IN THE HIGH COURT OF HIMACHAL PRADESH
SHIMLA

Cr. Appeal No. 41 of 2007

Judgment reserved on:16.09.2015

Date of Decision: September 30 , 2015

State of Himachal Pradesh ...Appellant.

Versus

Vijay Kumar ...Respondent.

Coram:

The Hon'ble Mr. Justice Sanjay Karol, Judge.

The Hon'ble Mr. Justice P.S. Rana, Judge.

Whether approved for reporting?[1] *No.*

For the Appellant: M/s V.S. Chauhan, Addl. AGs., Kush Sharma, Dy. AG., and J.S.Guleria, Asstt. AG., for the appellant-State.

For the Respondent: M/s Bhuvnesh Sharma and Ramakant Sharma, Advocates, for the respondent.

Sanjay Karol, J.

Assailing the judgment dated 21.09.2006, passed by Additional Sessions Judge, Fast Track Court, Kangra at Dharamshala, H.P., in Sessions Case No. 42-G/05/04, titled as *The State of Himachal Pradesh Versus Vijay Kumar,* whereby accused stands acquitted, State

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

has filed the present appeal under the provisions of Section 378 of the Code of Criminal Procedure, 1973.

2. It is the case of prosecution that on 21.05.2003, Ravinder Kumar (PW.1), Kuldip Kumar (PW.4) and Hoshiar Singh (PW.11) were on patrol duty. At Hanuman Chowk, Dehra, they got information that accused is indulging into illicit sale of contraband substance. Accordingly, information was sent through Ravinder Kumar (PW.1) to the office of Deputy Superintendent of Police. After forming a search party comprising of independent witnesses Jagdish (PW.2) and Satyabarat (PW.3), accused was searched. Prior thereto his consent (Ex.PW.2/A) was obtained. From the pocket of the pants worn by the accused, contraband substance which appeared to be charas and upon weighment was found to be 8 grams was recovered. Two samples of 2 grams each were drawn and the remaining contraband substance weighing 4 grams was also sealed with seal having impression 'H' and taken into possession vide recovery memo (Ex.PW.2/B). Sample of the seal was taken on cloth pieces (Ex.PW.2/G & Ex.PW.2/J). The shop was also searched from where 280 grams of charas was

recovered. Two samples of 20 grams each were drawn. Sample as also the bulk parcel were sealed with seal having impression 'H' and taken into possession vide recovery memo (Ex.PW.2/C). Rukka (Ex.PW.1/A) was carried by Jadev Singh (PW.5) to Police Station, Dehra, on the basis of which FIR No.52/03 dated 21.05.2003 (Ex.PW.13/A) was registered by Shakti Chand (PW.13) under the provisions of Section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as NDPS Act) against the accused. NCB form (Ex.PW.11/B) filled up on the spot. With the completion of formalities on the spot, contraband substance was deposited with MHC Onkar Chand (PW.6), who sent the same through Kuldip Chand (PW.7) to CTL, Kandaghat for chemical analysis and report thereof was obtained by the police. With the completion of investigation, which *prima facie* revealed complicity of the accused in the alleged crime, *Challan* was presented in the Court for trial.

3. The accused was charged for having committed an offence punishable under the provisions of Sections 20 of the NDPS Act, to which he did not plead guilty and claimed trial.

4. In order to establish its case, in all, prosecution examined as many as thirteen witnesses. Statement of the accused under Section 313 of the Code of Criminal Procedure was also recorded, in which he took defence of innocence and false implication. No evidence in defence was led.

5. Trial Court, after appreciating the testimony of prosecution witnesses acquitted the accused. Hence the present appeal.

6. We have heard M/s V.S. Chauhan, learned Additional Advocate General, assisted by Mr. Kush Sharma, learned Deputy Advocate General and Mr. J.S. Guleria, learned Assistant Advocate General, on behalf of the State as also M/s Bhuvnesh Sharma and Ramakanat Sharma, Advocates, on behalf of the accused. We have also minutely examined the testimonies of the witnesses and other documentary evidence so placed on record by the prosecution. Having done so, we are of the considered view that no case for interference is made out at all. We find that the judgment rendered by the trial Court is based on complete, correct and proper appreciation of evidence (documentary and ocular) so

placed on record. There is neither any illegality/infirmity nor any perversity with the same, resulting into miscarriage of justice.

