



IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA.

**Cr. A. No. 620 of 2017
Reserved on: 09.10.2023**

Date of decision: 11.10.2023

Mohammad Nadeem Akram ...Appellant

Versus

State of Himachal Pradesh ...Respondent

Coram

The Hon'ble Mr. Justice Tarlok Singh Chauhan, Judge.

The Hon'ble Mr. Justice Ranjan Sharma, Judge.

Whether approved for reporting? No

For the Appellant : Mr. Rupesh Upadhyay and Mr. Vir Bahadur Verma, Advocates.

For the Respondent: Mr. Y. W. Chauhan, Sr. Addl. A.G. with Ms. Sharmila Patial, Addl. A.G. and Mr. J. S. Guleria, Dy. A.G.

Tarlok Singh Chauhan, Judge.

The appellant has been convicted and sentenced to undergo rigorous imprisonment for a period of ten years and to pay a fine of Rs. 1,00,000/-, and in default of payment of fine, to further undergo simple imprisonment for one year for the commission of an offence punishable under Section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short 'ND&PS Act').

2. The case of the prosecution against the appellant is that on 13.02.2015, at about 5:05 p.m. Inspector SHO Lokender Singh, ASI Mohar Singh, H.C. Girdhari Lal, HHC Churamani, C. Pawan Kumar, C. Hem Singh, HHG Rewat Ram, HHG Khem Raj and L.C. Shivani had departed in a government vehicle bearing No. HP-33-B-1378 from P.S. Aut, which was being driven by HHG Komal, on traffic and patrolling duty vide rapat Ex. PW-1/A towards Jhalogi and Kothi Nalla side. At about 5.30 p.m. the police party was present at place Jhalogi where they noticed a person was coming on foot from the Thalot side on NH-21, having a carry bag Ex.P-2 which was yellow and coral coloured (Mungia) in his right hand. On seeing the police party, he turned back and tried to flee from the spot. The person has also tried to throw the carry bag Ex.P-2 below the road towards the river side, but said carry bag after striking with the safety grills installed at the spot came back on the road. The person was overpowered by the police party and thereafter interrogated and he disclosed his name and whereabouts to the police. Subsequently, the carry bag Ex.P-2 was checked by Inspector SHO Lokender Singh and it was found to be containing a polythene envelope prepared with Khaki cello tape Ex. P-3. Inspector SHO Lokender Singh made efforts to associate the independent witnesses in the investigation, but being a secluded place and no passengers or driver of the vehicles were ready to become a witness. After

10-15 minutes, when no independent witnesses were available, he associated police officials i.e. C. Hem Singh and ASI Mohar Singh as witnesses and checked transparent polythene envelope prepared with Khaki cello tape Ex.P-3 and the same was found to be containing a chapati and a long shape black coloured substance wrapped in a transparent polythene Ex. P-4 and on its smelling and experience, this black colour substance found to be charas i.e. Ex.P-5. It was weighed with the electronic scale and its weight was found to be 2 kgs. Thereafter, the recovered charas/cannabis Ex.P-5 was put in the same envelope Ex.P-3 and P-4 and these, in turn, was again put in a same carry bag Ex.P2. The carry bag was then put in the cloth parcel Ex. P-1 and then sealed the same with seal impression 'A' at ten places.

3. During the course of investigation, I.O. of the case filled up columns No. 1 to 8 of the NCB-1 form in triplicate Ex. PW-3/C, seal impression 'A' was also put by him on the NCB-1 form and the seal impression A' 'was also taken on a separate cloth Ex. PW-1/B. The seal after its use was handed over to ASI Mohar Singh. The recovered cannabis Ex.P-1, NCB-1 form in triplicate Ex. PW- 3/C and sample seal 'A' were also taken into possession by the I.O. vide memo Ex. PW-1/C. Copy of memo was also given by the I.O. to the appellant free of cost. The I.O. prepared rukka Ex. PW-1/D and sent the same with C. Hem Singh to P.S. Aut for registration of the FIR, whereupon FIR Ex.

PW-7/A was registered against the appellant. The I.O. also prepared spot map Ex. PW-8/A and recorded the statements of witnesses as per their versions. Thereafter, C. Hem Singh, on return, handed over the case file to the I.O. for further investigation. The appellant was arrested at about 8.45 p.m vide memo Ex. PW-6/A and as per the wish of the appellant, the intimation regarding his arrest was communicated to his wife. The case property along with NCB-1 form in triplicate was deposited by I.O. with MHC P.S. Aut to deposit the same in the Malkhana.

