

HIGH COURT OF UTTARANCHAL AT NAINITAL.

(Court's order whether the case is or not approved for reporting)
(Chapter VIII Rule 32 (2) (b))

Description of the Case.

Criminal Appeal No. 99 of 2004

Virendra Gupta @ Vinod Gupta ... Appellant

Versus

State ...Opposite Party

With

Criminal Appeal No. 107 of 2004

Dhirendra Gupta @ Dheeraj Gupta ... Appellant

Versus

State ...Opposite Party

~~Approved for reporting.~~

Not approved for reporting.

Date of Decision 31st March, 2005.

Initial of Judge.

**HIGH COURT OF UTTARANCHAL
AT NAINITAL
Criminal Appeal No. 99 of 2004**

Virendra Gupta @ Vinod Gupta
S/o Shri Rajendra Gupta @ Durga Prasad
R/o Village Simanuri
Police Station Sumerpur
Tehsil & District Hamirpur (U.P.) ... Appellant

Versus

State ...Opposite Party

With

Criminal Appeal No. 107 of 2004

Dhirendra Gupta @ Dheeraj Gupta
S/o Shri Rajehdra Gupta @ Raja Bhaiya
R/o Village Khajuria Pahra
Police Station Kotwali
District Mahoba (U.P.) ... Appellant

Versus

State ...Opposite Party

Sri P.M.N. Singh, learned counsel for the appellant
Sri Nandan Arya, learned A.G.A. for the State.

Hon'ble B.C. Kandpal, J.

1. Both the criminal appeals are arising out of common judgment. Therefore, both these appeals are being disposed of by this common judgment. For the sake of convenience, I am mentioning the facts in criminal appeal no. 99 of 2004, Virendra Gupta Vs. State.

2. This criminal appeal arises out against the judgment and order dated 03.03.2004 passed by Special Judge/Sessions Judge, Almora in Sessions Trial No. 7 of 2003

State of Virendra Gupta @ Vinod Gupta convicting the accused/appellant under Section 8/20 of N.D.P.S. Act. and sentencing him to undergo 5 years rigorous imprisonment and a fine of Rs. 25,000/- and in default of payment of fine, two years further rigorous imprisonment.

3. Brief facts of the prosecution case are that on 26.08.2003, Sri Ganga Singh - S.O. Police Station Dwarahat along with other police party in a jeep was on patrol duty. constable Kalyan Ram and Constable Bir Singh also accompanied them when they reach near tri-junction of Suraikhet at about 2:30 p.m. while returning of Dwarahat, they saw two persons coming from the side of Suraikhet towards tri-junction. Both the persons were having on plastic bag in their hand. On being enquired, both the persons disclosed that their plastic bags were full of Ganja. S.O. tried to engage some public witnesses but none was available there as the place was surrounded by jungle. Therefore, Ganga Singh – S.O. and police personnel took search of each other and then the bag carried by the accused Dhirendra Gupta was searched and about 20 Kgs of Ganja was recovered from the said plastic bag and Rs. 500/- were also recovered from the pocket of the accused Dhirendra Gupta. Thereafter, plastic bag of Virendra Gupta was searched and about 20 Kgs Ganja was also recovered from the bag and Rs. 300/- were recovered from the pocket of the accused - Virendra Gupta. The offence of the accused was disclosed to them and they were taken into custody. Arrest Memo Ext. Ka. 1 was prepared. Samples were taken out from each of the bags for chemical examination and both the bags were sealed separately on the spot. Recovery Memo Ext. Ka. 2

was prepared by the S.O. and signatures of the accompanying constables were obtained. On the basis of the Fard Recovery Memo case crime No. 41 of 2003 and case crime No. 42 of 2003 under Section 8/20 of the N.D.P.S. Act was registered against the accused persons.

4. Investigation of the case was entrusted to Sri Chandra Singh Bisht – S.O. P.S. Bhatraujkhan. After copying the G.D. and Chik F.I.R. in the case diary, the Investigating Officer visited the spot on 02.09.2003 and at the pointing out of recovering officer, Ganga Singh – S.O. prepared the site plan. Thereafter, Investigating Officer recorded the statements of the witnesses and sent the samples of Ganja for chemical examination at Agra Laboratory.

5. The Investigating Officer submitted the chargesheet against the accused. After submission of chargesheet the accused were committed to the Court of Sessions for trial and the trial court on 19.11.2003 framed charges under Section 8/20 of the N.D.P.S. Act. The accused denied of the charge levelled against him and claimed his trial.

6. The prosecution in order to support its case produced Sri Ganga Singh (P.W.1), Sri Brijpal Singh (P.W.2) – constable, and Sri Chandra Singh Bisht (P.W.3) – Investigating Officer.