7. It is a settled principle of law that acquittal leads to presumption of innocence in favour of an accused. To dislodge the same, onus heavily lies upon the prosecution. Having considered the material on record, we are of the considered view that prosecution has failed to establish the essential ingredients so required to constitute the charged offence.

8. In *Prandas v. The State*, AIR 1954 SC 36, Constitution Bench of the apex Court, has held as under:

> "(6) It must be observed at the very outset that we cannot support the view which has been expressed in several cases that the High Court has no power under S. 417, Criminal P.c., to reverse a judgment of acquittal, unless the judgment is perverse or the subordinate Court has in some way or other misdirected itself so as to produce a miscarriage of justice. In our opinion, the true position in regard to the jurisdiction of the High Court under S. 417, Criminal P.c. in an appeal from an order of acquittal has been stated in – 'Sheo Swarup v. Emperor', AIR 1934 PC 227 (2) at pp.229, 230 (A), in these words:
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> > "Sections 417, 418 and 423 of the Code give to the High Court full power to review at large the evidence upon which the order of acquittal was founded, and to reach the conclusion that upon that

> evidence the order of acquittal should be reversed. No limitation should be placed upon that power, unless it be found expressly stated in the Code. But in exercising the power conferred by the Code and before reaching its conclusions upon fact, the High Court should and will always give proper weight and consideration to such matters as (1) the views of the trial Judge as to the credibility of the witnesses, (2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at his trial, (3) the right of the accused to the benefit of any doubt, and (4) the slowness of an appellate Court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses. To state this, however, is only to say that the High Court in its conduct of the appeal should and will act in accordance with rules and principles well known and recognized in the administration of justice." "

9. In the instant case, we find that independent witnesses Jagdish (PW.2) and Satyabarat (PW.3) have not supported the prosecution case. Despite their extensive cross-examination, nothing fruitful could be elicited from their testimonies. They admit that Swapan son of Mahesh wanted the accused to vacate the premises occupied by him. They also admit to have signed the papers in the Police Station and no proceedings with

regard to search and seizure operations took place in their presence.

10. It is a settled proposition of law that sole testimony of police official, which if otherwise is reliable, trustworthy, cogent and duly corroborated by other witnesses or admissible evidence, cannot be discarded only on the ground that he is a police official and may be interested in the success of the case. It cannot be stated as a rule that a police officer can or cannot be a sole eye-witness in a criminal case. It will always depend upon the facts of a given case. If the testimony of such a witness is reliable, trustworthy, cogent and if required duly corroborated by other witnesses or admissible evidences, then the statement of such witness cannot be discarded only on the ground that he is a police officer and may have some interest in success of the case. It is only when his interest in the success of the case is motivated by overzealousness to an extent of his involving innocent people; in that event, no credibility can be attached to the statement of such witness.

11. It is not the law that Police witnesses should not be relied upon and their evidence cannot be

accepted unless it is corroborated in material particulars by other independent evidence. The presumption applies as much in favour of a police officer as any other person. There is also no rule of law which lays down that no conviction can be recorded on the testimony of a police officer even if such evidence is otherwise reliable and trustworthy. Rule of prudence may require more careful scrutiny of their evidence. If such a presumption is raised against the police officers without exception, it will be an attitude which could neither do credit to the magistracy nor good to the public, it can only bring down the prestige of police administration.

12. Wherever, evidence of a police officer, after careful scrutiny, inspires confidence and is found to be trustworthy and reliable, it can form basis of conviction and absence of some independent witness of the locality does not in any way affect the creditworthiness of the prosecution case. No infirmity attaches to the testimony of the police officers merely because they belong to the police force and there is no rule of law or evidence which lays down that conviction cannot be recorded on the evidence of the police officials, if found reliable, unless

corroborated by some independent evidence. Such reliable and trustworthy statement can form the basis of conviction.

