

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

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Date of Decision: 01.04.2014

+ Crl. Appeal 1364/2010
NAUSHAD ALAM Appellant
Through: Mr.Ajay Verma, Adv.

Versus

STATE Respondent
Through: Mr. Feroz Khan Ghazi, Adv.

CORAM:
HON'BLE MR. JUSTICE V.K.JAIN

JUDGMENT

V.K.JAIN, J. (Oral)

The case of the prosecution in nutshell is as follows.

On 23.7.2009, four police officials, namely, S.I. Jagmal Singh, ASI Rajesh Tyagi, Head Constable Davis and Constable Chandra Bhan while on patrolling reached near North Yard Bridge at about 3.10 pm, when they noticed a person coming from the side of Platform No.12 with a polythene bag in his hand. On seeing the police officials, he stood back for a while and then turned back at a fast pace. On suspicion, he was apprehended by the police officials. On search of the polythene which he was carrying in his hand, it was found to contain two brown colour packets kept in polythene. A black colour substance in the shape of sticks/bars was found in those packets. On smelling, the

aforesaid substance appeared to be charas. S.I. Jagmal Singh informed the SHO in this regard. He directed S.I. Jagmal Singh to take further action in the matter. Some passersby were requested to join the proceedings but no-one agreed to the request. A notice under Section 50 of NDPS Act was then served upon the appellant Naushad Alam informing him that it was his legal right to be searched in the presence of a Magistrate or a Gazetted Officer. The appellant responded to the said notice by writing, in his own hand, that he did not want to be searched in the presence of a Gazetted Officer or a Magistrate. Nothing else was found with the appellant. The substance recovered from the bag which the appellant was carrying with him, was weighed using the balance and weights which was procured from a nearby place. The total weight of the substance was found to be 1 kilogram. About 250 gms of the substance was taken as sample by taking small portions of each stick. The sample was sealed with the seal of 'JSM' after it was wrapped in a piece of cloth. The FSL form was also filled on the spot and the appellant was arrested.

2. The appellant was prosecuted and charged under Section 20 of NDPS Act for possessing 1 kilogram of charas. Since he pleaded not

guilty to the charge, as many as 9 witnesses were examined by the prosecution. No witness was, however was examined in defence.

3. S.I. Jagmal Singh came in the witness box as PW3 and, inter alia, stated that on 23.7.2009, he was on patrolling along with ASI Rajesh Tyagi and Head Constable Davis and Constable Chander Bhan in the area of Police Station New Delhi Railway Station. When they reached Pakka Pul, North Yard, he saw accused Naushad Alam coming from the side of platform No.12 of the Railway Station carrying a blue colour polythene bag in his right hand. On seeing the police party, he turned back and started moving at a fast speed. He was arrested on suspicion and asked about the contents of the polythene bag. He, however, could not give a satisfactory reply, whereupon the said bag was taken from him and was checked. It was found to contain two khaki colour packets which were torn open from the corners. The packets contained black colour bars which, on smelling, was found to be *charas*. The SHO was informed about the recovery of the aforesaid *charas* from the accused. According to the witnesses, the SHO directed him to conduct the proceedings whereupon he requested 7-8 public persons to join the investigation but no-one agreed to do the same whereupon he sent Constable Chander Bhan to bring weighing scale. The accused was

served with a notice Ex.PW3/A and was informed that he had a right to be searched before a Magistrate or a Gazetted Officer. The accused, however, refused to exercise the said right vide his endorsement signed by him at Point Y. He further stated that after Constable Chander Bhan brought weighing scale, both the packets were weighed and the weight of charas was found to be 1 kilogram. A small quantity from all the bars was taken as sample, thereby making total weight of the sample at 250 grams. The sample and the residual substance were kept in separate polythene bags and converted into separate parcels which were sealed with the seal of 'JSM'. The seal after use was handed over to ASI Rajesh Tyagi. Thereafter, SI Anuj Nautiyal came to the spot and the accused was handed over to him along with the documents.

4. PW4 Head Constable Davis, who is one of the police officials who had accompanied PW3 S.I. Jagmal Singh on patrolling. He corroborated the deposition of SI Jagmal Singh with respect to the appellant Naushad Alam having been seeing coming from the site of Platform No.12, he having been apprehended on suspicion and recovery of *charas* from him weighing 1 kg from him. He also corroborated the deposition of SI Jagmal Singh with respect to drawing of sample and is sealing as well as sealing the residual substance with the seal of JSM.

