

IN THE HIGH COURT OF HIMACHAL PRADESH AT SHIMLA

Cr. Appeal No. 127 of 2021
Reserved on : 10.04.2023
Pronounced on: 12.04.2023

Kishan Chand

... Appellant.

Vs.

State of Himachal Pradesh

....Respondent

Coram:

Hon'ble Ms. Justice Sabina, Acting Chief Justice

Hon'ble Mr. Justice Satyen Vaidya, Judge.

Whether approved for reporting?

For the appellant : Mr. N.K.Thakur, Sr. Advocate with
Mr. Divya Raj Singh, Advocate.

For the respondent : Mr. Rakesh Dhaulta, Additional
Advocate General.

Sabina, Acting Chief Justice

Appellant has filed the appeal challenging the judgment/
order dated 09.03.2021/12.03.2021, passed by the Special Judge,
Chamba Division, Chamba, H.P., whereby, he has been convicted and
sentenced as under:-

Under Section 20(b)(ii)(C) of the Narcotic Drugs and Psychotropic Substances Act, 1985 : Rigorous imprisonment for ten years and to pay a fine of Rs.1,00,000/- (Rs. One lac only). In default of payment of fine amount, he shall further undergo simple imprisonment for one year .

2. Prosecution story, in brief, is that on 11th March, 2018 Head Constable Vijay Singh, alongwith other police officials had gone to *Tissa* side in connection with investigation of case F.I.R No. 24/2018 dated 12th January, 2018 registered under Section 457 and 380 I.P.C., in search of accused Noor Mohammad alias Lali. At about 9.40 a.m., a person came on foot from the side of village *Bhandla*. On inquiry, the said person disclosed his name as Hemant Kumar. While the police party was inquiring from Hemant Kumar about accused Noor Mohammad alias Lali, one person came from *Kandla* side, on foot, carrying a white and chocolate coloured bag in his right hand. On seeing the police party, the said person tried to flee from the spot. On suspicion, the police party apprehended the said person and on inquiry he disclosed his name as Kishan Chand (appellant). The plastic carry bag carried by the appellant bore the inscription in English "*Royal Manbhawan*". Hemant Kumar was joined as an independent witness with the police party. When the bag of the appellant was checked it was found that it contained two carry bags, one of light green colour and other one was of white colour. On opening both the bags it was

found that they contained charas/cannabis in the form of sticks. On weighment, the contraband in white coloured bag weighed 2.900 kilograms, whereas, the black poly pack contained 2.606 kilograms of charas. Thus, in all the appellant was found in possession of 5.506 kilograms of charas/cannabis. The recovered contraband was made into a sealed parcel and was sealed with 8 seals bearing impression "SA". NCB form was prepared. Site plan at the spot was prepared. Ruqa was sent to the Police Station through HHG Raj Kumar for registration of the case. Photographs were taken at the spot. Appellant was arrested and his daughter was informed with regard to his arrest. Appellant was produced before the H.C. Dinesh Kumar alongwith the case property. H.C Dinesh Kumar after verifying the sealed cloth parcel, resealed it with six seals bearing impression "SB".

3. On 12th March, 2018 appellant was produced before the Court of Chief Judicial Magistrate, Chamba for proceedings under Section 52A of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the Act). The Chief Judicial Magistrate drew two samples of 26 grams each from both the packs and sealed them with seal impression "CJMCBA".

4. On 15th April, 2018 one sample weighing 26 grams was sent to the Forensic Science Laboratory for examination through constable Surinder Singh.

5. On 18th July, 2018 second sample weighing 26 grams was sent to the Forensic Science Laboratory for examination through constable Surinder Singh.

6. After completion of investigation and on receipt of the reports of the Chemical Examiner, *Challan* was presented against the appellant. On 17th December, 2018 charge was framed against the appellant under Section 20 of the Act by the trial Court. Appellant did not plead guilty to the charge framed against him and claimed trial.

7. Prosecution examined 15 witnesses in order to prove its case during trial. Appellant when examined under Section 313 of the Code of Criminal Procedure, 1973, prayed that he was innocent.

8. Appellant examined one witness in his defence.

9. Learned counsel for the appellant has submitted that the two samples examined by the Forensic Science Laboratory weighed 26 grams each and there was no evidence on record to prove that the samples, which were examined in the laboratory, were representative samples drawn out of the recovered contraband from the appellant.

10. Shri Rakesh Dhaulta, learned Additional Advocate General, on the other hand, has opposed the appeal and has submitted that the prosecution had been successful in proving its case as the prosecution witnesses have duly supported the prosecution case.

