

**2023 STPL(WEB) 9 HP
HIGH COURT OF HIMACHAL PRADESH**

(HON'BLE MS. JUSTICE SABINA, ACTING CHIEF JUSTICE AND HON'BLE MR. JUSTICE SATYEN
VAIDYA, JJ.)

KEHAR SINGH

Appellant

VERSUS

STATE OF HIMACHAL PRADESH

Respondent

Cr. Appeal No. 438 of 2022-Decided on 22-3-2023

Criminal, NDPS

Narcotic Drugs and Psychotropic Substances Act, 1985 – Section 20 – NDPS – Sample not representative – Seized quantity of charas more than two kg but sample sent to laboratory only 39 grams - Sample sent to laboratory not representative as from the statement of the Magistrate it is evident that no specific procedure was adopted for drawing a representative sample. Held: 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 39 grams of charas, which fall in the definition of Small quantity – Sentence modified from ten years imprisonment to one year.

(Para 9, 11, 18, 19, 20)

Advocate(s): For the appellant : Mr. Mohan Singh, Advocate.

For the respondent : Mr. Varun Chandel, Addl. Advocate General.

JUDGMENT

Sabina, Acting Chief Justice Appellant has filed the appeal challenging the judgment/ order dated 21.11.2022, passed by the Special Judge-II, Kinnaur at Rampur Bushahr, District Shimla, whereby, he has been convicted and sentenced as under:

Under Section 20 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, he shall further undergo simple imprisonment for two years .
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2. Prosecution story, in brief, is that on 25th February, 2021 H.C Kesar Singh alongwith other police officials were present near Dhishni Mod on patrol duty. At about 3.30 a.m a person came from Karshala side carrying a bag in his right hand. H.C. Sandeep stopped the vehicle near that person and inquired from the person as to why he was roaming around at such odd hours. The said person became nervous and failed to give any satisfactory reply to the query and tried to flee from the spot. On suspicion the said person was apprehended by the police and on inquiry he disclosed his name as Kehar Singh (appellant). When the bag carried by the appellant was checked it was found that it contained charas. Before checking the bag Mohinder Singh was joined as an independent witness alongwith the police party. The recovered contraband was in the shape of balls and on weightment it weighed 2 kilograms and 603 grams. The recovered contraband was made into a cloth parcel and was

sealed with seal bearing impression 'A'. NCB form was prepared and seal after use was handed over to Mohinder Singh. Photographs were taken at the spot. Appellant was arrested. Ruqa was sent to the Police Station through H.C. Kesar. After registration of the F.I.R., H.C. Rajesh reached the spot for further investigation.

3. After completion of investigation and on receipt of the report of the Chemical Examiner Ex. P-5/PW-7, Challan was presented against the appellant. On 13th January, 2022 charge was framed against the appellant under Section 20 of the Narcotic Drugs and Psychotropic Substances Act, (hereinafter referred to as the Act) by the trial Court. Appellant did not plead guilty to the charge framed against him and claimed trial.

4. Prosecution examined 13 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 and a false case has been registered against him. The appellant did not examine any witness in his defence.

5. Learned counsel for the appellant has submitted that the sample examined by the Forensic Science Laboratory weighed 39 grams and there was no evidence on record to prove that the sample, which was examined in the laboratory, was a representative sample drawn out of the recovered contraband from the appellant. Independent witness PW-1 Mahender Singh had not supported the prosecution case during trial.

6. Shri Varun Chandel, 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.

7. As per the prosecution, 2.603 Kilograms of charas was recovered from the bag carried by the appellant. In order to prove the recovery of the contraband from the bag carried by the appellant prosecution examined recovery witnesses PW-3 Kesar and PW-10 HC Sandeep Kumar. The said witnesses have categorically deposed that the appellant on the day of recovery was carrying a bag in his hand and on seeing the police party, he tried to run away. When the bag carried by the appellant was searched, it was found that it contained charas in the shape of balls. Photographs on record also reveal that the recovered contraband was in the shape of small balls.

8. We have carefully gone through the testimonies of the recovery witnesses and their statements inspire confidence. The said witnesses were cross-examined at length but nothing could be elicited from their cross-examination which would render their statements doubtful. Although in the present case independent witness has not supported the prosecution case during trial but the said fact in itself cannot be said to be fatal to the prosecution story. The fact that independent witness did not support the prosecution case during trial casts a duty on the Court to examine the statements of the official witnesses more carefully. In the present case, official witnesses were acting in discharge of their official duties and has no reason to falsely implicate the appellant in this case. Moreover, there is nothing on record to discredit the testimonies of PW-3 and PW-10, the recovery witnesses.

9. The next question that arises for consideration is with regard to the fact as to whether the prosecution has been successful in establishing that the recovered contraband from the appellant weighed 2.603 kilograms, as deposed by the official/recovery witnesses.

10. Ex.P-5/PW-12 is the order dated 1st March, 2021 passed by the Judicial Magistrate 1st Class, Anni, District Kullu, while disposing of the application filed by the appellant under Section 52(A)(2) of the Act. It has been mentioned in the said order that on a prayer made by the Investigating Officer

to draw representative sample, all the balls were spread on the table randomly and one ball was picked from contraband for first sample and its weight was 41 grams and thereafter another ball was randomly picked up for second sample and its weight was 39 grams. Both the samples were made into sealed parcel and were sealed with seal impression of Rs.5/- coin in the Court. The remaining contraband weighing 2.503 kilograms was also made into a sealed parcel. The case property was handed over to the police for further compliance.

11. Thus, as per the evidence on record, the seized contraband was in the shape of balls. From the order passed by the Magistrate, it cannot be said that the entire recovered contraband was made into a homogeneous mixture. Rather two balls were picked up from the recovered contraband and ball weighing 39 grams was sent to Forensic Science Laboratory for examination. Since the recovered contraband was in the shape of balls, it was incumbent upon the prosecution to establish that the representative samples had been drawn out of the entire recovered contraband. Rather from the statement of the Magistrate it is evident that no specific procedure was adopted for drawing a representative sample. The ball which was sent to the Forensic Science Laboratory for analysis has been randomly picked up from the recovered contraband.

12. Ex.P-5/PW-7 is the report of the Forensic Science Laboratory. A perusal of the same reveals that one sealed cloth parcel was received and on opening the said parcel, it was found that the substance was in the form of a ball and the net weight of the substance was 39 grams. After examination, it was opined that the exhibit was extract of cannabis and sample of charas. Thus, the contraband which reached the Forensic Science Laboratory for examination weighed 39 grams and was in the shape of a ball.

13. 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 39 grams of charas (sample drawn by the Magistrate).

14. 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."

15. 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."

16. 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."

17. 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."

18. Thus, from the evidence available on record, we are of the opinion that the sample weighing 39 grams of charas examined by the Forensic Science Laboratory, was not the representative sample of the entire bulk and therefore, appellant cannot be held to have been found in illegal conscious possession of 2.603 kilograms of charas and he can be held to be in possession of 39 grams of charas or at the most 80 grams of charas by including the weight of the other sample, which, as per the Act, would fall within the definition of small quantity.

19. 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.

20. The appellant was arrested on 26th February, 2021. 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.

21. 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.

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