

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

Judgment reserved on: July 05, 2010
Judgment delivered on: September 21, 2010

+ **CRIMINAL APPEAL NO.623/2008**

MOHD. ALLAUDIN

....APPELLANT

Through: Mr. Rajesh Mahajan, Advocate with
Mr. Ajay Raghav, Advocate

Versus

STATE OF G.N.C.T. OF DELHI

.....RESPONDENT

Through: Mr.R.N.Vats, APP

CORAM:

HON'BLE MR. JUSTICE AJIT BHARIHOKE

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

AJIT BHARIHOKE, J.

1. This appeal is directed against the impugned judgment dated 07.03.2008 and order on sentence dated 11.03.2008 in Sessions Case No.137/2007 FIR No.477/2004 P.S. Samay Pur Badli in terms of which the appellant has been convicted for the offence under Section 20 of the Narcotics Drug and Psychotropic Substances Act (for short `NDPS Act') and sentenced to undergo RI for the period of 10 years and also to pay a fine of ₹1 lakh , in default of payment of which to undergo SI for further period of six months.

2. Briefly stated, case of the prosecution is that on the night intervening 4th and 5th September, 2004, Constables Sudhir (PW2) and Constable Jagbir (PW3) were on patrol duty at Bhalsawa Dairy Pushta, Ganda Nala. At about 4:30 am, they noticed the appellant coming from the side of G.T.K. Road, Pushta Ganda Nala. Appellant was carrying a plastic "*katta*" (bag) on his head and a "*jute thaila*" (bag) in his hand. On seeing the police officials, the appellant took an about turn and started walking at a brisk pace. Constable Sudhir and Constable Jagbir got suspicious and apprehended him. On interrogation, the appellant disclosed his name as Allauddin S/o Mohd. Rashid, R/O A-3/12, J.J. Camp, Bhalsawa Dairy, Delhi. The plastic "*katta*" and the "*jute thaila*" were checked and the "*katta*" as well as the "*thaila*" were found to contain "*ganja*" wrapped in newspapers and plastic "*panni*". Constables conveyed this information to the Police Station on wireless which was recorded as DD No.34A (Ex.PW5/A) at 5:05 am on 05.09.2004. SHO, P.S. Badli was informed and copy of DD report was entrusted to SI Dhananjay Gupta (PW6) for necessary action. SHO along with SI Dhananjay Gupta along with other staff left the Police Station for the place of recovery. On reaching there, 3/4 passersby were requested to join the proceedings, but they declined to join as witnesses and left without disclosing their names and addresses.

3. The "*jute thaila*" was found to contain "*gudri*" (piece of cloth) wrapped in red colour plastic "*panni*" and the said "*gudri*" contained 6 kgs of "*ganja*", out of which, 1kg "*ganja*" was separated as a sample and sealed in a parcel and remaining 5 kg "*ganja*" along with "*gudri*" was kept in the plastic "*panni*" and converted into a sealed packet.

4. "*Katta*" on checking was found to contain 21 kgs "*ganja*" wrapped in plastic "*panni*" and newspaper. 1kg out of the same was separated as a sample and sealed in a separate packet. Remaining 20 kgs of "*ganja*" was kept in the "*katta*" and was converted into a sealed packet. All the four sealed packets were taken into possession vide a recovery memo. Form CFSL was also filled and thereafter the SHO left the spot for the Police Station along with the recovered "*ganja*" as well as forms CFSL which he deposited in the Malkhana.

5. SI Dhananjay Gupta recorded the statement Ex.PW2/B of Constable Sudhir and sent it to the police station after appending his endorsement Ex.PW6/A on it through Constable Jagbir Singh for the registration of the case. During investigation, the samples seized at the spot were sent to CFSL for chemical analysis and as per the report of CFSL, both the samples tested positive for "*ganja*". After

completing the formalities of investigation, charge sheet was filed against the appellant in the court.

6. The appellant was charged for the offence punishable under Section 20 of the NDPS Act to which he pleaded not guilty and claimed to be tried.

