

(2016) 01 SHI CK 0076

High Court of Himachal Pradesh

Case No: Cri. Appeal No. 635 of 2015

State of Himachal Pradesh

APPELLANT

Vs

Kamal Kishore

RESPONDENT

Date of Decision: Jan. 1, 2016

Acts Referred:

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

Citation: (2016) 2 CriCC 156 : (2016) CriLJ 1021

Hon'ble Judges: Rajiv Sharma and Sureshwar Thakur, JJ.

Bench: Division Bench

Advocate: P.M. Negi, Deputy Advocate General, for the Appellant;

Final Decision: Dismissed

Judgement

Rajiv Sharma, J.

1. This appeal has been instituted against Judgment dated 3.7.2015 rendered by learned Special Judge (II), Mandi, District Mandi, Himachal Pradesh in Session Trial No. 15/2011, whereby respondent-accused (hereinafter referred to as "accused" for convenience sake), who was charged with and tried for offence under Section 20 of the Narcotic Drugs & Psychotropic Substances Act, 1985 (hereinafter referred to as "Act" for convenience sake) has been acquitted. Case of the prosecution, in a nutshell, is that on 9.1.2010, ASI Chet Ram, C. Sanjeev Kumar, HHC Prabh Dayal, C. Vipin Kumar, C. Sanjeev Kumar and HHG Narender Kumar were present at Pulgharat where Naka was laid. At about 9.20 p.m., one Yog Raj, councilor of MC Mandi came there. All of a sudden, the accused came at the spot on foot. He tried to run away. He was nabbed. He was told at out his legal right to be searched before a gazetted officer or a Magistrate and consent was given by the accused to be searched by police officials. Police officials gave their personal search to the accused and thereafter personal search of the accused was conducted. In right front pocket of

accused, there was polythene bag. In the polythene bag, there were grapes and Pappad shaped cannabis. This cannabis was weighed and it was found to be 190 grams. It was kept in same polythene envelope and sealed at the spot. Sample seal was taken separately. Seal, after use, was given to the independent witness Yog Raj. NCB form in triplicate was filled at the spot. Rukka was sent to the Police Station. FIR was registered. Investigation was completed and Challan was put up in the Court after completing all codal formalities.

2. Prosecution has examined as many as 10 witnesses to prove its case against the accused. Accused was also examined under Section 313, Cr.P.C. He pleaded innocence. Learned trial Court acquitted the accused. Hence, this appeal.

3. Mr. P.M. Negi, Deputy Advocate General has vehemently argued that the prosecution has proved its case against the accused.

4. We have heard the learned counsel for the appellant and also gone through the record carefully.

5. According to PW-8 HC Sanjeev Kumar, accused was apprised by ASI regarding his legal right to be searched before a gazetted officer or a Magistrate. However, as per memo Ext. PW-8/A, option was also given to the accused to be searched before the police officials. This fact is mentioned in Rukka Ext. PW-10/A. We have seen Ext. PW-10/A with the assistance of record produced before us by the State. It is specifically mentioned in the Rukka that option was given to the accused to be searched before a Gazetted Officer, Magistrate or Police. There are only two options provided under Section 50 of the Narcotic Drugs & Psychotropic Substances Act, 1985. There is no third option.

6. Their Lordships of the Hon"ble Supreme Court in *State of Rajasthan v. Parmanand*, reported in , (2014) 5 SCC 345 : (AIR 2014 SC 1384 : 2014 Cri. L.J. 1756), have held that there is a need for individual communication to each accused and individual consent by each accused under Section 50 of the Act. Their Lordships have also held that Section 50 does not provide for third option. Their Lordships have also held that if a bag carried by the accused is searched and his personal search is also started, Section 50 would be applicable. Their Lordships have held as under:

"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.

16. It is now necessary to examine whether in this case, Section 50 of the NDPS Act is breached or not. The police witnesses have stated that the respondents were informed that they have a right to be searched before a nearest gazetted officer or a nearest Magistrate or before PW-5 J.S. Negi, the Superintendent. They were given a written notice. As stated by the Constitution Bench in Baldev Singh, it is not necessary to inform the accused person, in writing, of his right under Section 50(1) of the NDPS Act. His right can be orally communicated to him. But, in this case, there was no individual communication of right. A common notice was given on which only respondent No. 2 - Surajmal is stated to have signed for himself and for respondent No. 1 - Parmanand. Respondent No. 1 Parmanand did not sign.

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.

20. We have, therefore, no hesitation in concluding that breach of Section 50(1) of the NDPS Act has vitiated the search. The conviction of the respondents was, therefore, illegal. The respondents have rightly been acquitted by the High Court. It is not possible to hold that the High Court's view is perverse. The appeal is, therefore, dismissed."

7. Accused is only to be given option to be searched by a Gazetted Officer or a Magistrate. Since Section 50 of the Act, has been violated, as such entire trial was vitiated.

8. According to PW-8 HC Sanjeev Kumar, police officials did not check the vehicles on the way from police station upto Naka. PW-10 Chet Singh deposed that vehicles were checked. According to PW-8 Sanjeev Kumar, Naka was laid at about 4.00 pm whereas PW-9 Yog Raj deposed that Naka was laid at 8.30 p.m. PW-10 Chet Singh has deposed that PW-8 Sanjeev Kumar has taken Rukka to the Police Station from

the spot and he has not come back to the spot. PW-9 Yog Raj deposed that HC Sanjeev Kumar was present at the time of preparation of documents and after completion of investigation he had gone with other police officials and accused to the Police Station. Original seal was also not produced in this case to verify the sample seal.

9. Thus, the prosecution has failed to prove its case against the accused. There is no occasion for us to interfere with the well reasoned judgment of the learned trial Court dated 3.7.2015. There is no merit in the present appeal and the same is dismissed, so also the pending applications, if any.