

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

% *Judgment reserved on: 21.07.2015*
Judgment delivered on : 29.07.2015

+ CRL.A. 267/2012
UPENDER SINGH

..... Appellant
Through Ms. Saahila Lamba, Adv.

versus

THE STATE

..... Respondent
Through Mr. O.P. Saxena, APP for the
State

CORAM:
HON'BLE MS. JUSTICE INDERMEET KAUR

INDERMEET KAUR, J.

1 This appeal is directed against the impugned judgment and order on sentence dated 06.07.2011 and 11.07.2011 respectively wherein the appellant stood convicted under Section 20 (b)(ii) (C) of the Narcotic Drugs and Psychotropic Substances Act (hereinafter referred to as the 'said Act'). Since he was found to be in possession of a commercial quantity of ganja, he was sentenced to undergo RI for a period of 10 years and to pay a fine of Rs.1 lac. In default of payment of fine, to undergo RI for a period of three months.

2 The nominal roll of the appellant has been requisitioned. It reflects that as on 09.12.2014, the appellant has completed almost 5 years, 10 months and 27 days meaning thereby that as on date, he would have completed incarceration of almost 6- ½ years. His jail conduct is satisfactory.

3 The main thrust of the argument of the learned amicus curiae for the appellant is that the appellant was found to be in possession of 25 kg of ganja which has brought him in the bracket of commercial quantity. The evidence which is adduced before the trial Judge, however, shows that this alleged contraband also includes seeds and leaves which are excluded from the definition of ganja as contained in the said Act. Benefit of same must accrue in favour of the appellant. At best, the appellant can be convicted for being in possession of mid quantity of ganja which would encompass his conviction under Section 20 (b)(ii)(B) of the said Act and for which the punishment would be lesser. Additional submission being that the sentence already suffered by the appellant be the sentence imposed upon him.

4 Submissions and counter submissions have been noted. Record has also been perused.

5 The version of the prosecution is that on 10.01.2009 at about 05:20 pm the raiding party which included PW-6, PW-10 and PW-11 had spotted two persons holding a plastic bag on their shoulder each; they were coming from Lado Sarai bus terminal. One of these persons was appellant Upendra Singh. On checking the plastic katta being held by him, it was found to contain ganja. It had three similar packets; each of which weighed 5 kgms, 10 kgms and another 10 kgms. The ganja was weighed and thereafter 1 kgm from each of the three packets was taken out as a sample. The remaining contraband and the samples were then sealed. The CFSL had reported this contraband to be positive for ganja. It was on this basis that the challan was filed and charges were framed and conviction thereafter followed.

6 To answer the submission of the learned amicus curiae for the appellant, the testimony of the members of the raiding party is relevant.

7 PW-6 had deposed that he was a member of the raiding party along with PW-10 & PW-11 who had apprehended the accused. He deposed that PW-11 had weighed the ganja on an electronic scale which he had brought with him. Packet 1 was of 5 kgms, packet 2 was of 10 kgms and packet 3 also weighed 10 kgms. One kgm from each of the

three packets was taken and rest of the ganja was sealed back with the seal of 'DK;.

8 HC Pradeep Kumar (PW-10) had deposed that the accused was apprehended. SI Dalip (PW-11) was also present there. Public persons were asked to join the investigation but none agreed. Three packets of ganja were weighed. It was weighed on a scale brought by PW-11 from the police station. It was not an electronic scale. The weights brought by PW-11 were of 10 kgms, 5 kgms, 2 kgms, 1 kg, 500 gms, 200 gms, 100 gms and 50 gms. Each packet was weighed separately. The seal of 'DK' was affixed. He denied the suggestion that he is deposing falsely.

9 The Investigating Officer (PW-11) has also deposed on the same lines. He has also stated that all the three packets of ganja were weighed separately and one packet was of 5 kgms and other two were of 10 kgms each. One kgm from each of the three packets was taken out as a sample for the purpose of sending to CFSL for forensic examination. In his cross-examination, he admitted that the weighing scale was with him when he left the police station and it was a traditional scale (Tarazu) and the weights carried out were of 10 kgms, 5 kgms, 2 kgms, 1 kg, 500 gms, 200 gms, 100 gms and 50 gms. All the weights were not used.

10 Documents in this regard are also relevant. There is the report of the CFSL (Ex.PW-5/A) dated 17.04.2009. The covering letter discloses that the three exhibits S-1, S-2 and S-3 contained a greenish brownish flower vegetative material suspected to be ganja and was sent for examination. In the description of the parcels Ex.S-1 was found to contain 871.2 gms of dried greenish brownish flowery vegetative material and seeds. The second parcel (Ex.S-2) weighed 868 gms of dried greenish brownish flowery vegetative material and seeds and the third parcel (Ex.S-3) weighed approximately 841.3 gms of dried greenish brownish flowery vegetative material and seeds. The weight of these exhibits was inclusive of the polythene bag.