11. As per the prosecution, appellant was apprehended and from the bag carried by the appellant two plastic bags one of white colour and one of black colour were recovered. The white coloured bag contained 2.900 kilograms of charas, whereas, the black poly pack contained 2.606 kilograms of charas in the form of sticks. In this regard, testimonies of PW-12 Vijay Singh, PW-1 H.C. Gais Lal, PW-2 HHG Raj Kumar are relevant. PW-5 Hemant Kumar has also supported the version of the official witnesses. All the said witnesses have deposed with regard to the recovery of the contraband in the form of sticks from the appellant. The statements of recovery witnesses inspire confidence. DW-1 Gulam Rasul has deposed that he was present at Shikari Mod. alongwith Sena and appellant on 11th March, 2018. At about 9.00 a.m H.C Gais Lal came there in a private vehicle and took the appellant with him. In his cross-examination he deposed that he did not know if any contraband had been recovered from the possession of the appellant. The testimony of DW-1 fails to rebut the statements of the official witnesses as well as independent witness PW-5 Hemant Kumar with regard to the recovery of the contraband from him.

12. As per the order dated 12th March, 2018, Ex.PW-12/J, appellant alongwith case property was produced before the Chief Judicial Magistrate on 12th March, 2018. The case property produced

before the Chief Judicial Magistrate was bearing eight seals of seal bearing impression SA and six seals of re-seal bearing impression SB. Out of the contraband produced before the Chief Judicial Magistrate, one representative sample of charas weighing 26 grams was drawn from each carry bag and the same were made into sealed parcels and were sealed with seal bearing impression “CJMCBA”.

13. Ex. PX is the report of the Forensic Science Laboratory with regard to one sample. A perusal of the same reveals that the weight of the exhibit was 24.450 grams and the exhibit was extract of cannabis and sample of charas. The sealed parcel was bearing three seals of “CJMCBA”. Ex.PY is the report of the Forensic Science Laboratory with regard to the second sample and a perusal of the same reveals that one sealed cloth parcel bearing three seal impressions of “CJMCBA” had been received with seals intact. The weight of exhibit was 25.700 grams and the exhibit was extract of cannabis and sample of charas.

14. Thus, from the prosecution evidence, it duly stands established that the recovery of contraband was effected from the custody of the appellant.

15. The next question that arises for consideration is with regard to the effect as to whether the prosecution has been successful

in establishing that the recovered contraband from the appellant weighed 5.506 kilograms, as deposed by the prosecution witnesses.

16. As per the evidence on record, the seized contraband was in the shape of sticks. Two samples, weighing 26 grams each, were drawn by the Chief Judicial Magistrate, Chamba, from the recovered contraband. PW-7 HC Dinesh Kumar and PW-12 HC Vijay Singh have not deposed anything about the mode and manner, in which the samples were drawn from the contraband. However, the order passed by the Magistrate Ex.PW-12/J has been carefully perused. A perusal of the said order also does not show that while drawing the samples, the recovered contraband was made into a homogeneous mixture and thereafter representative samples were drawn. The recovered contraband was in the shape of sticks and in such a situation it was incumbent upon the prosecution to establish that the representative samples had been drawn out of the entire recovered contraband. There is nothing on record to establish that any specific procedure was adopted for drawing a representative sample.

17. Ex.PX and Ex.PY are the reports of the Forensic Science Laboratory. A perusal of the same reveal that two sealed cloth parcels were received and on opening the said parcels, it was found that the substance weighed 25.450 grams and 25.700 grams respectively. After examination, it was opined that both the exhibits were extract of

cannabis and samples of charas. Thus, the contraband which reached the Forensic Science Laboratory for examination weighed approximately 52 grams.

18. Since in the present case there is no evidence on record to establish that representative samples, out of the entire recovered contraband, had been drawn, hence, it can be said to be a case of recovery of only 52 grams of *charas* (samples drawn by the Magistrate).

19. In ***Khekh Ram*** Vs ***NCB***, Criminal Appeal No. 450 of 2016 decided on 29.12.2017, Division Bench of this High court held as under:

“78. Additionally and more importantly, we notice that the entire bulk of the alleged contraband was not sent for analysis and only four samples of 25 grams each were, in fact, sent for analysis. Thus, taking the prosecution case at best what is proved on record is the recovery of only 100 grams of charas from the possession of the accused. Admittedly, the alleged contraband was in different shapes and sizes in the form of biscuits and flat pieces.

79. Therefore, in this background, the question arise as to whether the entire bulk of 19.780 Kgs as was recovered, in absence of there being chemical examination of whole quantity, can be held to be charas.

80. This question need not detain us any longer in view of the authoritative pronouncement by the Hon’ble Supreme Court in Gaunter Edwin Kircher vs. State of Goa (1993) 3 SCC 145,

wherein the Court was dealing with the alleged recovery of two cylindrical pieces of Charas weighing 7 grams and 5 grams each. However, only one piece weighing 5 grams was sent for chemical analysis and was established to be that of Charas. The learned trial Court convicted the accused by taking the total quantity to be 12 grams and such finding was affirmed by Hon'ble Supreme Court, however, reversing such findings.

