IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

Cr. Appeal No.409 of 2011.
Reserved on : 20.10.2016.
Date of Decision: 29.12.2016.

State of Himachal Pradesh ....Appellant.

Versus

Kamlesh alias Kaka ....Respondent.

Coram

The Hon'ble Mr. Justice Dharam Chand Chaudhary, Judge.
The Hon'ble Mr. Justice Chander Bhusan Barowalia, 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 Kumar, Senior Advocate with Mr. Dheeraj Vashisht, Advocate.

Chander Bhusan Barowalia, Judge.

The present appeal is maintained by the appellant-State of Himachal Pradesh against the judgment of acquittal of the accused in a case under Section 21 of the Narcotic Drugs and Psychotropic Substances Act, 1985, passed by the learned Special Judge, Kullu, dated 31.3.2011, in Session trial No.43/2008.

2. Briefly stating facts giving rise to the present appeal are that on 31.5.2008, Police party while on patrolling duty, was present at Shishmati Kullu. In the

[1] Whether reporters of Local Papers may be allowed to see the judgment? Yes.

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meanwhile, ASI Balbir Singh, received a secret information to the effect that one person, namely, Kamlesh alias Kaka (hereinafter referred to as 'the accused') resident of Shishamati, having his shop near temple of Khalari Narayan, is indulging in the sale of smack. The informant also informed ASI Balbir Singh that if search conducted a large quantity of smack can be recovered. ASI Balbir Singh (Investigating Officer) complied with the provisions of Section 42 (2) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as 'the Act') and the said information was sent to the higher Police Officers. Thereafter, Investigating Officer alongwith other accompanying Police Officials proceeded to conduct the search of the shop of the accused and accused was found present in the shop. Police reached there at about 4:10 pm, in the second room of the shop, three persons were found taking tea. On inquiry, they disclosed their names as Sonu alias Rajinder, Mandeep alias Sonu and Ashok Kumar. Mandeep alias Sonu and Sonu alias Rajinder joined as witnesses by the police. In addition to this, Investigating Officer also associated ASI Man Singh as witness.

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Thereafter, Investigating Officer conducted the search of the shop of the accused. During search from the eastern side of the shop, Investigating Officer found two wrapping paper rolls from the lower shelf of the counter. In addition to this, one large packet (***pura***) made of wrapping papers, weighing scale made of brass, one weight of ten grams and one weight of two grams were also found in the same shelf. When the said 'p*ura*' was opened, it was found containing heroin type substance. When the said substance was checked on the narcotic drugs testing kit, then positive result of heroin was found. On weighing the recovered heroin was found 14 grams. Out of it two samples of 1-1 gram each were separated for chemical analysis. In compliance to the other formalities, Investigating Officer filled in NCB form in triplicate and the case property after sealing the same, was taken into possession. The investigation was later on entrusted to ASI Lal Chand, who made further investigation. After receipt of the chemical examiner's report, challan was presented in the Court.

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3. The prosecution in order to prove its case has examined as many as 10 witnesses. Statement of the accused was recorded under Section 313 Cr.P.C, wherein he has denied the prosecution case and claimed innocence. No defence was led by the accused.

4. Learned Additional Advocate General appearing on behalf of the appellant has argued that the prosecution has proved the guilt of the accused beyond the shadow of reasonable doubt and the learned trial Court has acquitted the accused, just on the basis of surmises and conjectures, therefore, the accused is liable to be convicted.

5. On the other hand, Mr. Ajay Kumar, learned Senior Counsel appearing on behalf of the accused has argued that the prosecution has failed to prove the guilt of the accused beyond the shadow of reasonable doubt. He has further argued that as per the law in ***Nallabothu Ramulu alias Seetharamaiah and others vs. State of Andhra Pradesh,2014 (12) Supreme Court Cases, 261,*** where two views are possible then one favourable to the accused is required to be taken. He has further argued that there is no

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perversity in the impugned judgment, therefore, the appeal is liable to be dismissed.

6. To appreciate the arguments of learned counsel appearing on behalf of the parties, this Court has gone through the record in detail and have minutely scrutinized the statements of the prosecution witnesses.

