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HIGH COURT OF DELHI : NEW DELHI

Judgment reserved on : February 02, 2009

Judgment delivered on : February 09, 2009

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Crl. A. No. 926/2006

% Suren Mandal S/o Rakshik Mandal... Appellant

Through: Mr. P.R. Thakur, Advocate

versus

The State (Govt. of NCT) Delhi ... Respondent

Through: Mr. Amit Sharma, Additional
Public Prosecutor for State

CORAM:

HON'BLE MR. JUSTICE SUNIL GAUR

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?

SUNIL GAUR, J.

1. In this appeal, challenge is to impugned judgment/order of 20th and 25th July 2002 of the learned Special Judge, (under the Narcotic Drugs and Psychotropic Substances Act, 1985) Delhi, who has convicted the Appellant for the offence of illegal possession of 137Kgs. of *ganja*, which is punishable under Section 20 of The Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter

referred to as NDPS Act) and sentenced him to undergo imprisonment for a period of ten years alongwith a fine of Rs.1,00,000/- (Rupees one lac only), and in default of payment of fine, he has been sentenced to undergo rigorous imprisonment for one year.

2. Prosecution version, emerging from the record of this case, is that on 26.10.2002, at about 5.50 PM an informer informed Inspector S.P. Kaushik that two persons are engaged in the sale of *ganja* and are present with huge quantity of *ganja* outside New Delhi Railway Station at Ajmeri Gate side, and this information was recorded in DD No.18, (Ex.PW-5/A) at 6:00 PM, by SI Kuldeep Singh and its copy was forwarded to ACP Narcotic Branch. After obtaining order from Shri R.P. Sharma, ACP, Narcotic Branch, raiding team was formed which consisted of SI Kuldeep Singh, HC Kuldeep Singh, Constable Dilawar Singh and Constable Girish, and it was headed by Inspector S.P. Kaushik, and they reached outside exit gate of New Delhi Railway Station at 6.25 PM. Appellant/accused was found sitting on three big bags on the pavement, near MCD Jansuvidha Complex, opposite to the exit gate of New Delhi Railway Station and his co-accused Siya Ram Mehto, was also found sitting on another set of three bags, lying there.

3. As per the version of the prosecution, Inspector S.P. Kaushik, PW-5, made an effort to make the public persons join the raiding party but none agreed.

4. Appellant/accused was given an option of being searched by a Gazetted Officer or by themselves, but he refused to avail of the option given by the raiding team vide Notice under Section 50 of NDPS Act (Ex. PW-2/B). SI Kuldeep Singh recorded aforesaid refusal/replies of appellant/accused as well as of his co-accused. Public persons were asked to join the search proceedings, but nobody agreed. Personal search of appellant/accused was conducted by SI Kuldeep Singh but nothing incriminating was recovered from his personal search, but from the bags on which he was sitting, upon opening them, it was found containing *ganja* therein. Likewise, personal search of co-accused Siya Ram was also conducted and nothing incriminating was recovered but three bags on which he was sitting, were found containing *ganja*. Two samples of 500 grams *ganja* from each bag were taken out. FSL Form was filled in. Recovered bags and samples were sealed with the seal of SI Kuldeep Singh, i.e., 2A PS NB Delhi and the same was also affixed on the FSL form. Spot proceedings were completed. FIR No.83/02 was registered. Appellant/accused was arrested. After completing the investigation, the charge-sheet was filed in the court against the

appellant/accused for commission of the offence under Section 20 of NDPS Act.

5. Trial commenced, as appellant/accused did not plead guilty to the charges framed against him under the aforesaid provisions of law. Each and every incriminating evidence appearing against appellant/accused was put to him, which he denied and pleaded false implication. Appellant and his co-accused got examined four witnesses in their defence, i.e., DW-1 – Subodh Mandal; DW-2 – Smt. Anjana wife of Appellant/accused; DW-3 - Smt. Sonia Devi, wife of co-accused Siya Ram Mandal and DW-4 – Naval Kishore regarding the Appellant and his co-accused being picked up at 8.30 AM on the day of the incident from Adarsh Nagar Chowk, Delhi, and of being falsely implicated in this case.

