

IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA.

Cr. Appeal No. 181 of 2013

Date of decision: September 30, 2016.

State of Himachal Pradesh

.....Appellant.

Versus

Randhir & others.

.....Respondents.

Coram

The Hon'ble Mr. Justice Dharam Chand Chaudhary, Judge.

The Hon'ble Mr. Justice Vivek Singh Thakur, Judge.

Whether approved for reporting?¹ Yes.

For the appellant : Mr. D.S. Nainta and Mr. Virender Verma, Addl. AGs.

For the respondents : Mr. Sunil Mohan Goel, Advocate.

Dharam Chand Chaudhary, J. (Oral)

State of Himachal Pradesh is in appeal before this Court. The complaint is that learned Special Judge, Kullu, Division at Kullu has erroneously acquitted the accused persons of the charge under Section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as 'the NDPS Act' in short), vide impugned judgment dated 1.12.2012 passed in Sessions trial No. 148 of 2012.

¹ *Whether the reporters of the local papers may be allowed to see the Judgment? yes.*

2. The legality and validity of the impugned judgment has been questioned before this Court on several grounds, however, mainly that the trial Court has miserably failed to appreciate the evidence available on record in its right perspective and also the law applicable to the case in hand.

3. The facts, in a nut shell, are that on 13.8.2009, PW-6 ASI Daya Ram accompanied by LHC Pinki Devi, HC Lal Singh (PW-2) and Constable Dinesh Kumar (PW-1) was on routine checking duty in front of the gate of Police Station, Manali. Around 4:50 PM, jeep bearing registration No. HP-66-0852 coming from Kullu side arrived at the spot where the vehicles were being checked by the aforesaid police party. Accused Om Parkash (hereinafter referred to as 'accused No. 3') was on the wheel of the jeep whereas his co-accused Randhir and Sandeep (hereinafter referred to as accused Nos. 1 & 2, respectively) were occupying the same. It was Janmashtami festival on that day, therefore, no one was available for being associated as independent witness. PW-6 ASI Daya Ram who is also Investigating Officer had therefore associated PW-1 Constable Dinesh Kumar and PW-2 HC Lal Singh as witnesses and offered first his search to the accused persons vide memo Ext. PW-1/A. Nothing incriminating was recovered from his possession, therefore, he checked the jeep thereafter. During checking, a dark grey coloured bag was found near the gear box of the jeep. On opening the said bag, charas

in the shape of rounds was found kept therein. When the recovered charas weighed, it was found to be 200 grams in weight. After observing the sampling and sealing process, PW-6 ASI Daya Ram has filled in the NCB-I form Ext. PW-6/A in triplicate, the sample whereof is Ext. PW-1/G. The seal after its use, was handed over to PW-1 Const. Dinesh Kumar for safe custody. The recovered charas was taken into possession vide recovery memo Ext. PW-1/B. The jeep was also taken into possession vide memo Ext. PW-1/C. It is, thereafter, rukka Ext. PW-6/B was prepared and handed over to PW-2 HC Lal Singh for being taken to the Police Station, Manali for registration of the case. On the basis thereof, the then Moharar Constable PW-4 Sher Singh has registered the FIR Ext. PW-4/A. PW-6 ASI Daya Ram has arrested all the accused persons. They were apprised about the grounds of arrest i.e. the offence they committed and the provision of sentence provided under the NDPS Act therefor vide memo Exts. PW-1/D, PW-1/E and PW-1/F. The information of their arrest was given to the persons of their respective choice. The statements of the witnesses were recorded.

4. On completion of the investigation at the spot, the case property was produced before PW-7 ASI Ram Swaroop, the then officiating SHO, who resealed the same with seal "M" and also filled in the relevant columns of the NCB-I form Ext. PW-6/A. The facsimile of seal "M" was drawn separately which is Ext. PW-

7/A. The case property was thereafter deposited in the malkhana with PW-4 MHC Sher Singh.

