

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

+ Crl. Appeal No.909/2005

% Judgment reserved on: 29th February, 2012
Judgment delivered on: 02nd July, 2012

BASANT RAI Appellant
Through: Mr. Aditya Wadhwa, Adv

versus

STATE Respondent
Through: Mr. Navin Sharma, APP for State .

CORAM:
HON'BLE MR. JUSTICE SURESH KAIT

SURESH KAIT, J.

1. Vide instant appeal, appellant has challenged the impugned judgment dated 18.10.2005 whereby he was convicted for the offences punishable under Section 20(b) (ii) (C) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred as 'NDPS Act') for having been found in unlawful possession of 3.5KGs of charas.

2. Also challenged the order on Sentence dated 21.10.2005 whereby, the appellant was sentenced to under RI for a period of ten years and to pay fine of ₹1.00 Lac and in default of payment of fine, he shall further undergo SI for one year. The benefit of Section 428 Cr. P.C. has also been extended to him.

3. The brief facts of the case are that on 24.09.2003, a secret information was received that the appellant was carrying charas at a

given place and at a particular time. Accordingly, a raiding team was constituted and the appellant was caught allegedly carrying 3.5 KGs of charas on 24.09.2003 at 02:00PM.

4. Further, the case of prosecution that he was carrying a green coloured polyethene bag which contains 8 smaller polyethene bags having black colour substance.

5. Accordingly, two samples of 25 Grams each were made after braking charas from each of the 08 slabs. The samples were sent to FSL and it found to be charas.

6. Mr.Aditya Wadhwa, learned counsel for appellant has argued that the sample sent to the FSL is not the representative of the entire quantity of the allegedly recovered substance. Therefore, it cannot be inferred that the quantity of 3.5KGs of recovered substance was charas.

7. He submitted, the admitted case of the prosecution is that the appellant was found carrying a green coloured polythene bag which in turn contains 08 smaller packets. It was in these smaller packets that the black coloured substance which stated to have been the charas. The PW1, investigating officer then take out small pieces of charas from each packet and made two sample parcels. These sample parcels, were sent to FSL and was later found to be charas.

8. Learned counsel has relied upon the case of ***Gaunter Edwin Kircher v. State of Goa: 1993(3) SCC 145*** and submitted that in the similar factual matrix, their Lordships have held as under:-

"If it is not practicable to send the entire quantity then sufficient quantity by way of samples from each of the packets of pieces recovered should be sent for chemical examination."

9. Learned counsel submitted that in the above referred case, where accused was found in possession of 12 grams of charas in two pieces (5 & 7 grams) the investigating officer had sent contraband weighing 5 grams for chemical examination. The same was found to be charas. In such situation, Hon'ble Apex Court has held that the other piece weighing 7 grams could not be inferred to be charas. Accordingly, the accused was sentenced only for possession 5 grams of charas.

10. Learned counsel has further relied upon ***Javed A Bhatt v. Union of India: 2007 Cri L J 3145*** decided by the High Court of Mumbai wherein it has been held as under:-

"In the case at hand, the prosecution did not send all the pieces either in the form of cigars or Hats for analysis but the prosecution remained satisfied only by sending some of such pieces weighing about 50 grams and therefore, applying the principle laid down by the Apex Court it has to be concluded that what the accused was found with, was only 50 grams of charas/hasis and not the entire quantity of 380 grams as contended by the prosecution and that is the inference which has got to be drawn, as drawn by the Apex Court, upon the failure of the prosecution to send all the cigars or flats found with the accused."

11. Learned counsel has argued that in the factual matrix of the case, since the representative sample from each of the 8 packets has not been sent for chemical examination, it cannot be inferred that the entire

seized substance 3.5 KGs was a charas and the appellant could not be convicted for possession thereof.

12. He further submitted that the report of Forensic Science Laboratory cannot be relied upon because of the fact that FSL Report Ex.PW8/B directly concludes that the received substance is charas. The report does not mention any material indicating the scientific tests, which were conducted to arrive at this opinion. Such a report does not give an opportunity to the Court independently assess whether the recovered substance was charas.

13. The Trial Court basing its conviction on the aforesaid report, has abdicated its judicial function by merely mechanically recording an order of conviction on the basis of this report. Moreover, it is pertinent to mention that the Chemical Examiner was not examined.

14. Learned counsel has further relied upon ***Mahmad Hanif Ibrahim v. State of Gujarat : 1995 (1) Crimes 274*** wherein it has been held in para No.8 as under:-

“Further, the Public Analyst cannot afford to forget that he was sending his opinion report to be used in a criminal trial which brooks no negligence or doubt! Any remissness, therefore, on the part of Public Analyst in discharge of the aforesaid duties, like naked electric wire permits no mistake to prove fatal! He should also further know that his opinion is admissible merely on the ground that he being an expert. In other words, merely because by virtue of Section 293 of the Code, his report could be admitted in evidence and exhibited without giving evidence before the Court that by itself does not mean that the same is to be

accepted straightway as a conclusive proof of evidence against the accused, more particularly when it does not contain even a grain of material indicating on what scientific tests his opinion was arrived at. Before the evidence of Public Analyst can be safely accepted and relied upon to base the order of conviction and sentence, the Court must have an opportunity of its own to independently assess and appreciate the same on the basis of scientific tests, etc. Instead, if the Court is to surrender to any bare opinion of the Public Analyst, that can amount to abdication of its judicial function, relegating itself to mechanically record the order of conviction and sentence without doing anything else!”

