. 8, 2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) - Section 313#Narcotic Drugs and Psychotropic
Substances Act, 1985 (NDPS) - Section 20, 50, 50(1)

Citation: (2015) 10 SHI CK 0013

Hon'ble Judges: Rajiv Sharma, J; Sureshwar Thakur, J

Bench: Division Bench

Advocate: Vivek Sharma, for the Appellant; M.A. Khan, Addl. AG, Advocates for the
Respondent

Final Decision: Allowed

Judgement

Rajiv Sharma, J

This appeal is instituted against the judgment dated 31.12.2014, rendered by the learned
Special Judge (I), Shimla, H.P,

in Sessions Trial No. 21-S/7 of 2013, whereby the appellant-accused (hereinafter referred
to as the accused), who was charged with and tried for

offence punishable under Section 20 of the Narcotic Drugs and Psychotropic Substances
Act, 1985 (hereinafter referred to as the ND & PS Act),

has been convicted and sentenced to undergo rigorous imprisonment for a period of 10
years and to pay fine of Rs. 1,00,000/- and in default of

payment of fine, he was further ordered to undergo rigorous imprisonment for one year.

2. The case of the prosecution, in a nut shell, is that on 13.3.2013, police party headed by SHO Daya Ram consisting of ASI Raj Kumar and

others was present during Nakabandi at place Pandranu from 4:00 AM to 6:00 AM. The police party while coming back in vehicle No. HP-07A-

0839 reached near Dhangu Dhank. The accused was found coming downward carrying red-gray coloured bag pack. On seeing the police party,

the accused became perplexed and tried to run away. On suspicion, accused was apprehended by the police party. The consent was taken vide

consent memo Ext. PW-1/A. The police official has given the personal search vide memo Ext. PW-1/B. On search of the bag of accused, one

plastic bag was found containing charas in the form of balls and sticks. The charas weighed 11 kg 50 grams. The charas Ext. P-4 was repacked in

the same bag and sealed with three seals of ""H"" in parcel Ext. P-1 in the presence of witnesses and taken into possession vide memo Ext. PW-

1/D. Sample of seal ""H"" was also taken on a piece of cloth vide Ext. PW-1/C. Rukka Ext. PW-11/A was prepared on the basis of which FIR Ext.

PW-7/D was recorded. I.O. sent the rukka and sealed parcel containing charas through HHC Babu Lal who deposited it in the malkhana register.

The abstract of malkhana register is Ext. PW-7/A. The IO prepared NCB form in triplicate vide Ext. PW-1/E. The case property was sent to FSL

Junga vide RC No. 4. The investigation was completed and the challan was put up in the Court after completing all the codal formalities.

3. The prosecution, in order to prove its case, has examined as many as 11 witnesses. The accused was also examined under Section 313 Cr.P.C.

The accused has denied the prosecution case. According to him, he was falsely implicated. The learned trial Court convicted and sentenced the

accused, as noticed hereinabove.

4. Mr. Vivek Sharma, Advocate, appearing on behalf of the accused, has vehemently argued that the prosecution has failed to prove its case

against the accused. On the other hand, Mr. M.A. Khan, Addl. AG, for the State has supported the judgment of the learned trial Court dated

31.12.2014.

5. We have heard learned counsel for both the sides and gone through the judgment and records of the case carefully.

6. PW-1 ASI Raj Kumar deposed that on 13.3.2013, he accompanied SI Daya Ram and other police officials in official vehicle for detection of

crime and laying of Naka towards Pandranu. When they came back from Pandranu after patrolling and reached at place named Dhangu Dhank

about 1 1/2 km. from Snail at about 7:00 AM, they witnessed one person coming from downside towards the main road. The person was carrying

a red-grey coloured bag on his back. The accused got frightened. He was apprehended. SI Daya Ram disclosed the accused that he was

suspecting some narcotic substance in the bag being carried by him. No independent witness was available on the spot at that time as the place

where the accused was apprehended was not having any houses nearby. The accused was apprised by SI Daya Ram about his right of being

searched in the presence of Magistrate or a Gazetted Officer. The accused gave his consent to be searched by the police officials present on the

spot. Memo Ext. PW-1/A was prepared to this effect. The bag was searched. It contained white coloured plastic sack. The plastic sack was

opened and was found to be containing the black coloured substance in the shape of sticks and balls. It was identified as charas. It weighed 11 kg.