4. The I.O. also prepared special report Ex. PW-5/A, in compliance with Section 57 of the NDPS Act and handed over the same to Dy. S.P., Mandi on 14.02.2015. The I.O. also procured the abstract of the Malkhana register, R.C., copy of register of SDPO, Mandi which were Ex. PW-3/A, EX.PW-3/B and Ex. PW-5/B, respectively. Regarding receipt of the special report, Rajesh Kumar, Dy. S.P., Mandi executed affidavit Ex. PW-5/C, which was produced by the I.O. along with CIPA certificate Ex. PW-3/D from MHC P.S. Aut and FSL report Ex. PW-8/B.

5. After completion of investigation police, the prosecution presented a charge-sheet against the appellant and upon finding a prima facie case charge under Section 20 of the ND&PS Act was framed against him to which he pleaded not guilty and claimed trial.

6. The prosecution in support of its case examined eight witnesses and exhibited material documents and objects to substantiate its case.

7. Thereafter, the appellant was examined under Section 313 Cr.P.C., in which he denied all the allegations made in the charge-sheet and pleaded to be innocent. The appellant examined one witness in his defence.

8. The learned Special Judge after evaluating the evidence, convicted the appellant as aforesaid and aggrieved thereby the appellant has filed the instant appeal.

9. The learned Special Judge after evaluating the evidence, convicted the appellant as aforesaid and aggrieved thereby the appellant has filed the instant appeal.

10. Shri Rupesh Upadhyay, learned Advocate for the appellant, has mainly put-forth following four points, which according to him, are sufficient enough to acquit the appellant:-

(i) No safety grills have been shown in the spot map Ext.PW8/A

(ii) Rukka has been prepared after the preparation of the seizure memo, which is illegal.

(iii) No independent witness has been examined.

(iv) The case of the prosecution about conscious possession of contraband has not been specifically put to the appellant.

11. On the other hand, Shri Y. W. Chauhan, learned Senior Additional Advocate General, would argue that the

Investigating Officer was not an architect or an engineer, and could therefore not be expected to show each and every detail including the safety grills in the spot map. There is nothing wrong with the procedure of investigation as it was only after recovery of the contraband that a rukka could have been sent for registration of FIR. As regards independent witnesses, it is more than settled law that evidence of the official witness if found to be cogent and convincing is sufficient for convicting the appellant and as regards the question not being specifically put to the appellant under Section 313 Cr.P.C., it is argued that it is only the essence i.e. required to be communicated.

We have heard the learned counsel for the appellant and the learned Deputy Advocate General for the State and have gone through the record of the case.

12. Before giving point-wise findings, it would be necessary to first refer to the testimony of the Investigating Officer Lokender Singh, who appeared as PW8, on whose shoulders the entire prosecution evidence rests, who in his testimony has deposed exactly in a manner referred to in paras 2 to 4 (supra), therefore, his testimony is not being reproduced to avoid repetition and the Court would then straightway come to his cross-examination.

13. In his cross-examination, he stated that the police party had departed from the police station at about 5.05 p.m.

and had straightway gone to place Jhalogi, which was around 8 km. from P.S. Aut towards Mandi. He admitted that there was a temporary Army camp at a distance of one and a half km. from the spot and an office of HPSEB, at a distance of 3-4 km. from the spot. He also admitted there were residential houses and shops near that HPSEB office. He admitted that the police party had checked near about 13-14 vehicles on the date of occurrence. He further admitted that he had not shown the safety grills in the spot map, but volunteered to state that he had mentioned this fact in the notes of spot map Ex. PW-8/A. He stated that he had not sent any police officials to bring independent witnesses on the spot, but stated that he had asked passengers of 14-15 vehicles to be witnesses in this matter, but had not recorded the names and addresses of those drivers and passengers. He further admitted that no proceedings were initiated against those persons who had refused to become witnesses. The cloth parcel was sewn from the three sides and the fourth side was stitched by him with the needle and thread on the spot. The shape of seal 'A' was rectangular and having only one impression i.e. 'A'. He had not called any empowered officers under ND&PS Act on the spot. He further stated that rukka Ext.1/D was written by H.C. Girdhari Lal under his dictation. The NCB- I in triplicate Ex. PW-3/C, is filled by him from columns No. 1 to 8 on the spot and the rest of the documents were written by other police officials

under his dictation. He admitted that he had first prepared seizure memo, then sent rukka for registration of FIR. He further admitted that investigation was carried out by him before sending rukka. However, he denied the suggestion that contraband was found in a bus and was lying 'unclaimed'. He further denied the suggestion that the appellant was falsely implicated. He further admitted that contraband was not checked by him scientifically but volunteered to state that the fluid of instruments was expired and he had smelled the substance by experience found that the same to be charas. He admitted that there was free and continuous flow of vehicles on the spot. He further admitted that he had not called any tailor or sewing machine on the spot and not any police official to get the parcel stitched.

