

IN THE HIGH COURT OF DELHI AT NEW DELHI

CRL.A. 907/2004

Reserved on: 11th March, 2008
Date of decision: 29th May, 2008

MOHD. WASEEM @ RAJU Appellant
Through Mr. Neeraj Jain, Amicus Curiae.
versus

STATE Respondent
Through Mr. Pawan Behl &
Mr. O.P. Saxena, APPs.

CORAM:
HON'BLE DR. JUSTICE S. MURALIDHAR

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| 1. | Whether Reporters of local papers may be allowed to see the judgment? | Yes |
| 2. | To be referred to the Reporter or not? | Yes |
| 3. | Whether the judgment should be reported in Digest? | Yes |

JUDGMENT
29.05.2008

Dr. S. MURALIDHAR, J.

1. This appeal is directed against the judgment and order dated 15th July 2004 passed by the Special Judge (NDPS Act), Delhi convicting the appellant guilty under Section 20(c) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS Act) for unauthorisedly possessing 6 kgs of charas. The appeal is also directed against the order dated 16th July, 2004 sentencing the appellant to undergo rigorous imprisonment for ten years and a fine of Rs. 1 lakh and in default of payment of fine to undergo simple imprisonment for one year.

2. The case of the prosecution is that on 3rd January 2001, Sub Inspector (SI) Arun

Choudhary at Police Station Seelampur received secret information that two persons standing near Shyamgiri Mandir were selling charas. The aforementioned information was reduced into writing and the SHO and the ACP were also informed. A raiding party was formed consisting of SI Arun Choudhary, SI Narender, Head Constable (HC) Virender, and Constables Mohd. Ismail, Beer Singh, Devender, Om Prakash, Amar Pal, Birbal and Jitender. It is claimed that the informer joined the raiding party at the traffic light of Shastri Park but none from the public were prepared to join the raiding party. On being pointed out by the informer, the appellant Mohd. Waseem @ Raju and one Kamrul Haque were apprehended by the police.

3. The appellant was apprehended by Shri Narender who is the investigating officer (IO) of the case. He was given an option of getting himself searched before either a Magistrate or a Gazetted Officer and also to search any of the members of the raiding party. The appellant is also supposed to have declined. Thereafter ACP Parvez Ahmed reached the spot at 1.30 pm. In his presence SI Narender Kumar was searched by the appellant. The suit case carried by the accused in his right hand was searched. It contained charas and some clothes. The charas when weighed was found to be 6 kg. A sample of 500 gms was taken and kept in a separate parcel and both parcels were sealed.

4. The prosecution examined 13 witnesses. The defence had examined none. The learned ASJ found the appellant guilty and sentenced him in the manner indicated

hereinbefore.

5. Mr. Neeraj Jain, the learned Amicus Curiae appeared for the Appellant and Mr. O.P. Saxena, the learned APP for the State.

6.1 It is first urged that the search and seizure documents purportedly prepared at the spot soon after the arrest, are of doubtful veracity since they carry the FIR number. In his cross-examination prosecution witness (PW) No.5 Constable Mohd. Ismail stated that the entire portion of the search and arrest memo including the FIR number was written at the time and soon after the arrest at that very place. Admittedly the case was not yet registered at the time the search was conducted and when the appellant was arrested. Therefore the case of the prosecution about the search and arrest should be discarded. Reliance is placed upon the judgments in *Lalji Shukla v. State* 82 (1999) DLT 715; *Zohra v. State* 83 (2000) DLT 177 and *Shashi Shekhar Tyagi v. State* 2007 [1] JCC [Narcotics] 18. In reply it is pointed out by the learned APP that the mere fact that the documents contain the FIR number cannot by itself render the search and seizure unbelievable. He refers to the evidence of PW 5 and PW 9 (SI Narender Kumar) who have consistently spoken about the search and arrest. He points out that the cross-examination on this point was not specific. He relies on the judgment in *Radhey Sham v. State of Haryana* 2001 (10) SCC 209.