He further stated that the parcels along with FSL Form and copy of seizure memo were taken by him to Police Station New Delhi Railway Station and handed over to Inspector Anil Jaitely.

PW7 – ASI Rajesh and PW9 – Ct. Chandra Bhan are the other police officials who were patrolling on that date. They also deposed with respect to the appellant coming from the side of platform no.12 with a polythene bag in his hand, he having been apprehended on suspicion and recovery of *charas* weighing 1 kg from him. ASI Anug Nautiyal also stated that the seal after use was handed over to him.

5. PW5 – Ct. Sanjay Kumar is the police official who took the parcel containing the sample from the Malkhana of the police station on 10.8.2009 and deposited the same with FSL. PW6 – Inspector Anil Jaitely, *inter alia*, stated that on 23.7.2009, SI Jagmal Singh informed him on wireless set that he had caught a person who was found in possession of *charas*. He instructed SI Jagmal Singh to take appropriate action under NDPS Act. He further stated that at about 6.10 pm, Head Constable Davis came to his office and handed over to him, two sealed parcels A-1 & S1 sealed with the seal of 'JSM' alongwith FSL Form bearing the same seal and a carbon copy of the seizure memo. He affixed his own seal of 'AJ' on both the parcels as well as on FSL Form,

noted particulars of the FIR on the parcels, FSL Form and copy of seizure memo. Thereafter, he called MHC(M) HC-Aman and handed over the case property to him after he had made entry in this regard in Register No.19. He further stated that later SI Anuj Nautiyal had submitted a report under Section 57 of the NDPS Act to him which he forwarded to the concerned DCP. The said report is Ex.PW2/A.

6. In his statement under Section 313 of Cr.PC, the appellant denied the allegations against him and claimed that he was going to the house of his brother-in-law at Nabikarim at about 8 pm when 3-4 police officials stopped him near Dargah on the pretext of making some enquiries and falsely implicated him in this case.

7. Vide impugned judgment dated 27.08.2011, the appellant was convicted under Section 20(b) (B) of the NDPS Act for possessing 1 kg of *charas* and vide impugned order on sentence dated 31.08.2010, he was sentenced to undergo imprisonment for five years and to pay a fine of Rs.50,000/-. In default of payment of fine, he was sentenced to undergo RI for six months. Being aggrieved from his conviction and sentence awarded to him, the appellant is before this Court by way of present appeal.

8. I do not see any reason to disbelieve the depositions of PW3 – SI Jagmal Singh which finds full corroboration from deposition of PW4 – HC Davis and PW7 – ASI Rajesh. Though all of them are police officials, the appellant does not claim that he had any kind of previous enmity with them. Therefore, the aforesaid police officials had no reason to depose falsely against the appellant and implicate him in false case of recovery of narcotic drug. It is true that no public witness was joined in the police team before searching the appellant, but, that would not be necessary considering that; (i) The police officials had no prior intimation with them and they searched the bag being carried by the appellant, only on account of suspicion having arisen due to the appellant retreating on seeing the police officials and trying to move away at a fast pace; and (ii) The recovery was not effected from a building, conveyance or enclosed place. In any case, an effort was made to join public witnesses before drawing samples and conducting other proceedings on the spot, but no one agreed to witness the same.

It cannot be disputed that the public does not want to get dragged in police and criminal case and wants to avoid them, because of long drawn trials and unnecessarily harassment.

Similar view was taken in Manish Vs. State, 2000 VIII AD (SC) 29 and in A. Bhai Vs. State of Gujrat, AIR 1980 SC 696. We can't be oblivious to the reluctance of a common man to join such raiding parties organized by the police, lest they are compelled to attend Police Station and Courts umpteen times at the cost of considerable inconvenience to them, without any commensurate benefit. Hence, no adverse inference on account of non-joining of public witnesses in such raids should be drawn.

In Ajmer Singh Vs. State of Haryana (2010) 3 SCC 746, it was contended that the evidence of the official witness cannot be relied upon as their testimony had not been corroborated by any independent witness. The Hon'ble Supreme Court, rejecting the contention, held as under:

“16. The minimum sentence prescribed under the Act is imprisonment of 10 years and fine. In this situation, it is normally expected that there should be independent evidence to support the case of the prosecution. However, it is not an inviolable rule. Therefore, in the peculiar circumstances of this case, we are satisfied that it would be travesty of justice, if the appellant is acquitted merely because no independent witness has been produced. We cannot forget that it may not be possible to find independent witness at all places, at all times. The obligation to take public witnesses is not absolute. If after making efforts which the court considered in the circumstances of the case reasonable, the police officer is not able to

get public witnesses to associate with the raid or arrest of the culprit, the arrest and the recovery made would not be necessarily vitiated. The court will have to appreciate the relevant evidence and will have to determine whether the evidence of the police officer was believable after taking due care and caution in evaluating their evidence.”

