

* **THE HIGH COURT OF DELHI AT NEW DELHI**

% Judgment reserved on: 15.10.2009
Judgment delivered on: 05.11.2009

Crl. Appeal No. 238/2000

BHIMA @ KALE Appellant

Vs

STATE Respondent

Advocates who appeared in this case:

For the Appellant : Ms Charu Verma, Advocate
For the Respondent : Mr Amit Sharma, Addl. Public Prosecutor

**CORAM :-
HON'BLE MR JUSTICE RAJIV SHAKDHER**

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

RAJIV SHAKDHER, J

1. This is an appeal filed under Section 36B of the Narcotic Drugs & Psychotropic Substances Act, 1985 (hereinafter referred to as the 'NDPS Act') against the judgment dated 23.03.2000 and the sentence dated 24.03.2000 passed by the learned Addl. Sessions Judge, Delhi. By virtue of the impugned judgment the appellant has been convicted under Section 20 of the NDPS Act and sentenced to undergo rigorous imprisonment for a period of four years with a direction to pay a fine of Rs 20,000/-. In default of payment of fine the appellant is required to undergo a further rigorous imprisonment for a period of one year.

2. Briefly the case set up by the prosecution is as follows:

2.1 On 09.04.1997, five police officers, namely S.I. Atma Ram, H.C. Ranbir Singh, constable Pawan, H.C. Paramjit Singh & H.C.

Mahavir Singh, who were on patrolling duty received information, through a secret informer that, at about 7:45 p.m., one person carrying ganja, would approach from the direction of F-Block, Extn., in Raghubir Nagar and proceed towards F-Block Jhuggi. Immediately thereupon, SI Atma Ram, along with his other four colleagues, set up barricades near the Masjid in F-Block. The appellant, upon reaching the barricade, was identified by the secret informer, on whose pointing out the appellant was apprehended. The appellant was confronted by the police party with the information in their possession that he was a carrier of a contraband article. Accordingly, the appellant was served a notice under Section 50 of the NDPS Act. The appellant was simultaneously informed of his right to be searched in the presence of a Gazetted Officer or a Magistrate. The appellant, however, declined to exercise his right of search, before the Gazetted Officer or the Magistrate. Consequent thereto, his search was carried out by the police party. The search of the gunny bag, which the appellant was carrying on his head, resulted in seizure of ganja. In the meanwhile, a rukka was sent to the police station, Rajouri Garden. On receipt of the information, the offence was diarized. The Additional Station House Officer (in short 'Addl. SHO') R.K. Rathie reached the site of the incident; since the Station House Officer was not present at the police station. On reaching the site the Addl. SHO R.K. Rathie was informed by the police party with regard to seizure of the ganja from the appellant.

2.2 Accordingly, the seized ganja was weighed. For this purpose weights were obtained from a nearby shop. On weighing, the ganja was found to weigh 30 kg. Out of the total seized quantity of 30 kg

the police party separated 5 kg, for the purposes of preparing a sample to be sent to a chemical examiner. Both, the sample, as well as the balance quantity of ganja seized, that is, 25 kg were put in two separate packets. Both packets were sealed. Both the SI Atma Ram and Addl. SHO R.K. Rathi affixed their respective seals on the two packets. A CFSL form was filled up, at the site and the seals 'ARS' and 'RK' were affixed thereupon by the SI Atma Ram and the Addl. SHO R.K. Rathi, respectively. A seizure memo was prepared with respect to both the sealed packets as well as, the CFSL form.

2.3 Based on the rukka, the duty officer at the police station registered the FIR, while the two sealed packets along with the CFSL form were deposited with the malkhana incharge. After investigation a chargesheet was filed.

3 The trial court framed charges on 27.04.1998 under Section 20 of the NDPS Act against the appellant. Since the appellant pleaded that he is not guilty and demanded trial; a trial was conducted. Upon conclusion of the trial, the trial court came to the conclusion that the appellant was guilty of the offence, with which he was charged, and accordingly, as indicated above, convicted the appellant.

3.1 It is important to note that the trial court in paragraph 9 of the judgment has recorded that on the date when final submissions were heard in the matter, the defence lawyer was not present in court, evidently on account of the fact that the lawyers had stuck work. The trial court, however, did not adjourn the matter, and instead heard the appellant in person. The State, however, was represented by the prosecutor.

3.2 In the appeal, filed before this court, one of the grounds which has been taken by the appellant is that on the final day, that is, the date of hearing he was not represented by a lawyer, and hence his constitutional right to fair trial has been vitiated. In this regard, reference has also been made to the provisions of Section 303, 304 and 309 of the Code of Criminal Procedure, 1973 (in short the 'Cr.P.C.').