5. On completion of the further investigation, such as preparation and submission of special report (Ext. PW-3/A) and receipt of the report of Chemical Examiner (Ext. PX), the report under Section 173 Cr.P.C. was filed against all the three accused in the trial Court.

6. Learned Special Judge on appreciation of the report and the documents annexed therewith has concluded that prima-facie, a case under Section 20 of the NDPS Act is made out against all the accused. Charge against each of them was framed accordingly. Since they pleaded not guilty to the charge therefore, the prosecution was called upon to produce evidence in order to sustain the charge against accused persons.

7. The prosecution has examined seven witnesses in all. The star prosecution witnesses are PW-1 Constable Dinesh Kumar, PW-2 HHC Lal Singh and PW-6 the I.O. ASI Daya Ram. The remaining prosecution witnesses PW-3 to PW-5 and PW-7 who were also police officials are formal as they remained associated with the investigation of the case in one way or the other.

8. All the accused in their statements recorded under Section 313 Cr.P.C. though have denied all incriminating circumstances appearing against them in the prosecution

evidence, either being wrong or for want of knowledge, however, interestingly enough, in reply to question No. 7 that charas in the shape of chapatti was recovered from grey coloured bag lying near the gear box has been admitted by all of them as correct. There is no explanation that if they were not in possession of the charas, how the same came to be implanted in the vehicle. The accused persons have also not opted for producing evidence in defence.

9. The learned trial Court, while rejecting all the arguments addressed on merits by learned defence counsel and holding that the charas was recovered from the conscious and exclusive possession of the accused persons, has proceeded to record the findings of acquittal on the sole ground that the report of the Chemical Examiner Ext. PX is silent about the resin contents in the recovered charas by applying the ratio of the judgment of Division Bench of this Court in *State of H.P. vs. Mazar Hussain* reported in *2012(1) Drugs Cases (Narcotics) 415*, in which reliance has been placed on a previous judgment, again that of Division Bench of this Court in *Sunil Vs. State of Himachal Pradesh, 2010 (1) Shim. L.C. 192*. The relevant portion of the impugned judgment reads as follows:

“20. The Hon’ble Division Bench of our own Hon’ble High Court in *State of H.P. Vs. Mazar Hussain* reported in *2012(1) Drugs Cases*

(Narcotics) 415 has held in para No. 5,6 and 7 as under:-

“5. Inter alia on many other grounds, one important aspect which requires consideration is that in view of the report Ext. PW-11/C, Assistant Chemical Examiner has observed as below:

‘Various scientific tests such as physical identification, chemical and chromatographic tests were carried out in the laboratory with the exhibit marked as S-1 under reference. The tests performed above indicated cannabinoids including the presence of tetrahydrocannabinol in the sample. The microscopic examination indicated the presence of Cystolithic hairs in the sample. Charas is a resinous mass and resin is an active ingredient of charas, which on testing was found present. The quantity of resin as found in the sample is 34.29% w/w. The result thus obtained is given below:”

6. We also notice that Assistant Chemical Examiner in Ext. PW-11/C has not indicated the percentage of tetrahydrocannabinol in sample. In the similar facts and circumstances, the Division Bench of this court in 2010(1) Drugs Cases (Narcotics) 63: 2010 (1)

Shim. L.C. 192 Sunil Vs. State of HP has observed as below:

“23. In Parikh’s Textbook of Medical Jurisprudence, Forensic Medicine and Toxicology, Sixth Edition, it is mentioned at page-10.54, in answer to Question No. 10.21 that tetrahydrocannabinol-THC is active principal and it is present in Bhang to the extent of 15 per cent, in ganja to the extent of 25 per cent and in charas to the extent of 25040 per cent.

29. As noticed herein above, the only tests, which were conducted by the Experts, were to find out tetrahydrocannabinol or cystolithic hair. They found tetrahydrocannabinol but did not indicate in their reports the percentage thereof. While in the witness box also, the experts did not say what was the percentage of tetrahydrocannabinol in the samples. Specific category of a cannabis product, like Charas, ganja, or mixture, as defined in Section 2(iii) of the Act, or anything else, like bhang etc. can also be determined, with reference to the percentage of tetrahydrocannabinol in the stuff. As noticed hereinabove, percentage of tetrahydrocannabinol varies from one product to other product of cannabis.