> [See: *Govindaraju alias Govinda v. State by Srirampuram Police Station and another,* (2012) 4 SCC 722; *Tika Ram v. State of Madhya Pradesh,* (2007) 15 SCC 760; *Girja Prasad v. State of M.P.,* (2007) 7 SCC 625); and *Aher Raja Khima v. State of Saurashtra,* AIR 1956].

13. Apex Court in *Tahir v. State (Delhi)*, (1996) 3 SCC 338, dealing with a similar question, held as under:-

> "6. ... .In our opinion no infirmity attaches to the testimony of the police officials, merely because they belong to the police force and there is no rule of law or evidence which lays down that conviction cannot be recorded on the evidence of the police officials, if found reliable, unless corroborated by some independent evidence. The Rule of Prudence, however, only requires a more careful scrutiny of their evidence, since they can be said to be interested in the result of the case projected by them. Where the evidence of the police officials, after careful scrutiny, inspires confidence and is found to be trustworthy and reliable, it can form basis of conviction and the absence of some independent witness of the locality to lend corroboration to their evidence, does not in any way affect the creditworthiness of the prosecution case."

14. Prosecution case primarily rests upon the statements of police officials Ravinder Kumar (PW.1),

Kuldip Kumar (PW.4) and Hoshiar Singh (PW.11), which we do not find to be inspiring in confidence. Police wants the Court to believe that two samples of 2 grams each were drawn out of the charas recovered from the pocket of the accused. Now where were the scales of 2 grams brought from none has come forward to disclose.

15. Not only that we find that accused was not informed of his statutory right of being searched only by the Magistrate or Gazetted Officer, in fact, he was asked as to whether he could be searched by the Officer present before him or not. Such fact stands corroborated by police official Kuldip Kumar (PW.4).

16. A Constitution Bench of the Apex Court in *State of Punjab versus Baldev Singh*, 1999(6) SCC 172**,** has clearly held that accused has a right to be made aware of his right of getting searched before a Magistrate or a Gazetted Officer. Having regard to the Miranda clause as enunciated by the Supreme Court of the United States of America in *Miranda v. Arizona* [384 US 436], the Constitution Bench held that, although, such communication itself may not necessarily be made in writing but, as far as possible, such communication

should be made in the presence of some independent and respectable persons witnessing the arrest and search. It was thereafter held as follows:

> "57 On the basis of the reasoning and discussion above, the following conclusions arise:
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> (1) That when an empowered officer or a duly authorised officer acting on prior information is about to search a person, it is imperative for him to inform the person concerned of his right under sub-section (1) of Section 50 of being taken to the nearest gazetted officer or the nearest Magistrate for making the search. However, such information may not necessarily be in writing.
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> (2) That failure to inform the person concerned about the existence of his right to be searched before a gazetted officer or Magistrate would cause prejudice to an accused."
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> (E*mphasis supplied*)

17. A three-Judge Bench of Supreme Court in *Vijaysinh Chandubha Jadeja v. State of Gujarat* 2007 (1) SCC 433 noticed the aforementioned dicta laid by the Constitution Bench in Baldev Singh (Supra) and in no uncertain terms opined that accused must be told of his

right to be searched before a gazetted officer or a Magistrate.

18. Thereafter, the Apex Court in *Man Bahadur versus State of H.P.* JT 2008 (10) SC 518 after taking note of judgments held that not only consent of the accused should be taken but he must also be informed of his right of getting himself searched in the presence of the Magistrate.

19. This Court in *Ashok Kumar versus State of H.P.* Latest HLJ 2009 (HP) 557 has clearly held that if consent memo does not record that accused was informed of his right of being searched before a Magistrate or a Gazetted Officer, search is not in conformity with Section 50 of the Act.

