

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

RESERVED ON : 5th FEBRUARY, 2014

DECIDED ON : 1st MAY, 2014

+ CRL.A. 545/2011 & CRL.M.B.No. 209/2014

INDER DEV YADAV AND ORS. Appellants

Through : Ms.Rajni Singh, Advocate for A1.
Mr.U.K.Giri, Advocate for A2.
Mr.Ajay Verma, Advocate for A3.

versus

THE STATE (NCT OF DELHI) Respondent

Through : Mr.Lovkesh Sawhney, APP.

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

S.P.GARG, J.

1. Inder Dev Yadav (A-1), Sushil Parsad (A-2) and Ram Dev Mandal (A-3) impugn a judgment dated 30.03.2011 of learned Addl. Sessions Judge in Sessions Case No. 147/08 arising out of FIR No. 438/08 PS Jahangir Puri by which they were convicted under Section 20 Narcotic Drugs & Psychotropic Substances Act (in short NDPS Act). By an order dated 06.04.2011, they were awarded RI for ten years with fine ₹ 1,00,000/- each.

2. Briefly stated, the prosecution case as set up in the charge-sheet was that on 26.08.2008 secret information was received by SI Bhasker Sharma at his office (Crime Branch) at 11.00 A.M. that A-1 who was main supplier of ganja would come along with his associates in a mini truck No. UP 78 T 2234 at Outer Ring Road, Bhalsava Red Light. The information reduced into writing vide Daily Diary (DD) No.6 (Ex.PW-1/A) shared with senior police officers. On their directions, a raiding party was organised and the police team left along with the secret informer in a private vehicle Qualis vide Daily Diary (DD) No.7 (Ex.PW-1/B) at 11.30 A.M. and reached at the spot at 12.00 (noon). Request was made to four / five passersby to join the raiding team but none agreed. At around 12.30 P.M. a mini truck No. UP 78 T 2234 came from ISBT side and was parked about hundred meters away from the red light. The secret informer recognised A-1 sitting in the truck. The police team waited for someone to take delivery of the contraband. When none appeared to take delivery, at around 01.00 P.M. the truck was raided and the appellants were apprehended. Notices under Section 50 NDPS Act were served to them. On enquiry, the appellants disclosed that they had concealed 'ganja' in a cabin in the truck. After opening the nuts of the cabin, fourty parcels were recovered. The total weight of the contraband came to 312.600 kg.

Samples were taken and sealed. The Investigating Officer prepared rukka (Ex.PW-1/A) and sent through HC Lakvinder for lodging First Information Report. At 05.30 P.M., SI Sanjay reached the spot and took over the investigation. He recorded the statements of the witnesses conversant with the facts. The accused persons were arrested. Further case of the prosecution was that on 28.08.2008, on the basis of secret information, Jai Kishan Sahani @ Buti Lal (since PO) was arrested and certain documents were recovered from his possession which were seized vide seizure memo (Ex.PW-5/A). During investigation, the sample pullandas were sent to Forensic Science Laboratory for examination and its report was collected. After completion of investigation, a charge-sheet was submitted against the appellants; they were duly charged and brought to trial. The prosecution examined ten witnesses to substantiate the charges. In 313 statements, the appellants pleaded false implication and denied their involvement in the crime. They examined DW-1 (Sanjiv Singh) and DW-2 (Rita Devi) in defence. On evaluation of the evidence and after considering the rival contentions of the parties, the Trial Court, by the impugned judgment, convicted the appellants as mentioned previously. Being aggrieved and dissatisfied, they have preferred the appeal.

3. I have heard the learned counsel for the parties and have examined the record. The secret information was reduced into writing by recording Daily Diary (DD) No.6 (Ex.PW-1/A) at 11.00 A.M. by SI Bhasker Sharma. It does not record presence of HC Lakvinder and Const.Sanjay in the office with him at that time. It does not reveal the time when the supplier of contraband with his associates would arrive. Admittedly, copy of this DD entry (Ex.PW-1/A) was not delivered / shown to the senior officers. It does not disclose as to in what manner / mode, the secret information was shared with the senior officers Insp. Anand and concerned ACP as none of them was examined. Daily Diary (DD) No.7 (Ex.PW-1/B) recorded at 11.30 A.M. reveals departure of raiding team in a private vehicle. However, it is conspicuously silent regarding its registration number and make. It also does not show if sincere and genuine attempts were made to associate independent public witnesses before proceeding to the spot. The author of these entries with original record was not examined

4. The appellants' conviction is based upon the testimonies of police personnel / officials alone. No independent public witness was associated at any stage of the investigation. No reasonable or plausible explanation has been offered by SI Bhasker Sharma, Incharge of raiding

team and SI Sanjay who took over the investigation subsequently for not associating any public witness despite having ample time and opportunity. The proceedings were conducted at the spot till around 12.00 (night). Non-joining of independent witness to the recovery creates serious doubt about the genuineness of the prosecution case. It is no rule of law but of prudence that public witnesses should be joined. This is desired to lend authenticity and credibility to the search and the recovery. Of course, it is not an absolute rule. The evidence of police witnesses without slightest independent evidence requires to pursue with great care and caution.

