

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

RESERVED ON : 15th APRIL, 2014

DECIDED ON : 03rd JULY, 2014

+ CRL.A.No. 263/2011 & CRL.M.B.No. 345/2011

RAJESH KUMAR @ SANJAY Appellant

Through : Mr.Pankaj Singh, Advocate.

versus

STATE OF NCT DELHI Respondent

Through : Mr.M.N.Dudeja, APP.

+ CRL.A.No. 211/2011

DAYA RAM Appellant

**Through : Mr.Ajay Verma, Advocate with
Mr.Shiv Kumar Dwivedi,
Advocate.**

versus

THE STATE (NCT OF DELHI) Respondent

Through : Mr.M.N.Dudeja, APP.

AND

+ CRL.A.No. 212/2011 & CRL.M.B.No. 676/2012

MUKESH KUMAR Appellant

**Through : Mr.Sudhansu Palo, Advocate with
Mr.T.K.Mahapatro, Advocate.**

versus

THE STATE (NCT OF DELHI) Respondent
Through : Mr.M.N.Dudeja, APP.

CORAM:
HON'BLE MR. JUSTICE S.P.GARG

S.P.GARG, J.

1. Rajesh Kumar @ Sanjay (A-1), Daya Ram (A-2) and Mukesh Kumar (A-3) impugn a judgment dated 29.11.2010 of learned Addl. Sessions Judge in Sessions Case No.30A/09 arising out of FIR No.241/07 PS Sarojini Nagar by which A-1 and A-3 under Sections 20(b)(ii)(C) of the NDPS Act and A-2 under Sections 20(b)(ii)(B) of the said Act were convicted; they all were further convicted under Section 29 of the said Act. By an order dated 07.12.2010, they were awarded various prison terms with fine. The substantive sentences were to operate concurrently.

2. Briefly stated, the prosecution case as reflected in the charge-sheet was that on the night intervening 14/15.05.2007 at around 03.30 A.M. near Kamal Cinema picket and B-4, Safdarjung Enclave, Delhi, the appellants were found in possession of 29.800 kg, 10.450 kg and 25.600 kg of ganja respectively when they were travelling in a TSR No. DL-1RE-2450. During investigation, statements of the witnesses conversant with the facts were recorded. The case property along with FSL form was deposited in the malkhana. Mandatory procedure prescribed under the *Crl.A.No.263/2011 & connected appeals.*

NDPS Act was followed. The exhibits were sent to Forensic Science Laboratory. After completion of investigation, a charge-sheet was filed against all of them in the Court; they were duly charged and brought to trial. The prosecution examined thirteen witnesses to substantiate the charges. In 313 statements, the appellants denied complicity in the crime and pleaded false implication without examining any witness in defence. The trial resulted in their conviction as aforesaid. Being aggrieved and dissatisfied, the appellants have preferred the appeals.

3. I have heard the learned counsel for the parties and have examined the file minutely. The appellants' conviction is primarily based upon the testimonies of the police officials only. Admittedly, no independent public witness was associated at any stage of the investigation. True, it is no rule of law that public witnesses should be joined in every eventuality and no conviction can be based upon the testimonies of the police officials. Sometimes it becomes highly difficult for the police officials to associate independent public witness for various reasons. At the same time, it is undoubtedly true that joining of independent public witness is not a mere formality. Simply saying by the police witnesses that the independent public witnesses were not available without any evidence to that effect would not be suffice. The Investigating

Officer is required to make genuine efforts to associate independent public witnesses if available. This is insisted so as to lend authenticity and credibility to the search and recovery that are effected. It is of course not an absolute rule and fact of each case has to be appreciated and scrutinized on its own merits. In the instant case, despite availability of independent public witnesses, no genuine and sincere efforts were made by the Investigating Officer to associate them. The explanation given by the Investigating Officer does not inspire confidence. The testimony of the police officials requires to be perused with great care and caution.

4. On scrutinizing the testimonies of police officials regarding recovery and other proceedings, it reveals that number of vital contradictions, inconsistencies and infirmities have emerged. Prosecution case is that when the appellants were travelling in TSR No. DL-1RE-2450, on seeing the police officials present at picket Kamal Cinema, they stopped the TSR at a distance of about 50 meters; turned it back and accelerated its speed to escape. They (the police officials) chased them. The TSR stopped due to failure of engine and the appellants were apprehended while fleeing from the spot carrying bags on their heads. On checking the bags, ganja was found contained therein. PW-5 (HC Surender) proved Daily Diary (DD) Entry No.66B (Ex.PW-5/A) by *Crl.A.No.263/2011 & connected appeals.*