7. After the evidence of the prosecution was over, the statement of the accused/appellants were recorded under Section 313 of the Criminal Procedure Code. The accused persons did not adduce any evidence in their defence.

8. The learned trial court, after hearing learned counsel for the parties and having perused the entire evidence on record convicted the accused under Section 8/20 of the N.D.P.S. Act and sentencing them for five years rigorous imprisonment and a fine of Rs. 25,000/- (Rupees twenty five thousand) each and in default of payment of fine further 2 years rigorous imprisonment, vide judgment and order dated 03.03.2004.

9. Feeling aggrieved by the impugned judgment and order, the accused preferred the appeal, which has been placed before this Court for final disposal.

10. Heard the learned counsel for the parties and perused the record.

11. Perusal of the record reveals that the prosecution has examined three witnesses, out of which, two witnesses were the witnesses of fact, i.e. Sri Ganga Singh (P.W.1) who was S.O. of the Police Station - Dwarahat on the date of the occurrence and Sri Brijpal Singh (P.W.2) is the constable who was in the company of the S.O. at the time and date of the occurrence.

12. Sri Ganga Singh (P.W.1) in his evidence has deposed that on the date of occurrence i.e. on 26.08.2003, he was on patrol duty and when he reached along with his police party near tri junction, he was that two persons, each carrying plastic bags with them coming from the side of Suraikehet and

when they were asked to disclose as to what was being carried by them then they disclosed that it was Ganja. The option before a Gazetted Officer of being searched was given to those two persons but they expressed their faith in the leading party.

13. Sri Ganga Singh (P.W.1) also deposed that he tried to collect some public witnesses but could not make available, as there was none at that time. Thereafter, the raiding party searched the accused/appellants and found 20 kgs of Ganja from each bags. Few cash amount was also recovered from the pockets of the accused/appellants. Sri Ganga Singh (P.W.1) prepared the recovery memo at the spot and took out ½ kg of Ganja from each bags and rest of the contraband recovered from the possession of the appellants were sealed separately. Both the accused were taken into custody and brought to the police station and the case was registered against them.

14. Sri Brijpal Singh (P.W.2) – constable also deposed in his evidence that he accompanied Sri Ganga Singh (P.W.1) as well as constable Mahendra Singh at the time of the occurrence. He has also deposed that the place of recovery was *Tiraha* and the same was surrounded by jungle. He has corroborated the version of Sri Ganga Singh (P.W.1).

15. The evidence of the aforesaid two witnesses makes the picture clear and it reveals that these two witnesses corroborate each other on almost on all material points. From the cross-examination of these witnesses nothing could be elicited which make recovery of the contraband, doubtful, from the possession of the accused/appellants. Merely, the absence

of availability of any public witness at the place of the recovery, it cannot be inferred that the police had planned a false story against the accused/appellants.

16. Learned counsel for the appellants has vehemently put the stress on this point that there is no compliance of Section 42 of the N.D.P.S. Act. He has cited a catena of decisions before me, in support of his submission and has placed his arguments that the arresting officer, who made a search of the accused/appellants upon an information shall have to reduce the reasons to believe from personal knowledge or prior information given by any person, in writing and shall have to sent forthwith a copy thereof to his immediate superior officer. He has submitted that in the instant case, no reasons have been recorded in writing hence, the compliance of Section 42 of the N.D.P.S. Act has rendered the resultant search and seizure suspect.

17. I perused the judgment cited by the learned counsel for the appellants and I am of the view that all these judgments do not apply to the facts and circumstances of the present case. In the instant case, it cannot be said that the police officer Sri Ganga Singh (P.W.1) who made a search of the appellants had any personal knowledge or prior information with regard to the fact that any narcotic or psychotropic substance was being carried by the accused/appellants. The search was all of a sudden as the police party was on patrol duty and on the way they found that the accused/appellants were going along with the bags with them and on having suspicion, the accused/appellants were apprehended by the police and the

search was made, thereafter only, it could reveal that the accused/appellants were carrying Ganja in those bags which was being carried by them. Thereafter, the question of compliance of Section 42 N.D.P.S. Act does not apply and the same also does vitiate the proceedings.

18. Learned counsel for the appellants has further argued that the compliance of Section 50 of the N.D.P.S. Act is mandatory and partial compliance is not compliance. Therefore, the prosecution has failed to prove the mandatory compliance of Section 50 with the result, both the appellants are liable to be acquitted.

19. Again, a number of decisions have been cited by the learned counsel for the appellants before me. My attention has also been drawn by the learned counsel for the appellants on the averment of the recovery memo Ext. Ka. 2, in which only option of Gazetted Officer has been mentioned. Learned counsel for the appellants has submitted that there is no mention in Ext. Ka. 2 regarding option to the accused/appellants of their right of being search before a Magistrate. Hence, under these circumstances, the proceedings are vitiated and search/seizure comes within the ambit of doubt.

