

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

+ **Crl. Appeal No. 382/2007**

% Date of Reserve: 29.07.2009
Date of decision: 11.08.2009

RAM MURTHI ...Appellant
Through: Ms. Anu Narula, Amicus Curiae

Versus

STATE (NCT OF DELHI) ...Respondent
Through: Mr. Naveen Sharma, APP

CORAM:
HON'BLE MR. JUSTICE MOOL CHAND GARG

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

: **MOOL CHAND GARG, J.**

1. This appeal has been filed against the judgment dated 11.10.2006 and the order on sentence dated 13.10.2006 passed in Sessions Case No.215/2001 arising out of FIR No.370/2005 registered at P.S. Kashmere Gate, convicting the appellant under Section 15 of the NDPS Act and sentencing him to undergo R.I. for 10 years and to pay a fine of Rs.1,00,000/- (Rupees One Lakh) and in default to further undergo SI for six months.

2. Briefly stating, it is the case of the prosecution that on 10.07.2005 at about 7 p.m. the appellant was sitting on two plastic bags (kattas) near the Out Gate ISBT, Kashmere Gate and at that time due to suspicion on his conduct he was apprehended by Constable Raj

Singh. Later on, when inquiry was made about the contents of two plastic bags on which he was sitting, he could not give any satisfactory answer and therefore, the bags were checked which were found to be containing brown colour Poppy Straw powder. On this the local police was informed and ASI Jagdish Chander came on the spot, who after complying with all necessary formalities weighed both bags and found each bag containing 36 packets of polythene. Each of the 72 packets of polythene were containing Poppy Straw powder. The weight of each of packet was 1 kg and thus, 72 kgs of Poppy Straw powder was seized out of the two bags on which the appellant was found sitting at the relevant time. Samples of 1 kg each were also taken out from both the bags which were then sent to FSL after complying with all the formalities. A rukka was also prepared which is the basis of registration of FIR. The articles seized were also taken into possession and deposited in the Malkhana. Thereafter, an FIR was registered in connection with this case and the investigation was handed over to ASI Jagdish Kumar.

3. It is also the case of the prosecution that the appellant was arrested, his personal search was conducted and arrest memo was also prepared. He also made a disclosure statement about his involvement in this case which was recorded as Ex.PW5/H. After completion of the investigation, challan was filed before the ASJ. The learned ASJ framed charges to which the appellant pleaded not guilty. After the prosecution led its evidence, the statement of the appellant was recorded under Section 313 Cr.P.C. The appellant has not led any defence evidence. Ultimately, the appellant was convicted and sentenced as aforesaid.

4. The appellant has assailed the judgment of conviction and order on sentence by submitting that there are material contradictions in the deposition of witnesses which creates a doubt in the story of the prosecution. It is also submitted that failure of the investigating agency to join public witnesses at the time of search also vitiates the entire proceedings. It is also submitted that even notice, as is required to be given under the provisions of the Act, was not given to the appellant. In fact, the seal was also not given to any independent person and was retained by the I.O. himself. The case property was sent to FSL after 38 days and as such there was a delay in sending the case property. It is also submitted that the SHO or the ACP were not informed about the incident nor were called at the spot. The search of the appellant was also not taken by the SHO or ACP. It is also submitted that the prosecution has failed to prove that the appellant was found in possession of the contraband consciously or that he was aware about the contents of the bags. No inquiry was made from the appellant about the source from where the said powder was obtained.

5. Learned APP submitted that the prosecution has been able to prove conclusively that the appellant was in conscious possession of the two plastic bags which were containing the contraband goods. In this regard, they have also followed the legal formalities by giving full opportunity to the appellant to get himself searched in the presence of a Gazetted officer but the appellant refused to avail that offer. It is submitted that in view of recovery of 72 Kgs of poppy straw powder from the possession of the appellant, the minor contradictions in the statements are of no consequence.

6. Ms. Anu Narula, learned Amicus Curiae appearing for the

appellant in support of her submissions has also relied upon the following judgments:

State of Punjab Vs. Balkar Singh and Anr. (2004) 2 SCC 582	Possession Not Conscious
Ranbir Singh Vs. State of Haryana (2001) 1 RCR (Cr) 674	Source of poppy husk obtaining and distribution not investigated
Gurbachan Singh Vs. State of Punjab 1998 (2) RCR (Cr) 175	Discrepancies in Statements in bringing weights, FSL Form
State of Punjab Vs. Har Chand Singh 2002 (2) RCR (Cr.) 746 State of Punjab vs. Jaswant Singh 2002 (3) RCR(Cr.) 548 (DB) Saudan and Anr. Vs. State of Rajasthan 2002 CrILJ 4816 Faujdari Mistry and others. Vs. State of Bihar 1999 (3) RCR (Cr.) 561 Chand Mohd. Vs. State of Punjab 1996 (3) RCR (Cr.) 142	No Public Witnesses
State of Punjab vs. Jaswant Singh 2002 (3) RCR(Cr.) 548 (DB)	Seal after use not given to independent witness
State of Punjab vs. Jaswant Singh 2002 (3) RCR(Cr.) 548 (DB)	Delay of 38 days in sending case property to FSL

7. I have examined the judgments relied upon by the appellant. In the case of *State of Punjab Vs. Balkar Singh & Anr. (supra)* the facts were entirely different inasmuch as at a place where hundreds of bags of poppy straw were lying the accused was sitting only on one of them and, therefore, to presume possession of the contents of hundred bags qua the accused was not found correct, which is not the case in hand.

8. The judgment delivered in the case of *Ranbir Singh (supra)* is also not applicable to the case of appellant as it has been given on peculiar facts of that case and taking a conclusive view on various deficiencies, which were pointed out even regarding the presence of the Police party at the spot.

