



**IN THE HIGH COURT OF HIMACHAL PRADESH,
SHIMLA**

Cr. Appeal No. 405 of 2006.

Date of Decision: 16th May, 2016.

Anil Kumar

.....**Appellant.**

Versus

State of H.P.

.....**Respondent.**

Coram

**The Hon'ble Mr. Justice Sureshwar Thakur,
Judge.**

Whether approved for reporting? Yes.

For the Appellant: Mr. Ajay Sharma, Advocate.

For the Respondents: Mr. Vivek Singh Attri, Dy. A.G.

Sureshwar Thakur, Judge (Oral).

The instant appeal stands directed by the accused/convict against the judgment of the learned Special Judge, Fast Track Court, Una rendered on 30.11.2006 in Sessions Case No. 3/2006/Sessions trial No. 18/2006, whereby, the latter returned findings of conviction against the accused/convict for his committing an offence punishable under Section 20 of the Narcotic Drugs and Psychotropic Substances Act (hereinafter referred to as the NDPS Act). The learned

trial Court proceeded to hence sentence him to undergo rigorous imprisonment for five years for commission of offence under Section 20 of the NDPS Act besides sentenced him to pay a fine of Rs.50,000/-, in default of payment of fine he was sentenced to undergo further simple imprisonment for one year.

2. The facts relevant to decide the instant case are that on 21.12.2003 at about 3.00 p.m. Nardev Singh, H.C., CIA Staff, Una was present near petrol pump Behlan along with other police officials in a private vehicle where he received an information from H.C. Rajinder Singh of CIA Staff, Una that the accused is illegally selling charas to his customers near a brick kiln at Behdala. On this information, Nardev Singh recorded the statement of Rajinder Singh, Ex.PW1/A under Section 154, Cr.P.C. and sent the same to P.S. Una for registration of a case and he himself proceeded towards brick kiln, Behdala after forming a raiding party. The accused was found present there. He after completion of Codel formalities conducted the search of the accused and on search one plastic

envelope containing 500 grams of charas was recovered from the pocket of the pant of the accused. Thereafter, other formalities were completed and accused was arrested. Report of the FSL was procured. Statements of the witnesses were recorded.

3. On conclusion of the investigation, into the offence, allegedly committed by the accused, report under Section 173 of the Code of Criminal Procedure was prepared and filed in the Court.

4. The accused was charged by the learned trial Court for his committing an offences punishable under Section 20 of the NDPS Act. In proof of the prosecution case, the prosecution examined 10 witnesses. On conclusion of recording of the prosecution evidence, the statement of the accused under Section 313 of the Code of Criminal Procedure was recorded by the trial Court, in which the accused claimed innocence and pleaded false implication in the case.

5. On an appraisal of the evidence on record, the learned trial Court, recorded findings of conviction against the accused/appellant herein.

6. The accused/appellant is aggrieved by the judgment of conviction recorded by the learned trial Court. The learned counsel appearing for the accused/appellant has concertedly and vigorously contended qua the findings of conviction recorded by the learned trial Court standing not based on a proper appreciation of the evidence on record, rather, theirs standing sequelled by gross mis-appreciation of the material on record. Hence, he contends that the findings of conviction being reversed by this Court in the exercise of its appellate jurisdiction and theirs being replaced by findings of acquittal.

7. On the other hand, the learned Deputy Advocate General has with considerable force and vigour, contended of the findings of conviction recorded by the Courts below standing based on a mature and balanced appreciation of evidence on record and theirs not necessitating interference, rather theirs meriting vindication.

8. This Court with the able assistance of the learned counsel on either side, has, with studied care and incision, evaluated the entire evidence on record.

9. The accused/convict is alleged to be at the relevant time holding possession of charas, Ex.P-1 weighing 500 grams. The prosecution to succor its case against the accused/convict depended upon the testimonies of official witnesses. The official witnesses in their respective depositions on oath underscored a version qua the genesis of the prosecution case embodied in Ex.PW6/A bereft of any intra se contradictions besides, when their respective depositions on oath are bereft of any inter se contradictions vis-a-vis their testimonies comprised in their respective examinations-in-chief and their testimonies comprised in their respective cross-examinations. Consequently, with their testimonies on oath qua the genesis of the prosecution case embodied in Ex.PW6/A standing bereft of any intra se or inter se contradictions necessarily then when their testimonies inspire confidence reinforcingly render their testimonies being amenable to implicit reliance

being placed thereupon by this Court for concluding qua the guilt of the accused.

