

IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

Criminal Appeal No. 373 of 2006

Judgment reserved on 25.7.2007

Date of decision: 31.7.2007

Koji Tateno

...Appellant.

Versus

State of H.P.

...Respondent.

Coram

The Hon'ble Mr. Justice Surjit Singh, Judge.

Whether approved for reporting?

For the appellant :Mr. Anup Chitkara with Mr. Chaman Negi, Advocates

For the respondent : Mr. Som Dutt Vasudeva, Additional Advocate General.

Surjit Singh, Judge

By way of this appeal, under Section 36 B of the Narcotic Drugs & Psychotropic Substances Act, 1985, judgment of trial Court, whereby the appellant has been convicted of an offence under Section 20 (B) of the Narcotic Drugs & Psychotropic Substances Act and sentenced to undergo rigorous imprisonment for three years and to pay a fine of Rs.25,000/-, has been challenged.

2. Prosecution version may be summed up thus. On 4.3.2004 around 6.00 a.m. when PW-9 Balwant Singh, then posted as SI In-charge Police Post, Manikaran, accompanied by HHC Bhag Chand (PW-2), Constable Gurdial Singh (PW-1) and HHC Rattan Lal (DW-1), was present at a place called Samod-Nalla near Hurludhar, the appellant was spotted

Whether reporters of the local papers may be allowed to see the judgment?

coming from Kasol side. He was carrying a haversack on his back. On seeing the police, the appellant turned somewhat shaky and nervous, which aroused the suspicion of PW-9 SI Balwant Singh. He suspected that the appellant might be carrying some narcotic drug or psychotropic substance. In the meanwhile, a taxi reached the spot. It was being driven by PW-8 Diwan Singh. The taxi was got stopped and its driver was associated as an independent person to witness the proceedings. Thereafter SI Balwant Singh (PW-9) informed the appellant, in writing, that it was intended to search his person and the haversack and he had the right to be searched in the presence of a Gazetted Officer or a Magistrate and in case he so desired, such search could be arranged in the presence of a Magistrate or a Gazetted Officer. The appellant opted for being searched by SI Balwant Singh on the spot. Thereafter the haversack was searched and it was found to contain 'Charas' which weighed 600 grams. Two samples, each weighing 25 grams, were separated. The samples and the bulk charas were made up into separate parcels and the parcels were sealed as per requirement of law. One of the samples was sent to the Chemical Examiner, who opined that it contained resin to the extent of 34.08 per cent.

3. Trial Court charged the appellant with an offence under Section 20 of the Narcotic Drugs & Psychotropic Substances Act and on his pleading not guilty, put him on trial. During the course of trial, prosecution examined Gurdial Singh as PW-1, Bhag Chand, HHC as PW-2, Balwant Singh SI as PW-9 and Diwan Chand, independent witness as PW-8. Rattan Lal, HHC, who too was associated as a witness, was given up on the plea that he had been won over. Defence examined this Rattan Lal as DW-1. He stated that he was not with the police party headed by SI Balwant Singh at

the place of the alleged recovery of 'Charas' on 4.3.2004 and that in fact the appellant had been seen by him at Police Post Manikaran on 3.3.2004. Diwan Chand (PW-8), independent witness also did not support the prosecution version. He stated that he was going to Manikaran Gurdwara to take bath, when the police called him to the Police Post around 7 or 8 O'Clock and told that they had recovered 'Charas' from the appellant. He was declared hostile and cross-examined by the prosecution with the leave of the Court.

4. The trial Court, relying upon the testimony of PW-1 Gurdial Singh, PW-2 Bhag Chand and PW-9 SI Balwant Singh, held that the case against the appellant stood established beyond reasonable doubt and consequently convicted and sentenced him, as aforesaid.

5. Submissions made on behalf of the appellant are two-fold. First it is submitted that the conviction is based on the tainted testimony of the police officials, whose credibility is rendered doubtful by the fact that they misappropriated the money, amounting to Rs.15,000/-, which was recovered from the appellant at the time of his arrest.

6. Second submission is that the 'Charas' content in the stuff recovered from the appellant was 34.08 per cent, because the report of the Chemical Examiner Ext. PS is to the effect that the sample contained only 34.08 per cent resin and the final opinion of the Chemical Examiner is that the sample contained contents of 'Charas' and not that the sample was of 'Charas'.

7. I have perused the entire evidence. There does not appear to be any contradiction, infirmity or discrepancy in the testimony of the three police officials, namely PW-1 Gurdial Singh, PW-2 Bhag Chand and PW-9 Balwant Singh, with regard to the interception of the appellant at a place called Samod Nalla near Hurludhar and the recovery of 'charas' from his haversack. Learned counsel for the appellant also did not point out any contradiction or inconsistency in their testimony. He, however, argued that it was made out from the evidence on record that the appellant was spotted at Police Post Manikaran on 3.3.2004, i.e. a day before his alleged interception at Samod Nalla and that he had been falsely implicated by the In-charge, Police Post Manikaran (PW-9) Balwant Singh to grab the money, which he (the appellant) was carrying.

