

*** IN THE HIGH COURT OF DELHI AT NEW DELHI**
RESERVED ON : 2nd FEBRUARY, 2017
DECIDED ON : 26th JULY, 2017

+ CRL.A. 1719/2014

MOHD. FIROZ Appellant
Through : Mr.Michael Peter, Advocate.
versus

STATE (GOVT. OF NCT DELHI) Respondent
Through : Mr.Akshai Malik, APP.

+ CRL.A. 1721/2014

SARFARAZ ALAM Appellant
Through : Mr.Michael Peter, Advocate.
versus

STATE (GOVT. OF NCT DELHI) Respondent
Through : Mr.Akshai Malik, APP.

AND

+ CRL.A. 1755/2014

MOHAMMAD SAMAD ALAM @ SANJAY Appellant
Through : Mr.Michael Peter, Advocate.
versus

STATE OF DELHI NCT Respondent
Through : Mr.Akshai Malik, APP.

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

S.P.GARG, J.

1. Aggrieved by a judgment dated 07.08.2014 of learned Addl. Sessions Judge / Special Judge NDPS in Sessions Case No. 05/N/2009 arising out of FIR No.130/2009 PS Crime Branch whereby the appellants were convicted for committing various offences under NDPS Act, they have filed the instant appeals. By an order dated 25.08.2014, they were awarded various prison terms with fine.

2. In brief, the prosecution case as reflected in the charge-sheet was that on 04.08.2009 PW-16 (SI Bhagwan Singh) received a secret information at around 06.10 a.m. at Narcotics Cell to the effect that an individual by the name of Samad @ Sanjay (A-3) along with his associates used to supply 'ganja' in whole sale. The secret informer further conveyed that on that day i.e. 04.08.2009 A-3 along with his two friends A-1 and A-2 would come in between 08.00 a.m. to 08.30 a.m. near Cement Siding, Shakur Basi in a Santro car bearing No. DL 2FQ 0040 to supply 'ganja' contained therein. SI Bhagwan apprised Insp.M.L.Sharma (PW-14) about the secret information at 06.20 a.m. He in turn informed ACP, Narcotics and Crime Prevention S.R.Yadav on phone and he directed them to take appropriate action. A raiding team was constituted after recording DD No.4 (Ex.PW-5/A) at 06.30 a.m.

3. The raiding team along with the secret informer went in a government vehicle (DL 1CJ 3481) to the spot and reached there at 07.55 a.m. The secret informer, from a distance of about 50 metres pointed towards A-1 and A-2 who were standing near the Santro car. Soon thereafter they were found carrying kattas / sacks on their shoulders and were apprehended at around 08.00 a.m. They were

informed of their legal right to be searched before Gazetted Officer or Magistrate. Notices under Section 50 NDPS Act were served to them. They declined to be searched before the Gazetted Officer or a Magistrate. On checking the materials contained in the gunny bags, it was found to contain 'ganja'. When weighed, its quantity was 20 kg each. 500 grams of each was taken as sample. Necessary proceedings were conducted at the spot. On checking the car, on the rear seat, another white 'katta' was recovered; it led to recovery of 20 kg of 'ganja'. The Investigating Officer prepared rukka (Ex.PW-16/C) and lodged First Information Report through Const.Rakesh. Subsequent investigation was taken over by PW-17 (ASI Rajveer Singh) who arrived the spot at around 05.30 p.m. Both A-1 and A-2 were interrogated and their disclosure statements were recorded. Pursuant to the disclosure statements, they recovered another gunny bag containing 45 kg. 'ganja' from a jhuggi No.TH-157 belonging to A-3. Necessary investigations were carried out there. Finally, the raiding team arrived at Narcotics Cell at around 12.25 (Night).

4. During investigation, efforts were made to find out as to from where the recovered 'ganja' was purchased. However, it could not be ascertained. Compliance under Section 57 NDPS Act was made. On 10.09.2009, A-3 surrendered in the Court and was taken on police remand. Statements of the witnesses conversant with the facts were recorded. Upon completion of investigation, a charge-sheet was filed against all the appellants in the Court. To prove its case, the prosecution examined seventeen witnesses. In 313 Cr.P.C. statements, the appellants denied their involvement in the crime and pleaded false

implication. The trial resulted in conviction as aforesaid. Being aggrieved and dissatisfied, the instant appeals have been preferred.