14. PW1 C. Hem Singh and PW6 ASI Mohar Singh have fully corroborated the testimony of PW8 Lokender Singh being the spot witnesses and nothing material could be pointed out from their cross-examinations of which note could be taken by this Court.

15. PW2 C. Pawan Kumar deposed that on 01.03.2015, he brought the result of this case along with the case property and other documents from FSL, Junga and handed over the same to PW3 MHC Sanjeev Kumar at Police Station Aut.

16. PW3 Sanjeev Kumar, who was the MHC at the Police Station Aut at the relevant time stated that on

13.02.2015, the case property of this case FIR No. 16/15 had been handed over to him alongwith form NCB-I in triplicate and sample seal 'A' by PW8 Investigating Officer. The case property consisted of parcel sealed with seal impression 'A' at ten places and stated to be containing 2 kgs. of charas in the shape of chapati wrapped in a transparent wrapper inside a polythene envelope, which was inside a carry bag yellow and coral in colour. He further deposed that he had made an entry regarding the articles in the concerned register at Sr. No. 27, copy of which Ext. PW3/A. He further stated that on 15.02.2015, he sent the case property alongwith NCB-I form in triplicate, sample seal, copy of FIR, copy of recovery memo with docket to FSL Junga through C. Hem Singh vide R. C. No. 181/2014-15 Ext. PW3/B. He went down to state that before sending the above stated articles, he had also filled column No. 12 of NCB-1 in triplicate Ext. PW3/C. The aforesaid articles were sent by him and find mentioned on the reverse side of RC Ext. PW3/B. The receipt of FSL, Junga was handed over to him by PW1 C. Hem Singh. On 01.03.2015, the result of the case alongwith case property and documents were brought back by PW2 C. Pawan Kumar from FSL, Junga and handed over to him and he made an entry in this regard in the Malkhana Register vide Ext. PW3/A and Ext. PW3/B, respectively.

17. PW4 Mahesh Kumar deposed that he was posted as MC in police station Aut at the relevant time and rapat No. 27, dated 13.02.2015 Ext. PW1/A, whereby the police party had left the spot had been typed by him in the computer of the police station and certified by him from the original record.

18. PW5 HC Narender Kumar, who was posted as Reader to Dy. S. P. Mandi and has proved on record the handing over of the special report Ex.PW5/A and abstract of attestation Ext. PW5/B.

19. PW7 ASI Chaman Lal stated that on 13.02.2015, he was working as officiating SHO and then at about 7:30 p.m. he received rukka Ext. PW1/D, which was brought by C. Hem Singh for registration of FIR on the basis of which he registered FIR Ext. PW7/A. He proved his endorsement on the rukka made vide Ext. PW7/B. After registration of the FIR, he further deposed that after registration of FIR Ext. PW7/A, the same was handed over to C. Hem Singh to further handover the same to the I.O.

20. Learned Counsel for the appellant has examined DW1 Naresh Kumar, Junior Assistant, Excise and Taxation, who stated that to prove that the I.O. Inspector Lokender Singh was not empowered to investigate this case as per Notification No. EXN-F(1)4/78-Part, dated 18.08.1987. However, suffice it to state that this question has already been answered against the appellant vide order dated 28.07.2023.

This in entirety is the evidence led by the parties.

Point No. i

No safety grill has been shown in the spot map Ext.PW8/A

21. As regards this contention, no doubt the grills have not been shown separately in the spot map Ext. PW8/A, however, in the foot note, more particularly, footnote No. 5, it has been specifically stated that it is that place of the road where the appellant had thrown his bag which struck back from the grill and came back on the road. In such circumstances, we really see no substance in the arguments of the learned counsel for the appellant given the fact that I.O. was neither an engineer nor an architect, who could have been expected to prepare map with sufficient accuracy and even otherwise the footnote appended alongwith the spot map would in our considered opinion be quite sufficient though it would have been desired if the grills somehow could have been shown in the spot map, but non-depicting of the grills would not in any way cast a doubt much less a serious doubt on the prosecution story.

Point No. ii

Rukka has been prepared after the preparation of the seizure memo, which is illegal.

22 As regards this contention, we really find no merit in the same, after all, it is after the contraband is seized that a rukka

for registration of FIR could have been sent. It is more than settled that it is when a cognizable offence comes to the notice of the I.O. or the police that it is mandated to lodge an FIR and the same cannot be lodged merely on the suspicion.