20. In **State Vs Naresh Kumar**, Criminal Appeal No. 782 of 2008 decided on 28.6.2019, Division Bench of this High court held as under:

“23. As quantum of recovery is concerned, as per prosecution case, 1 Kg. 500 grams charas was recovered from the respondent and after taking out two samples of 25 grams each, the remaining contraband was sealed in parcel and samples were also sealed in two different parcels. Bulk of charas claimed to be recovered from the respondent is Ext.P2 but during investigation and thereafter also, only one sample of 25 grams of charas was sent to CFSL Chandigarh for chemical analysis and as per chemical analyst report Ext. PX the sample was found to be of charas.

24. As per ratio laid down by the Apex Court in Gaunter Edwin Kircher vs. State of Goa, reported in (1993)3 SCC 145 the amount of contraband, recovered from the respondent, cannot be held more than that which was sent to the Chemical Analyst and was affirmed by the Forensic Science Laboratory as a contraband. The failure to send the entire mass for chemical analysis would result to draw inference that said contraband has not been analyzed and identified by CFSL as the charas.

25. *Learned Single Judge of this Court in Dhan Bahadur vs. State of H.P. reported in 2009(2) Shim.L.C. 203, after relying upon the judgment in Gaunter Edwin Kircher's case supra, has held that only analyzed quantity of contraband can be said to have been recovered from the respondent. Applying the ratio of law laid down by the Apex Court and followed by learned Single Judge of this Court, we find that in the present case quantity of recovered contraband is to be taken as 25 grams only and therefore, respondent can be convicted for recovery of 25 grams charas from his conscious possession for which punishment has been provided under Section 20(b)(ii)(A) for a term which may extend the six months or with fine which may extend to Rs.10,000/- or/with both.*

21. In **State of HP Vs Sultan Singh and Others** Criminal Appeal No. 324 of 2008, decided on 22.4.2016, Division Bench of this High court held as under:

"16. Charas was recovered from three different packets. PW-8 Constable Bhupinder Singh has categorically admitted in his cross-examination that IO did not mix up contents of the packets Ext. P2 to P4. PW-10 ASI Ghanshayam himself has admitted in his cross-examination that he did not mix up the contents of three polythene packets. IO should not have continued with the preparing of documents till the police official, who was sent to get independent witnesses, came back. IO should have made entire contraband homogenous for the purpose of chemical examination."

22. In **State of Himachal Pradesh Vs Sohan Singh**, Criminal Appeal No. 259 of 2009 decided, on 23.12.2015, Division Bench of this High court held as under:

“16. We have not understood why IO has sent PW-2 Hitender Kumar to an area which was not thickly populated instead of sending towards an area which was thickly populated to call independent witnesses. Case of the prosecution is that accused was given option to be searched before a gazetted officer or a Magistrate. He opted to be searched by the police. Consent memo is Ext. PW-1/A. According to the prosecution case, PW-2 Hitender Kumar was present on the spot and he was the person who has taken Rukka to Police Station. However, in his cross-examination he has denied that Ext. PW-1/A was prepared in his presence. He has also admitted that Ext. PW1/E was also not prepared in his presence. Thus, the presence of PW-2 Hitender Kumar at the spot is doubtful. Rukka was prepared at 11.30 pm by IO PW-12 Kishan Chand but was sent at 12.30 pm. According to HHC Padam Singh, samples were not taken homogenously. Few sticks were taken. According to PW12 Kishan Chand from all the four packets, samples were drawn. There is variance in the statements of PW-1 Padam Singh, PW-2 Hitender Kumar and PW-12 Kishan Chand whether sample was prepared homogenously or not entire contraband was required to be mixed homogenously for preparing samples to be sent for chemical examination to SFL.”

23. Thus, from the evidence available on record, we are of the opinion that the samples weighing 52 gram of *charas* examined by the Forensic Science Laboratory, were not the representative samples of the entire bulk and therefore appellant cannot be held to have been

found in illegal conscious possession of 5.506 kilograms of *charas* and he can be held to be in possession of 52 grams of *charas*, which, as per the Act, would fall within the definition of small quantity.

24. Accordingly, appellant is held guilty of offence under Section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985, for having been found in conscious possession of only small quantity of *charas* and is sentenced to undergo rigorous imprisonment for one year. The sentence qua fine is set-aside. The impugned judgment of conviction and order of sentence passed by the learned trial Court is accordingly modified.

25. The appellant was arrested on 11th March, 2018. He remained in judicial custody till the conclusion of trial and thereafter is undergoing sentence. Since the appellant has already undergone much more sentence than could be inflicted upon him, the appellant is ordered to be released immediately, if not required in any other case. The Registry is directed to prepare the release warrant forthwith.

26. In view of the provisions of Section 437 of Code of Criminal Procedure, 1973, appellant is directed to furnish his personal bond in the sum of Rs. 25,000/- with one surety in the like amount before the learned Registrar (Judicial) of this Court, which shall be effective for a period of six months with stipulation that in the event of Special Leave Petition being filed against this judgment, or on grant of

leave, the appellant, on receipt of notice thereof, shall appear before the Supreme Court.

27. The appeal is accordingly disposed of. Pending applications, if any, also stand disposed of.

(Sabina)
Acting Chief Justice

12th April, 2023^(TM)

(Satyen Vaidya)
Judge