7. PW-1 Nanak Chand took the information under Section 42 (2) of the Act, to Addl. Superintendent of Police, Kullu, at about 4:25 pm.

8. PW-2 Mandeep alias Sonu has stated that he was taking tea at Shishmati at about 4/4:30 pm, police raided the shop, but except this, he denied each and every aspect of the prosecution case, as such he was declared hostile. This witness has admitted the search of the shop in his presence, but he did not identify the accused, as the same person, who was found present in the shop. In his cross-examination, he deposed that his signatures were obtained by the police on the next day by calling him as well as his friend Sonu to Police Post, Akhara Bazar, Kullu.

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9. PW-3 ASI Man Singh has supported the version of PW-10 (Investigating Officer). He has stated that when Investigating Officer prepared the rukka, the same was given to him with a direction to take the same to Police Station, Kullu, on the basis of which FIR No.319 of 2008 was registered and the case file was handed over to him, which he handed over to the Investigating Officer at the spot. He has also identified the case property. According to this witness, Police Party started from Police Post at about 2:00 pm. The secret information was received by Investigating Officer through telephone. The area known as Shishmati is admitted by this witness to be thickly populated. He has further deposed that they reached at the spot after passing through number of houses, shops and temple. The shop of the accused was having three shutters, but he could not disclose about the fact whether all the shutters were open or not. When the question regarding the ownership of the shop was asked from this witness, he disclosed that it was accused who disclosed to them that all the shops were in his possession. He has admitted that except one weighing scale Ex.P-7 weight of ten grams Ex.P-8 and weight of two

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grams Ex.P-9, they were having no other weighing scale. He has deposed that Investigating Officer firstly weighed two grams of heroin and thereafter separated the same in two parts.

10. PW-4 LHC Manoj Kumari has deposed that on 31.5.2008 Inspector Partap Singh, deposited the case property of this case with her which she entered in register No.19 at Serial No.201. On the next day, she sent one sample parcel alongwith specimen sample seals of '**T**' and '**H**', NCB form in triplicate, copy of FIR, seizure memo to FSL, Junga through Constable Narender Singh, vide RC No.154 of 2008 Ex.PW4/B. This witness also filled in column No.12 of the NCB form.

11. PW-5 Narender Singh, took the case property to FSL, Junga and deposited the same on 2.6.2008 and receipt Ex.PW5/A and RC Ex.PW4/B were redeposited by him with MHC, Police Station, Kullu, on 4.6.2008.

12. PW-6 HC Nirat Singh, has proved the report under Section 42 (2) of the NDPS Act, endorsement of the then Addl. Superintendent of Police Ex.PW6/A and abstract of the register Ex.PW6/B.

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13. PW-7 Inspector Partap Singh, has deposed that on 31.5.2008, ASI Man Singh (PW-1) brought rukka to the Police Station, on the basis of which, he recorded FIR Ex.PW7/A and made endorsement Ex.PW7/B on rukka and handed over the case file to ASI Man Singh with a direction to take the same to Investigating Officer on the spot. On the same day, PW-8 Lal Chand, produced the case property consisting one bulk parcel and two sample parcels alongwith specimen seal impressions of '**T**' as well as NCB form in triplicate. This witness resealed the case property by affixing 3-3 seals of seal '**H**' on sample parcels and five seals of impression '**H**' on bulk parcel. He has also draw specimen sample impressions of seal of '**H**' one of which is Ex.PW7/C and also filled in columns No.9 to 11 of the NCB form and thereafter, he deposited the case property with MHC Police Station, Kullu.

14. PW-8 ASI Lal Chand, has prepared spot map Ex.PW8/A and recorded the statements of witnesses as per their version. This witness arrested the accused vide memo Ex.PW2/C and the case property was produced before the then Station House Officer, Police Station, Kullu, who

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resealed the same by affixing 3-3 seals of letter '**H**' on sample parcels and six seals of impression '**H**' on the bulk parcel. According to this witness, there were two shops at the spot having three shutters on it, which according to this witness were owned by accused Kamlesh. This witness admitted that adjoining to the shops there was a kiosk (khoka) and a house.