20. I failed to appreciate the arguments advance by the learned counsel for the appellants. Section 50 of the N.D.P.S. Act is applicable only with respect to personal search and does not apply to a search a bas, in view of the latest decision of the *Hon'ble Supreme Court reported in Madan Lal*

& others Vs. state of Himachal Pradesh 2003(2) J.Cr.C. page 1306.

21. According to the prosecution case 20 kgs of Ganja was recovered from each of the accused/appellants, the same was kept in plastic bags and the accused/appellants were carrying those bags in their hands. Thus, the Ganja was not recovered from the person of the accused/appellants but from the bags. The Hon'ble Apex Court in the judgment referred above has clearly held that "*A bare reading of Section 50 shows that it only applies in case of personal search of a person. It does not extent to search of a vehicle or a container or a bag or premises.*"

22. The Hon'ble Apex Court in the judgment referred above has taken into consideration the other cases i.e. ***Kalema Tumbo Vs. State of Maharashtra & another JT 1999 (8) Supreme Court Page 293, State of Punjab Vs. Baldev Singh JT 1999 (4) SC page 595 and Gurbax Singh Vs. State of Haryana 2001 (3) SCC page 28.***

23. The Hon'ble Apex Court in the judgment referred above has further held that "*the language of Section 50 is implicitly clear that the search has to be in relation to a person as contrasted to search premises, vehicle or articles*"

24. The aforesaid decision of Apex Court is fully applicable to the facts and circumstances of the present case and I am of the view that the submission of non-compliance of Section 50 N.D.P.S. Act is without substance.

25. Sri Ganga Singh (P.W.1) has also specifically deposed in his evidence before the court that he informed the higher authorities on R.T. Set immediately and this portion of his deposition has nowhere been challenged through cross-examination. Furthermore, non-compliance of this provision though by itself is not going to vitiate the proceedings.

26. Learned counsel for the appellants has further argued that the prosecution has not adduced any link evidence in order to show that the alleged contraband recovered from the place of the occurrence was kept intact at the police *malkhana* and thereafter, it was sent intact to the chemical examiner.

27. Again, he has cited a number of decisions before me in support of his arguments. It has been submitted that no sufficient explanation has been given by the prosecution that the seized article was kept under seal between the period of seizure and production in the court. Hence, it is doubtful whether the very article was seized and sent to the chemical examiner.

28. I again do not find myself in agreement with the submission advanced by the learned counsel for the appellants. Sri Chander Singh Bisht (P.W.3) – Investigating Officer has clearly deposed in his cross-examination before the court that he sent the sample of the contraband to the chemical examiner. The report of the chemical examiner further reveals that the sample was received by him and the seal of Sessions court was affixed on it. It is amply proved by the prosecution evidence

that the sample was sent to the chemical examiner and it was found that it was charas. The contention of the learned counsel for the appellants is not sustainable.

29. It may not be out of place to mention here that at the time of arrest both the accused disclosed their false names and wrong addresses. The record reveals that this fact came into light when the accused/appellants moved their bail applications before the trial court. Both the accused/appellants were asked to give their full names and addresses in their own handwriting at the time of remand and hearing of bail applications. The police was also directed to verify the addresses of both the accused as given by them at the time of their arrest and it was found that the accused/appellants had given wrong names and addresses.

30. This affair certainly goes to show the mental status of the accused/appellants in which they disclosed their identity at the time of the arrest. The reason was obvious that the accused/appellants wanted to escape them from the clutches of law and after obtaining the bail, they must be intending not to return back to face the trial.

31. Apart from the aforesaid, circumstances the accused/appellants have failed to explain their presence at the place of the recovery. They are resident of District Hamirpur (U.P.) which is at a great distance from place of occurrence in Uttaranchal. They have not given any reason, as to why and what for, they had been found with bags containing Ganja at the time of occurrence as well as at the place of recovery. This fact

must be within the knowledge of the accused/appellants as to what for they were present at the place where contraband was recovered from their possession. Therefore, the conduct of the appellants since from the beginning in the present case does not appear up to a mark and I do not find any evidence on record which may suggest that the accused/appellants have been falsely implicated in the present case.

32. After assessing of the evidence on record, I come to the conclusion that the prosecution has succeeded in proving the guilt of the appellants beyond reasonable doubt. Both the accused/appellants have been rightly convicted and sentenced by the trial court.

33. I do not find any ground for interference in this appeal. The appeal being devoid of any merit and is liable to be dismissed.

34. Accordingly, the appeal is dismissed. The conviction and sentence thereon passed by the trial court against the accused/appellants by way of the impugned judgment is hereby confirmed.

35. Let the copy of this order be placed in the Criminal Appeal No. 107 of 2004.

(B.C. Kandpal, J.)

March 31, 2005
ASWAL