4. In order to prove its case the prosecution has cited seven witnesses. The evidence of the prosecution was closed on 10.02.2000. On 15.02.2000 the statement of the appellant under Section 313 of the Cr.P.C. was recorded. The matter was posted for further proceedings to 22.02.2000 for evidence to be led by the defence. The order sheet of 22.02.2000 records that the appellant was asked as to whether he wishes to lead evidence. On his informing the trial court, in the presence of his lawyer, that he did not wish to lead evidence in defence, the trial court closed the defence evidence. Thereafter, the matter was posted on 25.02.2000; on that day the case had to be adjourned on account of the fact that the lawyer of the accused was not available on account of the fact that lawyers had struck work. Consequently, the matter was posted to 07.03.2000. The position, however, with respect to strike by lawyers, did not change on 07.03.2000. On the appellant seeking another adjournment, the trial court declined to adjourn the matter. Submissions, on behalf of the prosecution, were made by the prosecutor. The appellant was, evidently, as recorded in paragraph 9 of the impugned judgment, heard in person, and thereafter the case was reserved for orders. The case was directed to come up for orders on 15.03.2000. Due to non-availability of

stenographers it was adjourned to 23.03.2000, when the impugned judgment was delivered.

5. The circumstances, obtaining in this case, amply demonstrate that the appellant's fundamental rights, both under Article 21 and Article 22 of the Constitution of India, have been violated. Article 21 of the Constitution of India guarantees to every person that he shall not be deprived of his life or personal liberty except according to the procedure established by law. Similarly, clause (1) of Article 22 mandates that every person, who is arrested, shall not be denied right to consult and to be defended by a legal practitioner of his choice. It is well-settled that this right extends to the persons who are charged with offences both under general law as well as special statutes. Furthermore, the rights conferred under Article 22 clause (1) to consult and to be defended by a lawyer of one's choice obtains at the pre-trial stage, during the trial, as well as at the appellate stage. The facts obtaining in the present case suggest that both the appellant as well as the trial court was placed in peculiar circumstance. Since the lawyers had stuck work there was obviously no communication between the appellant and his lawyer. At least, the record does not show that such an opportunity was made available, which the appellant could have availed of. Similarly, the trial court could not proceed in view of the fact that the lawyer for the defence was not available. The question which arises for consideration is whether the appellant had an opportunity to exercise his right under Article 22 of the Constitution in view of the fact that on 07.03.2000 when the matter came up before the trial court for final hearing, the appellant did not have the benefit of assistance of his lawyer. This is apparent from the following: On

22.02.2000 it appears that the appellant informed the court that he does not wish to lead his evidence in defence. The matter was thereafter adjourned to 25.02.2000. On 25.02.2000 due to unavailability of the defence lawyer the matter was adjourned. On the request of the appellant, as indicated hereinabove, the matter was adjourned to 07.03.2000 for final arguments in the case. The appellant's request on 07.03.2000 for a further adjournment was declined by the court.

5.1 In the circumstances indicated above, which perhaps cannot be disputed, the absence of the appellant's lawyer on 07.03.2000 had the portents of impacting his rights under Articles 21 and 22 of the Constitution of India. One of the issues before me is: would it render the judgment of the court unsustainable? I shall deal with this aspect of the matter in the latter part of my judgment.

6. As indicated hereinabove, the prosecution, in order to prove its case, has cited seven witnesses. The appellant, on the other hand, chose not to lead any evidence in defence. The trial court, however, has recorded the statement of the appellant under Section 313 of the Cr.P.C. It would thus be important to note the relevant part of the testimony of each of the witnesses of the prosecution, in order to ascertain as to whether the prosecution has been able to establish its case against the appellant beyond a reasonable doubt.

7. H.C. Dhirender Pal (PW1), who was the malkhana incharge, proved that on 09.04.1997 he was posted at police station Rajouri Garden. On that day Addl. SHO R.K. Rathi had deposited a gunny bag containing ganja duly sealed; with seals 'ARS' and 'RK', affixed on it. Apart from this, another packet containing sample of ganja was also delivered with the aforesaid seals on it. He deposed that

the two packets were accompanied by the CFSL form bearing the said seals. He also testified that on 14.05.1997 the said two packets, with the seals duly intact, along with the CFSL form, were sent to the Central Forensic Science Laboratory through constable Tulsi Ram. He also testified that said samples and the CFSL report were received by him on 26.11.1997 through constable Satish Kumar. The entries to that effect in the malkhana register were proved by him. In the cross-examination there was no suggestion that the seals of the packets had been tampered with.