8. It is only DW-1 Rattan Lal, who says that the appellant was at Police Post Manikaran on 3.3.2004. Nobody else has stated that the appellant was spotted at Police Post Manikaran on 3.3.2004. Though some unclear suggestions were thrown to PW-1 Gurdial Singh, PW-2 Bhag chand and PW-9 SI Balwant Singh that on 3.3.2004 some foreigners were bathing in Manikaran river and on search of their luggage, 'Charas' was recovered and two – three foreigners were taken to the Police Post, but they denied such suggestions. The appellant in his statement under Section 313 of the Code of Criminal procedure though stated that he was taken to the Police Post forcibly from the bathing place near hot spring, he did not say that he was so taken on 3.3.2004. Therefore, the

testimony of DW-1 Rattan Lal that the appellant was seen by him at Police Post Manikaran on 3.3.2004, cannot be believed.

9. Learned counsel for the appellant then submitted that as per memo of personal search of the appellant Ext. PG, currency notes of Rs.15,000/- (in Indian currency) were recovered from the appellant, but when he was lodged in the jail on being remanded in judicial custody, only a sum of Rs.360/- was with him as per testimony of DW-2 Mast Ram Rana, Assistant Superintendent of Sub-Jail, Kullu. Learned counsel argued that this indicated that rest of the money had been misappropriated by the police officials, particularly PW-9 Balwant Singh, S.I.

10. Simply on the basis of the statement of DW-2 Mast Ram Rana it cannot be said that the difference between the money recovered from the appellant and the money deposited with him (the witness) at the time of the lodging of the appellant in sub-jail Kullu, had been misappropriated by PW-9 SI Balwant Singh or his companion police officials. Moreover, on Ext. PG itself there is a receipt in the hand of the appellant that he had received the money back.

11. In any case, even if it be assumed for the sake of argument that SI Balwant Singh or the other police officials have misappropriated the money that will not make their testimony incredible. The testimony of a witness does not become unworthy of credence simply for the reason that he has committed an act, which is an offence or which is immoral. Hence, the first limb of the argument of the learned counsel for the appellant is rejected.

12. Dwelling on the second submission, learned counsel urged that the appellant was sent up for trial for possessing 'Charas' and the 'Charas', as per definition contained in sub-clause (a) of Clause (iii) of Section 2 of the Narcotic Drugs and Psychotropic Substances Act, means resin, in whatever form, whether crude or purified, obtained from cannabis plant and also includes concentrated preparation known as Hashish oil or liquid Hashish. It has been submitted that in the present case, as per report of the Chemical Examiner, the entire sample stuff was not resin or say 'Charas', but only a part of it, to the extent of 34.08 per cent, was resin and, hence, the appellant cannot be said to be in possession of 600 grams of 'Charas'. He says that what was in possession of the appellant was not whole 'Charas' but something which included 'Charas' (resin) to the extent of 34.08 per cent only and the rest of the stuff was some unknown substance about which report of the Chemical Examiner is silent. He has taken me through the report of the Chemical Examiner, per which the sample contained contents of 'charas'.

13. I find myself in agreement with the aforesaid submission of the learned counsel for the appellant. His submission is supported by the judgment, delivered by a Division bench of this Court in Dharam Pal versus State of Himachal Pradesh and another appeal (Criminal Appeal Nos. 491 & 510 of 2003), decided on 15.5.2007. In the aforesaid case, it has been held that only the resin content of the stuff is 'charas' and that in the absence of the report of the Chemical Examiner about the rest of the contents of the stuff, the

quantity of the 'charas', based on the percentage of the resin found therein by the Chemical Examiner, is required to be worked out and the appellant – accused is to be held responsible for possessing 'charas' only to the extent, the stuff contained the resin content in it.

14. As noticed hereinabove, the total quantity of stuff recovered from the appellant was 600 grams. The chemical Examiner has found resin content in it to the extent of 34.08 per cent. That means the Charas / resin content in the recovered stuff was 204.48 grams. This quantity is less than the commercial quantity, as specified vide Notification No. S.O. 1055(E), dated 19th October, 2001, issued by the Central Government, even though more than the upper limit of the small quantity, i.e. 100 grams, fixed by the same Notification. The offence under Section 20 (B) is punishable with imprisonment that may extend to ten years and with fine which may extend to Rs.1,00,000/-. Offence for possessing small quantity, i.e. upto 100 grams is punishable under Section 20(A) of the Act and the punishment is imprisonment that may extend upto six months and fine that may extend upto rupees ten thousand. In this case, the quantity of 'charas' is 204.48 grams or say only about 100 grams in excess of the upper limit of small quantity. Looking to the quantity, I feel that the ends of justice would be met in case the sentence is reduced from three years rigorous imprisonment and a fine of Rs.25,000/- to two years rigorous imprisonment and a fine of Rs.25,000/-; in default of payment of fine simple imprisonment for a further period of four months.

15. The appellant has been in custody since 7.7.2005. Thus he has been in detention for a period longer than the sentence of substantive imprisonment awarded by this Court in appeal. Therefore, it is ordered that he be set at liberty as soon as he deposits the amount of fine. Otherwise, he be released only on expiry of the term of imprisonment awarded for non-payment of fine. Further if his custody is required in any other case, then he is not to be released unless orders for release are there by the competent Court in respect of that / those other matter(s).

16. Appeal stands disposed of.

17. A copy of this judgment be given to the accused – appellant free of cost.

July 31, 2007 (BC)

**(Surjit Singh)
Judge**