

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

Date of Reserve: 3rd August, 2010
Date of Order: September 13, 2010

+ Crl.Appeal No. 259/2006
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13.09.2010

Jodha Sahani

... Appellant

Through: Ms. Rakhi Dubey, Advocate

Versus

The State of NCT of Delhi

... Respondents

Through: Mr. O.P.Saxena, APP for the State

JUSTICE SHIV NARAYAN DHINGRA

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 judgment should be reported in Digest? Yes.

JUDGMENT

The present appeal has been preferred against order dated 30th May, 2005 convicting the accused/appellant under Section 8 of NDPS Act punishable under Section 20(b)(ii)(c) of NDPS Act and order dated 2nd June, 2005 sentencing him to undergo imprisonment for period of 10 years and a fine of Rs.1 lac.

2. As per prosecution's case, on 17th April, 2003 a police patrolling party at about 6.05 pm saw the appellant going near *baandh* holding a gunny back in his hand. When the appellant looked at police party

he got scared and quickly moved towards village *Devali*. This raised suspicion in the mind of police party and he was stopped by the police party and his gunny bag was checked. A substance like *charas* was found in the gunny bag. SI P.C.Yadav who was heading the police party told appellant that his personal search was to be taken and he served a notice under Section 50 NDPS Act (Exh. PW-4/A) upon the appellant. The appellant however did not ask for search in presence of a gazette officer and magistrate and his personal search was conducted. Nothing incriminating was found from personal search. The substance found in the gunny bag was weighed and found to be 8.5 kg. A message was sent to Police Station by SI P.C.Yadav and Inspector Nand Kishore reached the spot. A sample of 500 gm was taken from the substance in gunny bag and sealed with seal of PY. Form FSL was also prepared and the same seal was put on the form. Inspector Nand Kishore, who had reached the spot, also put his own seal of NK on the sample and on the form FSL. The remaining quantity of *charas* in gunny bag was sealed and taken to Police Station and deposited with *malkhana*. Sample *charas* (Exh. P1) was sent to the CFSL along with the form and the CFSL report confirmed that the substance was *charas*. The investigating officer had also sent a report under Section 57 NDPS to ACP Greater Kailash. The learned trial Court after considering the evidence and the documents came to the conclusion that the accused was found in possession of 8.5 kg of *charas*, a prohibited substance under NDPS Act and convicted the accused.

3. In the appeal, a plea has been taken that the provisions of Section 42 NDPS Act were not followed by the Investigating Officer. This plea has to be rejected since Section 42 NDPS Act was not applicable in this case as there was no prior intimation with the police party about the appellant carrying *charas* with him. Section 43 NDPS would be applicable in this case which relates to chance recovery and therefore procedure under Section 42 NDPS Act was not to be followed.

4. The other plea taken by the appellant is that the FSL report mentions - "The parcels one in number marked '1' which was sealed with specimen seal impression forwarded". It is stated that the word used in FSL report is "specimen seal" and not "specimen seals" as there were two seals "NK" and "PY" and therefore benefit of doubt should be given to the accused. I consider that this argument is a baseless argument. The accused cannot be given benefit of doubt because of wrong grammar of the person sitting at FSL. It seems that the person at FSL had no idea of usage of singular and plural words that is why for one parcel word "parcels" has been used. As the seal impression on the parcel tallied with the seal on the form there is no question of giving benefit of doubt. A plea is taken that form FSL was not sent or deposited with FSL along with the parcel. This point is falsified from FSL report itself which shows that the form FSL along with parcel was received. The Counsel for the appellant relied on *malkhana* register which does not mention of sending FSL form along with the sample. *Malkhana* register is not the ultimate proof of what was sent to CFSL laboratory. PW-3

Om Prakash in his testimony has categorically stated that sealed parcel with form FSL was sent to FSL Malviya Nagar through constable Raghubir. This testimony of witness cannot be rejected merely because in the *malkhana* register there is no mention of form FSL being sent along with the sealed sample.

5. The other ground taken is that a proper notice under Section 50 NDPS was not served upon the accused as the notice served was defective. This argument is not tenable since in this case recovery was not made from the person of the appellant. The recovery was made from a gunny bag and the Supreme Court in *State of Himachal Pradesh v. Pawan Kumar* 2005 (4) SCC 350, after considering large number of decisions including decision in *State of Punjab v. Baldev Singh* 1999 (6) SCC 172, categorically held that Section 50 of the Act would be applicable only in a case of personal search of an accused and it would not be applicable in respect of search of some baggage like bag, article or container which the accused at the relevant time was carrying.

6. The next ground taken by the appellant is that a notice under Section 57 of the NDPS Act about arrest and search was not signed and dated therefore this was no notice in the eyes of law. It would be seen that a report regarding arrest of accused was sent by SI Sanjiv Dodi, who on the date of incident was posted at PS Sangam Vihar. The report exhibited on the court record was a carbon copy of the information sent. The witness did

admit that carbon copy did not bear his signature and date but that does not mean that the original report was not signed. The witness has testified that he prepared this report and sent the same to ACP Greater Kailash. It is a normal procedure that a report with carbon copy is prepared and it is quite possible that the original alone was signed by this witness and sent to ACP and the carbon copy was kept for record. Signing and preparing of report are two different acts. Merely because carbon copy placed on record was not signed does not mean that the original was also not signed. I, therefore, find no force in this argument.

7. The next ground taken by the Counsel for the appellant is that no public witness was joined at the time of recovery. The accused had started moving quickly towards the village on the seeing police party and police party therefore stopped the accused/appellant and checked his gunny bag. On checking it was found that gunny bag held by the accused contained *charas*. Merely because the police party did not associate public persons in this “chance recovery” cannot be a ground to disbelieve the case of prosecution. Moreover, there is normal tendency of public persons not to associate themselves with police investigation as the investigation and the trials in this country are the source of great harassment to the witnesses who are often not taken care of by the courts or by the police. The witnesses are normally scared to join any investigation or give testimony even of what they have witnessed in broad daylight because of the repeated summoning in the

courts and sending them unexamined in a routine and casual manner by the courts.

8. The other ground of assailing trial Court judgment is that when the gunny bag containing remaining material was produced in the Court, its seal was not intact and therefore this was a case where benefit of doubt should be given to the accused/appellant. In *Rangi Ram v. State of Haryana* JT 2000(5) SC 494 a similar argument was made before the Supreme Court that seal on the gunny bag produced in the Court was found broken therefore there was no guarantee as to what was found in the gunny bag. The Supreme Court held that the submission did not deserve to be accepted because according to the evidence on record and from the material which was found in the gunny bag, a sample was taken and the chemical examiner had reported that it was powder of poppy husk.

9. Merely because of the circumstances the seal got broken, the Court could not jump to the conclusion that the material in gunny bag was substituted. Broken seal of the gunny bag, when it was produced in the Court, only reflected the the circumstances in which the materials are kept in *malkhanas* and have to remain there till they are produced in the Court. Most of the materials are kept one over the other due to several reasons, including paucity of space, and in this process while taking out required case property there is always possibility of the seals getting damaged. I, therefore consider that this is no ground to doubt the case of the prosecution.

I find no force in this appeal. The appeal is hereby dismissed.

September 13, 2010
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SHIV NARAYAN DHINGRA, J.