7.1 H.C. Ranbir Singh (PW2) reiterated the events of 09.04.1997 with regard to the fact that he along with his colleagues SI Atma Ram, constable Pawan Kumar, constable Mahavir Singh, and H.C. Paramjit Singh were on a patrol near the Masjid in F-Block, Rajouri Garden, when they received secret information with regard to the fact that one person, who would be coming from the direction of F-block extn., would be carrying ganja. He testified that this information was disclosed by him to five or six persons who were members of the public so that they could be witnesses to the arrest, if any. However, the said persons left the site without giving their names or addresses. He testified that about 7.55 p.m. the appellant came from the direction of F-block carrying a gunny bag on his head, whereupon on the pointing out of the informer the appellant was arrested. He also deposed that the appellant was informed that the police had information about the fact that he was carrying ganja, and in that connection they wanted to subject him to a search. He further stated that the appellant was informed that his search could be taken before the Gazetted Officer or a Magistrate. The appellant, however, declined the offer and confessed his guilt.

He further stated that at the say so of SI Atma Ram, he went to the police station to inform the S.H.O about the incident. Since the SHO R.S. Dahiya was not available the incident was disclosed to Addl. SHO R.K. Rathi. On reaching the site of the incident along with Addl. SHO R.K. Rathi, the ganja, which was discovered on the carrying out of search of the appellant, was weighed. He stated that it was found that the total weight of the ganja was 30 kg. A sample of 5 kg was separately made out. The remaining ganja was put in a separate packet. Both the packets were sealed with the seals of the 'ARS' and 'RK'. The seal affixed by SI Atma Ram was 'ARS' and that by Addl. S.H.O was 'RK'. He also stated that CFSL form was filled and said seals were affixed on the form. He also testified that the seals were handed over to him and the seizure memo (Ex. PW2/A) was prepared with respect to both the sealed packets as well as the CFSL form. He proved his signatures at point 'A' on the said seizure memo (Ex. PW2/A). He further stated that the I.O., i.e., SI Atma Ram prepared a rukka and sent it to the police station through constable Mahavir Singh. He stated that the CFSL form was handed over to Addl. SHO R.K. Rathi, while the sealed parcels were taken by him and the I.O. to the police station. He stated that he had deposited the sealed packets with the malkhana incharge, as they were handed over by the I.O. He also proved the personal search memo (Ex.PW2/B) of the appellant and his signatures appended on it. In court, PW2 identified the gunny bag (which was completely torn) to be the one which was found with the appellant, with the ganja in it, on the date of the incident.

7.2 Since PW2 had turned hostile, he was called for cross-examination by the prosecution. In his examination by the learned

APP, which was permitted by the court, he stated that in his statement, recorded under Section 161 of the Cr.P.C. by the I.O., he had not stated that the appellant was given an option of his search being taken before either the Gazetted Officer or Magistrate. He reiterated that in his said statement he had only referred to the Gazetted Officer. In his cross-examination by the learned APP, in the first instance, he stated that the two sealed packets, the CFLS form and the copy of the seizure memo, were handed over to him by the SHO for depositing in the malkhana. On a further cross-examination by the learned APP he submitted that there was no contradiction between his statement made in-chief and that which was made in cross-examination, as he had deposited the said items on the directions of the Addl. SHO.

7.3 In the cross-examination of PW2 by the defence he more or less confirmed what he had stated in his examination-in-chief. He, however, confirmed the fact that at the time, when the gunny bag was seized, it was not torn but was in a perfect condition.

8. H.C. Chanderpal Singh (PW3) proved the registration of the FIR. He deposed that he was working as duty officer at police station Rajouri Garden. On 09.04.1997 at about 9.25 p.m. he received a rukka from SI Atma Ram, sent through constable Mahavir Singh. He proved the original FIR (Ex. PW3/B). He also stated that as per the DD register S.I. Atma Ram had departed from the police station for patrolling duty at 7.20 p.m. In that regard he relied upon DD No. 13A. He further stated that ASI Atma Ram returned to the police station at about 11.30 p.m. In that regard he referred to DD entry 19A. These entries were proved by him. He also proved the departure of Addl. SHO R.K. Rathi from the police

station. According to him, Addl. SHO had left the police station at 8.10 p.m. and he had returned to the police station at about 11.30 p.m. The DD entries, with respect to the same, were also proved by him.

9. Constable Tulsi Ram (PW3A) proved the fact that he had collected the two sealed packets with seal intact along with CFSL form from the malkhana incharge on 14.05.1997 and that he had deposited the same with CFSL, Chandigarh on 15.05.1997. He testified that the seals, on the two packets, were not tampered. Importantly, no cross-examination of the said witness was conducted by the defence.

