IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

Cr. Appeal No. 381 of 2005

Reserved on: 26.2.2008

Date of decision: 31.3.2008

Rakesh Kumar ... Appellant

Versus

State of H.P. … Respondent

Coram :

The Hon'ble Mr. Justice V.K. Ahuja, Judge.

Whether approved for reporting?[1] Yes.

For the appellant: Mr. Anup Chitkara, Advocate.

For the respondent: Mr. J.S. Guleria, Law Officer.

V.K. Ahuja , J.:

This is an appeal filed by the appellant against the judgment of the Court of learned Additional Sessions Judge, Fast Track, Kullu, dated 16.8.2005, vide which the appellant was held guilty under Section 20 of the Narcotic Drugs and Psychotropic Substances Act, hereinafter referred to as the N.D.P.S. Act and was sentenced as under:-

> "Rigorous imprisonment for nine years, fine of Rs.90,000/- (ninety thousand) and in default of payment of fine, further simple imprisonment for a period of one year."

2. Briefly stated the facts of the case are that on 27.11.2003, at 8.00AM, PW-8 SI/SHO Daya Sagar alongwith other police officials was present near Ghiyagi Bridge in connection with patrol and detection

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[1]Whether reporters of Local Papers may be allowed to see the judgment? Yes.

of crime. A maruti car came there from Sojha side. It was stopped and its documents were demanded from the driver. The vehicle was being driven by the appellant and one Munish Kumar alias Sonu was sitting by his side and two other accused Babar Ali and Kamaljit were sitting in the rear seat of the car. It was an isolated place, therefore, two police officials, namely, ASI Lekh Ram and ASI Narain Singh alongwith SHO were associated and the personal search of the accused, one polythene packet containing in the shape of sticks and ball was recovered. The same was weighed and it was found to be 900 grams. Two samples of 25 grams each were taken which were sent for analysis and after completion of the investigation, the challan was filed as against the appellant, driver of the car, as well as three other occupants of the car.

3. The learned trial Court framed a charge under Section 20 read with Section 29 of the NDPS Act and tried the appellant and his other companions. The appellant was held guilty under Section 20 of the Act and was convicted and sentenced as detailed above, while the other occupants of the car were acquitted of the charge framed against them.

4. I have heard Mr. Anup Chitkara, Advocate, for the appellant and Mr. J.S. Guleria, learned Law Officer, for the respondent and have carefully gone through the record of the case.

5. The main submission made by the learned counsel for the appellant was that there was non compliance of the provisions of Section 50 of the Act which was mandatory. The second plea taken was that in view of the Division Bench decision of this Court which shall be referred below, the sentence imposed upon the appellant deserves to be reduced considerably.

6. Coming to the first plea taken by the learned counsel for the appellant, it is clear that it was not a case of prior information to the police but it was a case of chance recovery insofar as the appellant is concerned. This plea was also taken before the learned trial Court that the provisions of Section 50 of the Act were not complied with since there was no option given to the appellant to get his search conducted before a Magistrate or a gazetted officer. In considering this question, the learned trial Court had referred to the statements of the Investigating Officer and other witnesses and after referring to some decisions of the Apex Court had concluded that since it was a case of chance recovery, the provisions of Section 50 of the Act were not attracted to the present facts.

7. I may make a reference to the statement of PW-8 SI/SHO Daya Sagar, who during course of cross-examination had specifically stated that he was present in the area in connection with patrolling and detection of crime. He stated in the cross-examination that the search of the accused was taken on suspicion of some theft property or keys etc. but he was not suspecting Charas in his possession. He further stated that about 10-12 theft cases had taken place in his jurisdiction in one month. He does not remember how many F.I.Rs. were registered about such theft. The mere fact that he has not been able to substantiate the F.I.R. numbers or their details is not sufficient to hold that his statement cannot be relied upon. He had stated that he searched the person of the appellant on suspicion of some theft property or keys etc. but was not suspecting Charas in his possession. In view of the fact that his presence at the spot was in connection with patrolling and detection of crime and he had checked the person of the appellant and other

occupants of the car suddenly without any prior permission which can be termed as a case of chance recovery. In case of chance recovery, which shall be referred below, it cannot be said that the provisions of Section 50 of the Act are required to be complied with until and unless it is proved that there was prior information to the police or the Investigating Officer had suspicion that the accused may be possessing Charas. The statements of PW-1 Lekh Ram, ASI and that of PW-7 Rajender Singh, H.C. do not substantiate the plea of the appellant that it was a case of prior information or that they suspected that the accused may be possessing Charas.

8. In coming to its conclusion in this regard, the learned trial Court had referred to the decision of the Apex Court in **State of Punjab** Vs. **Baldev Singh**, **(1999) 6 S.C.C. 172**, as well as the decision in **State of Punjab** Vs. **Makhan Chand, 2004(2) S.L.J. 980**.

9. The observations made in **State of Punjab** Vs. **Baldev Singh** are relevant and are being reproduced below:-

> "It is an obligation of the empowered officer and his duty before conducting the search of the person of a suspect, on the basis of prior information, to inform the suspect that he has the right to require his search being conducted in the presence of a gazetted officer or a Magistrate. The failure to so inform the suspect of his right would render the search illegal because the suspect would not be able to avail of the protection which is inbuilt in Section 50. Similarly, if the person concerned requires, on being so informed by the empowered officer or otherwise, that his search be conducted in the presence of a gazetted officer or a Magistrate, the empowered officer is obliged to do so and failure on his part to do so would cause prejudice to the accused and also render the search illegal and the

conviction and sentence of the accused based solely on recovery made during that search bad."