6. At trial, prosecution had got examined eleven witnesses, out of which HC Roshan Lal (PW-4) had proved the FIR Ex. PW-4/A; HC Gyan Prakash, MHC/M (PW-1) had proved relevant entries dated 26.10.02 in the *Malkhana* register No.19 regarding deposit of the case property and FSL form and *jamatalasi* articles of the accused persons Ex.PW-1/A. He further deposed that on 1.11.02 samples duly sealed with the seals of 2APSNB Delhi and 1SHONBR Delhi were sent to FSL, Malviya Nagar through Ct. Vinod vide RC No.105/21 and entry to this effect is Ex.PW-1/C; Constable Virender

(PW-7) had deposed that on 31.10.02, he took parcels for depositing the same at FSL Office, Malviya Nagar; Constable Vinod (PW-9) deposed that he had deposited the parcels at FSL Office, Malviya Nagar on 1.11.2002; HC Ved Prakash (PW-6), SO to DCP/Narcotics had proved the special reports under section 57 of NDPS Act Ex.PW-6/A and PW-6/B of the IOs namely SI Kuldeep Singh and SI Attar Singh. Dr. Madhulika Sharma (PW-11) had deposed regarding arrest of the accused persons and the disclosure statements of appellant/accused Suren Mandal and his co-accused Siya Ram Mehto as Ex.PW-2/E and Ex.PW-2/H respectively. HC Kuldeep Singh, (PW-2); Constable Girish, (PW-8); SI Kuldeep Singh (PW-10) and Inspector S.P. Kaushik (PW-5) deposed about the raid proceedings.

7. After the trial, Appellant/accused has been convicted and sentenced as indicated above.

8. Counsel for the parties, were heard and the record of this case has been perused.

9. Learned counsel for appellant has assailed the conviction of the Appellant/accused solely on the ground that the prosecution has failed to prove that Appellant was in conscious possession of the recovered narcotic substance and he relies upon the decisions

reported in **2002 SCC (Cri) 1769; 2004 SCC (Cri) 838; 2003 (3) JCC 1513; 2006 (1) RCR (Cri) 4; 2005 (1) RCR (Cri) 70; and 2009 (1) RCR (Cri) 310** to contend that merely because the accused is found sitting on the bags, containing the narcotic substance, it cannot be presumed that he was in possession of the said substance. It has been pointed out that it has not been put to the Appellant/accused in his statement under Section 313 Cr. P.C. that the Appellant/accused was in 'conscious possession' of the recovered narcotic substance and therefore, the impugned judgment convicting the Appellant/accused is rendered illegal and Appellant deserves to be acquitted. Nothing else is urged on behalf of the Appellant/accused.

10. Learned Additional Public Prosecutor for the State submits that the stand taken by the Appellant/accused in his statement under Section 313 Cr. P.C. is of the *ganja* being recovered from somebody else and of planting it upon the Appellant. It is pointed out that it was put to the Appellant in his statement under Section 313 Cr. P.C. that there was secret information of Appellant possessing *ganja* and for that purpose the search of the bags, on which the Appellant was sitting was to be taken and an offer was given to the Appellant to get the search conducted in the presence of the Gazetted Officer or Magistrate, but the Appellant had declined. Thus, it is submitted that there was no requirement of specifically putting to the

Appellant/accused that he was in conscious possession of the *ganja*, which was recovered from the bags on which the Appellant was sitting. It is pointed out that the cases cited on behalf of the Appellant pertain to the recovery of poppy husk etc. and none of those cases were of prior secret information and were of chance recovery while on patrolling and therefore, the aforesaid decisions are distinguishable on facts and the conviction and sentence imposed upon the Appellant is perfectly legal and justified in this case.

