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

% *Judgment reserved on : 29.9.2015*
Judgment delivered on : 07.10.2015

+ CRL.A. 926/2013, CRL.M.(B) 1487/2013 & CRL.M.A.
10880/2013

ARUN KUMAR Appellant

Through Ms. Arundhati Katju and Mr. Ali
Choudhary, Advocates.

versus

STATE (NCT OF DELHI) Respondent

Through Ms. Kusum Dhalla, 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 10.02.2011 and 22.02.2011 respectively wherein the appellant stands convicted under Section 20 of the Narcotics Drugs and Psychotropic Substance Act (in short NDPS Act). He had been sentenced to undergo RI for a period of 10 years and to pay a fine of

Rs.1 lac and in default of payment of fine to undergo SI for 6 months.

2 Nominal roll of the appellant reflects that as on date he has undergone incarceration of almost about 6 years.

3 The version of the prosecution is that on 25.10.2009 SI Bhagwan Singh (PW-9) had received a secret information that a person by the name of Arun Kumar resident of Bihar presently residing at Mahavir Enclave, Delhi was to supply charas and would reach the bus stand of Punjabi Bagh, South, Rohtak Road, Delhi between 02:15 pm to 03:00 pm. This secret information was reduced into writing and was forwarded by PW-9 to his senior officer ACP S.R. Yadav who directed him to constitute a raiding party. PW-9 along with HC Kawal Singh and constable Satpal (PW-5) reached the spot. On the pointing out by the secret informer, the appellant who was coming from the side of Rani Jhansi Road was apprehended. 4-5 passengers who were close by were asked to join the raid. None agreed. The appellant was carrying a shoulder bag. Notice under Section 50 of the NDPS Act (Ex.PW-3/A) was served upon the appellant informing him that he has a right to get his search conducted either before a Gazetted Officer or before a Magistrate. He declined this option and his refusal has been recorded at

point 'A' on Ex.PW-3/B. From the shoulder bag of the appellant, it was found to contain 8 slabs of rectangle shape; four slabs were of big size and 4 slabs were of small size. All the slabs were covered with khaki tape and on opening of the same, some batinuma substance of black colour was found and a foul smell was emanating from the same. When tested, it was found to contain charas. Total weight was 6 kgms. 4 samples of 50 gms each were drawn, two samples of 50 gms each were drawn from the bigger bag marked A-1 and A-2 and two samples were drawn from the four smaller bags marked B-1 and B-2. Samples were seized and sealed and so also the balance contraband. The case property along with FSL Form was deposited with malkhana by Inspector Akshay Kumar (PW-4). The malkhana mohrar HC Chand Ram was examined as PW-2. He had received the remnant samples on 27.11.2009 through HC Om Prakash (PW-7). The CFSL had tested the samples sent to it positive for charas. Report under Section 57 of the NDPS Act was also made and this was proved in the version of PW-7.

4 The statement of the accused was recorded under Section 313 of the Cr.PC. His version was that he has been falsely implicated in the present case. No evidence was led in defence.

5 On the basis of the aforementioned evidence collected by the prosecution, the appellant was convicted and sentenced as aforementioned.

6 On behalf of the appellant, learned amicus curiae has made a vehement submission that the samples were not the representative samples and the four larger slabs which were recovered from the appellant were admittedly four kgs of the alleged charas from which two samples were drawn; from the four smaller slabs, two samples of 50 gms each were drawn; there was not homogenized; this is violative of the Standing Order of NCB and attention has been drawn to the Standing Order No. 1/88 and the procedure entailed therein. Attention has been drawn to serial No. 1.3, 1.6 and 1.7; submission being that it was mandatory for the prosecution to have drawn a representative sample which in the instant case was not done. The second submission of the learned amicus-curiae is that there is no explanation as to why no public witness was joined when the recovery was effected at the Punjabi Bagh bus stand in the afternoon at 02:15 pm and even as per the prosecution, there were sufficient persons who were passing through that area. The weight of the samples when sent to the CFSL was 60 gms instead of 50 gms which as per the prosecution was the drawn samples.

On this count also, the appellant is entitled to a benefit of doubt and a consequent acquittal.