5. Allegedly, the raiding team went to the spot in a Qualis driven by SI Bhasker Sharma. The prosecution witnesses, however, did not divulge the registration number of the Qualis; when and from where it was arranged; when it arrived at the office of Crime Branch and with which travel agency the Qualis was attached. It is unclear who drove the Qualis from the travel agency to the Crime Branch. The prosecution witnesses have given inconsistent and conflicting version in this regard. It is unbelievable that the travel agency would not provide a driver on hiring the taxi from it. It appears that prosecution witnesses have not given true facts about the hiring of the vehicle by which they arrived at the spot. The raiding team had prior information about availability of huge quantity of

‘ganja’ and had ample time to arrange the weighing scale and plastic bags at the office itself. However, only after the alleged recovery of the contraband from the cabin of the truck, PW-7 (Const.Sanjay) was sent to arrange weighing machine and plastic bags. He allegedly brought fourty bags and a weighing machine from a ‘kabari’ sitting on a pavement within fifteen minutes. The said ‘kabari’ was not associated at the time of conducting proceedings at the spot. None of the prosecution witnesses disclosed name of the ‘kabari’ from whom electronic weighing machine and plastic bags numbering fourty were purchased within a few minutes. It is unbelievable that a ‘kabari’ sitting on a pavement would keep ready an electronic weighing machine and the plastic bags to make available to the raiding team on their demand within no time. There is no evidence if any specific payment was made for the purchase of the articles or any receipt was obtained from him.

6. SI. Bhasker Sharma categorically deposed that he took out one sample each of 100 grams from all the fourty packets / parcels; assigned serial numbers S1 to S40; converted into pullandas; sealed with the seal of BS and seized vide seizure memo (Ex.PW-1/N). When these samples were sent to FSL vide letter No. 843/Spl.Team/CB dated 09.09.2008, on weighing their weight was found in the range of 89 grams

to 114.30 grams as reflected in the report (Ex.PX). The prosecution did not offer any plausible explanation for this glaring mismatch. In the cross-examination, PW-1 (SI Bhasker Sharma) attempted to justify variation in the weight of different samples due to error in weighing or the weighing machine. This explanation does not inspire confidence. Keeping in view the discrepancy in the weight of the samples taken by the Incharge, Crime Team and the weight of the samples examined by the Scientific Officer, the possibility of tempering cannot be discarded. The provisions of NDPS Act are stringent and casts a duty upon the prosecution to rule out any possibility of tempering with the sample. The delay of fifteen days in sending the sample to FSL has not been explained.

7. The offending vehicle (mini truck No. UP 78 T 2234) was recovered and seized vide seizure memo (Ex.PW-1/A). Documents pertaining to the vehicle seized vide memo (Ex.PW-1/B) were only photocopies and no attempt was made to recover original documents. No investigation was carried out as to who was the registered owner of the vehicle and how; when and under what circumstances, the vehicle in question came into appellants' possession and if so, in what capacity. It was also not investigated as to from where the appellants had collected the contraband and who was its supplier. The movements of the vehicle prior

to its seizure were not ascertained to reach out to the real culprits king pins. As per the secret information, the contraband was to be delivered at the spot to prospective buyers. Again, the information proved incorrect as none came near the vehicle to take delivery of the contraband. Nothing was ascertained as to, to whom the appellants were to deliver the contraband and at what price.

8. A-1 was found driving the vehicle in question; A-2 and A-3 were found present in the truck at the time of recovery. However, no evidence was collected to ascertain as to what was the role of all the appellants in the transaction. Whenever a person is held up for possession of any offending articles, it must be in his exclusive possession. It is obligatory on the part of the prosecution to establish by cogent and reliable evidence that the suspect was an exclusive and conscious possession of the contraband article. In the instant case, mere presence of A-2 and A-3 in the truck at the time of search will not be sufficient to hold that they had kept the contraband articles in the cabin and were aware of it. It is unclear if all the appellants were beneficiaries in the transaction in any manner.

PWs have given inconsistent statements on various material facts. PW-5 (HC Lakhvinder) claimed that he left the spot in the seized

truck with the case property at about 05.10 P.M. and reached the police station Jahangir Puri at about 05.20 P.M. He, however, arrived at the spot back at around 11.00 P.M. It is unclear as to who drove the offending vehicle to the police station. There are inconsistencies in the statements as to where the writing work was carried out i.e. inside the truck or on the pavement; how much time was taken to record the proceedings; who assigned the investigation to SI Sanjay. In the personal search of two of the appellants, mobile phones were recovered. However, the Investigating Officer did not collect call details of the mobile phones to find out as to with whom they remained in touch during the relevant period.

9. Appellants' counsel pointed out that in the FSL reports (Ex.PX) and Ex.PW-10/A, the samples sent were described 'dried vegetative material'. On the basis of morphological microscopical examination, the samples were identified to be dried Indian Hemp i.e. 'Ganja'. In the cross-examination, PW-10 (Ms.Shashi Bala) admitted that she did not mention in the report that the samples contained fruiting or flowering tops. She admitted that 'dried vegetative material' included leaves, stems, flowering portion and seeds. She further admitted that in the report, she did not mention about the presence of leaves and stems. She volunteered to add that all this was done in her worksheet which was not

made part of the report. Apparently, the report did not reflect the complete findings and it prejudiced the appellants.

Antecedents of the appellants were not verified during investigation. Their houses at native places were not raided. The source from where the contraband was collected or purchased was not ascertained. Nominal rolls of the appellants reveal that they are not involved in any other criminal case.

10. In the light of above discussion and considering the vital discrepancies and deficiencies in the prosecution case, conviction and sentence awarded to the appellants cannot be sustained and are set aside. The appeal is allowed. Pending application also stands disposed of. Trial Court record be sent back forthwith with the copy of the order. A copy of the order be sent to the Superintendent jail for information. The appellants shall be released forthwith if not required to be detained in any other case.

(S.P.GARG)
JUDGE

MAY 01, 2014 / tr