which, Const.Ramesh and Const.Vijender were sent for picket duty at Kamal Cinema T Point. The prosecution witnesses, however, are silent about the presence of Const.Vijender at the picket duty at Kamal Cinema. Const.Vijender was not examined as a witness and there is no explanation about his whereabouts at the time of apprehension of the appellants. PW-2 (HC Ramesh Chand) in his testimony claimed that he was on picket duty at Kamal Cinema from 12.00 (night) to 05.00 A.M. and at around 02.30 A.M., ASI P.D.Meena and Const.Rajesh came to the picket and checked number of vehicles by putting barricades. At about 03.25 A.M., a TSR No. DL-1RE-2450 came from Jhandu Singh Marg, Safdarjung side. PW-9 (ASI P.D.Meena) gave a conflicting version and deposed that on the night intervening 14/15.05.2007, he along with Const.Rajesh was on picket duty at Kamal Cinema and at around 02.30 A.M., a TSR No. DL-1RE-2450 came from the side of A-2 Block, Safdarjung Enclave. PW-10 (Const.Rajesh) giving different version stated that he and ASI P.D.Meena were on patrolling duty and at around 03.00 A.M. Const.Ramesh joined them and they all started checking vehicles. It is thus unclear whether ASI P.D.Meena and Const.Rajesh were on patrolling duty or were on picket duty. The inconsistency has not been explained. Again, the witnesses have given divergent statements regarding the checking of vehicles prior to the

apprehension of the appellants. PW-2 (HC Ramesh Chand) disclosed that ASI P.D.Meena had checked number of vehicles by putting barricades and the number of searched vehicles was 10 - 15. PW-10 (Const.Rajesh) also disclosed about the checking of the vehicles by ASI P.D.Meena but gave the number of the checked vehicles as 2 – 3. ASI P.D.Meena did not testify if any vehicle was checked by him before apprehending the appellants by putting barricades. He was unable to disclose the number of the vehicles checked by them before the arrival of the TSR in the cross-examination. PWs have given inconsistent statements if the number of such checked vehicles was recorded in the register. Some have answered in affirmative and the others in negative. The Investigating Officer revealed that no such register containing numbers of vehicles checked prior to the apprehension of the appellants was handed over to him by ASI P.D.Meena.

5. PWs have given conflicting statements as to the manner in which the appellants were apprehended. PW-2 (HC Ramesh Chand) testified that on seeing the police, the TSR stopped at a distance of 40 / 50 meters away from the picket; they started turning back the TSR and on suspicion, ASI P.D.Meena directed them to stop it. On seeing the police, the TSR driver accelerated its speed and at a distance of 50 meters, the

TSR stopped due to engine failure. Three individuals came out from the TSR taking gunny bags on their heads and started running towards B-4 Block, Safdarjung Enclave. At some distance, A-3 (the TSR driver) was apprehended by him. Const.Rajesh apprehended A-2 and A-1 was apprehended by ASI P.D.Meena and they were brought back near the TSR and thereafter, to the police picket where the bags found in possession of the appellants were checked. PW-10 (Const.Rajesh) disclosed that at around 03.25 A.M. on seeing the police, the TSR stopped at a distance of 40 / 50 yards. On suspicion, they proceeded towards the TSR; the TSR driver turned it and accelerated its speed to escape. They chased the TSR for 40 / 45 yards and it stopped due to engine failure. The appellants came out of the TSR with their gunny bags and started running towards B-4, Safdarjung Enclave. They all were apprehended and enquiries were made about the contents of the bags which they could not reply satisfactory. PW-9 (ASI P.D.Meena) checked the bags and the proceedings were conducted there. Again, entirely different sequence of events by Investigating Officer. PW-9 (ASI P.D.Meena) disclosed that at about 02.30 A.M., a TSR came from the side of A-2 Block, Safdarjung Enclave and on seeing the police, its driver started turning it back. In the meantime, PW-2 (HC Ramesh Chand) also reached at the spot. They

stopped the TSR and the three individuals came out of it. They were having gunny bags on their shoulders and were stopped. The bags were checked which gave the smell of ganja type material. Enquiries were made about the contents but the answer was unsatisfactory. The inconsistency regarding the manner in which the appellants were apprehended are quite material and have remained unexplained. It is unclear whether the proceedings were conducted at the place where the TSR stopped due to engine failure or all the appellants were brought at the picket and the writing work was conducted there.

6. PW-10 (Const.Rajesh) was sent to procure scale to weigh ganja from one Shadab (kabari). Surprisingly, he was able to procure it from him and the ganja was allegedly weighed at the spot. The prosecution examined PW-7 (Shadab) who supported the prosecution and deposed that on 15.05.2007, Const.Rajesh approached him to take electronic weighing machine at around 04.00 A.M. and it was returned to him at 08.30 A.M. It is unbelievable that PW-7 (Shadab) would be available at odd hours to make available the electronic weighing machine to PW-10 (Const.Rajesh). He was not requested to join the investigation despite his alleged availability. PW-10 (Const.Rajesh) claimed that he had taken lift on a motorcycle for going to the 'kabari' shop and returned to

the spot with the weighing machine on a motorcycle after taking lift. No such motorcyclist was joined in the investigation and motorcycle number was not disclosed. PW-7 (Shadab) in the cross-examination giving inconsistent version disclosed that PW-10 (Const.Rajesh), Beat officer of the area, had come to him in a Government Gypsy. In the cross-examination, he admitted that his counsel Ms.Upasna, Advocate had read the statement to him outside the Court. PW-2 (HC Ramesh Chand) in the cross-examination disclosed that he had seen Const.Rajesh coming with the electronic weighing machine on foot.