10. Constable Mahavir Singh (PW4) reiterated the events of 09.04.1997. He testified to the effect that on 09.04.1997 at about 7.55 p.m. the appellant was apprehended near the Masjid in Raghubir Nagar, while carrying a gunny bag, full of ganja, on his head. He also testified to the effect that S.I. Atma Ram had served a notice under Section 50 of the NDPS Act to the appellant and informed him about his right to be searched in the presence of a Gazetted Officer or a Magistrate. He stated that the accused had refused to exercise any of the options, which were put forth to him. In his statement he also reiterated what was said by the other witnesses as regards the weight of the ganja recovered and the fact that they were split into two packets, and sealed by the S.I. Atma Ram as well as Addl. SHO R.K. Rathi. On being shown the gunny bag (Ex.PW2) and the ganja (Ex. P1), in court, he testified that the said exhibits were the ones which were recovered from the possession of the appellant on the date of incident. He also identified the remanants of sample (Exp3), which were returned by

the CFSL. Importantly, PW4 stated that the rukka, which was prepared by S.I. Atma Ram, was carried by him to the police station, on the basis of which, FIR was registered by the duty officer, in this case. In his cross-examination he reiterated the fact that the appellant was apprehended at 7.55 p.m.; and that the place, at which the appellant was apprehended; was a busy public thorough fare. He deposed that none of the persons from the public were asked to join the proceedings after the appellant had been apprehended or during the time the proceedings were carried on at the spot, at which the appellant was apprehended. He further stated, in his cross-examination, that he returned with the copy of the FIR and rukka to the spot, where the appellant was apprehended, at about 9.15 p.m.

11. SI Atma Ram (PW5), who was the I.O. in the case, reiterated in detail the facts with regard to receipt of information from a secret informer at about 7.45 p.m. on 09.04.1997. He stated that on receipt of information the same was recorded in writing, being Ex. PW5/A. He also stated that he had asked five or six persons to join the raiding party. However, since the members of the public had expressed their inability, they left the place. He stated that due to shortage of time he did not serve any notice on these persons. He proved the fact that the appellant was apprehended carrying a gunny bag, containing ganja, near the Masjid, while approaching from F-block extn. in Raghubir Nagar at about 7.55 p.m., on being pointed out by the informer. He testified the fact that he served a notice under Section 50 of the NDPS Act to the appellant, and also informed him of his right of being searched in the presence of a Gazetted Officer or a Magistrate. He proved the notice (Ex. PW5/B)

under Section 50 of the NDPS Act and the reply (Ex. PW5/C) of the accused. He also proved the thumb impression of the accused at point 'A' & 'B' and his signatures at point 'C' & 'D'. He also stated that he had sent the same information (Ex. PW5/A) to the SHO through H.C. Ranbir Singh at about 8.30 a.m. He stated that on receipt of information Addl. SHO reached the spot along with H.C. Ranbir Singh. He testified to the effect that he explained the events to Addl. SHO R.K. Rathi. He also testified that on opening the gunny bag it was found that it contained ganja. The contraband, i.e., ganja was weighed. He stated that the total weight of the ganja was 30 kg. He further testified that a sample, equivalent to 5 kg, was drawn, whereupon the sample and the remaining ganja was sealed in two separate packets, on which, he stated that both he and the Addl. SHO had affixed their respective seals, that is, 'ARS' and 'R.K' respectively. He also testified to the effect that CFSL form was filled by him at the spot where the appellant was apprehended. He testified that the two packets, CFSL Form, samples seals and the copy of the recovery memo was handed over to the Addl. SHO; after they were seized vide seizure memo (Ex. PW2/A). He testified that he had prepared the rukka (Ex. PW5/D), which was sent by him to the police station through constable Mahavir Singh. He also proved the site plan (Ex. PW5/E). He stated that he arrested the appellant after conducting his personal search vide memo bearing Ex. PW2/B. He testified that, as required under Section 57 of the NDPS Act, information with regard to offence was sent to the senior officer; a carbon copy of which being Ex. PW5/F; was also proved by him. He testified the receipt of the CFSL report (Ex. PW5/G), as also the fact that after

investigation, a challan was prepared and filed in court. He proved that the ganja (Ex. PW1), gunny bag (Ex. P2), as also the remanants (Ex. P3) of the sample received from the CFSL were seized from the appellant. Importantly, no cross-examination whatsoever was conducted by the defence of this crucial witness.

