

**IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA****Criminal Appeal No. 420 of 2012****Reserved on : 18.05.2023****Date of decision : 02.06.2023**

Sandeep Kumar

Appellant

Versus

State of Himachal Pradesh

Respondent

Coram :-**Justice Jyotsna Rewal Dua, Judge****Whether approved for reporting?¹ Yes**

For the Appellant : Mr. Amar Deep Singh, Advocate

For the Respondents : Mr. Y.P.S. Dhaulta, Additional Advocate General

Jyotsna Rewal Dua, Judge

The appellant was convicted by the learned Trial Court on 06.09.2011 for the commission of offence punishable under Section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short the Act) for possessing approximately 390 Gms. of cannabis. Vide order dated 11.09.2011, he was sentenced to undergo rigorous imprisonment for one year and to pay fine of Rs. 10,000/- with default clauses. The substantive sentence imposed upon the appellant was suspended vide order dated 31.10.2012 passed in this appeal preferred by him.

2. Briefly put, the prosecution case is :-

¹Whether reporters of print and electronic media may be allowed to see the order? Yes.

2(i) On 07.10.2010, a police party was patrolling its jurisdictional area in a police vehicle (daily diary report Ex. PW-9/C). The police officials nabbed the appellant at the spot which was about 1 Km. short of Gharatgarh. The appellant was apprehended at around 9.30 a.m. while he was attempting to flee from the spot.

2(ii) The police waited at the spot for about 10-15 minutes for associating independent witnesses. Since no one passed, the police officials associated PW-8 HHC Hem Ram and HC Shesh Raj (given up in evidence) in search procedure.

2(iii) In presence of above stated witnesses, the appellant was apprised on the spot of his legal right of search before a Magistrate or Gazetted Officer. The appellant consented to be searched before the Magistrate vide consent memo Ex. PW-7/A. The consent memo Ex. PW-7/A was prepared on the spot.

2(iv) The appellant was taken to the office of Tehsildar Banjar, District Kullu in a government vehicle. The Tehsildar-Kirpa Ram (PW-7) was apprised about the incident. Consent memo Ex. PW-7/A was presented to him.

2(v) The appellant first searched the I.O. Ram Lal (PW-9) vide Ex. PW-7/B. Nothing incriminating was recovered from I.O. Ram Lal. The investigating officer Ram Lal thereafter carried out search of the appellant. Cannabis in form of balls and sticks weighing 390 Gms. was recovered from a packet made of transparent plastic tape concealed around appellant's waist under-pant. The recovered contraband was sealed

in a parcel Ex. P-1 with seal 'N' at six places. Seizure memo Ex. PW-7/C was prepared. All codal formalities were completed.

2(vi) After the search, the I.O. prepared the spot map Ex. PW-9/B by visiting the spot. The appellant was arrested vide arrest memo Ex. PW-8/A.

2(vii) Entire bulk of contraband (Ex. P-1) was sent to Forensic Science Laboratory (FSL) for scientific analysis. PW-1, the Assistant Director and Assistant Chemical Examiner prepared the FSL report Ex. PW-1/B. As per the report, the brown tape and poly bag were found in the sample cloth parcel and the exhibit that weighed 390.00 Gms.

3. Learned trial Court on considering the entire case, came to the conclusion that prosecution had been able to prove beyond reasonable doubt that 390 Gms. of cannabis was recovered from exclusive and conscious possession of the appellant. The appellant was accordingly held guilty of commission of offence under Section 20 of the Act vide judgment dated 06.09.2011. He was sentenced to rigorous imprisonment of one year alongwith fine of Rs. 10,000/- with default clauses vide order dated 11.09.2011. This judgment and the sentence order have been assailed in the instant appeal.

4. Observations

I have heard Mr. Amar Deep Singh, learned counsel for the appellant and Mr. Y.P.S. Dhaulta, learned Additional Advocate General, for the respondent-State. With their assistance, I have also considered the record of the case.

The submissions made by learned counsel for the appellant primarily revolve around non-compliance of Section 50 of the Act. In order to avoid repetition, the submissions of learned counsel for the parties on this point viz.-a-viz. the evidence led in the case are being discussed hereinafter.

4(i) Since it has been asserted on behalf of the appellant that there has been infraction of Section 50 of the Act, it would be appropriate to first extract the provisions of this Section and notice some Judicial precedents :-

“50. Conditions under which search of persons shall be conducted.—

(1) When any officer duly authorised under section 42 is about to search any person under the provisions of section 41, section 42 or section 43, he shall, if such person so requires, take such person without unnecessary delay to nearest Gazetted Officer of any of the departments mentioned in section 42 or to the nearest Magistrate.

(2) If such requisition is made, the officer may detain the person until he can bring him before the Gazetted Officer or the Magistrate referred to in sub-section (1).