11 At this stage, it would be relevant to note the definition of ‘ganja’ as given in Section 2(iii)(b) of the said Act. It reads herein as under:-

“2. Definition.- In this Act, unless the context otherwise requires,-

.....

(iii) “cannabis(hemp)” means-

.....

(b) ganja, that is, the flowering or fruiting tops of the cannabis plant (excluding the seeds and leaves when not accompanied by the tops), by whatever name they may be known or designated; ”

12 This definition of ganja as contained in the Act clearly means that

the ganja/contraband would be the flowering or fruiting tops of the cannabis plant which excludes seeds and leaves when not accompanied by the tops. The report of the CFSL (Ex.PW-5/A) clearly states that what has been received in the CFSL for an examination includes greenish brownish flowery vegetative material with seeds. Seeds do not come within the definition of 'ganja'. They have to be excluded.

13 The version of the prosecution is that the sample of 1 kgm from each of the three packets was taken out. This was exclusive of the polythene. What was received in the department were three exhibits i.e. Ex.S-1 weighing 871.2 gms; Ex.S-2 weighing 868 gms and Ex.S-3 weighing 841.3 gms. There was a difference of almost 130-150 gms in each of the samples which had been received by the CFSL. This clearly establishes the argument of the learned amicus curiae for the appellant that the weighment of the contraband was not precise; it was not definite. This is also substantiated by the ocular testimony. PW-10 and PW-11 have categorically stated that the traditional tarazu had been used but PW-6 had stated that the electronic weighing scale was used. Be that as it may, this is a clear case where it can be said that benefit of doubt

has to be given to accused. There is doubt on the actual quantity of the ganja which has been recovered. This is for two reasons. Seeds do not come within the definition of 'ganja'. The discrepant weight i.e. the version of the prosecution being that 1 kgm of ganja was recovered from each of the three packets (inclusive of polythene) but what had been received by the department was 840 to 870 gms with the polythene clearly shows that the weighment of the contraband was not carried out accurately and with a definite precision.

14 The observations of the Apex Court in 2004 (3) JCC 1827 Rajesh Jagdamba Avasthi Vs. State of Goa would be relevant. In this case the version of the prosecution was that from the right shoe of the accused 100 gms of charas was recovered but the substance when weighed was found to be 98.16 gms. Similarly from the left shoe 115 gms of charas was recovered and sealed but when opened it weighed 82.54 gms. This discrepancy not having being explained by the prosecution, had resulted in a benefit accruing in favour of the appellant. These observations would be relevant and read herein as under:-

“We do not find it possible to uphold this finding of the High Court. The appellant

was charged of having been found in possession of Charas weighing 180.70 gms. The Charas recovered from him was packed and sealed in two envelopes. When the said envelopes were opened in the laboratory by Junior Scientific Officer, PW-1, he found the quantity to be different. While in one envelope the difference was only minimal, in the other the difference in weight was significant. The High Court itself found that it could not be described as a mere minor discrepancy. Learned counsel rightly submitted before us that the High Court was not justified in upholding the conviction of the appellant on the basis of what was recovered only from envelope 'A' ignoring the quantity of Charas found in envelope 'B'. This is because there was only one search and seizure, and whatever was recovered from the appellant was packed in two envelopes. The credibility of the recovery proceeding is considerably eroded if it is found that the quantity actually found by PW-1 was less than the quantity sealed and sent to him. As he rightly emphasized, the question was not how much was seized, but whether there was an actual seizure, and whether what was seized was really sent for chemical analysis to PW-1. The prosecution has not been able to explain this discrepancy and, therefore, it renders the case of the prosecution doubtful."

15 In the instant case, the appellant was found to be in possession of 25 kgms of ganja. Had it been less than 20 kgms, the appellant would have fallen within the mid bracket. He would have been convicted under Section 20 (b)(ii) (B) of the said Act. This Court noting the discrepancies (as discussed supra) i.e. on the difference in the weighment of the samples which were purportedly seized from each of the three packets (one kgm. in each case) and the samples received in

the Department weighing 840 to 870 gms and this discrepancy being unexplained; the only answer being that the weighment of the contraband was not properly carried out; it was not with an exact precision. This is further fortified by the fact that as per PW-10 and PW-11 an ordinary tarazu was used but as per PW-6 an electronic scale was used. The CFSL also reporting the fact that part of the contraband received in the Department were seeds which are specifically excluded from the definition of 'ganja'. All these facts persuades this Court to hold that at best the contraband recovered from the accused would be of a mid quantity.

16 Accordingly, the conviction of the appellant is modified from a conviction under Section 20 (b)(ii)(C) to under Section 20 (b)(ii)(B) of the said Act. The sentence of more than 6 years already undergone by the appellant is the sentence imposed upon him.

17 Appeal disposed of in the above terms.

INDERMEET KAUR, J

JULY 29, 2015

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