12. Insp. R.K. Rathi (PW6), who, at the relevant time, was the Addl. SHO at police station Rajouri Garden, testified that on receipt of communication through SI Atma Ram with regard to secret information (Ex. PW5/A), he along with H.C. Ranbir Singh proceeded to the spot, i.e., F-Block, Raghubir Nagar after making the necessary endorsements on the said written communication at Ex. PW6/A. He testified that the information was received by him at about 8.15 p.m., and that he reached at the spot at about 8.30 p.m. On reaching the spot the appellant was presented before him, and he was informed about the fact that the appellant had been apprehended with a gunny bag. He stated that he made enquiries from the appellant; whereupon the gunny bag was opened and it was found to contain ganja. He stated that ganja was weighed; it was found that the total weight of the ganja, recovered from the gunny bag, was 30 k.g. He also stated that a sample of about 5 kg was prepared. The said sample of 5 kg and the remaining ganja were put in two separate packets and sealed. He stated that he had affixed his seal 'RK' on the two packets which was similarly replicated by the SI Atma Ram by affixing his own seal 'ARS'. He also confirmed the fact that CFSL form was filled and seals were affixed by both, him and SI Atma Ram, on the said form. He categorically stated that a seizure memo (Ex. PW2/A) was prepared on which his signatures at point 'C' were appended. He also

testified that the custody of both the packets and CFSL form was taken by him and thereupon deposited with the malkhana on that very day, i.e., 09.04.1997 with their seals intact. In court, he identified both the gunny bag (Ex. P2) and ganja (Ex. P1), as was done by the other witnesses. In his cross-examination he deposed consistently with what he had stated in his examination-in-chief. He, however, deposed to the effect that even though the spot, where the appellant was apprehended, was a busy place, ASI Atma Ram had not asked any person in his presence to join the proceedings.

13. The appellant's response, to all question except two, put to him by the trial court while recording his statement under Section 313 of the Cr.P.C. was a flat denial. To a question put to him by the trial court as to whether he would lead evidence in defence, the appellant responded in the affirmative. The other question put to him by the court, which was a general question, to the effect as to whether he had anything to say; the appellant replied by saying that he had been falsely implicated, by having the ganja planted on him. The appellant elaborated on this aspect, and said that, the reason for the same was that, a day before the alleged incident he was returning from a marriage at about 11.00 p.m., when in a state of intoxication he ran into three or four persons in civil clothes. Consequently, a fight broke out, in which he retaliated. On discovering that the persons were police personnel, he apologized. He was forcibly taken to the police station, wherein he was physically abused. He further stated that his wife sat outside the police station to seek his release, and only the next day at about 10.00 p.m. his wife was told that he had been implicated in a case

so that he could be taught a lesson, and that he would be produced before the court the next day.

14. Based on the evidence placed before the court by the prosecution, Ms Charu Verma, learned counsel for the appellant submitted before me that the impugned judgment of the trial court deserves to be set aside and could not be sustained for the following reasons:

- (i) the provisions of Section 50 of the NDPS Act were violated, in as much as, the appellant was not informed of his right to be searched either before the Gazetted Officer or before the Magistrate. In this connection, reliance was placed on the testimony of H.C. Ranbir Singh (PW2), who had turned hostile.
- (ii) constable Pawan, who was part of the patrolling party, was not examined and hence, a doubt was cast on the veracity of the evidence led by the prosecution;
- (iii) even though at the spot at which the appellant was apprehended, was a busy public thorough fare, no independent public witnesses were examined by the prosecution. As a matter of fact the names and addresses of persons, who were asked and who refused to join the investigation were not noted down;
- (iv) the sample, which was seized on 09.04.1997, was sent to the CSFL after nearly a month, i.e., on 14.05.1997; and
- (v) lastly, when the gunny bag was produced in court for identification, it was found torn.

15. As against this, Mr Amit Sharma, learned APP submitted that the prosecution has been able to prove its case beyond a reasonable doubt. In reply, he submitted that the testimony of HC Ranbir Singh (PW2) was consistent with what the other witnesses have

stated, except with regard to one aspect, which was, whether the appellant had been duly informed of his right under Section 50 of the NDPS Act. He stated that the testimony of SI Atma Ram (PW5) and constable Mahavir Singh (PW4) could independently be relied upon to establish that the appellant was served not only with written notice under Section 50 of the NDPS Act, but also informed with regard to the full ambit of his right. In the alternate, he submitted that in view of the fact that the ganja was recovered from a gunny bag, carried by the appellant, the provisions of Section 50 of NDPS Act were not applicable, as the search, which was to be conduct, was not with respect to the person of the appellant.

15.1 As regards the fact that no independent public witnesses have been examined, he once again relied upon the testimony of SI Atma Ram and Ct. Mahavir Singh to submit that public witnesses were asked to join the proceedings, before the appellant was apprehended, however, they refused to do so, and due to paucity of time their names and addresses could not be recorded.

15.2 As regards the fact that gunny bag was torn he relied upon the testimony of the malkhana incharge, i.e., PW1, which, according to him, clearly demonstrated the fact that at every given point in time the seal on the two packets was intact, and that there was no tampering of the samples. He submitted that no suggestion was made to the witness with regard to seals having been tampered. The fact that when the bag was produced in court, it was torn-it could have been so because of various reasons, which were unconnected with the fact that they were tampered with.

