

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

+ **Criminal Appeal No.250/2007**

% Date of reserve: 31.08.2009
Date of decision: 04.09.2009

MAHINDER SINGH @ SONU ... APPELLANT
Through: Ms. Neelam Grover, Advocate

Versus

STATE ...RESPONDENT
Through: Mr. Navin Sharma, APP for state

CORAM:
HON'BLE MR. JUSTICE MOOL CHAND GARG

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

MOOL CHAND GARG, J.

1. This appeal is directed against the judgment and order on sentence dated 16.03.2007 delivered in Sessions Case No. 196/2006 arising out of FIR No. 548/2001 registered at P.S Tilak Nagar. By the impugned judgment the appellant stands convicted under section 21 of the NDPS Act and has been sentenced to undergo RI for 10 years besides payment of fine of Rs. 1,00,000 (Rupees One Lakh) and in default of payment of fine to further undergo RI for one year.
2. Briefly stating, the case of prosecution is that on 10.08.2001, at about 7.00 PM, the SHO received an information from a secret informer that at around 7.30 PM one person would come on Black color Yamaha

motorcycle bearing number DL 4S C 8136 from CRPF Camp, Tilak Vihar and would be having smack. On that basis after recording the said information vide DD No. 27A a raiding party was constituted and FIR was registered. Four/Five passerby were requested to join the raiding party but none of them joined, except Balwinder Singh s/o Jang Singh, who during the course of trial has appeared as PW-2.

3. After Nakabandi the appellant who came on the black colour motorcycle was apprehended by the Police around 7.30 PM and was found in possession of 500 grams of smack. His search was taken after completing the formalities. It is also the case of the prosecution that the appellant also made a disclosure statement disclosing that 10.5 kgs of smack was also lying in his house on a tand as disclosed to him by his father. Accordingly, the said smack was also recovered from his flat bearing No. E-57, A Block, DDA quarters, Tilak Vihar, New Delhi. Out of the total smack recovered i.e. 21 packets of 500 grams each, samples were drawn weighing 50 gms each and were sent to the FSL. Report of the FSL was received when it was revealed that the goods seized from the appellant were contraband, the possession whereof is prohibited and therefore, the challan was filed against the appellant under Section 21 of the NDPS Act. The Ld. ASJ framed charges to which the appellant pleaded not guilty. The prosecution to prove its case has examined 16 witnesses. Thereafter, the statement of the appellant was also recorded under Section 313 Cr.P.C. No defence was led by the appellant. After concluding the trial, the appellant was convicted and sentenced as aforesaid.

4. The appellant has assailed the judgment of conviction and the order on sentence primarily on the following grounds:

- i. That there are material contradictions in the deposition of witnesses raising doubt in the prosecution story.
- ii. That the investigating agency failed to comply with the provisions of Section 50 of the NDPS Act and the appellant was not informed about his right to get searched in the presence of a gazetted officer.
- iii. The story of the prosecution is absolutely false inasmuch as if the appellant was in possession of the smack seeing all the police officials who were in dress, he would not have stayed there and would have ran away.
- iv. The alleged recovery of motorcycle from the appellant is also a figment of imagination inasmuch as no keys of the said motorcycle have been seized by the prosecution.
- v. That the story of recovery of smack from the flat which is in the name of mother and was purchased on 8.11.2000 is again misconceived inasmuch as the disclosure statement as recorded by the Police goes to show that the smack was kept by the father of the appellant who was admittedly in custody since 3.8.2000 i.e. prior to the date of the purchase of the flat. Thus, this also casts very serious doubt upon the recovery of smack from the flat in question. Moreover, no public witness from the locality has been associated with the alleged recovery.
- vi. That the alleged linked persons to whom the smack has to be supplied named by the prosecution were never interrogated by the Police.

- vii. It is also his case that after sealing the packets allegedly recovered, the seal was never given to any independent witness and retained by the IO.
- viii. That the recovered samples were sent for analysis after one month and as such, there was sufficient time to tamper with the samples.
- ix. There is also a discrepancy in the weight of the samples allegedly sent by the prosecution to the FSL and the weight of the samples received by the FSL inasmuch as according to the prosecution 50 gms each was taken as sample out of 21 packets whereas according to the FSL report Ex.PW16/B the sample sent for examination were more or less than 50 gms and therefore, there is variance in the weight of each packet. The FSL report dated 12.10.07 is reproduced hereunder:

**Forensic Science Laboratory
Govt. of NCT of Delhi**

Description of articles contained in Parcel

Parcel-A	One cloth parcel sealed with the seals of KS & RS. It is found to contain exhibit 'A' kept in a polythene.
Exhibit-A	Brown coloured powdered substance stated to be smack. Weight approx. 52.6 gms with polythene.
Parcels 1-21	Each cloth parcel sealed with the seals of RPA & RS. It is found to contain exhibits 1 to 21 are kept in a polythene.
Exhibits 1-21	Brown coloured powdered substance stated to be smack, weight approx. are each with polythene in grams are 51, 49, 51, 52, 51, 47, 51, 41, 51, 30, 51, 57, 54, 48, 51, 42, 51, 50, 51, 80, 51, 45, 51, 49, 51, 45, 51, 81, 51, 23, 51, 57, 51, 84, 51, 70, 51, 70, 51, 80 & 51, 75 respectively.