5. I have heard the learned counsel for the parties and have examined the file minutely.

6. At the outset it may be mentioned that appellants' conviction is primarily based upon the sole testimonies of the police officials. No independent public witness was associated at any stage of investigation. The secret information was received at around 06.10 a.m. on 04.08.2009 and the police team remained at the spot for around eleven hours. Curiously enough, during the whole period, the investigation agency was unable to join any independent public witness at any stage. The explanation offered by the Investigating Officer and the other police officials that request was made to certain passersby to join the investigation inspires no confidence. This is a routine response given almost in all such cases. No name of any such individual to whom the request was made at different stages has emerged. It is surprising as to why only the passersby were asked to join the investigation when the other witnesses from fixed / definite places i.e. residences / shops were easily available. It has come on record that even at the place of recovery, there were certain jhuggies and the public persons were available therein. The Cement Siding was nearby but no plausible explanation has been offered as to why no such person was requested to join the investigation. Offences under the NDPS Act are serious and heavy punishment is provided for. It is obligatory to ensure that investigation is above suspicion and all bonafide efforts are made to ensure that independent witnesses are

joined. Ensuring the presence of independent public witnesses is not a ritual or formality.

7. I do agree that the evidence of the police officials cannot be rejected per se merely because of non-joining of independent public witnesses. However, it puts the Court on guard to scrutinise their testimonies with great care and caution since they could be interested in the result of the case projected by them.

8. Secret information was recorded vide DD No.4 on 04.08.2009 at around 06.30 a.m. on a plain paper having no Serial No. It is unclear as to why the important information was not recorded in a proper register duly maintained in the office. There is every possibility of such a document to be manipulated or fabricated any time. No authenticity as such can be placed on such a loose sheet of paper. As per the secret information, A-3 was to arrive at the spot along with his two associates A-1 and A-2 in a santro car. The secret informer did not disclose as to what was the quantity of the contraband contained in the said car; from where the car was to depart and for whom the contraband was meant. Description of the suspects was not mentioned in the secret information. The secret information apparently did not prove true as A-3 was not found present at the spot at the time of alleged recovery at both the places i.e. near Cement godown and jhuggi No. TH-157.

9. A-3 who was the mastermind in supplying the contraband could not be arrested at the spot or soon thereafter. He surrendered in the Court on 10.09.2009 and was taken on police remand. Nothing incriminating was recovered from his possession or at his instance

thereafter. It has come on record that the Investigating Agency had visited A-3's residence at Prem Nagar as pointed out by A-1 and A-2 on 05.08.2009. The said house was found locked. It is unclear as to why no surveillance was mounted at the said residence and why no efforts were made to obtain search warrant to search any incriminating contraband in the said house. The investigating agency also did not collect any document showing A-3 to be the owner of the said house. It is also not clear as to when A-3 or his family members returned to the said house or if subsequent to that, it was searched by the investigating agency.

10. The second recovery is alleged to have taken place pursuant to the disclosure statements of A-1 and A-2 from a jhuggi bearing No. TH-157. It is pertinent to note that the said jhuggi was at a short distance of 30 – 40 metres from the spot of initial recovery. Astonishingly, recovery at jhuggi No.TH-157 could be effected only after PW-17 (ASI Rajveer Singh) interrogated A-1 and A-2 and came to know that another bag of contraband was lying inside the said jhuggi. At around 08.40 p.m. PW-17 (ASI Rajveer Singh) informed the SHO regarding the said disclosure. Only thereafter, the police team along with accused persons (A-1 and A-2) reached there. It was found that the jhuggi was covered with 'tripal' from all the sides; it had no permanent number. Again, no independent public witness was requested to join the investigation from the nearby / adjoining jhuggies. It is on record that no one else was present inside the jhuggi; it was even not locked. It was a temporary hut with no permanent door. No other valuable article was found inside the jhuggi. The

investigating agency did not collect any document to show if jhuggi TH-157 was in existence in official records. Merely because this address finds mention in the registration certificates of various vehicles allegedly owned by A-3, it did not mean that such a hut with No. TH-157 existed in the official records. It was not investigated as to when the contraband allegedly recovered from there was kept, and if so, by whom. 'Ganja' weighing 45 kg is not expected to be left unattended in a jhuggi accessible to all.