15.3 With regard to the submission of the defence that Constable Pawan Kumar was not examined; the learned APP submitted that in

view of the fact that events of 09.04.1997 have been sufficiently established through the testimony of other prosecution witnesses, nothing would turn on prosecution not examining constable Pawan Kumar. It is submitted that this was neither a ground taken by the appellant before the trial court nor is it a ground taken in the appeal before this court.

15.4 On the aspect of delay in sending the sample to the CFSL; the submission of the learned APP was that delay by itself would not vitiate the trial in view of the fact that the PW1 has clearly stated that there was no tampering with the sample sent to the CSFL. He reiterated that there was no suggestion made to PW1 as regards this aspect of the case.

REASONS:

16. I have heard the learned counsel for the appellant as well as the learned APP. Having heard both the counsel, I am of the view that prosecution has been able to prove its case beyond a reasonable doubt. My reasons for coming to this conclusion are as follows:

16.1 It is the case of the prosecution that on 09.04.1997 at about 7.45 p.m. the appellant was apprehended near the Masjid in Raghubir Nagar by a police patrolling party comprising of S.I. Atma Ram, H.C. Ranbir Singh, Ct. Pawan, H.C. Paramjit Singh & H.C. Mahavir Singh. At the point in time when the appellant was apprehended he was carrying a gunny bag on his head. The appellant was informed by the patrol party that they had secret information that he was carrying ganja in the gunny bag. The appellant was thereupon issued a written notice under Section 50 of the NDPS Act. The appellant was also informed of his right to

have his search conducted in the presence of a gazetted officer or a magistrate, as contemplated under Section 50 of the NDPS Act. The appellant, evidently, declined to exercise the option available to him in terms of section 50 of the NDPS Act. In the meanwhile information was also sent to the police station. The Addl. SHO R.K. Rathie arrived at the spot when he was informed about the background circumstances in which the appellant had been apprehended. On the gunny bag being opened, it was found to contain ganja. The I.O., i.e., SI Atma Ram, who was carrying scales with him, weighed the same by obtaining the weights from the nearby shop. The ganja was found to weigh 30 kg, whereupon the seizure memo was prepared. A sample weighing 5 kg was drawn. The sample was sealed in a packet as also the remaining 25 kg, which was sealed in a separate packet. On both the packets, the I.O., S.I. Atma Ram and the Addl. SHO affixed their respective seals, that is, 'ARS' and RK'. The said packets were deposited in the malkhana along with the CFSL form on which the seals of 'ARS' and 'RK' were appended.

16.2 The aforementioned prosecution version has come through clearly in the testimony of constable Mahavir Singh (PW4) and SI Atma Ram (PW5), the I.O. in the case. The version, given by the said witnesses, has been consistent even in the cross-examination.

16.3 The case set up by the learned counsel for the appellant that he has been falsely implicated cannot pass muster. The reason being that the appellant for the first time in his statement given under Section 313 of the Cr.P.C. informed the court that he had been falsely implicated in view of the fact that on a day prior to his arrest he had ran into three or four persons in civil dress, in a state

of intoxication, because of which a fight broke out, and since he retaliated he was taken to the police station, and the instant case was registered against him. Even if this version set up by the appellant is to be believed it is pertinent to note that this case was not put to the witnesses who testified for the prosecution. As a matter of fact no suggestion on these lines has been made to any of the prosecution witnesses. The appellant has in his statement under Section 313 of the Cr.P.C. also referred to the fact that his wife evidently picketed outside the police station on the day he was illegally detained in the police station. Even though the appellant had stated before the court on 15.02.2002 that he would be leading evidence in defence the appellant chose not to cite his wife as a witness despite an opportunity having been granted to him by the trial court. The fact that what was seized from the appellant was ganja is clearly established and proved by the prosecution. In this regard the prosecution correctly relied upon the report of the CFSL dated 29.08.2007 (Ex. PW5/G). The fact that the sample was not tampered was clearly proved by the prosecution witness (PW1).

16.4 The fact that PW2 turned hostile would not further the case of the appellant, in as much as, in so far as the first part of the prosecution's case is concerned, as regards the appellant being apprehended, and the recovery of ganja the same has been alluded to by PW2. The only point with respect to which PW2's testimony differed from those of other prosecution witnesses, was with respect to; firstly, as to whether an option had been given to the appellant as to whether his search could take place before a Gazette Officer or a Magistrate; and secondly, whether the sealed

packets, CFSL form and the seizure memo were deposited by PW2 in the malkhana or they were handed over to the SHO.