50 grams. The charas was placed in the poly sack and the plastic sack was tied and placed in the same bag which the accused was carrying. The

bag was placed and packed in a cloth parcel and the parcel was sealed with three seal impressions of ""H"". NCB forms in triplicate were filled in. In

his cross-examination, he deposed that there was no habitation visible from the spot where the accused was apprehended. Volunteered that there

is a colony in front of that place but the road to that colony leads from the other side which is 3 to 4 km from the spot. The place Kuddu and

Sanail is at a distance of about 2-1/2 km from Dhangu Dhank. No effort was made to associate any independent witnesses from Kuddu and

Sanail. He admitted that the barrier stationed at Kuddu is operated throughout the day.

7. PW-2 HC Babu Lal also deposed the manner in which the accused was apprehended, charas was recovered from the accused, search, seizure

and sealing proceedings were completed on the spot. S.I. Daya Ram prepared rukka Mark-A and handed over the same to him for being

deposited at PS Jubbal for registration of case. He handed over the same to MHC at PS, Jubbal on the basis of which FIR No. 14/2013 was

registered. In his cross-examination, he admitted that they had checked 4 light vehicles and one bus. Only 5 vehicles were checked there without

fixing any barricades at Pandranu. They did not check any vehicle while returning from Pandranu to Dhangu Dhank. They crossed Kuddu barrier

while going and coming back to the Police Station. He admitted that each and every vehicle which crosses through the barrier is entered at the

Kuddu barrier. Volunteered that sometime the entry of the police vehicle is not made. Their vehicle was not entered in the Kuddu barrier either

while going or coming back from Pandranu. He admitted that the spot is on the National highway which connects Rohru areas with Poanta Sahib.

He admitted that the road is a busy road. There were some houses visible on the other side of the river and people were residing there. He

boarded one vehicle from the spot when he brought the rukka and case property to the Police Station. The rukka was written in his presence by

the SHO. In his cross-examination, he further admitted that option was given to the accused that he could get himself searched from the police

party present and no other option was given to get the police party searched. He signed Ext. PW-1/A after reading its contents.

8. PW-3 HC Gopal Singh also deposed the manner in which the accused was apprehended, charas was recovered from the accused, search,

seizure and sealing proceedings were completed on the spot. In his cross-examination, he admitted that they have crossed the Kuddu barrier on

13.3.2013 while going and coming back from Pandranu. He also admitted that no instructions were given to him to bring any witness from Kuddu.

9. PW-4 HC Attar Singh (retd.) deposed that on 16.3.2013, he was holding the charge of MHC PS Jubbal as per directions of SHO. he handed

over the parcel stated to be containing charas weighing 11.50 grams in a bag sealed with three seal impressions of ""H"" alongwith a docket, sample

seal, NCB forms, copy of memo to Const. Jagjeet Singh vide RC No. 100/12-13 dated 16.3.2013 for being deposited at FSL, Junga. In his

cross-examination he admitted that there was overwriting over the FIR number written in FC Ext. PW-4/A. Only one parcel was sent. He

admitted that there was no entry of NCB form being sent through the RC. Volunteered that he had sent the NCB form in a docket. There is no

reference in the RC about any docket sent alongwith the case property.

10. PW-5 Const. Jagjeet Singh deposed that he carried the case property to FSL, Junga for chemical analysis and deposited the same on the

same day.

11. PW-7 HC Jagat Ram has proved copy of malkhana register vide Ext. PW-7/A.

12. PW-10 LC Babita has also deposed the manner in which the accused was apprehended, charas was recovered from the accused, search,

seizure and sealing proceedings were completed on the spot.

13. PW-11 SI Daya Ram also deposed the manner in which the accused was apprehended, charas was recovered from the accused, search,

seizure and sealing proceedings were completed on the spot. He prepared rukka Ext. PW-11/A and sent alongwith case property, NCB forms

through HC Babu Lal to PS Jubbal. FIR Ext. PW-7/D was got registered against the accused. In his cross-examination, he admitted that there

was no exemption of police vehicle from being entered in the records of the Kuddu barrier. He admitted that there was no entry of the police

vehicle in which he was travelling in the record either at the time of going towards Pandranoo or coming back to PS Jubbal on that day. He also

admitted that the distance between Dhangu Dhank and Pandranoo is about 8 kms. He also admitted that no efforts were made to call any

independent witness from the places known as Snail and Kuddu. He also admitted that Kuddu and Snail places are having residential and non

residential accommodation. HC Gopal was sent in the police vehicle to Kuddu who came back after half an hour. He admitted that the places Snail

and Kuddu are at a distance of five minutes drive from the spot. No vehicle crossed during the period when they had carried out the proceedings

in the present case. He admitted that the place where they had apprehended and carried out the proceedings is a road which connects Rohru area

to Paonta Sahib.