15. PW-9 Nirmal Singh, has partly investigated the case and recorded the statements of Vidya Devi, MHC Manoj Kumari, Constable Narender Kumar, and Head Constable Nirat Singh under Section 161 Cr.P.C.

16. PW-10 ASI Balbir Singh (Investigating Officer) has deposed that on 31.5.2008, he alongwith ASI Man Singh, HC Mohar Singh, HC Chet Ram, Constable Nanak Chand and Constable Kishore, was on patrolling duty and at about 4:00 pm, when they were present at Shishamati, he received a secret information regarding indulgence of the accused in the sale of smack and other narcotics. The said information was found authentic by this witness and as such, he complied with the provisions of Section 42 (2) of the NDPS Act and prepared the information Ex.PW1/A and

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sent the same to the then Addl. Superintendent of Police Ahmed Sayed through Constable Nanak Chand. Thereafter, this witness alongwith other accompanying Police officials proceeded to the spot and reached there within few minutes. One person was found standing on the counter of the shop. On inquiry, he disclosed his name as Kamlesh (accused). Investigating Officer also found three other persons sitting in the shop and they were having tea and on inquiry, they disclosed their names as Sonu alias Rajinder, Mandeep alias Sonu and Ashok Kumar. The accused as well as those three persons were apprised about the secret information received by Investigating Officer. Thereafter, Investigating Officer had given his personal search to the accused, but nothing incriminating was found from his possession. The search of the shop was conducted and he found two silver foils/wrapping papers rolls, one large packet (pura) made of wrapping papers kept on the lower shelf of the counter. He also found one weighing scale made of brass, one weight of ten grams and one weight of two grams from the same shelf. When the said large packet (pura) was opened, it was found

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containing heroin type white powder, on checking with the help of narcotic detection kit, it was found positive and the heroin was recovered weighing 14 grams. Two samples of 1-1 gram each were separated from the recovered heroin. The samples were separated sealed in two packets by affixing 3-3 seals of letter '**T**' on each and the bulk parcel was sealed with seal '**T**' by affixing five seals of letter '**T**' NCB forms in triplicate was filled in one of which is Ex.PW4/C and specimen seal impression of letter '**T**' Ex.PW10/A was also drawn by the Investigating Officer. This witness has duly identified the other specimen sample seals attached with the sample and bulk parcel. Thereafter, the seal was handed over to witness Sonu alias Rajinder. The case property was taken into possession vide memo Ex.PW2/B, thereafter prepared ruqa Ex.PW10/B and handed over the same to ASI Man Singh, with a direction to take the same to Police Station, Kullu. Thereafter, this witness telephonically informed ASI Lal Chand, Incharge, Police Post, City Kullu, to come present on the spot. In his cross-examination, he deposed that when he received secret information, the entire police party was also present there. Thereafter, he

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enquired about the shop of the accused from a person, but he admitted that he did not associate the said person in the investigation from whom he inquired about the shop of the accused. He has admitted that no personal search of the accused was conducted and only his shop was searched. So far as the alleged independent witnesses are concerned, according to this witness, they were present at the time when he searched the shop. He has also admitted that the area where the shop of the accused is allegedly situated is thickly populated area. He has further deposed that since he was having specific secret information, he only searched one shop of the accused, where the accused was found standing.

17. In the present case, PW-10 ASI Balbir Singh, (Investigating Officer) was having a specific secret information regarding indulgence of the accused in the sale of smack and other narcotics. He found the said information authentic and after complying the provision of Section 42 (2) of the NDPS Act, prepared the information Ex.PW1/A and sent the same to the then Addl. Superintendent of Police Ahmed Sayed through Constable