15. He has further argued that there is discrepancy in the time of parcels were deposited in the malkhana. PW1, IO of the case states that the appellant was arrested at 02:00PM on 24.09.2004 and *rukka* alongwith the parcels were sent through Ct.Umesh (PW5), who left at 04:00PM. PW5 also maintains that he took the parcels at 04:00PM alongwith *rukka*.

16. Whereas, PW2 HC Gyan Parkash, Malkhana Incharge, deposed that he deposited the parcels in the Malkhana at 02:00PM and made the entry in the Register No.19 at 02:05PM.

17. Learned counsel submits that this discrepancy strikes at the root of the case. Such discrepancy certainly raises a reasonable doubt with regards the process of arrest and seizure; the benefit of which must be given to the accused.

18. He further submitted that chain of custody and contraband has not been established; because of the fact that the IO/PW1 mentioned that after sealing the contraband with the seal '5 B PS NB Delhi' he handed over the seal to HC Bhagwat Dayal. HC Bhagwat Dayal should have been examined to prove that he received seal after it was used to seal the parcels.

19. To buttress his arguments on the issue, learned counsel has relied upon the case of ***Satnam Singh v. State : 1997 Cri L J 2067*** wherein the High Court of Punjab and Haryana held as under:-

“In this case the examination of public witness Arjan Singh had become more essential due to an important link in the evidence of the prosecution to connect the appellant with the offence, i.e. seal after use was handed over to him. It was only Arjan Singh who could have deposed as to whether seal after use was handed over to him and as to when he had returned the same. This was all more important to rule out the possibility that the sample parcel was not tampered with by anybody till it reached the hands of the Chemical Examiner. Non-examination of Arjan Singh is another factor which strikes at the root of the prosecution case.”

20. Learned counsel has further submitted that no public witness has been examined. Therefore, it creates suspicion on the story of the prosecution. In such eventuality, the benefit of doubt should go to the appellant/accused.

21. Moreover, learned Trial Judge has wrongly convicted the appellant without going through the evidence in favour of appellant and has not even applied its mind to the extent that the green coloured

polythene bag was carrying eight smaller packets which contained contraband. Two samples of 25 grams each after breaking and mixing charas from each of the packets were prepared. Therefore, this was wrong process of taking samples. The police should have been taken the samples from each packet instead of mixing all samples into two representative samples. If the process of mixing and taking sample was defective, then ultimately, the result thereon is also defective. Therefore, cannot be relied upon such a report.

22. On the other hand, Mr. Navin Sharma, learned APP submitted that during the search of the appellant, it was found that he was holding a green coloured polythene bag in his right hand having 08 transparent polythene bags. On checking them, all found to contain black coloured substances in the shape of slabs. On checking the same with the help of drug testing kit, the same gave positive test for charas. The said recovered charas in all the 8 packets were collectively weighed and it came to 3.5KGs. Small pieces of charas were taken out from all the packets and two samples of 25 grams each were prepared after putting the same into two separate envelope. Both the envelopes were marked as A and B. The remaining contrabands were kept in green coloured polythene and cloth parcel of the same was prepared which was given mark C. FSL form was also filled in at the spot. PW1 put his official seal '5 B PS NB Delhi' on the parcels Mark A to C and FSL form. Seal after use was handed over to HC Bhagwt Dayal.

23. Learned APP further submitted that PW5 Ct.Umesh Kumar has deposed that the IO conducted the formal search of the appellant and got recovered the polythene packet from his right hand, which was containing 8 polythene packets which were containing slabs of black coloured substance. SI Prem Chand checked and it found to be charas. He supported the version of the PW1/IO. Therefore, the appellant has been rightly convicted for the offences under Sections 20 & 21 NDPS Act.

24. It is submitted that Section 2(iii) defines 'Cannabis' and Section 2(iv) defines 'Cannabis plant'. The appellant did not put any suggestion during trial as he has argued before this Court in this appeal. Therefore, the appellant should not be given benefit of the same.

25. After hearing both the learned counsel for parties and going through the Trial Court Record, I find force in the submission of learned counsel for appellant. Admittedly, the samples were drawn after breaking small pieces from 08 of the polythene bags which were allegedly kept in a green coloured bag by the appellant in his right hand. The IO prepared two samples of 25 grams each after taking a small quantity from each of the slabs.

26. Though the settled law is that if it is not practicable to send the entire quantity then sufficient quantity by way of samples from each of the packets of pieces recovered should be sent for chemical examination. Otherwise, result thereon, may be doubted.

27. For example, if the 08 packets were allegedly recovered from the appellant and only two packets were having contraband substance and rest 6 packets did not have any contraband; though all may be of the same colour, when we mix the substances of all 8 packets into one or two; then definitely, the result would be of the total quantity and not of the two pieces. Therefore, the process adopted by the prosecution creates suspicion. In such a situation, as per settled law, the benefit thereof should go in favour of the accused. It does not matter the quantity. Proper procedure has to be followed, without that the results would be negative.

28. In view of above discussion, instant appeal is allowed.

29. Consequently, impugned judgment dated 18.10.2005 and order on sentence dated 21.10.2005 are hereby set aside. Appellant is acquitted from the charges.

30. Jail authorities are directed to set the appellant free forthwith, if not required in any other case.

31. Trial Court Record be remitted immediately.

32. Copy of order be sent to Jail Superintendent for compliance.

33. No order as to costs.

SURESH KAIT, J

JULY 02, 2012

Mk/jg