

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

+ **CRL.A. 344/2011**

Reserved on: 30.09.2015

Date of decision: 06.10.2015

LAVLESH KUMAR

..... Appellant

Through: Mr.Jitender Sethi, Mr.Hemendra Jailiya  
and Mr.Akash Sharma, Advocates.

versus

STATE

..... Respondent

Through: Ms. Alpana Pandey, APP for the State  
SI Amar Singh, P.S. Saket.

**CORAM:**

**HON'BLE MR. JUSTICE ASHUTOSH KUMAR**

**ASHUTOSH KUMAR, J.**

1. Lavlesh Kumar stands convicted by judgment dated 13.01.2011 passed by the learned ASJ/Special Judge, NDPS/South and South-East, Saket Court Complex, New Delhi in Sessions Case No.41A/09 arising out of FIR No.13/09 (P.S.Saket) under Section 20(b)(ii)(C) of the Narcotic Drugs and Psychotropic Substances Act.

2. By order of sentence dated 14.01.2011, appellant Lavlesh has been sentenced to undergo Rigorous Imprisonment for 10 years, a fine of Rs.1 lakh and in default of payment of fine a further Rigorous Imprisonment

for three months for the offence under Section 20(b)(ii)(C) of the Narcotic Drugs and Psychotropic Substances Act. The appellant was apprehended from near the Bus Terminal, Lado Sarai, M.B.Road on 10.01.2009 at about 5.20 pm and was found to be in possession of 22 kgs of Ganja, in contravention of the provisions of the NDPS Act.

3. The appellant has assailed the Trial Court judgment of conviction and sentence on various grounds namely that (i) only police witnesses have been examined at the trial and no public or independent witness has been made a prosecution witness or has been made to join the investigation; (ii) the notice under Section 50 of the NDPS Act served upon the appellant did not state that the appellant also had a right to search the police officials before subjecting himself to the search by the officials; (iii) despite the fact that the appellant Lavlesh Kumar was arrested along with co-accused Upender Singh, instead of one FIR, two separate cases vide two different FIRs were lodged; (iv) the case property namely the sample drawn from the recovered narcotic was tampered with as the FSL report gives the description of the sample parcel weighing 903 grams and 885 grams respectively, when two samples of 1 kg each was drawn by the police officer at the time of the recovery; (v) unusual delay of 20 days in sending the sample to the FSL and (vi) not proving the road certificate which renders the prosecution case of sending the samples to FSL doubtful.

4. In the alternative, it has been argued on behalf of the appellant that since there was discrepancy in the weight of the samples which were

drawn at the time of recovery and what was sent to the FSL, there was every reason for doubting the assessment of the entire seized narcotic to be 22 kgs was doubtful and if the weight of the recovered narcotic is less than 20 kgs which is the commercial quantity for Ganja, the appellant would have been visited with a lesser penalty.

5. In order to appreciate the contention of the appellant, it is necessary to examine the deposition of the relevant prosecution witnesses.

6. HC Pradeep Kumar (PW-3) has deposed that on 10.01.2009 he along with Constable Satish Kumar (PW-8) was on duty for checking of vehicles at Lado Sarai, M.B.Road. At about 5.15 pm, Head Constable Giriraj (PW-4) and other QRT staff also joined them. At about 5.20 pm, PW-3 and others named above spotted two persons coming from the side of Lado Sarai Bus Terminal, both of whom were carrying one plastic gunny bag each on their shoulders. Seeing the police party, the aforesaid persons tried to retrace their steps but were apprehended. They were identified as the appellant and one Upender Singh. The gunny bag carried by the appellant was found to contain a brown coloured bag containing Ganja in brick form. PW-3 has affirmed that the appellant admitted that the recovered article was Ganja. The gunny bag which was being carried by Upender Singh also contained Ganja. PW-3 then informed the duty officer regarding the recovery, where after SI Gagan Bhaskar (PW-11) and SI Dileep Kumar came to the spot. Head Constable Giriraj (PW-4) handed over the appellant and the recovered narcotic to SI Gagan

Bhaskar (PW-11). PW-3 has denied the suggestion that he had not joined the investigation and was only cited as a witness later.

7. Head Constable Giriraj (PW-4) has supported the statement of Pradeep Kumar (PW-3) and has stated that he found the gunny bag carried by the appellant to be containing two packets of ganja in the shape of bricks. Later, other police officers including PW-8 & PW-11 joined the investigation. SI Gagan Bhaskar (PW-11) recorded the statement of PW-4 (Ex.PW-4/A). He has further testified to the fact that PW-11 requested 4-5 passersby to join the raiding party but nobody obliged and left the spot without disclosing their names and addresses.