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Nanak Chand. Thereafter, this witness alongwith other accompanying Police Officials proceeded to the spot and reached there within a few minutes. One person was found standing on the counter of the shop. On inquiry, he disclosed his name as Kamlesh (accused) in the present case. The Investigating Officer also found three other persons sitting in the shop, who were having tea and disclosed their names as Sonu alias Rajinder, Mandeep alias Sonu and Ashok Kumar. The accused as well as other two-three persons were apprised about the secret information received by the investigating Officer. Investigating Officer associated ASI Man Singh, Mandeep alias Sonu and Sonu alias Rajinder, as witnesses in the investigation. Investigating Officer gave personal search to the accused, thereafter the search of the shop was conducted and found two silver foils/wrapping papers rolls, one large packet (***pura***) made of wrapping papers kept on the lower shelf on the counter. He has also found one weighing scale made of brass, one weight of ten grams and one weight of two grams from the same shelf. When the said large packet (**pura**) was opened, it was found containing heroin

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type white powder, the result of which, on checking with the help of narcotic detection kit was found positive. Thereafter, the heroin was recovered weighing 14 grams. He also took two samples of 1-1 gram each, which were separated from the recovered heroin. The samples were separated sealed in two packets by affixing the seals on the sample filled in the NCB forms and seal impression was also taken. This witness duly identified the other specimen sample seals attached with the sample and bulk parcel. The case property was taken into possession by him. Investigating Officer prepared the rukka and sent the same through ASI Man Singh with a direction to take the same to Police Station, Kullu and handed over the further investigation to ASI Lal Chand. The case property was duly identified by this witness in the Court. PW-8 ASI Lal Chand, took further investigation from PW-10 ASI Balbir Singh. He reached at the spot at about 7:50 PM. He prepared the spot map and recorded the statement of witnesses, as per their version. He arrested the accused and produced the case property before the then Station House Officer, Police Station, Kullu, Shri Partap Singh, who resealed the same with

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seal impression '**H**' on the bulk parcel. The bulk was also sealed by him with six seal impression '**H**'. He has also filled the relevant columns of NCB forms in triplicate and obtained the specimen sample seal of '**H**'. According to PW-8 ASI Lal Chand, there are two shops at the spot having three shutters and these were owned by accused Kamlesh. PW-3 ASI Man Singh, has supported the version of PW-10 ASI Balbir Singh (Investigating Officer) on material aspect of the case. PW-7 Inspector Partap Singh, has stated about the registration of FIR, on the receipt of rukka making endorsement and handing over the case file to ASI Man Singh with a direction to take the same to Investigating Officer at the spot. As far as taking the case property to FSL in safe custody has also been proved on record, as the narcotics were recovered from the shop of the accused, on the basis of secret information, there is sufficient compliance of Section 42 (2) as required under the Act. PW-2 Mandeep Singh alias Sonu independent witness has admitted his presence in the shop at the time of recovery. He was declared hostile and in his cross-examination, he has admitted his signatures on the documents. He has also

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admitted that some documents were written. He also admitted the presence of Rajinder alias Sonu at the place. He has stated that his statement was not recorded by the police. He has admitted that the police have come to the shop of the accused. Though, he has thereafter not supported the recovery, but he has admitted his signature in the recovery memo. He has admitted that memo Ex.PW2/A to Ex.PW2/C bears his signature. He also admitted that when he signed these documents no pressure was put by the police.

18. From the above, it is clear that the independent witnesses have tried to shield the accused, but his admission on the signatures of the memos Ex.PW2/A to Ex.PW2/C and his admission with regard to his presence and the presence of other independent witnesses on the spot and that he signed the documents without any pressure shows that he is not stating the truth before the Court.

19. As stated here-in-above, the prosecution by leading cogent, convincing and reliable evidence of PW-8 ASI Lal Chand, PW-10 ASI Balbir Singh and other police

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witnesses has proved on record the guilt of the accused beyond reasonable doubt that the prosecution has recovered 14 grams of heroin from the shop of the accused on 31.5.2008 at about 4:00 PM, at Shishmati, District Kullu, H.P, which was in the exclusive possession of the accused and accused was in possession of heroin, on the basis of secret information, heroin was lying in the shop of the accused. So, we hold that the accused has committed an offence under Section 21 of the Narcotic Drugs and Psychotropic Substances Act, 1985. The findings arrived at by the learned Court below with respect to the non compliance of provision of the Act are not in accordance with law and thus are required to be set aside. The findings of the learned Court below that the heroin was not recovered from the possession of the accused are also against the proved facts on record and liable to be set aside.