10. A perusal of the decision in **State of Punjab** Vs. **Makhan Chand** supra shows that movements of the accused who had alighted from a bus causing suspicion and, therefore, the accused was apprehended. He declined the search in the presence of a Gazetted Officer or the Magistrate. Search was conducted by the police leading to recovery of drugs. Conviction was set aside by High Court on the ground of non compliance of Section 50 by the police as no independent witness was joined. It was held by the Apex Court that Section 50 does not apply in case where there is no prior information with the police as contemplated by Section 42.

11. In the present case, the statement of the Investigating Officer suggests that it was a routine checking and during that checking the Charas was recovered from the possession of the appellant and it can be said that in case of a chance recovery, provisions of Section 50 of the Act were not required to be complied with and non-compliance of the same is not fatal for the prosecution.

12. I have gone through the statements of Investigating Officer PW-8 SI Daya Sagar as well as two witnesses PW-1 ASI Lekh Ram and PW-7 HC Rajender Singh and they all corroborated the statements of one another. These statements do not suffer from any material contradictions or infirmities and as such, their statements duly prove that Charas was recovered from the possession of the appellant. The other corroborative evidence has been discussed by the learned trial Court which proves that the sample reached in the office of Chemical Examiner safely and the

report of the Chemical Examiner Ext. PA can be linked with the accused. No material infirmities were pointed out in the evidence in this regard.

13. The last point urged by the learned counsel for the appellant was that in the sample of Charas sent to the laboratory, the resin content was found to be 30.08% only and, therefore, it cannot be said that the recovered substance was Charas weighing 900 grams and it has to be held that the recovered Charas was only 30.08% of total 900 grams recovered at the spot which comes to little less than 1/3rd of the total substance recovered. Accordingly, it was submitted that the total recovered Charas was only less than 300 grams. The learned counsel for the appellant relied upon a decision of Division Bench of this Court and according to the said decision, the quantity of the Charas recovered in this case can not be said to be 900 grams as per the reasoning given by the Division Bench of this Court. Thus it was submitted that the appellant is entitled to punishment provided for recovery of small quantity only.

14. Reliance was placed upon a decision of Division Bench of this Court in **Dharam Pal** Vs. **State of H.P.**, **Latest HLJ 2007 (HP) 827**. A perusal of this judgment shows that a question was raised before the Division Bench that in case the percentage of resin found in the content of Charas is less than the recovered Charas, the quantity of resin found can be said to be Charas and not the whole quantity recovered from possession of the accused. Accordingly, it was held that the sentence has to be imposed keeping in view the quantity of resin found in the total quantity of Charas recovered from the possession of the accused. A perusal of the said judgment of the Division Bench shows that a similar plea was raised before the Bench and in that case the

quantity of Charas recovered was 1.600 grams, but the chemical examiner on the analysis of representative of the sample of the stuff found that it contained only 28.92% resin and accordingly had referred to the term cannabis, charas, ganja etc. The Division Bench finally concluded that since the report of the chemical examiner shows that percentage of resin found was 28.92% and it was silent about the rest of the contents of the stuff which means that the entire quantity of the recovered stuff was not Charas. The learned Additional Advocate General appearing for the State had submitted that there are no definite findings of the chemical examiner that apart from the percentage of the resin found in the stuff, rest of it was not Charas or it contained some other substance. It was submitted on behalf of the State that there is nothing in the report to suggest that the other part of the substance recovered was mixture of gur, dhoop or some other extraneous substance which was mixed with Charas and as such, it cannot be said that only percentage of resin found in the substance recovered was Charas and not the remaining substance recovered from the possession of the accused. This question cannot be considered by this Court on the basis of the arguments raised by the learned Additional Advocate General since this question has been discussed at length by the Division Bench of this Court which had finally concluded that only the percentage of the resign found in the substance can be termed as Charas and not the remaining substance. Once there are findings of the Division Bench about this aspect, this plea is not open to be considered before this Court which is bound by the Division Bench ruling of this Court.

15. Applying the decision in the above case in which it was held that recovered stuff was Charas only to the extent of resin content

found therein and accordingly, it has been concluded that since in the present case the resin content found was 30.08% approximately 1/3rd, it can be concluded that the Charas recovered from the possession of the accused was 1/3rd of the total substance i.e. less than 300 grams only. However, the punishment prescribed under Section 20 of the Act remains the same since in case Charas found was above 100 grams which is above small quantity since small quantity is less than that, therefore, the conviction prescribed remains the same under clause (B) i.e. for quantity less than commercial quantity but greater than small quantity and the punishment prescribed is rigorous imprisonment for ten years or fine which may extend to one lakh rupees. The punishment awarded by the learned trial Court is rigorous imprisonment for nine years and fine to the extent of Rs.90,000/-.

16. The last point raised by the learned counsel for the appellant was on the point of sentence and it was submitted that applying the decision of the Division Bench to the facts of the case and the fact that the Charas recovered can be said only less than 300 grams, the substantive sentence imposed upon the appellant deserves to be reduced keeping in view the punishment prescribed. The sentence imposed is reduced to rigorous imprisonment for three years and fine which shall extent to Rs.30,000/-. In default of payment of fine, the appellant shall undergo rigorous imprisonment for a period of six months.

17. Keeping in view the above discussion, the appeal filed by the appellant is partly accepted to this extent that the sentence awarded by the learned trial Court is reduced to rigorous imprisonment for a period of three years. The fine is also reduced to Rs.30,000/- and in default, the

appellant shall undergo rigorous imprisonment for a period of six months.

18. The learned trial Court shall take steps that the appellant serves the sentence and fresh jail warrant be issued accordingly by the trial Court. The information regarding deposit of fine shall also be sent to this Court as and when the fine is realized. A copy of the judgment alongwith record be returned to the learned trial Court.

(V.K. Ahuja),
Judge

March 31, 2008
(BSS)