8. PW-4 has stated that SI Gagan Bhaskar (PW-11) gave a notice to the appellant under Section 50 of the NDPS Act explaining to him the requirement of law and his right of being searched before a Magistrate or a Gazetted officer. Carbon copy of the notice (Ex.PW-4/B) has been proved by PW-4 at the trial. He has specifically stated that the Ganja recovered from the appellant was weighed and each brick was found to be of 11 kgs, the total weight of the recovered narcotic from the appellant being 22 kgs. The IO took 1 kg from each brick as a sample and prepared a pulanda of the same. The samples were numbered as S1 & S2 and the bricks were given the number P1 & P2. The bricks P1 & P2 were also later converted into pulandas and sealed with the seal of GB. FSL form also was filled up.

9. PW-4 has deposed that thereafter the IO (PW-11) sent Constable Satish Kumar (PW-8) to the police station to hand over the rukka, case

property, samples, FSL form and copy of the seizure memo to the SHO. After some time Constable Satish Kumar (PW-8) came back to the spot along with copy of the FIR, original rukka and handed over the same to SI Gagan Bhaskar, IO (PW-11). The appellant was arrested vide arrest memo (Ex.PW-4/E). From the personal search of the appellant, a purse containing Rs.160 and a driving license was recovered. The aforesaid witness, at the trial identified all the pulandas which were sealed and exhibited. He has denied the suggestion that the appellant was falsely implicated by foisting ganja on him. What is important is that he has, on cross examination stated that none of the members of the raiding party had any IO kit when the appellant was apprehended.

10. Constable Satish Kumar (PW-8) has also stated the same sequence of events. He has testified that the packet which was being carried by the appellant contained two plastic packets of brown colour containing ganja. The narcotic was weighed by SI Gagan Bhaskar (PW-11). Out of the recovered narcotic two samples of 1 kg each was taken and made into pulandas which were numbered as P1 & P2 and the samples were given numbers S1 & S2. After the affixation of seal, the same was given to Head Constable Giriraj (PW-4). This witness has also identified the pulandas.

11. SI Gagan Bhaskar (PW-11), the IO of the case has testified to the fact that he weighed the recovered ganja and drew samples from the same. The samples, according to PW-11 were sent to FSL on 30.01.2009 through Constable Mahmood Khan (PW-10) who deposited the same

with FSL, Rohini. On 04.05.2009, the aforesaid witness received the result of the FSL (Exh.PW-9/A & 11/C). Thereafter the case file was submitted to the SHO for filing of challan. The aforesaid witness has correctly identified the appellant in the Court. In the cross examination, PW-11 has admitted of carrying IO kit with him along with the scale as well as weights. The weights were of 100 grams, 200 grams, 500 grams, 1 kg and 5 kg. The packets recovered from the appellant was opened by the aforesaid witness, who also drew samples and weighed the ganja recovered. The suggestion that the appellant was falsely implicated or that no effort was made by him to join private/independent persons and that no such recovery was made was denied by the aforesaid witness. Thus from the deposition of the aforesaid PWs namely 3, 4, 8 & 11, it stands established that the appellant was caught with Ganja weighing 22 kgs. The procedural formalities before search and seizure were followed. The plastic bag which was being recovered by the appellant was searched and it was found to contain two brown packets of Ganja in brick form. One kg each samples were drawn from each of the bricks and made into pulandas which were marked as S1 & S2. The IO of the case (PW-11) had the IO kit with him and he was carrying weights of different measures. This obviously means that there was no electronic weighing scale and the weighment of the narcotic and the samples were done manually. This further becomes clear from the deposition of PW-4 who has admitted that none of the members of the raiding party had the IO kit. Only PW-11 claims himself to be in possession of IO kit. Thus what can

be safely presumed is that the weighment of the recovered narcotic and all the samples were done manually and not with an electronic scale.

12. All the aforesaid witnesses have spoken about two samples being drawn from the recovered narcotic by PW-11. The aforesaid samples were of 1 kg each. However, the FSL report describes the parcel S1 & parcel S2 to be of approximately 903.08 kgs and 885.5 grams of dried greenish brownish flowery vegetative material along with seeds described as ganja. The result of the analysis was that S1 & S2 were identified to be of flowering portions of Indian hemp plant (Ganja). In this context, it would be necessary to examine the definition of ganja as given in Section 2 (iii) (b) of the NDPS Act, 1985. It reads as hereunder:-

(iii) “Cannabis (hemp)” means-

(a) .....

(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; and

(c) .....

This definition of Ganja as contained in the Act, makes it very clear that it has to be the flowering or fruiting tops of the cannabis plant and it must exclude the seeds and leaves when not accompanied by the tops.

13. In this context, the FSL report (Ex.PW-9/A) describes as to what was received by the CFSL for examination. The two parcels namely S1 & S2 (Ex.S1 & S2) included greenish brownish flowery vegetative material with seeds. The weights of the samples were also less than 1 kg in each of the parcel (903.08 grams and 885.5 grams). The seeds or the

leaves do not come within the definition of ganja and, therefore, could they could not have been added up with the flowering or fruiting tops of such plants.