(3) The Gazetted Officer or the Magistrate before whom any such person is brought shall, if he sees no reasonable ground for search, forthwith discharge the person but otherwise shall direct that search be made.

(4) No female shall be searched by anyone excepting a female.

(5) When an officer duly authorised under section 42 has reason to believe that it is not possible to take the person to be searched to the nearest Gazetted Officer or Magistrate without the possibility of the person to be searched parting with possession of any narcotic drug or psychotropic substance, or controlled substance or article or document, he may, instead of taking such person to the nearest Gazetted Officer or Magistrate, proceed to search the person as provided under section 100 of the Code of Criminal Procedure, 1973 (2 of 1974).

(6) After a search is conducted under sub-section (5), the officer shall record the reasons for such belief which necessitated such search and within seventy-two hours send a copy thereof to his immediate official superior.”

1999 (6) SCC 172 (State of Punjab Vs. Baldev Singh) holds, it is imperative on the officer to inform the accused that he has a right of search before a Magistrate or Gazetted Officer. If search is not conducted as per option of accused, it would vitiate the conviction and sentence of the accused. Illicit article seized without following provisions of Section 50 cannot be used as evidence of unlawful possession of illicit articles on the person from whom that contraband has been seized. Recovered illicit article cannot be used as proof of unlawful possession of contraband seized from the suspect as a result of illegal search and seizure. Whether safeguards provided in Section 50 have been observed would be determined by Court on the basis of evidence led at the trial. Use of evidence collected in breach of safeguards provided in Section 50 at the trial would render the trial un-fair.

In **2011 (1) SCC 609 (Vijaysinh Chandubha Jadeja Vs. State of Gujarat)**, it was held that failure to comply with the provision of Section 50 would render the recovery of illicit article suspect and vitiate the conviction if the same is recorded only on the basis of the recovery of the illicit article from the person of the accused during such search.

2012 (5) SCC 226 (Myla Venkateswarlu Vs. State of A.P.) holds that before making search, it is imperative for the empowered officer to inform the suspect of his right before search in the presence of a Gazetted Officer or a Magistrate. Strict compliance of Section 50(1) of the Act is necessary and not substantial compliance. In the said case, accused were informed after recovery that they have right to be searched in

presence of a Gazetted Officer or a Magistrate. It was held that this does not amount to compliance of Section 50(1) of the Act.

In **2016 (11) SCC 687 (State of Rajasthan Vs. Jagraj Singh)**, the Apex Court held that if search is conducted in violation of Section 50, it may not vitiate the trial, but that would render the recovery of illicit articles suspect and vitiate the conviction and sentence of the accused. The Hon'ble Supreme Court observed that object of NDPS Act is to make stringent provision for control and regulation of operation relating to those drugs and substances. At the same time, to avoid harm to the innocent person and to avoid abuse of the provisions by the officer, certain safeguards are provided which in the context have to be observed strictly.

While deciding Criminal Appeal No. 2035 of 2022 (**Amar Chand Vs. State of Himachal Pradesh**), the Apex Court vide its decision dated 22.11.2022 set aside the conviction of the appellant under Section 20 of the Act giving benefit of doubt after noting gaps in the prosecution case as arrest memo and body search memo were not proved. Site plan was wrongly prepared and there were no independent witnesses.

2022 (12) Scale 637 (Sanjeet Kumar Singh @ Munna Kumar Singh Vs. State of Chhatisgarh) holds that if independent witnesses come up with the story which creates a gaping hole in the prosecution theory about the very search and seizure, then the case of the prosecution should collapse like pack of cards.

In **Sanjeev & Anr. Vs. State of Himachal Pradesh, 2022 (6) SCC, 294** there was non-compliance of requirement of

affording an option to be searched before a Magistrate or competent Gazetted Officer. The Hon'ble Supreme Court held that if two views are possible from the evidence on record, the appellate Court must be extremely slow in interfering with the judgment against acquittal.

4(ii) Spot of occurrence, place of search & recovery from the appellant vis-à-vis violation of Section 50 of the Act.

4(ii) (a) As per prosecution story narrated in the documents, there does not seem to be any dispute regarding the spot of occurrence, i.e. where the appellant was nabbed by the police officials. The spot map Ex. PW-9/B was prepared by PW-9 the I.O. According to the investigating agency the consent memo Ex. PW-7/A was prepared at the spot whereunder the appellant had consented to be searched before a Magistrate or gazetted officer.

The place of search and recovery from the appellant projected by the prosecution was the office of Tehsildar. The appellant was searched and recovery was effected from him vide recovery memo Ex. PW-7/C.

According to prosecution, this all happened in the office of Tehsildar.