11. After arrest on 10.09.2009, pursuant to the disclosure statement, A-3 took the police team to WZ-45, Sri Nagar Colony belonging to one Manjur Alam. Again, the said house was found locked and nothing objectionable was recovered from there. Manjur Alam was not found there. PW-17 (ASI Rajveer Singh) further disclosed that on 18.09.2009 he along with SI Bhagwan Singh, HC Mahesh and other staff went to the house of Manjur Alam at Shri Nagar Colony Vill. Shakurpur where he was found present. On enquiry, he revealed that due to previous enmity with A-3, he was falsely named by him. The investigating agency did not find incriminating evidence against Manjur Alam to charge-sheet him. PW-16 (SI Bhagwan Singh) did not depose on this aspect. Strangely enough, the Investigating Officer believed the statement of Manjur Alam without any further inquiry or investigation and opted to exonerate him completely. The investigating agency was unable to ascertain / find out during investigation as to from where the huge quantity of contraband 105 kg was procured, and if so, by whom and when. It was also not elaborated as to when and from where A-1 and

A-2 had got the possession of the contraband to be transported in A-3's santro car. It is not clear as to when A-1 and A-2 came into possession of santro car and what route was taken by A-2 to arrive at the spot from a particular destination. It is also not clear as to who had driven the said vehicle to the spot. At the time of their apprehension even the key of the car was not with them. It was recovered only subsequently from inside the car at the time of its search.

12. The other salient feature of the case is that, the investigating agency was unable to disclose as to, to whom the huge quantity of contraband was to be delivered, and if so, for what consideration. When A-1 and A-2 were allegedly carrying out the gunny bags containing 'ganja' 20 kg. each on their shoulders, the Investigating Officer could have waited for some time to find out as to, to whom the said contraband was to be delivered. During their presence at the spot, none came to get delivery of the 'ganja'.

13. No Call Detail Records were collected and produced by the investigating agency. Nothing has surfaced to show if A-1 and A-2 were in touch with A-3 at any time. In the personal search of both A-1 and A-2, conducted vide memos (Ex.PW-10/B and PW-10/E), paltry sums of ₹50 and ₹30 respectively was recovered. The individuals allegedly involved in delivering huge quantity of 'ganja' are not expected to have only meagre amount of ₹50 - ₹30. This amount was not sufficient even to procure a small quantity of petrol in the car allegedly driven by them.

14. PW-2 (Dilip Kumar) has been examined by the prosecution to buttress its case. His permanent residential address is at

Gaon Jagwani, District Araria, Bihar. In his deposition before the Court as PW-2 he did not disclose his residential address at Delhi. He merely claimed himself to be a resident of shop No.11, Shankar Market, Connaught Place, New Delhi and working as 'fruit seller'. Apparently, PW-2 (Dilip Kumar) avoided to furnish his residential address at Delhi. He had no concern with shop No.11 and he used to sell fruit on a 'Rehri' nearby. The appellants examined DW-1 (Const.Robin Singh) to prove the information obtained in RTI. In response (Ex.DW-1/A) given vide letter No.2103/DAC/NDD dated 07.07.2011, it was informed that no person with the name of Dilip Kumar s/o Vinod Kumar lived at shop No.11, Shankar Market and the address given was incorrect. The prosecution has failed to justify this material discrepancy.

15. PW-2 (Dilip Kumar) in his deposition informed that one Sambhu Paswan of dark complexion used to work with him; he was in the habit of consuming 'ganja' procured from Shakurpur, Cement Side, jhuggi No.TH-157 belonging to one Sanjay. He further deposed that Sambhu Paswan once had taken him to the jhuggi and there he was introduced to A-1, A-2 and Sanjay. During their stay for ten minutes, they had sold 'ganja' to three individuals. He further deposed that Sambhu Paswan took ₹2,000/- from him to go to his native place Bihar in June – July 2009 and did not return. On 31.08.2009, he had gone to get his money back from Sambhu Paswan. On reaching near the jhuggi, he found it lying vacant. From neighbours, he came to know that the said jhuggi was raided by the police and the persons dealing in 'ganja' had been sent to jail. He