6.2 This court finds that although the FIR number is found written on the

documents referred to by the learned amicus curiae, that would not vitiate the search and the arrest or the recording of the FIR. A similar contention was rejected by the Supreme Court in *Radhey Sham v. State of Haryana* where it was observed (SCC, p.208):

“Learned counsel for the appellant further submitted that FIR number is mentioned on the recovery memo and therefore it is apparent that FIR was first registered and thereafter the recovery memo was prepared. He has also submitted that sealing of the article seized was also not proper. No independent witness was examined nor was the accused having any injury even though the van turned turtle. In our view, the aforesaid submissions deserve no consideration because with regard to the FIR, FIR number is mentioned on the recovery memo but that would not vitiate the recording of FIR.”

6.3 It is possible that the writing of the FIR number was by way of cross-referencing. There is merit in the contention of the Respondent that there was no specific question put to the PWs concerned in this behalf in their cross-examination. PW5 was asked whether the portion of the document from “point A to A” (which included the portion containing the FIR number) was written at the same time. If the defence wanted to bring out that the FIR number was in fact written at a later point in time the witness ought to have been asked that question. No such question was asked perhaps because the explanation that might have been given by the witness may not have helped the accused.

7.1 It was next submitted on behalf of the appellant that the evidence adduced by the prosecution does not satisfactorily prove that any Forensic Science Laboratory

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(FSL) form was in fact sent along with the sample at the time of dispatch for testing. The malkhana register also does not indicate that any such FSL form was sent. This makes it doubtful that any FSL form was in fact prepared. This is essential in order to show that the sample sent for testing was the same as that which was allegedly recovered from the appellant. It is further urged that there is an unexplained delay of about 28 days in sending the sample for testing. Although PW 3 has said that he took the sample to the FSL Chandigarh for testing there is no entry in this regard in the store room register. It is pointed out that in his cross examination PW 8 HC Devender Kumar admitted that there was no entry in the store room register about the sample having been sent to the FSL at Malaviya Nagar along with the FSL form. Reliance is placed upon the judgments of the Supreme Court in *Valsala v. State of Kerala 1993 Supp (3) SCC 665*; *State of Gujarat v. Ismail U Haji Patel (2003) 12 SCC 291*. Learned APP on the other hand points out that several of the PWs talk consistently of the preparation of the FSL form at the sit and its deposit with the sample in the store room register. Either they have not been cross examined or if they have, nothing worthwhile has been elicited to discredit the case of the prosecution. Reliance is placed on the judgments in *State of Orissa v. Kanduri Sahu (2004) 1 SCC 337* and *Rameshwar v. State 98 (2002) DLT 364*.

7.2 This Court on perusing the record finds that PWs 1, 5 and 9 have consistently deposed that an FSL form was prepared on the spot, that the sample seals were affixed thereon and that the FSL form was sent along with the sealed samples to

the police station. PW 2 says that at Police Station Seelampur on 3rd January 2001, Constable Ismile came to him and produced three pullandas and the FSL form sealed with the seal of NK, and thereafter he affixed his seal on the FSL form. The lodging of the samples with the CFSL form at the police station is spoken to by PW8. Their cross examination on this point has not produced anything that might cast a doubt about the veracity of their statements. As regards what happened in the first instance when the sample was taken to Chandigarh FSL is spoken to by PW3. He has not been cross-examined at all. The same is the case with PW4 who says he took the sample with the FSL form to the CFSL Malaviya Nagar. Then there is no cross-examination of PW 10 Madhulika Sharma who says that she tallied the seals on the sample “with specimen seal impression forwarded.” If the defence wanted to show that no FSL form accompanied the sample then these witnesses ought to have been cross examined. PW 8 was cross-examined only on whether the store room register contains an entry that the sample was deposited along with an FSL form. Even if it did not, it does not automatically mean that there was no FSL form particularly when PWs 3,8 and 10 have specifically adverted to its presence. This entire submission, being made only at the stage of appeal, is unsupported by the evidence on record. When there is no contradiction of the PWs who support the case of the prosecution, this court cannot possibly discard that evidence and proceed to draw an inference that no FSL form accompanied the sample. Therefore there is no merit in the contention of the appellant in this behalf. For these reasons, the decisions in ***Radha Kishan v. State* 87 (2000) DLT 106**, and ***Matloob v. State* 67 (1997) DLT 372** may

not be helpful to the appellant since they turned on facts different from the present case.