10. Be that as it may, with unblemished testimonies of the official witnesses qua the factum of the accused at the relevant time holding conscious and exclusive possession of charas weighing 500 grams which item of contraband stood recovered under Ex.PW1/E from his right pocket, the learned Deputy Advocate General has with much vigour canvassed before this Court qua the findings of conviction recorded against the accused standing not open to face ouster qua their legal vigour. However, before accepting the aforesaid submission addressed by the learned Advocate General for hence tenacity standing imputed to the findings of conviction recorded against the accused/convict by the learned trial Court, it is imperative to advert to the factum of the Investigating Officer joining an independent witness named Avtar Singh in the relevant investigations held by him. The aforesaid independent witness to the relevant incident had signed all the relevant memos prepared purportedly at the site of

occurrence at the stage contemporaneous to the recovery of charas weighing 500 grams under memo Ex.PW1/E from the purported exclusive and conscious possession of the accused/convict in the manner espoused by the prosecution. True it is that the depositions of official witnesses when bereft of any vice of any intra se or inter se contradictions, non occurrence thereof for the reasons aforesaid are sufficient to sway an inference of the prosecution succeeding in proving the guilt of the accused yet the vigour of the aforesaid inference would lose vigour when despite the Investigating Officer joining an independent witness in the apposite proceedings besides obtaining his signatures on all the relevant memos prepared purportedly at the relevant time, the learned APP omitting to examine him as its witness. The learned APP has merely for flimsy reason on his standing won over by the accused omitted to examine him as a prosecution witness. His stepping into the witness box was imperative. The immensity of frailty of the speciousness of the reason assigned by the learned APP to omit to examine him as a prosecution

witness has a cascading effect upon the success of the prosecution case. The APP concerned though may have held the view of Avtar Singh standing won over by the accused yet the mere fact of the APP concerned holding a view of his standing won over by the accused/convict when may well have been concerted to be tested by him on Avtar Singh stepping into the witness box or when only on Avtar Singh stepping into the witness box would thereupon underscorings occur qua his supporting or omitting to support the prosecution case besides, even if, thereat by his turning hostile or reneging from his previous statement recorded in writing he omitted to lend succor to the prosecution case yet when it was open to the learned APP to hold him to cross-examination after obtaining the permission of the learned trial Court. The learned APP, however, has by his forming an opinion of Avtar Singh standing won over by the accused/convict abandoned further concerts to subject him to examination-in-chief whereafter in case he turned hostile, it was open to the learned APP to hold him with the permission of the learned trial Court

to cross-examination for his thereupon concerting to prove through him the validity or authenticity of his signatures occurring on various memos prepared purportedly at the site of occurrence by the Investigating Officer. With PW Avtar Singh not stepping into the witness box, the learned APP concerned has obviously foregone an opportunity to obtain apposite elicitations from Avtar Singh qua whether his signature borne on relevant memos purportedly prepared at the site of occurrence qua the purported recovery of charas from the purported exclusive and conscious possession of the accused belonging or not belonging to him. The lack of apposite elicitations from Avtar Singh does obviously constrain this Court to hold of the prosecution not proving to the hilt of Avtar Singh signaturing the relevant memos purportedly prepared at the site of occurrence by the Investigating Officer. In sequel, the recovery memos purportedly prepared at the site of occurrence by the Investigating Officer with a disclosure therein of charas weighing 500 grams standing recovered from the purported exclusive and

conscious possession of the accused in the manner reflected therein stands not unflinchingly proved by the prosecution. Contrarily, when unflinching proof qua the factum recorded in the apposite recovery memos would have emanated on the examination of Avtar Singh as a prosecution witness, his non examination by the learned APP concerned has sequelled the prosecution omitting to prove the existence of his signatures borne on various memos. Even otherwise, if Avtar Singh on stepping into the witness box had denied his signatures occurring thereon yet it was open for the learned APP concerned to on his denying the signatures occurring on various memos to beseech the learned trial Court to elicit an opinion from the FSL concerned after its comparing his disputed purported signatures on the relevant memos with his admitted signatures, with an underscoring therein whether they do or do not belong to aforesaid Avtar Singh. However, when the learned APP concerned omitted to facilitate the stepping of Avtar Singh into the witness box, the making of the aforesaid endeavour by the learned APP on Avtar

Singh denying his signatures on the apt memos stands frustrated. In aftermath, it is to be firmly held of the prosecution failing to prove the prime fact of the signatures of Avtar Singh existing on all the relevant documents. Consequently, it is to be held that the prosecution has failed to prove the factum of the recitals occurring in all the relevant memos carrying any probative worth, as corollary, it is to be held of the depositions of the official witnesses though for reasons aforestated standing bereft of any taint of intra se or inter se contradictions, nonetheless they are for omission of examination of Avtar Singh by the prosecution concluded to be holding no probative force rather it appears of their testimonies standing engendered by prior to theirs respectively stepping into the witness box theirs holding a consensual view to depose in harmony qua the prosecution case for ensuring its success. Also it appears of theirs conveniently with intra se collusion rendering a tutored version qua the prosecution case. Consequently, their depositions are unworthy of credence.