7 Needless to state, these arguments have been refuted by the learned Public Prosecutor for the State. Submission being that on no count, does the impugned judgment call for any interference.

8 Arguments have been heard. Record has been perused.

9 The second and third argument propounded by the learned amicus-curiae shall be answered first. All members of the raiding party which included PW-3, PW-5 and PW-9 have categorically stated that passersby were asked to join the raid but none had agreed. This has come in the categorical versions of all the aforementioned three members of the raiding party. Thus nothing adverse can be inferred for non-joining of the public witness and especially as it is a matter of common knowledge that public persons are wary of joining raids as the procedure is long drawn and once they become witnesses, they would be called at the police station time and again which is the deterrent for their non-joining these raids. Record also evidences that efforts were made to join the members of the public. In fact at the cost of repetition, all the members of raiding party i.e. PW-3, PW-5 and PW-9 had stated that

efforts were made to join the public passersby but they had not agreed. There is also no gainsaying to the settled proposition that if the testimony of a police witness is cogent, coherent and inspires confidence and is not attributable to any malafides, there is no reason as to why the same cannot be relied upon. It is also relevant to note that it is not the case of the appellant that the police party had any enmity against the appellant; his simplicitor defence being that he has been falsely implicated. Applying the rule of caution to the testimony of PW-3, PW-5 and PW-9, this Court is of the considered view that their versions being cogent and coherent, their testimony cannot be discarded only on the count that public witnesses had not joined the raid. The second argument of the learned counsel for the appellant is without any merit.

10 The third argument of the learned counsel for appellant is on the weight of the samples. Admittedly as per the version of the prosecution, four samples were drawn from the total contraband of 6 kgs; each of them weighed 50 gms. The Investigating Officer (PW-9) has deposed that weighment of the contraband was done on an electronic scale. PW-9 who had drawn the samples has categorically stated that the two samples of 50 gms each were drawn from the four bigger slabs (marked A-1 and

A-2); the balance two samples of 50 gms each were drawn from the four smaller slabs. After seizing and sealing the samples, they were deposited in the malkhana and thereafter PW-7 sent the samples for testing to the CFSL. The report of the CFSL (proved as Ex.PW-8/H) shows that the two samples marked A-1 was received intact and tallied with specimen seal and on testing, it was found to contain charas. The CFSL has reported that the weight of each sample as approximately 60 gms with the polythene; the version of the prosecution was that 50 gms was drawn which was the gross weight of a sample and this was exclusive of the weight of the polythene. Even otherwise, a discrepancy of 2-3 gms on either side would not dent the version of the prosecution as it is not the argument before this Court that the drawn samples were tampered or that they did not contain charas. In this intervening period, the seals had remained with PW-3; the possibility of tampering was even otherwise excluded. This argument qua the weight of the sample is thus without any merit.

11 The first argument which had been propounded by the learned counsel for the appellant is also noted to be rejected. PW-9 has categorically stated that what was drawn were representative samples;

this has come in his version. The total haul was 6 kgs. There were four slabs of 1 kg each. Two samples of 50 gms each were taken from the four big slabs meaning that a small quantity was taken from all the four slabs. Similarly from the four smaller slabs, a small quantify was taken from each of the four smaller slabs and marked as B-1 and B-2. Thus the submission of the learned counsel for the appellant that they were not representative samples was negatived. The samples drawn were duly representative as they were drawn from each of the 8 slabs i.e. from the four bigger slabs as also from four small slabs.

12 The Standing Orders of the NCB are even otherwise guidelines which should by and large be followed by the investigating agency and even in case of an irregularity, it may not by itself be sufficient to vitiate the trial. In the facts of the instant case, the procedure has been followed and there has been no violation of the Standing Order of the NCB as the drawn samples were representative samples.

13 The impugned judgment does not call for any interference. It has been established beyond reasonable doubt that what was recovered from the appellant pursuant to a secret information was charas. It falls in the commercial quantity being 6 kg. The appellant has rightly been

convicted under Section 20 of the NDPS Act. The sentence which has been imposed upon him is also of the minimum of RI 10 years and a fine of Rs.1 lac. The sentence also calls for no interference.

14 Appeal is without any merit. Dismissed.

INDERMEET KAUR, J

OCTOBER 07, 2015

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