7. In order to bring home the guilt of the appellant, the prosecution has examined six witnesses, who are police officials. It would be appropriate to have a look upon the testimony of some material witnesses.

8. PW2 Constable Sudhir and PW3 Constable Jagbir Singh are claimed to be the witnesses of recovery. PW2 Constable Sudhir has deposed that on the intervening night of 4th and 5th September, 2004, he and Constable Jagbir were on patrol duty at Bhalsawa Dairy. At about 4:30 am when they were at Pushta near Ganda Nala, they noticed the appellant coming from the side of GTK Road. He was carrying a plastic "*katta*" on his head and a "*jute thaila*" in his hand. Witness claimed that on seeing the police party, the appellant took an about-turn and started walking briskly. On suspicion, they apprehended the appellant and both "*katta*" and "*thaila*" were checked, which were found to contain a material smelling like tobacco. On enquiry, the appellant told him that it was "*ganja*". This information was given to the Police Station on wireless

at about 5:00 am. Pursuant to the information, SHO Shish Ram (PW4) and SI Dhananjay Gupta (PW6) reached at the spot at about 5:20 am. The SHO checked the contents of "*katta*" and "*thaila*" and it was found to be "*ganja*". "*Ganja*" found in "*thaila*" on weighing was found to be 6 kg. Out of that, 1 kg was taken as a sample. Thereafter "*ganja*" contained in "*katta*" was weighed and it was found to be 21 kg, out of which 1 kg was separated as a sample and rest was kept in "*Katta*". Both the samples were converted into sealed packets with the seals of "DG" and "SR". Similarly, "*katta*" with remaining "*ganja*" and "*thaila*" with remaining "*ganja*" were also sealed with the seals of "DG" and "SR" and they were taken into possession vide memo Ex.PW2/A. The witness claimed that SI Dhananjay Gupta requested some passersby to join the proceedings but none of them agreed. On completion of the proceedings, "*katta*" and "*thaila*" containing "*ganja*" as well as samples and a carbon copy of recovery memo were handed over by SI Dhananjay Gupta, Investigating Officer to the SHO and both the seals were handed over to Constable Jagbir Singh. The witness further stated that SI Dhananjay Gupta thereafter recorded his statement Ex.PW2/B and sent the *rukka* to the police station for registration of case through Constable Jagbir and Constable Jagbir returned to the spot along with the copy of FIR at 8:15 am. Thereafter, the appellant was arrested vide arrest memo Ex.PW2/C. His personal

search was conducted vide memo Ex.PW2/D. PW2 Constable Sudhir also identified "*jute thaila*" Ex.P1, red colour polythene Ex.P2, cloth "*gudri*" Ex.P3, "*ganja*" containing therein Ex.P4. He also identified "*katta*" Ex.P5 and "*ganja*" containing therein as Ex.P6 and plastic "*panni*" and newspaper as Ex.P7 and Ex.P8 respectively. PW3 Constable Jagbir Singh, the other witness of the recovery has also deposed to almost similar effect. In his cross-examination, he stated that notice under Section 50 of the NDPS Act was not given to the accused as he was caught suddenly.

9. PW4 Shish Ram is another important witness. He was SHO, P.S. Badli at the relevant time. He has deposed that on 05.09.2004, on the receipt of information that Constable Sudhir and Constable Jagbir have apprehended the accused Mohd Allauddin carrying "*ganja*", he along with SI Dhananjay Gupta reached at the spot. The Constables produced before him plastic bag and a "*thaila*" recovered from the possession of Mohd. Allauddin. On checking, the plastic bag as well as "*thaila*" was found to contain "*ganja*". He directed SI Dhananjay Gupta to investigate the matter. The "*ganja*" contained in "*thaila*" was weighed and it was found to be 6 kgs. 1 kg out of the same was separated as a sample and the sample as well as remaining "*ganja*" were sealed in separate packets. Thereafter, the "*ganja*" contained in the "*katta*" (plastic bag) was weighed and it was found to be 21 kgs. 1 kg out of the same was