9. In the case of *Gurbachan Singh (supra)* the discrepancy was

about the place of recovery, which is not the case in hand. Here the place of recovery is fully identified i.e. ISBT, Kashmere Gate. The other judgments cited by appellant are of no help to him in the given facts.

10. I have also gone through the impugned judgment of the trial court and the order of sentence. The star witness of the case is Constable Raj Singh who was examined as PW5. He has deposed that on 10.07.2005 when he was posted at Police Post Kashmere Gate and was on duty at Out Gate from 8 am to 8 pm at about 7pm, while he was checking the person passing through the Out Gate, he saw the accused present in court sitting on two white colour plastic bags at footpath in left side. After he saw the accused/applicant sitting on the said bags, the appellant tried to slip away leaving the bags. On suspicion the accused was overpowered whose name later revealed on inquiry as Ram Murthi. On being asked about the contents of the two bags, he could not give satisfactory answer. On checking, the bags were found to be containing polythene packets containing brown colour powder like poppy straw. Then he informed the PP on telephone and thereafter ASI Jagdish Chand reached there. He also deposed that ASI then recorded his statement which is Ex.PW5/A and bears his signature at point A. He further deposed that then ASI asked 4-5 passerbys to join the proceedings when he informed about the possession of two bags by the accused but none of them agreed to join the proceedings. He further deposed that ASI then gave a notice u/s 50 of the NDPS Act to the appellant. The said notice is Ex.PW5/B and bears his signatures at point A. He also deposed that he informed the appellant about his legal right to get himself searched before the Magistrate or Gazette Officer and that the arrangement can be made

at spot or he can be produced before the said authorities. He also deposed that accused refused his search before the above authorities and the reply of the accused in his own hand writing along with the carbon copy of Notice is Ex.PW5/C. Appellant also put his signature on the same. He also deposed that he and ASI Jagdish Chand also offered their search to the accused to which he refused. He further deposed that he was then sent to bring scale, IO bag and weight from Police Post. Thereafter, the ASI opened both the bags and checked the packets after opening the same, which were containing 36 polythene packets in each bag i.e. total 72 packets. Each packet was containing one kg poppy straw. The poppy straw in all the packets were kept in plastic bags and one kg from each bag was taken as sample. The bags were given S.No.1 and 1 A and samples which were kept in polythene and later on converted into a pulanda of cloth were given S.No. 2 and 2 A. The mouth of the bags were also tied with the aid of the cloth and sealed with the seal of JC. The sample pullandas were sealed with the same seal and the same were taken into possession vide seizure memo Ex.PW5/D. He also deposed that ASI prepared tehrir on his statement and handed over the same to him along with the FSL form, copy of seizure memo and the case property. He produced the tehrir before the DO and produced the case property along with the sample pullandas, copy of seizure memo and form FSL. He also deposed that further investigation was entrusted to ASI Jagdish Chander and he handed over the tehrir and copy of FIR handed over to him by DO to the said ASI who was present at the spot.

11. The testimony of PW5 stands fully corroborated by ASI Jagdish Chander, who appeared as PW6 and prepared the report under section

57 of the NDPS Act vide Ex. PW-6/C.

12. As regard non-examination of the public witnesses, the learned Additional Sessions Judge has rightly held that once an opportunity is granted and nobody is ready to join the proceedings, no fault can be attributed to the investigation. Similarly, with regard to the argument that the SHO and the ACP were not informed or called at the spot, it was held by the Ld. ASJ that accused was produced before the SHO in the PS and report under section 57 NDPS Act was duly sent to the office of ACP, Sadar Bajar within time and therefore, this argument advanced in appeal also has no legs to stand. As regard to the contradictions, it is rightly held that they were minor in nature and do not go to the root of the prosecution story. I may observe here that merely because the case of recovery of contraband in this case is based upon the sole testimony of the police witnesses it does not make the testimony inadmissible in evidence since this is a case of chance recovery and therefore putting to accused about the source and its distribution is not material while seizing the Contrabands. Reference in this regard can be made to a judgment delivered by this court in *Criminal Appeal No.394/2007, Ram Swaroop Vs. State (GNCT) of Delhi decided on 04.05.2009*. Reference can also be made to a judgment delivered by Apex Court in *Abdul Majid Abdul Hak Ansari Vs. State of Gujrat, 2003 (10) SCC 198*.

13. At this stage, I may observe that the search in the present case was covered by the powers available to Police under section 43 of the NDPS Act, which reads as under :-

43. Power of seizure and arrest in public places.

Any officer of any of the departments mentioned in section 42 may –

- (a) seize, in any public place or in transit, any narcotic drug or psychotropic substance in respect of which he has reason to believe an offence punishable under Chapter IV has been committed, and, along with such drug or substance, any animal or conveyance or article liable to confiscation under this Act, and any document or other article which he has reason to believe may furnish evidence of the commission of an offence punishable under Chapter IV relating to such drug or substance;
- (b) detain and search any person whom he has reason to believe to have committed an offence punishable under Chapter IV, and, if such person has any narcotic drug or psychotropic substance in his possession and such possession appears to him to be unlawful, arrest him and any other person in his company.
Explanation.-- For the purposes of this section, the expression "public place" includes any public conveyance, hotel, shop, or other place intended for use by, or accessible to the public.

14. Since it is a case of chance recovery, the aforesaid observations are fully applicable in this case also.

15. Accordingly, no infirmity is found in the impugned judgment and the order of conviction. The appeal is dismissed.

16. Trial Court record be sent back with a copy of this judgment. Another copy be sent to the appellant through jail Superintendent.

Crl.M.B.940/2007

In view of the orders passed above, the application stands disposed of as having become infructuous.

MOOL CHAND GARG, J.

AUGUST 11, 2009
anb/dc