Dr. Madhulika Sharma

No explanation has been furnished as to the difference of weights in the samples.

x. PW-2 Balwinder Singh in his cross-examination has
deposed as under :-

I did not know SI Kehar Singh and Inspr. Rajinder Singh before the present case. I do not remember on what dates I attended this court. I do not remember how long I stayed with the police on the day when the recovery was effected from the accused. I might have been with the police for an hour. I signed many papers but I do not remember the numbers thereof. I signed on the papers which read over to me by SI Kehar Singh asked me to do so, these papers were the same. I do not remember who else signed on those papers apart from myself. I left the spot after signing the papers. I do not remember whether Ex. PW2/DA was fully written or not when I signed at point A. The same is my answer regarding Ex. PW2/C. I cannot say now what is written in Ex. PW2/C. The flat where I went along with the police is in a populated area. I do not know how many police officials were in uniform and how many police officials were not in uniform. No one collected there when we reached there. When we went to the flat that time we straight away went inside the flat. The key of the flat was found in the pocket of the accused at CRPF Camp, Mahavir Nagar. The people keep coming and going at the road at CRPF camp. There are 3 or 4 stories in the building where the flat is situated. The flat is on the ground floor but I do not remember the number thereof. Police did not went to the flat of the other people in the neighbourhood in my presence. I do not remember at what time I went to the flat of the accused. I cannot say whether I went to the flat of the accused at 6 p.m. or 7 p.m. or 8 p.m. We stayed in the flat for almost 1 and half hour. I do not remember whether people were using stair case of the building or not. I do not remember how many police personnel went inside the flat along with me. The contraband was recovered from the flat in my presence. I do not remember where from the police got the white cloth to make parcels. I did not sign on the parcels. I do not remember whether any one signed on the parcels in my presence or not. I cannot say what was written on the parcels but writing work was being done in my presence on the parcels. The flat of the accused nearby to the CRPF Camp. I do not remember how we went to the flat of the accused. I do not remember whether we went in the vehicle of ACP or SHO or not. I cannot tell the number of the vehicles of SHO and ACP. It is wrong to suggest that I was not present at the spot at CRPF Camp or at the flat or that no recovery was made in my presence or that I signed the papers at the PS at the instance of police officials. It is wrong to suggest that I earlier deposed in other cases in support of the prosecution case. It is incorrect that I am deposing falsely.

The testimony of this witness casts a doubt in the story of the prosecution and goes to show that either PW-2 was a stock witness or was not a witness to the recovery.

5. To support her aforesaid submissions, the learned counsel for the

appellant has also relied upon the following judgments:-

(i) *Rajesh Jagdamba Vs. State of Goa*, AIR 2005 SC 1389.

(ii) *Pappu Vs. State of Rajasthan*, 2007(2) JCC (Narcotics) 67.

(iii) *Shanti Lal Vs. State of M.P.*, 2008 Cri.L.J. 386.

6. On the strength of these judgments, it has been submitted that the discrepancy in the weight of the samples is almost vital to the case of the prosecution. This is the view taken by the Apex Court in the case of *Rajesh Jagdamba's case (supra)* as also by the Rajasthan High Court in *Pappu Vs. State of Rajasthan (supra)*.

7. Relying upon the *Shanti Lal's case (supra)*, it has also been submitted that in this case the appellant has already spent more than nine years in Jail out of the sentence of ten years RI awarded to him and is not in a position to pay the fine and that in such a case this Court is competent to reduce the period of sentence in default of payment of fine.

8. On the other hand, Ld. APP has submitted that in order to bring home the guilt of the appellant, the prosecution has examined 16 witnesses, out of which the Police witnesses namely PW4, PW8, PW13, PW14 and PW15 have consistently deposed about the recovery of smack from the accused and nothing material have come in their cross-examination also which may disprove their testimonies. It is also submitted by Ld. APP that PW2, the independent witness, also corroborated the statement of Police witnesses and therefore, according to him prosecution has proved its case beyond reasonable doubt. The minor contradictions in the statements are of no consequence.

9. Having examined the record of the case and submissions made from both sides, I find that the order of conviction passed in this case by the learned Additional Sessions Judge is not sustainable in law inasmuch the only public witness who has been associated by the prosecution with the raid has not fully supported the case of the prosecution. In fact, his deposition goes to show that he was not probably present there. The non-association of public witnesses in the case itself creates doubt in the prosecution's story. It is also not explained as to why there is discrepancy in the weight of the samples which were sent to the FSL inasmuch as the case of the prosecution that the samples which were drawn from each of the packets weighed 50 gms is not supported by the report of the FSL. This also casts doubt in the testimony of the investigating officer of this case who stated that he was having weights in his investigation bag. The recording of the alleged confessional statement is also doubtful inasmuch as a person who was in jail i.e. the father of the appellant would not have been in a position to come and put smack in a house of which possession has been taken later on by the mother of the appellant.

10. It may also be observed here that Ld. Addl. Sessions Judge who tried this case has not taken note of all the contentions raised before him by the appellant inasmuch as in the entire judgment there is no mention about the discrepancy in the weight of the samples, which is a very material fact, taking into consideration the judgment delivered by the Apex Court in *Rajesh Jagdamba's case (supra)* and the judgment delivered by the Rajasthan High Court in *Pappu's case (supra)*. Similarly, there is also no explanation as to how the IO/SHO was justified in keeping the seal with them and causing delay in sending

samples to the FSL after one month. The vital aspect which occurs in the testimony of PW-2 regarding the Police having not given the seal to him is again completely ignored by the Additional Sessions Judge. The non-seizure of keys of motorcycle from the appellant is another circumstance which has been overlooked by the Additional Sessions Judge.

11. In these circumstances, I am satisfied that the case set up by the prosecution against the appellant, who has already suffered incarceration of nine years out of the total incarceration of 10 years awarded to him, is doubtful and the appellant is entitled to the benefit of doubt. Accordingly, the appeal is allowed and the conviction of the appellant is set aside. The appellant be released forthwith, if not wanted in any other case. A copy of this order be sent to the Jail Superintendent immediately for compliance.

MOOL CHAND GARG, J.

SEPTEMBER 04, 2009
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