

IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA.

Criminal Appeal No. 215 of 2011

Reserved on: 24.3.2017

Date of Decision: 31.3.2017

State of Himachal Pradesh.Appellant

Versus

Mahesh Verma.Respondent

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,
Additional Advocate Generals.***

For the respondent: Mr. Ajay Chandel, Advocate.

Vivek Singh Thakur, Judge

Judgment dated 30.3.2011 passed by learned Special Judge, Fast Track Court Kullu in Sessions Trial No. 27 of 2009 in case FIR No. 114 of 2008 registered in Police Station, Banjar under Section 20 of Narcotic Drugs and Psychotropic Substances Act, 1985, acquitting respondent, has been assailed by State of Himachal Pradesh by way of present appeal.

2. We have heard learned counsel for the parties and have also gone through the record.

3. Prosecution case is that on 6.10.2008, police party headed by PW-9 ASI Man Singh consisting of PW-6 Constable Puran Chand, PW-7 Constable Ramesh Kumar was on patrolling in Taxi No. HP-01K-1491 being driven by PW-5 Sunder Singh from Banjar to Sai

¹ Whether reporters of Local Papers may be allowed to see the judgment? yes

Ropa side. On the way near village Dogri Ropa, on noticing respondent coming from Gushaini side with backpack on his right shoulder, police party questioned him, who on inquiry disclosed his name as Maheshwar son of Kehar Singh, R/o Khadrangi. PW-9 ASI Maan Singh suspected possession of some contraband and therefore, associated PW-5 Sunder Singh and PW-6 constable Puran Chand, as witnesses and then gave his personal search vide memo Ex. PW-5/A to respondent in presence of these witnesses, nothing except uniform worn by him was found in his possession. Thereafter on searching backpack of respondent, charas in the form of stick, ball and pancake was found inside a polythene bag, which on weighing was found to be 1 Kg 500 grams. Two samples weighing 20 grams each were extracted and those samples and remaining charas, left in polythene bag, were sealed in different pieces of cloth with six seal impressions of seal 'D' on each parcel. Parcel of remaining charas was kept in the same bag from which it was recovered and bag was also sealed in a cloth in similar manner. Sample seal was taken separately on separate piece of cloth, NCB form Ex. PW-9/A was prepared in triplicate and after use seal was handed over to PW-5 Sunder Singh. Seizure memo Ex. PW-5/C was prepared, which was signed by witnesses and copy of the same was supplied to respondent after obtaining his signatures on memo. Rucka Ex. PW-9/B was prepared and sent to Police Station Banjar through PW-6 Constable Puran Chand, who came back on the spot after registration of FIR Ex. PW-4/A in pursuance to rucka. Statements of witnesses

were recorded and site plan Ex. PW-9/C was prepared and respondent was interrogated and arrested at 5:30 P.M. and arrest memo Ex. PW-5/D was prepared accordingly and intimation of his arrest was given to his brother, as desired by him and memo of personal search Ex. PW-9/E was also prepared after personal search. Thereafter case property was produced before PW-4 SHO SI Lal Singh in Police Station, who re-sealed it with seal impression "H" and handed over the same to PW-1 MHC Uttam Chand. Special report was prepared and copy of same Ex. PW-2/A was delivered to Additional Superintendent of Police, Kullu through PW-8 Constable Laxman Dass on 7.10.2008 at about 4:00 P.M. On 9.10.2008, sample parcels were sent to State Forensic Science Laboratory (FSL), Junga by PW-1 MHC Uttam Singh through PW-7 Constable Ramesh Kumar vide Road Certificate No. 78/08 along with NCB-1 form, seal impression H, seal impression D, copy of FIR and copy of seizure memo which were delivered by PW-7 in State Forensic Science Laboratory, Junga on 13.10.2008, as there were holidays on 10.10.2008, 11.10.2008 and 12.10.2008. Receipt issued by FSL, Junga was deposited by him with PW-1 MHC Uttam Chand.

4. It is further case of prosecution that on 18.12.2009 PW-10 HHC Sobha Ram took parcel of contraband from District Malkhana to State FSL, Junga vide RC No. 8/09 (Ex. PW-10/A) and deposited the case property on the same date in State FSL, Junga and handed over the receipt thereof to MHC on his return.

5. As per prosecution, on verification from Gram Panchyat Chehni, name of respondent was found to be Mahesh Verma @ Happy and since accused deliberately disclosed wrong name, commission of offence under Section 419 IPC was also added against him. Photographs of the spot Ex. PW-7/A to Ex. PW-7/E, snapped by PW-7 Constable Ramesh Kumar were also developed. On completion of investigation, file was handed over to PW-4 SI/SHO Lal Singh. PW-4 after receiving chemical examination report Ex. PW-4/C from FSL Junga, indicating therein that recovered contraband was charas, prepared challan and presented it before the Court.