PW-9, the I.O. in his examination-in-chief has stated that the consent memo Ex. PW-7/A was prepared on the spot after apprising the appellant of his legal right in compliance to mandatory provisions of Section 50 of the Act. He has affirmed this statement even during the course of his cross examination. However, towards the end of his cross examination, the I.O. has stated that ;-

“the charas was also burnt at the spot to check its authenticity.”

The statement of I.O. leads to a positive inference that the alleged recovery of cannabis was effected on the spot itself. That being the case, necessary corollary is that the alleged recovery was made before apprising the appellant of his right to be searched before a Magistrate or Gazetted Officer. The alleged recovery was effected even prior to preparing the consent memo Ex. PW-7/A. This all is in contravention of Section 50 of the Act.

4(ii) (b) PW-8 HHC Hem Ram stated that consent memo Ex. PW-7/A was prepared by the I.O. at the ‘spot’. As already observed, ‘spot’ is the place where the appellant was apprehended. The ‘spot’ is the place where the consent memo Ex. PW-7/A was statedly prepared and pursuant to which the appellant was taken to the Tehsil office in the government vehicle. As per the prosecution story narrated in all the documents and as per spot witnesses PW-8 and PW-9 the I.O., the consent memo Ex. PW-7/A was prepared on the ‘spot’ which was 1 Km. short of Gharatgarh. The consent memo was prepared by associating PW8 HHC Hem Ram and H.C. Shesh Raj (given up in evidence).

PW-7 Kirpa Ram, the Tehsildar, has most effectively contradicted the entire prosecution version by categorically stating in his examination-in-chief that :-

“the consent memo Ex.PW-7/A, memo regarding personal search of police officials Ex. PW-7/B were prepared in my presence which bear my signatures as well as signatures of other witnesses”.

PW-7, the Tehsildar has remained steady on the above aspects in his cross-examination as well. In fact, he has gone up one step ahead in his cross examination and further stated that ;-

“Ex. PW-7/A to Ex. PW-7/D were prepared in my presence. No addition or alteration was made to my knowledge in these documents by the I.O. thereafter”.

4(iii) The **sum total of discussion** of above evidence is that there is no dispute regarding the ‘spot’ from where the appellant was apprehended by the police. There is no dispute about the place of search and recovery from the appellant. As per prosecution case, the search and recovery was effected from the appellant in the office of Tehsildar. As per the case of the prosecution, the consent memo Ex. PW-7/A was prepared at the ‘spot’ i.e. where the appellant was apprehended. However, the Tehsildar (PW-7) has stated that consent memo Ex. PW-7/A and documents Ex. PW-7/B to Ex. PW-7/D were prepared in his office in his presence. Hence, contradictions and uncertainty regarding preparation of memo of consent galore. The statement of PW-9 I.O. about burning the cannabis on the spot goes to the root of the case and creates a major dent in the prosecution version. There is serious flaw in the prosecution case. It cannot be ruled

out that alleged cannabis was recovered even before the compliance of provisions of Section 50 of the Act. It cannot be ruled out that consent memo & seizure memo were prepared thereafter. Irrespective of the place of preparation of these documents, the entire case of the prosecution of effecting recovery of cannabis from the appellant in the office of Tehsildar becomes doubtful. The benefit of this serious doubt has to be accorded to the appellant.

4(iv) Another significant aspect of the case is that as per prosecution, the alleged contraband was recovered in a bag made of “transparent plastic” and the whole contraband after recovery was sealed with six seal impressions of ‘N’. The seal was statedly handed over to PW-8 HHC Hem Ram after use. During examination, PW-8 did not produce the same and stated to have misplaced it. As per FSL report, Ex. PW-1/B, the parcel cloth had “brown tape” and poly bag. There is obviously contradiction. The bulk cannabis recovered and parceled as Ex. P-1 did not match the parcel sent for examination.

5. The upshot of above discussion is that the appellant has been able to show infraction of provisions of Section 50 of the Act by the prosecution. The prosecution has failed to establish the guilt of the appellant beyond reasonable doubt. Therefore, the benefit of the serious doubts in prosecution case has to go in favour of the appellant. Accordingly, this appeal succeeds and is allowed. The judgment of conviction dated 06.09.2011 and the sentence order dated 11.09.2011,

passed by the learned Trial Court in Sessions Trial No. 53 of 2010 are set aside. Appellant, be released forthwith, if not required in any other case, subject to his furnishing personal bond in the sum of Rs.50,000-, with one surety in the like amount, to the satisfaction of learned trial Court, so that in the event of any appeal being preferred against this judgment, his presence in the appellate Court be secured. The bond so furnished shall, however, remain in force only for a period of six months. The appeal stands finally disposed of, so also the pending miscellaneous application(s), if any.

2nd June, 2023 (K)

Jyotsna Rewal Dua
Judge

High Court