14. It has come in the statement of PW-1 ASI Raj Kumar that no effort was made to associate independent witnesses from the places Kuddu and

Snail. He admitted that the barrier stationed at Kuddu is operated throughout the day. The place Kuddu and Sanail are at a distance of about 2-

1/2 km from Dhangu Dhank. PW-2 HC Babu Lal deposed that they have checked 4 light vehicles and one bus. Only 5 vehicles were checked

there without fixing any barricades at Pandranu. They did not check any vehicle while returning from Pandranu to Dhangu Dhank. They crossed

Kuddu barrier while going and coming back to the Police Station. He admitted that each and every vehicle which crosses through the barrier is

entered at the Kuddu barrier. Volunteered that sometime the entry of the police vehicle is not made. Their vehicle was not entered in the Kuddu

barrier either while going or coming back from Pandranu. He admitted that the spot is on the National highway which connects Rohru areas with

Poanta Sahib. He admitted that this road is a busy road. The houses are visible on the other side of the river and people were residing there.

15. PW-11 SI Daya Ram has also admitted in his cross-examination that every vehicle that crosses the Kuddu barrier is duly entered in the

records of Kuddu barrier. Volunteered that the police vehicles were not entered. He also admitted that there was no exemption of police vehicle

from being entered in the records of the Kuddu barrier. There was no entry of the police vehicle in which he was travelling in the record either at

the time of going towards Pandranoo or coming back to PS Jubbal on that day. He also admitted that the distance between Dhangu Dhank and

Pandranoo is about 8 kms. He also admitted that on suspicion of accused carrying some contraband, no efforts were made to call any independent

witness from the places known as Snail and Kuddu. He also admitted that Kuddu and Snail places are having residential and non residential

accommodation. HC Gopal was sent in the police vehicle to Kuddu who came back after half an hour. He also admitted that the places Snail and

Kuddu are at a distance of five minutes drive from the spot. The place where they had apprehended the accused and carried out the proceedings is

a road which connects Rohru area to Paonta Sahib. Neither the place was isolated nor secluded where the accused was apprehended.

16. PW-11 SI Daya Ram has deposed that he has sent HC Gopal in police vehicle to Kuddu to get independent witnesses. However, PW-3 HC

Gopal has categorically deposed in his cross-examination that no instructions were given to him to bring any witness from Kuddu. The police has

not made any sincere efforts to associate independent witnesses at the time of search, seizure and sealing proceedings on the spot. The police

ought to have associated independent witnesses, being available to inspire confidence the manner in which the accused was apprehended, search,

seizure and sealing proceedings were completed on the spot.

17. The accused was apprehended on 13.3.2013 while carrying a bag. However, despite that his personal search was carried out. The police has

given option to the accused either to be personally searched before the Magistrate or the Gazetted Police Officer. The accused was also given

option whether he wanted to be searched by the IO in the presence of witnesses mentioned in Ext. PW-1/A. According to Section 50 of the ND

& PS Act, the accused has to be apprised of his legal right to be searched either before the Magistrate or the Gazetted Officer. There is no third

option to be searched before the Police Officer. Thus, the consent obtained from the accused was not in conformity with Section 50 of the Act. It

has vitiated the entire trial.

18. Their lordships of the Hon"ble Supreme Court in the case of Suresh and Others Vs. State of Madhya Pradesh, (2013) 3 AD 517 : (2013)

CriLJ 474 : (2013) 1 Crimes 51 : (2013) 1 JCC 17 : (2013) 1 RCR(Criminal) 229 : (2012) 11 SCALE 281 : (2013) 1 SCC 550 , have held that

in a case where the accused were merely asked whether they would offer their personal search to police officer concerned or to gazetted officer

and the appellants gave their consent for their personal search by police officer concerned, it will amount to non-compliance of Section 50(1) of

the ND & PS Act. Their lordships have held as follows:

16) The above Panchnama indicates that the appellants were merely asked to give their consent for search by the police party and not apprised of

their legal right provided under Section 50 of the NDPS Act to refuse/to allow the police party to take their search and opt for being searched

before the Gazetted officer or by the Magistrate. In other words, a reading of the Panchnama makes it clear that the appellants were not apprised

about their right to be searched before a gazetted officer or a Magistrate but consent was sought for their personal search. Merely asking them as

to whether they would offer their personal search to him, i.e., the police officer or to gazetted officer may not satisfy the protection afforded under

Section 50 of the NDPS Act as interpreted in Baldev singh's case.