11. The concept of 'conscious possession' has been dealt with by the Apex Court in a greater detail in the case of '*Megh Singh vs. State of Punjab*' **2003 (3) JCC 1513**, by holding that once possession is established, the person who claims that he was not in a 'conscious possession', has to establish it because how he came to be in possession, is within his special knowledge. Section 35 of the NDPS Act gives a statutory recognition of this position because of presumption available in law. Similar is the position in terms of Section 54 of the NDPS Act, where also presumption is available to be drawn from the possession of illicit articles.

12. In the aforesaid decision, it has been highlighted by the Apex Court that in criminal law, there are no precedents and the apt observations made read as under:-

“Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases or between two accused in the same case. Each case depends on its own facts and a close similarity between one case and another is not enough because a single significant detail may alter the entire aspect. It is more pronounced in criminal cases where the backbone of adjudication is fact based.”

13. It is true that in a case of chance recovery, the question of ‘conscious possession’, would definitely be of prime importance. Present case is of prior secret information and therefore, the decisions cited by learned counsel for appellant of ‘chance recovery’ would not be of any help. There was no occasion for framing of specific question of Appellant being in ‘conscious possession’ of the recovered *ganja*, as the factum of prior secret information was already disclosed to the Appellant and despite opportunity to conduct the search of the bags on which he was sitting, in the presence of Gazetted Officer being given to the Appellant. The stand taken by the Appellant is of mere denial, which cannot be accepted on the face of it, in the facts of this case. In fact, Appellant was found sitting on the bags, which were lying not outside the exit gate of New Delhi Railway Station, but were lying on the pavement outside MCD Jan Suvidha Complex, which was, of course, opposite to the exit gate of New Delhi Railway Station.

14. It has been neither suggested to the prosecution witnesses nor it is the stand of the Appellant in his statement under Section 313 Cr.

P.C. that Appellant was not aware of the contents of the bags on which he was sitting. In fact, the stand of the Appellant has been that the aforesaid recovery of 137 Kgs of *ganja* has been planted upon the Appellant. It has not been shown as to why such a heavy recovery would be planted upon the Appellant. It is not the case of the Appellant that the raiding team had any animus against the Appellant, who does not explain his presence at the spot. He takes no plea of alibi.

15. It is pertinent to take note of the question No.10, which was put by the trial court to the Appellant in his statement under Section 313 Cr. P.C. and it reads as follows:-

“Q10. *It is further in evidence against you that PW5 SHO S.P. Kaushik told to you the secret information that they have an information that you indulge in selling of ganja in Delhi and at this time also ganja can be recovered from your possession for which search your gunny bags is to be taken by the police; that you were also apprised of your legal rights that if you so desire, you could be produced in front of a Gazetted Officer or a Magistrate and you can take search of the police party prior to your search. What have you to say?*

Ans. *It is incorrect.”*

16. Had it been the case of Appellant sitting on the bags (from which *ganja* was recovered), while waiting for the bus or somebody, then in normal course, he would have stated so while answering any

of the questions put to him under Section 313 of the Cr. P.C. Instead of taking any such plea, the stand taken by the Appellant in his statement under Section 313 Cr. P.C. is of recovery of 137 Kgs. of *ganja* from somebody else and of being planted upon the Appellant. As already noted above, the plea of the Appellant of planting such a heavy recovery upon him is totally unacceptable.

17. It is pertinent to note that the recovery of 137 kgs. of *ganja* from the bags on which the Appellant was sitting stands firmly proved from evidence on record and therefore, burden shifts upon the Appellant to explain. The explanation offered by the Appellant is hardly acceptable and the plea of his not being aware as to what was contained in the bags, on which he was sitting is neither taken nor is available to him, as the present case is not of chance recovery nor of presence of the Appellant at the spot being by chance. I am of the considered opinion that the necessity of framing a specific question of 'conscious possession' would not arise in this case as the present case is of prior secret information, which was already disclosed to the Appellant/accused.

18. In the ultimate analysis, it is found that the conviction and the sentence imposed upon the Appellant suffers from no illegality or infirmity and is perfectly justified in the face of the evidence on record.

19. There is no merit in this appeal, which deserves to be dismissed. It is ordered accordingly.

SUNIL GAUR, J.

February 09, 2009

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