



NON-REPORTABLE

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO. 96 OF 2018

THE STATE OF HIMACHAL PRADESHAppellant

VERSUS

SURAT SINGHRespondent

JUDGMENT

PRASANNA B. VARALE, J.

1. The present criminal appeal arises out of a judgement and order dated 08.10.2015 passed by High Court of Himachal Pradesh vide Cr. Appeal No. 155 of 2015 wherein the judgment of conviction and sentence to undergo rigorous imprisonment for a period of 10 years and to pay fine of Rs. 1,00,000/-, rendered by the learned Special Judge-I, Shimla, H.P, in Sessions trial No. 21-S/7 of 2013, dated 31.12.2014 was set aside. The prosecution has failed to prove the case against the accused for the commission of offence under Section 20 of the Narcotic Drugs and Psychotropic

Substances Act, 1985 (herein after ND & PS Act). Accused was acquitted of the charges framed against him.

BRIEF FACTS

2. The factual matrix of the case 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.

3. 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. Investigating Officer sent the rukka and sealed parcel containing *charas* through Head Constable Babu Lal who deposited it in the malkhana and corresponding entry was taken in the register. The abstract of malkhana register is Ext. PW-7 /A. The Investigating Officer prepared NCB form in triplicate vide Ext. PW-1/E. The case property was sent to FSL Junga vide RC No. 4. On completion of the investigation, the chargesheet was submitted in the competent court.

4. The prosecution, in order to prove its case, has examined as many as 11 witnesses. The statement of accused under Section 313 of Criminal Procedure Code, 1973 (hereinafter 'Cr.P.C.') was recorded. The accused has denied the prosecution case. According to him, he was falsely implicated. The accused claimed trial. The learned Trial Court on appreciation of evidences on record, convicted and sentenced the accused, as noticed herein above.

5. Being aggrieved by the judgment of Trial Court, the accused preferred an appeal before the High Court. The Hon'ble High Court of Himachal Pradesh after considering the material and on hearing the submissions advanced by the respective parties allowed the appeal by setting aside the judgment of Trial Court. The High Court observed that the accused was apprehended on 13.3.2013 while

carrying a bag. However, despite that his personal search was carried out. The police had 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 Investigating Officer 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. The act of Investigating Officer providing the third option namely, the search of accused in presence of the Police officer was clearly contrary to the provisions of the Act and particularly contrary to the provisions of Section 50 of ND & PS Act. Considering this act, the High Court observed that when the provisions of the Act namely, Section 50 provides only two options i.e. apprising the provision of the Act, apprising the accused of his legal right available with two options namely, to be searched either before the Gazetted Officer or before the Magistrate and providing the third option by the officer concerned that the

search before the police officer being contrary to the provisions of law vitiated the entire trial.

6. The Hon'ble High Court held that the prosecution has failed to prove the case against the accused for the commission of offence under Section 20 of the ND & PS Act. Accordingly, in view of the analysis and discussion made, the appeal was 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, was set aside. Accused is acquitted of the charges framed against him.

7. Aggrieved by the said judgement of the High Court, the appellant is before us.

CONTENTIONS

8. The Learned Counsel for the State of Himachal Pradesh vehemently submitted that the reasons given by the Trial Court, while passing the judgment of conviction are on the basis of evidence on record and without giving scope for contrary view and as such the court ought not to have allowed the appeal.

9. Petitioner contended that Hon'ble High Court erred in setting aside conviction of respondent and not considering the fact that the said *charas* was being recovered from the bag of the accused

person and that the same was not recovered from the personal search of accused. Statements of PW-1, PW-2 and PW-3 are in corroboration that *charas* weighing 11 kg 50 grams was recovered from the bag which the accused was carrying and not from the physical search.

10. It was also contended that there was no prior information with the Investigating Officers regarding the possession of *charas* and that the police party had only proceeded on routine nakkabandi. Therefore recovery made from the bag of the accused person was rather a chance recovery. Even on examination under section 313 Cr.P.C the accused denied that he has been falsely implicated, but no evidence has been led by him to prove his innocence. The petitioner relied upon ***Abdul Rashid Ibrahim Mansuri v. State of Gujarat*¹** and ***State of Punjab v. Makhan Singh*²**.