separated as a sample and the sample as well as remaining “ganja” found in “katta” were sealed in separate packets and all the four packets were seized vide memo Ex.PW2/A. FSL form was filled by SI Dhananjay Gupta and the seals used for sealing of the packets with the inscriptions “DG” and “SR” were handed over to Constable Jagbir. Witness claims that thereafter he left the spot along with the seized pullandas and FSL forms and deposited the same with Moharrir Malkhana of the Police Station. This witness has identified the exhibits as P-1 to P-8. In his cross-examination, the witness deposed that he and SI Dhananjay Gupta requested four or five persons to join the proceedings, but none agreed. He also stated that Investigating Officer had carried the scale and weights from the Police Station. He denied the suggestion that he did not visit the spot of recovery and all the proceedings have been done at the Police Station.

10. PW6 SI Dhananjay Gupta is the Investigating Officer. He has also deposed in almost similar fashion. He further stated that he recorded the statement of Constable Sudhir and sent it to the Police Station for the registration of the case. He also proved the rough site plan prepared by him as Ex.PW6/B and the arrest memo Ex.PW2/C besides personal search memo Ex.PW2/D. He further stated that he prepared the report Ex.PW6/C under Section 57 of the NDPS Act and gave it to the Reader to the SHO to be forwarded to

the ACP. He arranged for sending the samples and FSL form to FSL Rohini and obtained the result of chemical analysis. In the cross-examination, he denied the suggestion that he did not visit the spot along with the SHO or that the case property has been planted upon the accused.

11. The appellant, when examined under Section 313 Cr.P.C., denied the prosecution story. He claimed that he was picked up from his residence at night and falsely implicated in this case. No witness has been examined in defence.

12. The learned Additional Sessions Judge on the strength of the above referred evidence of the prosecution concluded that the prosecution has been able to establish that the appellant was found in possession of 27 kgs of "*ganja*" on 05.09.2004 and convicted and sentenced him for the offence punishable under Section 20 of the NDPS Act.

13. Learned Shri Rajesh Mahajan, Advocate appearing for the appellant has submitted that the impugned judgment is based upon the wrong appreciation of facts. He submits that the appellant is innocent, and he was picked up from his residence and falsely implicated in this case. In support of this contention, he has drawn my attention to the testimonies of PW2 Constable Sudhir, PW3 Jagbir Singh, PW4 Inspector Shish Ram and PW6 S.I. Dhananjay Gupta, the

Investigating Officer, who have stated that the post raid proceedings regarding weighing of the recovered "*ganja*", separating of samples, seizure of case property and filling of FSL form were conducted before sending *rukka* to the police station for the registration of the case. According to PW4 Inspector Shish Ram, after the post raid proceedings, he left the spot along with the case property and the FSL form filled at the spot and deposited the same in malkhana P.S. Samay Pur Badli on his arrival there. Learned counsel submits that if the aforesaid version is true, then the FIR number written at the top of the recovery memo Ex.PW2/A should not have been there. He argued that mention of FIR No.477/2004 under Section 20/61/85 NDPS Act on the top of recovery memo Ex.PW2/A belies the entire story of recovery and raises a strong suspicion that all proceedings pertaining to this case have been conducted while sitting at the police station and this circumstance by itself is sufficient to extend the benefit of doubt to the appellant.

14. Learned APP, on the other hand, has drawn my attention to DD No.4A dated 05.09.2004 P.S. Samay Pur Badli wherein arrival of Inspector Shish Ram at the police station at 7.35 A.M. is recorded and it is also recorded that on arrival at the police station, Inspector Shish Ram was told by the Duty Officer that the case in respect of the recovery of aforesaid "*ganja*" had already been registered as FIR No.477/2004 under Section 27/61/85 NDPS Act and on this, he

appended the FIR number on the sealed packets as well as Form FSL and deposited the same at the malkhana. Learned APP submits that from this it is properly explained as to how the FIR number has surfaced on the *pullandas* of the case property, the recovery memo-cum- seizure memo Ex.PW2/A.