30. According to Parikh's Textbook of Medical Jurisprudence, Forensic Medicine and Toxicology, in the case of bhang it is 15 per cent, in the case of ganja it is about 25 per cent and in the case of Charas it is between 25 to 40 per cent. When the percentage of tetrahydrocannabinol in the sample stuff is not indicated in the report nor had any test been conducted to ascertain whether the stuff was Charas, that is to say resin, or some other preparation of cannabis, it cannot be said that the stuff was in fact Charas. As regards cystolithic hair, these being the fibre of cannabis plant, are bound to be present in all the products of cannabis. It is quite likely that the samples were only of bhang i.e. the dried leaves of cannabis plant, which is also supposed to contain 15 per cent concentration of tetrahydrocannabinol. Possession of only the leaves or the seeds of cannabis plant is no offence, because it is only the Charas, ganja or mixture, as defined in Section 2(iii) of the Act, which is an offence, under Section 20 of the Act. Leaves and seeds of cannabis plant are not included either in the definition of charas or ganja and are rather specifically excluded from the definition of ganja, unless accompany the flowering and fruiting tops of the plant.

7. Since in the present case, no percentage of tetrahydrocannabinol has been mentioned, in such circumstances, we are of the considered view that the contraband good, so recovered, cannot be said to be 'charas' in view of report Ex. PW-11/C of Assistant Chemical Examiner and in view of the judgment of this Court (DB) in *Sunil* (supra).

21. The relevant portion of the chemical report Ex. PX in the present case is reproduced as under:-

“RESULT OF THE EXAMINATION.

Various scientific tests such as physical identification, chemical & chromatographic analysis were carried out in the Laboratory with the exhibit under reference. The above tests performed indicated the presence of cannabinoids including the presence of tetrahydrocannabinol in the exhibit. The microscopic examination indicated the presence of cystolithic hairs in the exhibit. Charas is a resinous mass and resin is an active ingredient of Charas, which on testing was found present in the exhibit. The quantity of resin as found in the exhibit was 31.72% w/w. The result thus obtained is given below. The exhibit is extract of cannabis and sample of CHARAS”.

10. It is worth mentioning that a Larger Bench of this Court in *State of Himachal Pradesh versus Mehboob Khan 2013(3)*

Him.L.R. (FB) 1834 has reconsidered the law laid down by the Division Bench in *Sunil's* case (supra) and concluded as under:-

a. After taking into consideration Section 293 of the Code of Criminal Procedure, Sections 45 and 46 of the Indian Evidence Act and the Law laid down by the apex Court as well as various High Courts discussed in detail hereinabove, we conclude that on account of non-consideration of the same by the Division Bench, which has rendered the judgment in *Sunil's* case, correct law on the expert opinion and the reports assigned by the scientific expert after analyzing the exhibit has not been laid down.

b. We further conclude that on account of non-consideration of various reports of the United Nations Office on Drugs and Crime including Single Convention on Narcotic Drugs, 1961 and to the contrary placing reliance on the text books, which basically are on medical jurisprudence, the Division Bench in *Sunil's* case failed to assign correct meaning to 'charas' and 'cannabis resin', the necessary constituents of an offence punishable under Section 20 of the NDPS Act.

c. In view of the detailed discussion hereinabove, the Division Bench while deciding *Sunil's* case supra has definitely erred in taking note of the percentage of tetrahydrocannabinol in three forms of cannabis i.e. Bhang, Ganja and Charas and hence, concluded erroneously that without there being no reference of the resin contents in the reports assigned by the Chemical Examiners in those cases, the contraband recovered is not proved to be Charas, as in our opinion, the Charas is a resinous mass and the presence of resin in the stuff analyzed without there being any evidence qua the nature of the neutral substance, the entire mass has to be taken as Charas.