6. Prosecution has examined ten witnesses to prove its case. After his examination under Section 313 Cr.P.C., respondent also examined DW-1 Rajesh Kumar (conductor of HRTC Bus) in his support. Recovery of charas from bag on 6.10.2008 is not disputed, except that recovered charas was 3 Kgs and not 1.5 Kgms, as indicated in the challan and that bag containing charas did not belong to respondent. Further, recovery of said contraband from respondent has been disputed and it is defence of respondent from very beginning, put to every relevant witness, that on 6.10.2008 respondent was travelling in HRTC bus No. HP-34A-1285 plying on Bathar-Banjar route, on the last seat on driver side and the said bus was intercepted by police party near Amni and one unclaimed bag, lying inside the bus near rear door, was found whereafter police party proclaimed that they had information that bag belonged to a person wearing blue jean pant and respondent for wearing blue jean pant,

was apprehended by police in the pretext of the said secret information and was deboarded from bus and bag was also taken out by the police. After covering a distance of about three kilometers, at Dogri Ropa, taxi was stopped and parked on the side of road in jungal and respondent was taken out of taxi along with bag and photographs were snapped after handing over bag to him. On searching bag charas in form of stick, ball and pancake like was found in two polythene bags and on weighing the said charas was found to be, 3 Kgs (1.5 Kgms in each packet) and respondent was framed in present case, though for recovery of 1.5 Kgrms charas from his conscious possession.

7. As per chemical examination report Ex. PW-4/C, recovered contraband was found extract of cannabis and sample of charas. Respondent also disputed safe transportation of samples as well as remaining bulk of seized contraband to State FSL. Samples as well as remaining bulk of contraband were deposited with MHC Uttam Chand, Incharge of Malkhana Police Station, Banjar. There is no evidence on record that remaining bulk of contraband was shifted to District Malkhana, Kullu. Two parcels of samples were sent by PW-1 MHC Uttam Chand through PW-7 Constable Ramesh Kumar to FSL, Junga, but remaining charas was stated to have been sent to State FSL, Junga through PW-10 HHC Sobha Ram on 18.12.2009 after receiving one parcel from District Malkhana Kullu. How and when remaining contraband was shifted from Police Station Banjar to District Malkhana, Kullu is not clear from the evidence on record and

there is no documentary or oral evidence, proved on record, indicating the said shifting. Therefore, link evidence connecting the remaining charas in present case with parcel taken by PW-10 on 18.12.2009 to State FSL, Junga from District Malkhana is missing.

8. Samples of contraband were handed over to PW-7 by PW-1 on 9.10.2008 who deposited these parcels in State FSL on 13.10.2008, stating that there were holidays on 10th, 11th and 12th October, 2008. How and when he travelled from Banjar to State Forensic Science Laboratory Junga, where he stayed during these three holidays and how and where he kept parcels of sample during his journey and stay during intervening period from 9.10.2008 to 13.10.2008 is not clear. There are also cuttings and overwriting in record, vide which sample parcels were stated to be transported from Police Station Banjar to State Forensic Science Laboratory, Junga. PW-1 admitted that it was correct that in Road Certificate Ex. PW-1/B figure 78 had been overwritten and the same was without initials. He also admitted that in original Road Certificate, date is visible as 8.10.2008, which was changed to 9.10.2008 on the front as well as back of the said Road Certificate. He also admitted that it was correct that figure 8.10.2008 against column of date was altered to 9.10.2008 in the carbon copy of Road Certificate. He also admitted that in NCB form, date of issuance of Road Certificate 78/08 was mentioned as 8.10.2008 whereas Road Certificate in prosecution evidence was claimed to be issued on 9.10.2008. Though, he explained that it was a clerical mistake, but for the reasons that date 8.10.2008 was

changed to 9.10.2008 more than three places in Road Certificate, it cannot be said that it was a clerical mistake, rather it appears that concerned officer forgot to tamer/or manipulate date mentioned on NCB form. Also date of Road Certificate written on NCB Form as 8.10.2008 was attributed to clerical mistake, however, no reason was assigned in the evidence placed on record for firstly writing date on Road Certificate as 8.10.2008 and later on changing the same as 9.10.2008. All these discrepancies cast doubt on fair investigation and lead to an inference that scope of manipulation in investigating the matter cannot be ruled out and truth is something else contrary to prosecution story as portrayed.