17. Further a reading of the judgments of the trial Court and the High Court also show that in the presence of Panchas, the SHO merely asked all

the three appellants for their search by him and they simply agreed. This is reflected in the Panchnama. Though in Baldev Singh's case, this Court

has not expressed any opinion as to whether the provisions of Section 50 are mandatory or directory but ""failure to inform"" the person concerned

of his right as emanating from sub-section (1) of Section 50 may render the recovery of the contraband suspect and the conviction and sentence of

an accused bad and unsustainable in law. In Vijaysinh Chandubha Jadeja's case (supra), recently the Constitution Bench has explained the

mandate provided under sub-section (1) of Section 50 and concluded that it is mandatory and requires strict compliance. The Bench also held that

failure to comply with the provision would render the recovery of the illicit article suspect and vitiate the conviction if the same is recorded only on

the basis of the recovery of the illicit article from the person of the accused during such search. The concept of substantial compliance as noted in

Joseph Fernandez (supra) and Prabha Shankar Dubey (supra) were not acceptable by the Constitution Bench in Vijaysinh Chandubha Jadeja,

accordingly, in view of the language as evident from the panchnama which we have quoted earlier, we hold that, in the case on hand, the search

and seizure of the suspect from the person of the appellants is bad and conviction is unsustainable in law.

19. In the instant case the accused was to be apprised of his legal right to be searched either before the Gazetted Officer or before the Magistrate

and not before the Police Officer.

20. Their lordships of the Hon"ble Supreme Court in the case of State of Rajasthan Vs. Parmanand and Another, AIR 2014 SC 1384 : (2014)

AIRSCW 1578 : (2014) CriLJ 1756 : (2014) 5 JT 271 : (2014) 3 SCALE 303 : (2014) 5 SCC 345 , have held that if merely a bag is carried by

person is searched without there being any search of his person, S. 50 will have no application but if bag carried by him is searched and his person

is also searched, S. 50 would be attracted. Their lordships have also held that it was improper for PW-10 SI ""Q"" to tell respondents that a third

alternative was available. It has been held as follows:

15. Thus, if merely a bag carried by a person is searched without there being any search of his person, Section 50 of the NDPS Act will have no

application. But if the bag carried by him is searched and his person is also searched, Section 50 of the NDPS Act will have application. In this

case, respondent No. 1 Parmanand"s bag was searched. From the bag, opium was recovered. His personal search was also carried out. Personal

search of respondent No. 2 Surajmal was also conducted. Therefore, in light of judgments of this Court mentioned in the preceding paragraphs,

Section 50 of the NDPS Act will have application.

19. We also notice that PW-10 SI Qureshi informed the respondents that they could be searched before the nearest Magistrate or before a

nearest gazetted officer or before PW-5 J.S. Negi, the Superintendent, who was a part of the raiding party. It is the prosecution case that the

respondents informed the officers that they would like to be searched before PW-5 J.S. Negi by PW-10 SI Qureshi. This, in our opinion, is again

a breach of Section 50(1) of the NDPS Act. The idea behind taking an accused to a nearest Magistrate or a nearest gazetted officer, if he so

requires, is to give him a chance of being searched in the presence of an independent officer. Therefore, it was improper for PW-10 SI Qureshi to

tell the respondents that a third alternative was available and that they could be searched before PW-5 J.S. Negi, the Superintendent, who was

part of the raiding party. PW-5 J.S. Negi cannot be called an independent officer. We are not expressing any opinion on the question whether if

the respondents had voluntarily expressed that they wanted to be searched before PW-5 J.S. Negi, the search would have been vitiated or not.

But PW-10 SI Qureshi could not have given a third option to the respondents when Section 50(1) of the NDPS Act does not provide for it and

when such option would frustrate the provisions of Section 50(1) of the NDPS Act. On this ground also, in our opinion, the search conducted by

PW-10 SI Qureshi is vitiated.

21. The prosecution has failed to prove the case against the accused for the commission of offence under Section 20 of the N.D & P.S., Act.

22. Accordingly, in view of the analysis and discussion made hereinabove, the appeal is allowed. Judgment of conviction and sentence dated

31.12.2014, rendered by the learned Special Judge-I, Shimla, H.P., in Sessions trial No. 21-S/7 of 2013, is set aside. Accused is acquitted of the

charges framed against him. Fine amount, if any, already deposited by the accused is ordered to be refunded to him. Since the accused is in jail, he

be released forthwith, if not required in any other case.

23. The Registry is directed to prepare the release warrant of the accused and send the same to the Superintendent of Jail concerned, in

conformity with this judgment forthwith.