15. I have considered the rival contentions on this aspect of the matter. At the outset, it may be pointed out that DD No.4A referred to by the learned APP has not been proved on record. Otherwise also, even if it is assumed that this DD report was actually recorded at the police station, it does not help the prosecution for the reason that as per the testimony of PW4 Inspector Shish Ram, he had left the spot in the official vehicle after the seizure of the case property and filling up of the FSL Form. It is also the case of the prosecution that thereafter Inspector Dhananjay Gupta recorded the statement of Constable Sudhir, appended his endorsement thereupon and sent it to the police station through Constable Jagbir Singh for the registration of the case. The said *rukka* sent by the Investigating Officer is Ex.PW6/A and as per the endorsement on this *rukka* it was sent to the police station at around 7.00 AM. One can safely assume that Investigating Officer must have taken around 5-10 minutes in recording the statement of Constable Sudhir and preparing *rukka* Ex.PW6/A after the SHO had left the spot. In that eventuality, Constable Jagbir Singh in all probabilities could not have reached the

police station before the arrival of the SHO Inspector Shish Ram at the police station. Therefore, it is highly improbable that at the time of arrival of Inspector Shish Ram at the police station the FIR was already registered. This circumstance raises a strong doubt against the correctness of prosecution story.

16. Another discrepancy pointed out by the learned counsel for the appellant is that as per the evidence of prosecution witnesses, two samples of 1 kilogram each were separated and sealed at the spot. However, perusal of the FSL report dated 02.12.2004 reveals that the samples which reached at the FSL respectively contained 860 gms and 892 gms of dried greenish, brownish, flowery vegetative material described as "*ganja*". There is no explanation about the discrepancy in the weight of the samples which were allegedly taken at the spot and which reached at the FSL. Learned APP, to counter this argument, has submitted that in the instant case the seizure was effected on 06.09.2004 and the samples were sent to FSL Rohini after about 2½ months on 21.11.2004. He submitted that a possibility cannot be ruled out that during intervening 2½ months, the samples lost moisture because of evaporation and heat which resulted in the decrease in weight of the samples. I am not convinced with the above argument of learned APP. The difference in weight of the samples which were allegedly taken at the spot and which reached at the FSL is substantial and it cannot be attributed

to loss of moisture due to heat and evaporation. It may further be pointed out that as per the case of prosecution, the samples seized were handed over at the spot to Constable Jagbir Singh. Constable Jagbir Singh in his cross examination has stated that he returned the seal to the Investigating Officer. PW6 S.I. Dhananjay Gupta in his cross examination has stated that the seal was returned to him by Constable Jagbir Singh after 2/4 days. S.I. Dhananjay Gupta has also stated that he himself collected the samples from the malkhana and took those samples along with FSL form to FSL, Rohini. Ex.PW1/B is the road certificate vide which the samples and FSL form were sent to FSL Rohini. This road certificate is dated 22.11.2004. This imply that when S.I. Dhananjay Gupta collected the samples and FSL Form from Moharrir Malkhana P.S. Samay Pur Badli, he was already in possession of the seal used for sealing the samples. Therefore, a possibility of tampering with the samples and the FSL form cannot be ruled out.

17. Aforesaid discrepancy in the prosecution evidence, coupled with the fact that there is no independent witness to the recovery, raises a strong doubt against the correctness of the version of prosecution witnesses, who fell within the category of interested witnesses being the police officials involved with the investigation. Thus, it is not safe to rely upon their testimony.

18. In view of the discussion above, I find it difficult to sustain the conviction and sentence of the appellant, who at least is entitled to the benefit of doubt. I, therefore, accept the appeal and set aside the impugned judgment of conviction and order on sentence. The appellant is acquitted of the charge, giving him benefit of doubt.

19. The appellant is in Jail. He be released forthwith, if not required in any other case.

20. The appeal is disposed of accordingly.

(AJIT BHARIHOKE)
JUDGE

SEPTEMBER 21, 2010
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