7. PW-9 (ASI P.D.Meena) disclosed that ganja was put on a cloth piece after taking it out from the bags. The cloth piece was requisitioned from malkhana and it measured about 10 meters. However, no record from the malkhana showed if any cloth piece was issued for this purpose. The prosecution witnesses have given conflicting statements regarding the removal of TSR from the spot to the police station. PW-2 (HC Ramesh Chand) stated that an auto driver was asked to drive it to the police station. PW-9 (ASI P.D.Meena), however, disclosed that the TSR was driven by a public person whose name he did not remember. PW-10 (Const.Rajesh) was not aware as to how the TSR was taken to the police station. PW-12 (SI Rajesh Shukla) disclosed that subordinate officials had

taken it to the police station. The PWs have given inconsistent statements as to who had gone to deposit the case property with the MHC(M). In the cross-examination PW-1 (HC Shiv Narain) introduced an altogether different story deposing that ASI P.D.Meena had brought the case property in the malkhana on 15.05.2007 at about 11.00 A.M.. SHO Laxmi Narain was also with him at that time. Const. Ramesh Chand had assisted ASI P.D.Meena in carrying the case property. Prosecution case is that case property was sent for deposit by ASI P.D.Meena through Const.Ramesh Chand. Number of other discrepancies; whether the accused persons had run towards one direction or different directions when chased by the police officials; whether they were carrying the gunny bags on their heads or shoulders; whether the proceedings were conducted at the place where the TSR stopped due to engine failure or at the police picket; whether the TSR was pushed from the place of its seizure to the police picket; at what time the case property was deposited; at what time, the seal was returned to ASI P.D.Meena; at what time the police officials left the spot finally; whether the gross weight of the ganja recovered was inclusive of the weight of the gunny bags; how many FSL forms were filled are apparent in the statements of prosecution witnesses. Some of these discrepancies

were noted and observed in the impugned judgment by the Trial Court.

8. During investigation, it revealed that the TSR No. DL-1RE-2450 belonged to one Sri Ram and it was released to him on superdari. However, TSR owner has not been examined to ascertain as to when and under what circumstances, it came into possession of the accused persons and since when they were plying it. The origin of the ganja allegedly recovered from the possession of the appellants could not be ascertained. Nothing emerged during investigation as to for whose benefit this ganja was meant for. The appellants were not involved in any other such criminal activity prior to the incident. It was imperative for the Investigating Officer to investigate as to from which source, at what time / date and for what price the ganja was procured. It was also not investigated as to whom ganja was to be disposed of or sold. Allegedly two mobile phones were recovered from the possession of the appellants, however, for the reasons best known to the Investigating Officer, no call details of the mobile phones were recovered to find out if the appellants remained in regular touch with each other and someone to whom they wanted to sell the ganja in question. It is unclear if after the apprehension of the appellants, they were first taken to police station or to hospital for

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medical examination. The prosecution witnesses have given different statements on this aspect. No medical examination report of any of the appellants has been placed on record to infer as to at what time they were taken to the hospital and were medically examined.

9. Inordinate delay in sending the samples to FSL has remained unexplained. Indisputably, the samples in question were sent on 25.06.2007 after a delay of about 40 days. Road certificate by which the samples were sent to FSL does not reflect if FSL form was sent along with samples. There is no mention of FSL form in the Road certificate (EX.PW-1/C).

10. No investigation was carried out to find out if the accused persons hatched criminal conspiracy, and if so, on what date and time. All the accused persons were from different places and nothing is on record to infer if they used to have prior meetings indulging in the sale of contraband.

11. In the light of above referred deficiencies, inconsistencies and discrepancies, the statements of the official witnesses without corroboration from independent sources cannot be believed to base conviction for stringent provisions of the Act. The law on this aspect is that “stringent the punishment stricter the proof”. In such like cases, the

prosecution evidence has to be examined very zealously so as to exclude every chance of false implication. The prosecution has failed to establish the commission of offence by the appellants beyond reasonable doubt. It cannot take benefit of appellants' inability to establish their defence pleaded in 313 statements beyond reasonable doubt. Mere apprehension of the appellants is not enough. The evidence is scanty and lacking to establish that the contraband was recovered from the possession of the appellants in the manner alleged by the prosecution on the said date and time. They deserve benefit of doubt.

12. Resultantly, appeals filed by the appellants are accepted. The conviction and sentence are set aside. The appellants shall be released forthwith if not required to be detained in any other criminal case. Pending applications stand disposed of as infructuous. Trial Court record be sent back immediately with the copy of the order. A copy of the order be sent to the Superintendent jail for information.

(S.P.GARG)
JUDGE

JULY 03, 2014 / tr