7.3. As regards the delay of 28 days in sending the sample for testing, as already noticed there has been no cross examination of the PWs to contradict their version that an unsuccessful attempt was made on 11th January 2001 to send the sample for testing to the CFSL at Chandigarh and thereafter it was sent to the one at Malaviya Nagar, Delhi on 31st January. In the circumstances, it cannot be said that the delay was unexplained. Nevertheless the law in this regard has been explained in three decisions of the Supreme Court. The law concerning the effect of the delay in sending samples to the CFSL was first explained by the Supreme Court in *Valsala*. This was followed in *State of Gujarat v. Ismail U Haji Patel* where it was held in para 5 as under: (SCC @ p. 292)

“5. We find that there was really no material brought on record to show as to where the seized articles were kept. The High Court after analyzing the evidence on record came to hold that the identity of the articles sent for analysis was not established and it was not established that the articles seized were in fact sent for chemical examination. In view of the judgment of this Court in *Valsala v. State of Kerala* the view of the High Court is in order. **It is not the delay in sending the samples which is material. What has to be established is that the seized articles were in proper custody, in proper form and the samples sent to the Chemical Analyst related to the seized articles.**” (emphasis supplied)

7.4 The position was reiterated in *Kanduri Sahu*, where it was held that what is to

be seen is whether the samples were in fact in safe custody in Malkhana during that period and were not tampered. The evidence of PWs 3, 8 and 10 does not give rise to any doubt that the samples in this case were not in a secure environment in the Malkhana or were tampered with during this period. Therefore, the court does not agree with the submission of counsel for the appellant that the FSL form was not prepared on the spot or that it was not sent along with the sample or that the delay in sending the sample for testing is fatal to the case of the prosecution.

8.1 It was submitted that although the seized substance was stated to be charas weighing 6 kg, there is nothing to show that any field testing kit was used and there is a discrepancy or whether any weighing scale was carried at all by the raiding party. It is submitted that there is a discrepancy as to how the raiding party reached at the spot and that the evidence PWs 5, 9 and 13 did not corroborate each other in this regard. Finally it was submitted that despite the arrest taking place in a busy area, no independent witness was associated.

8.2 In reply it was submitted by the learned APP that the evidence of PW 5 was sufficient to prove the case of the prosecution that the seized substance was weighed on the spot. The non-association of independent public witness at the time of arrest and seizure, was not fatal to the case of the prosecution. Reliance is placed upon the judgments in *Karamjit Singh v. State (Delhi Admn.) AIR 2003 SC 1311*; *State of NCT of Delhi v. Sunil 2001 (1) CC Cases (SC) 6*, *M. Prabhulal v. Asst. Director, Directorate of Revenue Intelligence (2003) 8 SCC 449* and *Ravindran*

@ *John v. Superintendent of Customs (2007) 6 SCC 410.*

8.3. As regards the field testing kit not being used, the cross-examination of PW1 who supports the case of the prosecution has not elicited anything useful. If the case of the accused that there was no testing kit has to be accepted then there should have been some questions put to the PWs in this regard. As regards the weighing scale, it is true that PW 9 in his cross-examination stated that the scale used by SI Arun Choudhary was the traditional scale but then he quickly corrected it to say that it was an electronic scale and it may be between 5 or 10 Kgs. However, it is not possible to read too much into this because in the evidence of PW 5 it appears that weights were not used since the scale was with the IO. These are all not material discrepancies that throw doubt on the veracity of the prosecution case. The learned trial judge has after examining the evidence on record, come to the above conclusion, and this court is unable to find any legal infirmity in it. The contention that independent witnesses ought to have been associated with the arrest and seizure cannot be accepted in view of the decisions of the Supreme Court in *P.P. Beeran v. State of Kerala (2001) 9 SCC 571* and *M. Prabhu Lal v. DRI 2003(8) SCC 449*.

9. The appeal is accordingly dismissed. The Court records its appreciation of the excellent preparation and presentation of the case on behalf of the appellant by the learned amicus curiae Mr. Neeraj Jain.

S. MURALIDHAR, J

MAY 29, 2008

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