d. There is no legal requirement of the presence of particular percentage of resin to be there in the sample and the presence of the resin in purified or crude form is sufficient to hold that the sample is that of Charas. The law laid down by the Division Bench in *Sunil's* case that 'for want of percentage of tetrahydrocannabinol or resin contents in the samples analyzed, the possibility of the stuff recovered from the accused persons being only Bhang i.e. the dried leaves of cannabis plant, possession of which is not an offence, cannot be ruled

out', is not a good law nor any such interpretation is legally possible. The percentage of resin contents in the stuff analyzed is not a determinative factor of small quantity, above smaller quantity and lesser than commercial quantity and the commercial quantity. Rather if in the entire stuff recovered from the accused, resin of cannabis is found present on analysis, whole of the stuff is to be taken to determine the quantity i.e. smaller, above smaller but lesser than commercial and commercial, in terms of the notification below Section 2 (vii-a) and (xxiii-a) of the Act.

e. We have discussed the Single Convention on Narcotic Drugs, 1961 in detail hereinabove and noted that resin becomes cannabis resin only when it is separated from the plant. The separated resin is cannabis resin not only when it is in 'purified' form, but also when in 'crude' form or still mixed with other parts of the plant. Therefore, the resin mixed with other parts of the plant i.e. in 'crude' form is also charas within the meaning of the Convention and the Legislature in its wisdom has never intended to exclude the weight of the mixture i.e. other parts of the plant in the resin unless or until such mixture proves

to be some other neutral substance and not that of other parts of the cannabis plant. Once the expert expressed the opinion that after conducting the required tests, he found the resin present in the stuff and as charas is a resinous mass and after conducting tests if in the opinion of the expert, the entire mass is a sample of charas, no fault can be found with the opinion so expressed by the expert nor would it be appropriate to embark upon the admissibility of the report on any ground, including non-mentioning of the percentage of tetrahydrocannabinol or resin contents in the sample.

f. We are also not in agreement with the findings recorded by the Division Bench in *Sunil's* case that "mere presence of tetrahydrocannabinol and cystolithic hair without there being any mention of the percentage of tetrahydrocannabinol in a sample of charas is not an indicator of the entire stuff analyzed to be charas" for the reason that the statute does not insist for the presence of percentage in the stuff of charas and mere presence of tetrahydrocannabinol along with cystolithic hair in a sample stuff is an indicator of the same being the resin of

cannabis plant because the cystolithic hair are present only in the cannabis plant. When after observing the presence of tetrahydrocannabinol and cystolithic hair, the expert arrives at a conclusion that the sample contains the resin contents, it is more than sufficient to hold that the sample is of charas and the view so expressed by the expert normally should be honoured and not called into question. Of course, neutral material which is not obtained from cannabis plant cannot be treated as resin of the cannabis plants. The resin rather must have been obtained from the cannabis plants may be in 'crude' form or 'purified' form. In common parlance charas is a hand made drug made from extract of cannabis plant. Therefore, any mixture with or without any neutral material of any of the forms of cannabis is to be considered as a contraband article. No concentration and percentage of resin is prescribed for 'charas' under the Act."

11. A Larger Bench, therefore, has held that the judgment in *Sunil's* case supra does not lay down the correct legal position as to what is Charas and what shall be its constituents in legal parlance and as such not to be followed. Therefore, in view of the Larger Bench judgment in *Mehboob*

Khan's case (supra), the impugned judgment can not be said to be legally and factually sustainable and the same as such is quashed and set aside. The case, however, is remanded to learned trial Court for fresh disposal in accordance with law. The parties through learned counsel representing them are directed to appear before the trial Court on *7th November, 2016*. Record be sent back so as to reach in the trial Court well before the date fixed.

12. The appeal is accordingly allowed and stands disposed of.

(Dharam Chand Chaudhary),
Judge.

(Vivek Singh Thakur),
Judge.

September 30, 2016.
(karan-)