9. PW-6 Constable Puran Chand, PW-7 Constable Ramesh Kumar and PW-9 ASI Maan Singh in their examination in chief reiterated the prosecution case. In cross-examination, all of them denied that police party engaged taxi of PW-5 Sunder Singh for apprehending a person coming in HRTC bus and HRTC bus HP-34A-1285 coming from Gushani to Banjar was stopped by police party and on finding unclaimed bag near rear door of bus, respondent was framed in the case for wearing blue jean pant for information with them that one person wearing blue jean pant was coming with contraband in the said bus. PW-7 described dates, time and other minute details in his examination-in-chief, but in cross-examination stated that he did not remember that where vehicle was stopped, how many parcels were stitched and also that the instrument used in weighing contraband was a traditional or electronic. He further stated

that first of all photographs were taken and thereafter other proceedings were conducted. Perusal of photographs Ex. PW-7/B, PW-7/C and Ex. PW-7/E clearly indicates that these photographs were taken after opening bag and keeping its articles on the road. Meaning thereby that prosecution story of giving personal search by PW-9 to respondent and preparation of memo in respect thereof is not true. In special report Ex. PW-2/A as well as rucka Ex. PW-9/B, there was no mention that PW-9 Investigating Officer had given his personal search to respondent, much less preparation of memo Ex. PW-5/A.

10. In photograph Ex. PW-7/B, two polythene bags all clearly visible. However, prosecution witnesses claimed that there was only one polythene bag and in Court also only one poly bag was produced. PW-6 also stated that no parcels were stitched on the spot. Whereas, case of prosecution is that samples parcels and parcel of remaining bulk were stitched and sealed on the spot. PW-6 Constable Ramesh Kumar is an official witness, therefore, his statement casting doubt about prosecution story is material, particularly when only independent witness PW-5 Sunder Singh has also not supported the prosecution case.

11. PW-5 Sunder Singh who was admittedly with police party, not only desisted from lending support to prosecution case, but also admitted the defence version propounded by respondent since very beginning of the trial and re-iterated in statement under Section 313 Cr.P.C which was also fortified by examining DW-1 Rajesh Kumar,

Conductor of HRTC Bus HP-34A-1285, who was on duty on 6.10.2008 in the said bus coming from Bathar to Banjar wherefrom respondent was claimed to be de-boarded and detained. PW-5 was declared hostile and was subjected to cross-examination by learned Public Prosecutor. He admitted suggestion of learned Public Prosecutor that when bag was opened and checked, charas in the shape of stick, ball and pancake was found and he also admitted photographs mark C-1 to C-5 (Ex. PW-7/A to Ex. PW-7/E) taken on the spot. However, he denied that weight of charas was found to be 1.5 Kgm and volunteered that it was more than that. But contrary to prosecution story, in examination-in-chief as well as in cross-examination by defence, he stated that his taxi was engaged by police for checking bus on the basis of information received by police that one person was coming in the said bus along with contraband. He also admitted and corroborated the version of respondent propounded in his defence. Therefore, defence plea of false implication cannot be legally discarded.

12. It is also clearly well settled that mere fact that a witness is declared hostile does not make him unreliable witness so as to exclude his evidence from consideration altogether the evidence remains admissible in the trial and there is no legal bar to base conviction or acquittal upon testimony of hostile witness if corroborated by other reliable evidence. Hon'ble Supreme Court in case ***Raja and others Vs. State of Karnataka (2016) 10 SCC 506*** has held as under:-

“32. That the evidence of a hostile witness in all eventualities ought not stand effaced altogether and that the same can be accepted to the extent found dependable on a careful scrutiny was reiterated by this Court in Himanshu @ Chintu (supra) by drawing sustenance of the proposition amongst others from Khujji vs. State of M.P. (1991) 3 SCC 627 and Koli Lakhman Bhai Chanabhai vs. State of Gujarat (1999) 8 SCC 624. It was enounced that the evidence of a hostile witness remains admissible and is open for a Court to rely on the dependable part thereof as found acceptable and duly corroborated by other reliable evidence available on record.”

13. From very beginning, respondent had set up a clear, distinct and definite defence with certainty by mentioning registration number of bus, its route and name of conductor on duty in the said bus plying on Bathar-Banjar route on 6.10.2008. Respondent also placed on record certificate Ex. DW-1/A issued by HRTC authorities, which was not disputed by prosecution, certifying that on 6.10.2008 bus No. H.P.-34A-1285 was operating on Bathar-Banjar route with driver Sh.Leela Vilas-II and Conductor DW-1 Rajesh Kumar. DW-1 corroborated story put forth by respondent in his defence and in his cross-examination, nothing material for doubting his veracity could be brought on record.