Point No. iii

No independent witness has been examined

23. As regards non association of independent witness, it is settled law that evidence of official witnesses is not to be disbelieved or discarded, merely for the reasons that they are official witnesses. Presumption is that every witness is impartial and independent, unless proved contrary. There is no presumption for doubting the credibility of official witnesses, in principle. Statements of official witnesses can be the basis for the conviction of the accused; however, before basing conviction on the evidence of official witness, strict scrutiny with care and caution is required. In cases where the evidence of the official witnesses is found to be cogent, reliable and credible, conviction can be based only on the evidence of the official witnesses.

24. Reliance in this regard can conveniently be placed on one of the latest judgments rendered by three-Judge Bench of the Hon'ble Supreme Court in **Sathyan Versus State of Kerala, 2023 INSC 703.**

Point No. iv

The case of the prosecution with regard to conscious possession of contraband has not been specifically put to the appellant.

25. As regards the aforesaid contention, suffice it to observe that what law requires is not that the exact language of the statute or that the essence of accusation has to be brought to the notice of the accused. Like in the instant case, it is noticed that what is required is that the accused attention has to be drawn to every inculpatory material so as to enable him to explain. This is the basic fairness of the criminal trial and failures in this area may gravely imperil the validity of the trial itself, if consequential miscarriage of justice occurs. However, where such omission has occurred it does not ipso facto vitiate such an omission and prejudice occasioned by such defect must be established by the accused. In the event of evidentiary material not being put to the accused, the court must ordinarily eschew such material from consideration. However, this is not the fact situation obtaining in the instant case because when the appellant was examined under Section 131 Cr.P.C., the essence of the accusation was duly brought to his notice, more particularly, with respect to his being in conscious possession of the contraband, which is evident from questions No. 2 to 7, which read as under:-

Q.2 It has come in the prosecution evidence led against you accused that on 13-2-2015 at about 5.05

p.m. while PW-8 SHO Inspector Lokender Singh, PW-6 ASI Mohar Singh, H.C. Girdhari Lal, H.C. Churamani, constable Pawan Kumar, constable, Hem Singh, HHC Khet Ram, HHG Khima Ram, L.C. Shivani proceeded on patrolling and traffic duty in a government vehicle bearing No. HP-33-B- 1378 which was being driven at that time by HHG Komal from the P.S. Aut. (To that effect rapat No. 27 Ex. PW-1/A was recorded in the P.S. Aut) and reached at about 5.30 p.m. at place Jhalogi and were present thereon. What you have to say about it?

Ans. It is incorrect.

Q.3 It has further come in the prosecution evidence led against you accused that on the aforesaid date, time and place you accused were noticed by police party coming from Thalot side NH-21 and you were having at that time one carry bag Ex.P-2 yellow and Mungiya coloured in your right hand. On seeing police party you turned and tried to fled away from the spot by throwing your carry bag Ex.P-2 towards down side of the road. What you have to say about it?

Ans. It is incorrect.

Q.4 It has further come in the prosecution evidence led against you accused that your carry bag Ex.P2 remained on the road after striking with the safety grills installed on the spot. What you have to say about it?

Ans. It is incorrect.

Q.5 It has further come in the prosecution evidence led against you accused that you were apprehended by PW- 8 Inspector SHO Lokender Singh at some distance

of the spot and inquired about your whereabouts, then you have disclosed your name Mohamad Nadeem Akram son of Sh. Shekh Abdul Majid, R/o 13/3 Pamanental Street 62 park street, P.S. Pamanental Street Culcatta. What you have to say about it?

Ans. It is incorrect.

Q.6 It has further come in the prosecution evidence led against you accused that PW-8 Inspector SHO Lokender Singh had checked your yellow and Mungia coloured bag. Ex. P-2, inside of the said carry bag one envelope prepared by Khaki cello tape Ex.P-3 was found. PW-8 tried to associate independent witness but place being secluded and no driver and passenger of the vehicle ready to be a witness of the occurrence. Then PW-8 associated PW-1 constable Hem Singh and PW-6 ASI Mohar Singh as witnesses with him in their presence and checked the polythene envelope Ex.P-3 and inside the same Chapatti shape and long shape black coloured substance was found wrapped in transparent wrapper Ex.P-4. What you have to say about it?

Ans. It is incorrect.

Q.7 It has further come in the prosecution evidence led against you accused that black colour substance Ex. P-5 on experience and smelling by PW-8 found the same cannabis, it was weighed by PW-8 with electronic scale and found as 2 K.G. What you have to say about it? It is incorrect.

Ans. It is incorrect.

26. In view of the aforesaid discussion, we find no merit in this appeal and the same is accordingly dismissed, so also pending applications, if any.

(Tarlok Singh Chauhan)
Judge

(Ranjan Sharma)
Judge

11.10.2023
(sanjeev)

High Court of HP