11. Be that as it may, the factum of recovery of charas weighing 500 grams under recovery memo Ex.PW1/E stood effectuated from the right pocket of the pant worn by the accused. Given the manner of its recovery from the right pocket of the pant of the accused rendered applicable besides attracted qua the aforesaid manner of its recovery, especially when it stood effectuated hence from his personal search, the provisions of sub section 5 of Section 50 of the NDPS Act carrying an explicit mandate therein of the Investigating Officer communicating to the accused under an apposite consent memo of his having a primary vested legal right of his personal search standing carried by a Gazetted Officer or a Magistrate. Only on an express intimation standing embodied in an unambiguous phraseology constituted in the apt consent memo in display of the facet aforesaid of the accused holding a valid statutory right of his initial personal search being held by a Gazetted Officer or Magistrate, besides the said intimation standing distinctively succeeded by an apt phraseology conveying to the accused of in case he foregoes his

statutory right of his personal search being initially held by a gazetted officer or a Magistrate, his thereupon having an option to be searched by the police officer concerned, would foist tenability to the consent memo. For gauging whether consent memo Ex.PW1/B begets compliance of the mandatory statutory provisions engrafted in sub section 5 to Section 50 of the NDPS Act, an advertence thereto of its phraseology unveils of the Investigating Officer therein communicating to the accused qua the factum whether he intends qua his jama-talashi standing carried out by a Gazetted Officer or a Magistrate or only by a Police Officer. The sentence embodying the aforesaid manifestations halts there. It stands succeeded by a communication by the IO to the accused of his having a legal right qua all the facets aforesaid. The implication thereof is of vivid upsurging manifestive of each of authorities occurring in the sentence, standing successively displayed in the apposite sentence to concurrently hold or theirs respectively holding authority to carry out his personal search and of the accused having a right to be

searched by each of them, whereas, with the express mandate of law for a consent memo begetting conformity with it diktat, would occur only on the Investigating Officer unequivocally making a vivid communication to the accused/convict of his having a statutory right qua his standing initially searched only by a Gazetted Officer or a Magistrate which option on standing refused to be availed by him, his thereupon having a right to be searched by the Investigating Officer. Reiteratedly, when the intimation purveyed to the accused/convict under memo Ex.PW1/B by the Investigating Officer apprises him or awakens him of his jama-talashi standing carried out by a Gazetted Officer or a Magistrate and the police. Hence, with the IO making a communication under consent memo Ex.PW1/B to the accused qua his having a right to be searched by a Gazetted Officer or a Magistrate concerned also his therein incorporating of in the alternative the Police Officer also holding leverage to carry his personal search besides enjoying the apposite authority concurrently with the Gazetted Officer or Magistrate

concerned palpably appears to be a communication to the accused of the police also holding a concurrent authority along with the Gazetted Officer or a Magistrate concerned to hold his personal search. Contrarily when the initial right of the accused qua the carrying of his personal search stood statutorily vested alone in the Gazetted Officer or a Magistrate, however, for the reasons aforesaid, the Investigating Officer in the apposite consent memo has not communicated in clear and unambiguous terms to the accused of his holding the initial statutory right for his personal search standing held only by a gazetted officer or a magistrate nor is there an express communication therein of on his refusing to be subjected to personal search by a gazetted officer or a Magistrate his holding an option to be searched by a Police Officer whereas It was enjoined upon the Investigating Officer to communicate to him in a precise and unequivocal terms qua the aforesaid right. In sequel, any personal search carried inconsonance therewith besides any recovery of contraband under the relevant memos standing effectuated from the

purported conscious and exclusive possession of the accused is neither efficacious nor has any tenacity in law.

12. For the reasons which have been recorded hereinabove, this Court holds that the learned trial Court below has not appraised the entire evidence on record in a wholesome and harmonious manner apart therefrom the analysis of the material on record by the learned trial Court suffers from gross perversity or absurdity of mis-appreciation and non appreciation of evidence on record.

13. Consequently, the instant appeal is allowed and the impugned judgment is set aside. The accused/appellant is acquitted of the offence charged. Fine amount, if any, deposited by the accused be refunded to him forthwith. Records be sent back forthwith.

16th May, 2016
(jai)

(Sureshwar Thakur)
Judge.