20. In *Ashok Kumar Sharma v. State of Rajasthan,* (2013) 2 SCC 67, the apex Court held as under:

> "8. We may, in this connection, also examine the general maxim "ignorantia juris non excusat" and whether in such a situation the accused could take a defence that he was unaware of the procedure laid down in Section 50 of the NDPS Act. Ignorance does not normally afford any defence under the criminal law, since a person is presumed to know the law. Indisputedly ignorance of law often in reality exists, though as a general proposition, it is true, that knowledge of law must be imputed to every person. But it must be too much to impute knowledge in certain situations, for example, we

> cannot expect a rustic villager, totally illiterate, a poor man on the street, to be aware of the various law laid down in this country i.e. leave aside the NDPS Act. We notice this fact is also within the knowledge of the legislature, possibly for that reason the legislature in its wisdom imposed an obligation on the authorized officer acting under Section 50 of the NDPS Act to inform the suspect of his right under Section 50 to be searched in the presence of a Gazetted Officer or a Magistrate warranting strict compliance of that procedure."

[See: *Vijaysinh Chandubha Jadeja v. State of Gujarat,* (2011) 1 SCC 609 (Constitution Bench); and *Myla Venkateswarlu v. State of A.P.*, (2012) 5 SCC 226]

21. In view of the law laid down, accused must also be informed about his right and since this was admittedly not done even orally, there is violation of mandatory provisions of Section 50 of the Act, rendering the prosecution case to be fatal.

22. Even by way of link evidence, we find that prosecution not to have established its case. What was deposited before MHC Onkar Chand (PW.6) were only the samples and not the remaining bulk parcel to the extent of 4 grams which was recovered from the pocket of the accused. Not only that Malkhana register was not produced in Court, also there is no impression of seal on the NCB form which only belies version of the Investigating Officer Hoshiar Singh (PW.11) of having

filled up forms on the spot and having appended the impression of the seal thereupon.

23. The genesis of the prosecution story of Kuldip Singh (PW.4) and Hoshiar Singh (PW.11) having left Police Station on patrol duty appears to be in doubt, for there is no record with regard thereto. Also what was Ravinder Kumar (PW.1) doing near Hanuman Chowk, falling within the territorial jurisdiction of Police Station, Dehra, remains unexplained. There is nothing to corroborate his version that he was on patrol duty. Prosecution wants the Court to believe that Ravinder Kumar (PW.1) was on a separate patrol duty than Kuldip Kumar (PW.4) and Hoshiar Singh (PW.11), which version stands uncorroborated on record. Version of Ravinder Kumar of having left the Police Station on patrol duty stands contradicted if not belied by Kuldip Kumar (PW.4), according to whom, police party met Ravinder Kumar, who was in civil dress.

24. We do not find prosecution to have proved its case, beyond reasonable doubt, by leading clear, cogent, convincing piece of evidence with regard to recovery of contraband substance from the conscious possession of

the accused. Contradictions in the statements of police officials are glaring, material and relevant, totally shaking the edifice of prosecution story. Witnesses are unreliable and their testimonies not free from embellishments/ contradictions/variations.

25. The Court below, in our considered view, has correctly and completely appreciated the evidence so placed on record by the prosecution. It cannot be said that judgment of trial Court is perverse, illegal, erroneous or based on incorrect and incomplete appreciation of material on record resulting into miscarriage of justice.

26. The accused person has had the advantage of having been acquitted by the Court below. Keeping in view the ratio of law laid down by the Apex Court in *Mohammed Ankoos and others* versus *Public Prosecutor, High Court of Andhra Pradesh, Hyderabad (2010) 1 SCC 94*, since it cannot be said that trial Court has not correctly appreciated the evidence on record or that acquittal of the accused has resulted into travesty of justice, no interference is warranted in the instant case.

For all the aforesaid reasons, present appeal, being devoid of merit, is dismissed, so also the pending

application(s), if any. Bail bonds furnished by the accused are discharged. Record of the trial Court be immediately sent back.

(Sanjay Karol),
Judge.

(P.S. Rana),
Judge.

September 30, 2015.
(Purohit)