Rejecting a similar contention in *Kashmiri Lal Vs. State of Haryana* (2013) 6 SCC 595, the Hon’ble Supreme Court *inter alia* observed as under:

“9. it is evincible from the evidence on record that the police officials had requested the people present in the 'dhaba; to be witnesses, but they declined to cooperate and, in fact, did not make themselves available. That apart, there is no absolute command of law that the police officers cannot be cited as witnesses and their testimony should always be treated with suspicion. Ordinarily, the public at large show their disinclination to come forward to become witnesses. If the testimony of the police officer is found to reliable and trustworthy, the court can definitely act upon the same. If in the course of scrutinising the evidence the court finds the evidence of the police officer as unreliable and untrustworthy, the court may disbelieve him but it should not do so solely on the presumption that a witness from the department of police should be viewed with distrust. This is also based on the principle of quality of the evidence weighs over the quantity of evidence. These aspects have been highlighted in *State of U.P. v. Anil Singh* 1988 Supp SCC 686, *State, Govt. of NCT of Delhi v. Sunil and another* (2001) 1 SCC

652 and Ramjee Rai and others v. State of Bihar (2006) 13 SCC 229.”

Dealing with a similar contention in **Ram Swaroop Vs. State (Govt. NCT) of Delhi 2013 (7) SCALE 407**, where the alleged seizure took place at a crowded place yet no independent witness could be associated with the seizure, the Apex Court inter alia observed as under:

“7. We may note here with profit there is no absolute rule that police officers cannot be cited as witnesses and their depositions should be treated with suspect. In this context we may refer with profit to the dictum in State of U.P. v. Anil Singh 1988 Supp SCC 686, wherein this Court took note of the fact that generally the public at large are reluctant to come forward to depose before the court and, therefore, the prosecution case cannot be doubted for non-examining the independent witnesses.”

In **Ramjee Rai and others v. State of Bihar** (2006) 13 SCC 229, it has been opined as follows: -

“26. It is now well settled that what is necessary for proving the prosecution case is not the quantity but quality of the evidence. The court cannot overlook the changes in the value system in the society. When an offence is committed in a village owing to land dispute, the independent witnesses may not come forward.

Keeping in view the aforesaid authorities, it can safely be stated that in the case at hand there is no reason to hold that non-examination of the independent witnesses affect the prosecution case and, hence, we

unhesitatingly repel the submission advanced by the learned counsel for the appellant.”

9. The prosecution has also proved the requisite link evidence. The police officials who took the sample to Police Station NDRS and handed it over to Inspector Anil Jaitely (PW6) was examined. The register containing entry of depositing the case property sealed with the seals of JSM and AJ in the *Malkhana* on the same day has been produced and the signatures of MHC(M) have also been identified by PW6 Inspector Anil Jaitely. The police official who took the sample to FSL has also been examined as witness. The samples were duly sealed with the aforesaid seals when he took the sample for depositing the same with FSL. A perusal of FSL report Ex.PX would show that the substance found in the sealed parcels received by FSL on 1.08.2009 was found to be *charas*. It thus stand proved that the appellant was found in possession of *charas* weighing 1 kg at a public place on 23.07.2009.

As per section 2(vii)(a) of NDPS Act, a commercial quantity in relation to a narcotic drug and psychotropic substance means any quantity greater than the quantity specified in the Official Gazette. Therefore, a quantity of more than 1 kg only would be a commercial quantity whereas *charas* more than 100 gms but upto 1 kg would be an

intermediate quantity. The appellant has, therefore, been rightly convicted under Section 20(b) of NDPS Act.

However, the nominal roll of the appellant does not show involvement in any other case. In the facts and circumstances of the case, the substantive sentence awarded to the appellant is reduced from five years to four years and six months. It is also directed that in the event of failure to deposit the fine imposed by the learned trial court, the appellant shall undergo RI for two months as against six months awarded by the learned trial Judge.

The appeals stand disposed of accordingly.

One copy of this order be sent to the concerned Jail Superintendent for information and necessary action.

Trial Court record be sent back along with a copy of this order.

APRIL 01, 2014/*rd/kamlesh*

V.K. JAIN, J.