16.5 As regards the option given to the appellant as to whether he would prefer that his search be taken before a Gazetted Officer or a Magistrate, this aspect clearly comes through upon perusal of the testimony of other witnesses, that is, PW4 and PW5. As regards other aspect of the matter as to who deposited the sealed packets, the CFSL form and the seizure memo with the malkhana incharge; is clearly established upon perusal of the testimony of PW1 and PW5. As noticed hereinabove, on this aspect of the matter there was no suggestion made to PW1 that the two packets, the CFSL form and the seizure memo was not deposited by the Addl. SHO R.K. Rathi. The testimony of PW2, who turned hostile, on both the aforementioned aspects can be excluded without impacting the case of the prosecution for the reason that perhaps the delay of nearly 21 months from the date of the incident to the date when PW2 was examined, could have caused a lapse in memory. PW2, however, as regards the other aspects has clearly supported the case of the prosecution. In any event as correctly submitted by Mr Amit Sharma, learned APP the issue raised by the learned counsel for the appellant that provisions of Section 50 of NDPS Act were not adhered is really of no significance in this particular case, in as much as, the contraband, in issue, i.e., ganja was carried by the appellant in a gunny bag held over his head. The judgment of the Supreme Court in ***State of H.P. vs Pawan Kumar (2005) 4 SCC 350*** categorically holds that Section 50 of the NDPS Act will not be applicable where the contraband is contained, in a accompaniment such as a bag, briefcase, container or any such article save and

except a clothing, or a covering, or footwear. (See observations in paragraph 11 & 12 at page 360 of the said judgment). This judgment has been followed by the Supreme Court in the case of ***State of Haryana vs Ranbir alias Rana (2006) 5 SCC 167***, wherein the contraband was carried by the accused in a plastic bag. The court held that provisions of Section 50 were not applicable as the same did not fall within the ambit of the expression 'search of a person' found in sub-Section (1) of the NDPS Act. (See observations in paragraph 7 at page 170 of the said judgment). Therefore, apart from the fact that the PW5 and PW4 have stated that an option was given to the appellant in terms of Section 50 of the NDPS Act; the fact that the contraband, i.e., Ganja was carried in a gunny bag, which was held by the appellant on his head, the provisions of Section 50 of the NDPS Act, had no applicability, and hence whether or not such an option was given would not impact the case of the prosecution.

16.6 The submission of the learned counsel for the appellant that constable Pawan Kumar was not examined even though he was part of the patrolling party would in my view not cast any doubt on the veracity of the evidence placed on record by the prosecution, since I am otherwise convinced that the testimony of the other witnesses examined by the prosecution can be relied upon. [See ***Amar Singh vs Balwinder Singh (2003) 2 SCC 518*** at **page 531-533, paragraph 16-18**]. This is also the reason that I am of the view, that mere non-examination of public witnesses by itself would not in any sense dilute the case of the prosecution. [See ***State of UP vs Anil Singh 1988 (Supp) SCC 686*** at **page 691-692, paragraph 15** and ***Ambika Prasad & Anr vs State (Delhi Administration)***]

(2000) 2 SCC 646 at page 653-654, paragraph 12] I have no reason to believe that prosecution witnesses would falsely implicate the appellant, as suggested by the learned counsel for the appellant.

16.7 The submission of the learned counsel for the appellant that doubts were cast on the prosecution's case on account of the fact that the seized sample were sent to the CFSL after one month, and that when the gunny bag was produced in court for identification it was torn; in my view in the instant case; is also, without merit. This is so as PW1 in his testimony has clearly stated that seal on the sample remained intact at all relevant points in time. In the cross-examination it was not suggested to the PW1 that the seals of the sample or the remnants of ganja which remained in the malkhana had been tampered with. In these circumstances, the fact that the samples were sent late to the CFSL or that the gunny bag was found torn when produced in court would not impact, in my view, the prosecution's case. The gunny bag could have been torn due to several reasons. As long as there was no suggestion that the seals were tampered, there is no basis to disbelieve the testimony of prosecution witness.

16.8 Coming to the last but most important aspect of the case that on 07.03.2000 the trial court proceeded to hear final arguments in the case, even though the appellant did not have the benefit of the services of his counsel on account of work being stuck by the lawyers. I am of the view that this may have resulted in the conviction being overturned save and except for the reason that there is nothing on record to suggest that the appellant applied to the court for being granted legal aid since his lawyer had not