11. Moreover, the site plans clearly show that the place where the alleged recovery took place was an isolated one there was no residential area near to the spot the statement corroborates with the Investigating Officer-PW 11, as he states that due to the place being isolated no individual witnesses could be engaged. Also, due

1. (2000) 2 SCC 513

2. (2004) 3 SCC 453

to the fact that it was early winter morning it is less likely to spot individuals at 7 a.m.

12. *Per contra*, the Ld. Counsel for the respondent contended that the accused was apprehended on 13.3.2013 while carrying a bag. However, despite that his personal search was carried out. The police had 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 Investigating Officer 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.

13. The counsel for the respondent acknowledged that as per Section 54 of ND & PS Act, under which “unless and until the contrary is proved, the accused has committed an offence under this Act for the possession of which he fails to account satisfactorily”, there is a reverse burden of proof on the accused. However, the respondent relied upon para 34 of the ***Sanjeet***

Kumar Singh alias Munna Kumar Singh versus State Of Chhattisgarh³ wherein this court held that-

“It is true that Section 54 of the Act raises a presumption and the burden shifts on the accused to explain as to how he came into possession of the contraband. But to raise the presumption under Section 54 of the Act, it must first be established that a recovery was made from the accused. The moment a doubt is cast upon the most fundamental aspect, namely, the search and seizure, the appellant, in our considered opinion will also be entitled to the same benefit as given by the Special Court to the co-accused.”

14. The learned counsel for respondent also relied upon the judgment of this court in the case of **State of Rajasthan Versus Kistoora Ram⁴** wherein Hon’ble J. B. R. Gavai held under para 8 that-

“The scope of interference in an appeal against acquittal is very limited. Unless it is found that the view taken by the Court is impossible or perverse, it is not permissible to interfere with the finding of acquittal. Equally if two views are possible, it is not permissible to set aside an order of acquittal, merely because the Appellate Court finds the way of conviction to be more probable. The interference would be warranted only if the view taken is not possible at all.”

15. Moreover, the Ld. counsel for the respondent also contended the statement of PW-8 is contrary to the story of prosecution, as per his cross examination, no Head Constable came to his shop and no one asked for the electronic weighing scale. He did not know that accused was apprehended by the police. PW-8 in his oral testimony before the Court in clear and unambiguous words stated that in his shop only the traditional weighing scale was

3. (2022) 16 SCC 58

4. (2023) 18 SCC 87

available and there was no electronic weighing scale. This uncontroverted version of the witness falsifies the story of prosecution to the effect that for weighing the contraband article *charas*, electronic weighing scale was used. Thus, the oral evidence of PW-8 is additional reason making the prosecution case doubtful and untrustworthy.

ANALYSIS

16. After hearing the ld. counsels appearing for the respective parties and on going through the material placed before us, we are of the opinion that the High Court committed no error in appreciating the submissions and also assessing the evidence brought before the Trial Court in its proper perspective.

17. The High Court vide its judgement dated 08.10.2015 acquitted the respondent-accused while observing as under:

17. "The accused was apprehended on 13.03.2013 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 I.O. 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 versus State of Madhya Pradesh, reported in (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 Chan 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 case of State of Rajasthan versus Parmanand and another, reported in (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 S.I. "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." "

18. The oral testimony of the witnesses clearly established that the Investigating Officer took a departure from the provisions of law and on the contrary committed an act which is clearly contrary to the provisions of law. It may not be out of place to state at the cost of repetition that the testimony of PW-8 reveals that there was no electronic weighing scale available in the shop and he was using only the traditional weighing scale as such the story of prosecution that an electronic weighing scale was used for weighing the contraband article *charas* falls flat on the face of it and the version of the prosecution and the story of the prosecution becomes doubtful and ultimately unacceptable. The High Court was also justified in placing reliance on the judgment of this Court in ***State of Rajasthan versus Parmanand and Anr.***⁵, in support of the conclusions drawn by it.

5. (2014) 5 SCC 345

19. Thus, in our opinion, the present appeal is devoid of merits and deserves to be dismissed. Accordingly, the same is hereby dismissed.

.....**J.**
[PANKAJ MITHAL]

.....**J.**
[PRASANNA B. VARALE]

NEW DELHI;
MARCH 16, 2026.