further stated that when he was returning on foot to take bus from Punjabi Bagh flyover, some police personnel met him in civil dress and on enquiry from them, he told that he had gone in search of Sambhu Paswan. He thereafter narrated the purpose of his visit. An attempt was apparently made to produce PW-2 (Dilip Kumar) to prove that he had acquaintance with Sambhu Paswan who used to purchase 'ganja' from A-1, A-2 and Sanjay. The testimony of PW-2 (Dilip Kumar) does not inspire confidence at all. Sambhu Paswan has not been examined and produced. PW-2 (Dilip Kumar) did not lodge any complaint with the police any time against the appellants for selling 'ganja' illegally. He did not give detailed particulars as to when he had visited the jhuggi; who was found present there and for what consideration the 'ganja' was purchased. His sudden and unexpected encounter with the police is equally astonishing. It is unbelievable that the police officials would make enquiry from him in the absence of any prior suspicion about the appellants and their acquaintance with Sambhu Paswan. PW-2 (Dilip Kumar) seems to have been introduced falsely to build up a case against the appellants. In the cross-examination, he came up with the plea that Sambhu Paswan had started to work with him in January, 2009. He did not maintain any record of making payment of salary to Sambhu Paswan. He was unable to tell the date and month when Sambhu Paswan had taken him to Shakurpur Cement Side. The jhuggi to where Sambhu Paswan had taken him was an open shed covered by plastic 'panni' from all the sides. There was no name or number on the jhuggi. He was unable to tell as to where Sambhu Paswan used to live during night and what

was his residential address in Delhi. There was no occasion for PW-2 to visit the jhuggi in question to get recovery of ₹2,000/- from Sambhu Paswan when he had no information of his return from Bihar on any particular date. Possibility of this witness to be a stock witness cannot be ruled out.

16. PW-16 (SI Bhagwan Singh) informed in the cross-examination that the secret informer had first met the Duty Officer and the Duty Officer had sent the secret informer to him. In the cross-examination, he admitted that no document was prepared by Duty Officer about the arrival of the secret informer. It is not clear as to why the secret informer did not divulge the information to the Duty Officer and why the Duty Officer sent him to PW-16 (SI Bhagwan Singh) only to give secret information when other senior officers were present at the Narcotics Cell.

17. The prosecution has miserably failed to establish if A-3 hatched criminal conspiracy with A-1 and A-2 to dispose of 'ganja' weighing 105 kg. Undisputedly, A-3 was not present at the spot at the time of alleged recovery from the possession of A-1 and A-2 on 04.08.2009 at two different places. No contraband whatsoever was recovered from A-3's possession. Though the police officials had visited A-3's residence but it was found locked. No attempt was made subsequently to search the residential premises to find out any incriminating piece of evidence. The Investigating Agency was unable to apprehend A-3 and finally on 10.09.2009 he surrendered in the Court. Even thereafter the Investigating Agency was unable to collect any incriminating information. Attempt has been made to

establish nexus with A-1 and A-2 as the santro car which was in their possession at the time of alleged recovery belonged to the appellants. This circumstance per se is not enough to establish conspiracy. The Investigating Agency came to know that the appellant had registered 13 different vehicles at TH-157 and these vehicles were used to transport 'ganja'. This claim is not believable as nothing has come on record to show if all these vehicles were used by A-3 to transport the contraband. No investigation was carried out as to for what purpose these vehicles were used; who used to drive them. It was also not ascertained as to how all these vehicles were registered at the same address TH-157, Cement Siding, Shakurpur. An individual having so many vehicles meant for transportation of contraband is not imagined to keep 'ganja' weighing 45 kg. in a temporary hut without any permanent structure un-attendingly. A-3's previous conviction is not enough to presume his involvement in the present case. Though PW-2 (Dilip Kumar) has claimed to have gone to TH-157 and was allegedly introduced to the appellants, however, no Test Identification Proceedings were conducted during investigation. The prosecution was unable to collect any Call Detail Record to establish any contact of A-3 with his co associates. It was also not ascertained whether A-3 used to deal in retail or whole-sale business. It is not clear if all these vehicles registered in A-3's name at TH-157 really belonged to him. No investigation has been carried out as to when all these vehicles were purchased and from where the necessary funds were arranged. The investigation carried out by the Investigating Agency is not up-to-the-mark.

18. Taking into consideration the above referred deficiencies, it would not be safe to base conviction on the sole testimonies of the police officials. The appellants deserve benefit of doubt. The appeals are allowed. Conviction and sentence recorded by the Trial Court are set aside.

19. The appellants shall be released forthwith if not required to be detained in any other case.

20. 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 / compliance.

(S.P.GARG)
JUDGE

JULY 26, 2017 / tr