attended the court on that crucial date. The appellant had merely sought an accommodation; however, no alternative plea in the form of application or otherwise was made to the trial court for being accorded legal assistance through the legal aid. Had such an application been made result would, perhaps have been different. This aspect of the matter was put to Mr Amit Sharma, APP. In response he cited the judgment of the Supreme Court in the case of ***Ex-Capt. Harish Uppal vs UOI (2003) 2 SCC 45***. It was the learned APP's submission based on said judgment that, in view of the mandate of the Supreme Court, the trial court had no option but to proceed with the matter even though the lawyers had stuck work. I am of the opinion that the correct ratio of the judgment is that, it forbids lawyers from ceasing work save and except where work is struck on issues which impinge upon the dignity, integrity and independence of the Bar. Even in those circumstances, the Bar Associations are required to take permission of the Chief Justice of the concerned High Court. The judgment by itself does not take away the power of the court to adjourn the matter for good reason. In my view the rights of the accused, which are protected under Article 21 and Article 22 of the Constitution, are precious. When a situation, such as one, which arose in the instant case does arise in future, the court ought to put to the accused as to whether he would want to avail of legal aid. The court has several lawyers empanelled with the various legal aid authorities which work under the aegis of the trial court. On the accused being informed of such an option being available, and the failure of the accused to exercise such option - it would perhaps then be open to the trial court to proceed with the matter. The submission of the learned APP that

the failure to provide a lawyer at the stage of final hearing would not vitiate the judgment is one which I cannot accept.

17. Section 303 and 304 of the Cr.P.C. are, in a sense, a fruition of the endeavours of the Legislature to achieve the constitutional goal set forth in Article 39A, and the constitutional mandate enunciated in Articles 21 and 22 of the Constitution. Section 303 of the Cr.P.C. provides that any person who is accused of an offence before a criminal court or against whom the proceedings are instituted under the Cr.P.C., he would have a right to be defended by a pleader of his choice. Broadly, Sub-section (1) of Section 304, fortifies this right by holding forth that where in a trial before a court of sessions the accused is not represented by a lawyer and it appears to the court that the accused does not have 'sufficient means' to engage a pleader, the court is duty bound to assign a pleader for the defence of the accused at the expense of the State. 'Trial', to my mind, in the context of Section 304 of the Cr.P.C., would culminate only upon a judgment being delivered against the accused of either acquittal or conviction. (See ***Asgarali Nazarali Singaporewalla vs State of Bombay AIR 1957 SC 503 para 23 & 24 at pages 509-510***). The other expression used in Section 304 which is 'sufficient means' would include within its ambit not only an accused who is not able to engage the services of a lawyer on account of his pecuniary disability but also an accused who is put in a situation where he is not in a position to communicate with his lawyer. In such a situation if the accused seeks assistance for legal services being made available to him, the State is duty bound to do so, at its own expense. [See ***Madhav Hayawadanrao Hoskot vs State of Maharashtra (1978) 3 SCC 544 para 10***,

11, 12 & 27 at pages 551- 553 & 557 and *Hussainara Khatoon & Ors.(IV) vs Home Secretary, State of Bihar, Patna (1980) 1 SCC 98 para 6 & 7 at pages 103-105*

17.1 In providing legal assistance the State will have to ensure that lawyers of experience and ability are engaged. (See ***Darpan Potdarin vs Emperor AIR 1938 Pat 153 at page 158*** and ***Dikson Mali & Anr vs Emperor AIR 1942 Pat 90 at page 93***)

17.2 A conjoint reading of Sections 303 and 304 of the Cr.P.C. would thus, to my mind, encompass the following:

- (i) Any person accused of an offence before a criminal court or against whom proceedings are instituted in the court under the provisions of the Cr.P.C. has a right to be defended by a pleader of his choice.
- (ii) This right extends throughout the trial and culminates only upon a judgment being delivered by the trial court either acquitting or convicting the accused.
- (iii) The expression '**sufficient means**' found in Section 304(1) of the Cr.P.C. would include a situation where the accused is not in a position to communicate with a lawyer of his choice.
- (iv) On an application being made by the accused for being provided legal assistance; the State shall engage a lawyer of ability and experience, at its own expense to defend the accused.

17.3 Therefore, the submission of the learned APP that the right of the accused to be defended by a lawyer does not extend to the stage when final submissions are made in a case, is in my view, not tenable.

18 As observed above, in the instant case as there is no material on record that the appellant chose to avail of the remedy available under Section 304 of the Cr.P.C., I do not find this a fit case in which, I would overturn the judgment of the trial court on this ground. However, having regard to the fact that the appellant has already suffered imprisonment for a period of two years and ten months out of the total permissible sentence of 5 years, and no subsequent aberration in the conduct of the appellant have been brought to my notice - it would perhaps meet the ends of justice if the sentence in the instant case is reduced to the imprisonment already undergone by the appellant.

19. In these circumstances, while the impugned judgment of the trial court is sustained the sentence of imprisonment is altered to the extent already undergone by the appellant. The appeal is thus partially allowed. The appellant shall be released forthwith, if in custody, unless he is required to undergo incarceration in another case.

RAJIV SHAKDHER, J

NOVEMBER 05, 2009
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