20. Consequently, the appeal is allowed and accused Kamlesh alias Kaka is convicted under Section 21 of the Narcotic Drugs and Psychotropic Substances Act, 1985. Thus, accused Kamlesh alias Kaka now convict is

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required to be heard on quantum of sentence for the offence punishable under Section 21 of the Narcotic Drugs and Psychotropic Substances Act, 1985.

21. Let the convict be produced before this Court on ***12.01.2017*** by issuing a production warrant.

22. Before parting with the case, we would be failing in our duty, if ignore the manner in which PW-2 Mandeep Singh alias Sonu, independent witness has conducted himself while in the witness box. Taking note of the statement, he made while in the witness box, in our opinion, he has not disclosed true facts. He has admitted his signatures on the recovery memo Ex. PW2/A to Ex.PW2/C. He while in the witness box admits his signatures on these memos. In his cross-examination, he has admitted his signatures on the documents. He has also admitted that some documents were written. He also admitted the presence of Rajinder alias Sonu at the place. He has stated that his statement was not recorded by the police. He has admitted that the police have come to the shop of the accused. Though, he has thereafter not supported the recovery, but he has admitted his signature

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in the recovery memo. He has admitted that memo Ex.PW2/A to Ex.PW2/C bears his signature. He also admitted that when he signed these documents no pressure was put by the police. If nothing of this sort took place in his presence, he should not have signed these documents. Therefore, he has not spoken the truth and has rendered himself liable to be dealt with in accordance with law including his prosecution under Section 211 of the Indian Penal Code and also within the meaning of sub-Section (1) of Section 195 of the Indian Penal Code.

23. Section 340 of the Code of Criminal Procedure takes care of such a situation. The provisions contained under the Section ibid reveal that if on an application made to it or otherwise, the Court is of the opinion that it is expedient and in the interest of justice that an inquiry should be made into any offence referred to in clause (b) of sub-Section (1) of Section 195 of the Code, which appears to have been committed in relation to proceeding of a case in that Court, the Court shall hold a preliminary inquiry and after recording a finding that

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by producing a document or giving a statement in evidence, an offence referred to in clause (b) of sub-Section (1) of Section 195 of the Code is made, order to make a complaint in writing to a Magistrate of the first class having jurisdiction over the matter.

24. Section 340 of the Code of Criminal Procedure contemplates a preliminary inquiry to be conducted by the Court to form an opinion that it is expedient and in the interest of justice to hold inquiry into the offence which appears to have been committed. It is not mandatory for the trial Court to hold preliminary inquiry, because it has the opportunity to see the witness while in the witness box and to observe his demeanour. We, however, feel that the appellate Court, having no such opportunity to observe the demeanour of the witness, should hold an inquiry and give an opportunity of being heard to him, before forming an opinion that an offence within the meaning of clause (b) of sub-Section (1) of Section 195 of the Code of Criminal Procedure appears to have been committed by him. It is only thereafter, an order qua

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filing a complaint, as contemplated under Section 340 of the Code of Criminal Procedure, should be passed.

25. Therefore, before initiating any action against PW-2 Mandeep Singh alias Sonu, we deem it expedient and in the interest of justice to call upon him to show cause as to why an action be not initiated against him in the light of the observations in this judgment. Consequently, there shall be a direction to the Registry to issue show cause notice to PW-2 Mandeep Singh alias Sonu, for **12.01.2017** and the proceedings be registered against him separately. A copy of judgment be also sent to PW-2 Mandeep Singh alongwith show cause notice. Office of learned Advocate General to collect notice from the Registry of this Court for onward transmission to the Superintendent of Police, Kullu, for effecting service thereof upon the witness Mandeep Singh well before the date fixed. The record of the learned trial Court be retained for being referred to at the time of further consideration of the matter, after taking on record the version of the witness to be referred

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to as 'the respondent' in the proceedings ordered to be drawn separately against him.

(Dharam Chand Chaudhary)
Judge

(Chander Bhusan Barowalia)
Judge

29th December, 2016
(CS)

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