14. PW-5 Sunder Singh is a prosecution witness who not only denied the prosecution version but also deposed a story different to the said version but similar to defence propounded by respondent in cross-examination of prosecution witnesses and narrated by DW-1 Rajesh Kumar and also strengthened by documentary evidence Ex. DW-1/A a certificate issued by HRTC authorities.

15. From evidence on record, possibility of second view has clearly been established by respondent and on the other hand prosecution has failed to prove its case beyond reasonable doubt by leading cogent, reliable, convincing and confidence inspiring evidence. Presumption of innocence is a recognized human right and it is well settled that benefit of doubt belongs to accused and therefore, whenever possibility of two views arises from evidence on record, the view beneficial to accused is to be preferred by the Court. Hon'ble Apex Court in ***P. Satyanarayana Murthy Vs. District Inspector of Police State of Andhra Pradesh and another (2015) 10 SCC 152*** has held as under:-

“26. In reiteration of the golden principle which runs through the web of administration of justice in criminal cases, this Court in criminal cases, this Court in Sujit Biswas V. State of Assam (2013) 12 SCC 406 had held that suspicion, however grave, cannot take the place of proof and the prosecution cannot afford to rest its case in the realm of “may be” true but has to upgrade it in the domain of “must be” true in order to steer clear of any possible surmise or conjecture. It was held, that the court must ensure that miscarriage of justice is avoided and if in the facts and circumstances, two views are plausible, then the benefit of doubt must be given to the accused.”

16. In its recent decision, Hon'ble Apex Court in case ***Jose alias Pappachan Vs. Sub-Inspector of Police, Koyilandy and another (2016) 10 SCC 519*** has held as under:-

“56. It is a trite proposition of law, that suspicion however grave, it cannot take the place of proof and that the prosecution in order to succeed on a criminal charge cannot afford to lodge its case in the realm of may be true but has to essentially elevate it to the grade of must be true. In a criminal prosecution, the court has a duty to ensure that mere conjectures or suspicion do not take the place of legal proof and in a situation where a reasonable doubt is

entertained in the backdrop of the evidence available, to prevent miscarriage of justice, benefit of doubt is to be extended to the accused. Such a doubt essentially has to be reasonable and not imaginary, fanciful, intangible or non-existent but as entertainable by an impartial, prudent and analytical mind, judged on the touch stone of reason and common sense. It is also a primary postulation in criminal jurisprudence that if two views are possible on the evidence available, one pointing to the guilt of the accused and the other to his innocence, the one favourable to the accused ought to be adopted.”

17. Scrutiny of evidence does not inspire confidence in favour of prosecution, rather creates doubt about fairness of investigation. Version of respondent propounded in defence story also appears to be plausible and according to settled law out of two possible views, view favorable to accused will have precedence. Therefore, respondent is entitled for benefit of doubt.

18. Illicit drug trafficking is menace having disastrous effect not only to particular individual, but also on family as well as society at large. Keeping in view dangerous effect of drug abuse at National and International level, the Narcotic Drugs and Psychotropic Substances Act, 1985 has been enacted with stringent provision having deterrent punishment against an offender. The offence committed under the Act is serious and heinous in nature. Therefore, presumption of culpable mental state has also been provided under Section 35 of the Act, which provides that for an offence under this Act, which requires a culpable mental state of accused, the Court shall presume the existence of such mental state. Section 54 of the Act also provides presumption regarding commission of offence by

accused under this Act for possession of any material which have undergone any process towards the manufacture of a narcotic drug or psychotropic substance or controlled substance, or any residue left of the materials from which any narcotic drug or psychotropic substance or controlled substance has been manufactured, of which he fails to account satisfactorily. However, the said presumptions are rebuttable on proving contrary by the accused. Presumption of Sections 35 and 54 of the Act will come into play only when prosecution establishes conscious and physical possession of contraband by the accused, beyond all reasonable doubt, which is sine qua non for recording finding of conviction against the accused.

19. In present case, prosecution has failed to prove recovery of contraband from conscious and physical possession of respondent by leading cogent, reliable, convincing and confidence inspiring evidence. Therefore, provisions of Sections 35 and 54 of the Act are not attracted in present case.

20. Respondent has advantage of being acquitted by the trial Court which strengthens presumption of his innocence. Onus to rebut such presumption heavily lies upon prosecution, to which prosecution has miserably failed. After considering arguments of respective counsel for the parties and minutely examining the testimonies of the witnesses and other documentary evidence placed on record, we are of the considered view that no case for interference is made out.

21. Thus, present appeal, devoid of any merit, is dismissed and also pending applications, if any. Bail bonds, if any, furnished by

or on behalf of the respondent are discharged. Records of the Court below be immediately sent back.

(Dharam Chand Chaudhary)
Judge.

(Vivek Singh Thakur)
Judge

31st March, 2017
(KRS)