14. A careful analysis of the prosecution version and the description given by the FSL reveals that the weighment of the narcotic (22 kgs) was not proper as 1 kg sample (each) did not weigh the same when it was weighed in the FSL. The consistent prosecution case has been that out of the two packets weighing 22 kgs, one kg each was drawn as sample which was made into pulandas and marked as S1 & S2. Thus there is difference of more than 100 grams in each of the samples as weighed at the time of recovery and at the time of its analysis by the CFSL. There could, therefore, be no doubt that the weighment of the contraband was not accurate or definite. From the ocular testimonies of PWs.3, 4, 8 & 11 it becomes very clear that except for PW-11, nobody had the IO kit. PW-11 had an IO kit with the scale and weights of different measures. Thus there is no doubt that instead of an electronic weighing scale, the normal weighing scale was used for weighment. Because of the difference in the weight of the samples, one cannot say with certainty that the weight of 22 kgs of the recovered narcotic in totality is a correct and precise figure after weighment. If that be so, then necessarily, the appellant has to be given the benefit of doubt with respect to the quantity of the narcotic recovered from him.

15. That apart, the description of samples by the CFSL further testifies that the sample contained seeds as well. Seeds do not come within the

definition of ganja. Thus, weight and description of the sample makes it very difficult to come to a conclusion that more than the commercial quantity of ganja was recovered from the possession of the appellant.

16. Section 20 of the NDPS Act deals with the contravention in relation to cannabis plant and cannabis. The section reads as hereunder:-

***“20. Punishment for contravention in relation to cannabis plant and cannabis.***

*Whoever, in contravention of any provision of this Act or any rule or order made or condition of licence granted thereunder,*

*(a) Cultivates any cannabis plant; or*

*(b) Produces, manufactures, possess, sells, purchases, transports, imports inter-State, exports interstate or uses cannabis, shall be punishable, –*

*(i) Where such contravention relates to clause (a) with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine which may extend to one lakh rupees; and*

*(ii) Where such contravention relates to sub-clause (b),-*

*(A) And involves small quantity, with rigorous imprisonment for a term which may extend to six months, or with fine which may extend to ten thousand rupees, or with both;*

*(B) And involves quantity lesser than commercial quantity but greater than small quantity, with rigorous imprisonment for a term which may extend to ten years, and with fine which may extend to one lakh rupees;*

*(C) And involves commercial quantity, with rigorous imprisonment for a term which shall not be less than ten years*

*which may extend to twenty years and shall also be liable to fine which shall not be less than one lakh rupees but which may extend to two lakh rupees: Provided that the court may, for reasons to be recorded in the judgment, impose a fine exceeding two lakh rupees.]*

*Provided that the court may, for reasons to be recorded in the judgment, impose a fine exceeding two lakh rupees.”*

17. A distinction has been made between the quantities of Ganja for fixing the quantum of punishment. For recovery of small quantity, the punishment is imprisonment which may extend to six months or with fine or with both; for commercial quantity which is 20 kgs, with Rigorous Imprisonment for a term which shall not be less than 10 years, extendable upto 20 years and fine which would not be less than Rs.1 lakh but which may extend to Rs.2 lakhs and with respect to quantity lesser than the commercial quantity but greater than the small quantity, with Rigorous Imprisonment for a term which may extend to 10 years and with fine which may extend to Rs.1 lakh. Thus the Legislature has given due importance to the weight of the narcotic which is recovered from an accused. For the reason that the weight of the recovered narcotic has been found to be doubtful, it cannot be said with certainty that the appellant was carrying commercial quantity of Ganja with him. Anything less than 20 kgs of ganja would account for a mid category/bracket of the class of accused person under the NDPS Act. In that event, if the offence is proved, the appellant could be sentenced for a lesser period than 10 years and a fine which may extend to Rs.1 lakh.

18. The contention of the appellant that since only police witnesses were examined and no public/independent witnesses were made to join the investigation, therefore, the entire case becomes doubtful, is not tenable. The deposition of the witnesses do affirm and establish the recovery of the narcotic from the possession of the appellant. It is to be noted that there was no prior information to the police officials and it was only a coincidence that the appellant was apprehended because of the suspicious manner in which he was approaching the bus terminal at Lado Sarai. It further appears from the records that an attempt was made to make independent/public persons join the search and seizure proceedings but no one obliged the police party. All those persons who were requested by the police party, left the place of occurrence without disclosing their names and identity. It is not an uncommon feature and there are explicable reasons for the private persons being reluctant in joining the investigation or participating in the trial as prosecution witnesses. The long winding system under which the criminal jurisprudence works would make any spirited citizen also loathe in joining the investigation for supporting the prosecution case against an erring individual.

19. The argument advanced on behalf of the appellant regarding notice under Section 50 of the NDPS Act, to be defective as it did not contain the information about the right of the accused to search the police officials before subjecting to search by those police officials, is not correct. What is required under Section 50 of the NDPS Act is to inform

an accused of his legal right to be searched in presence of a Magistrate or a Gazetted Officer. However, even if the information which is stated to be missing in such notice, would have been provided to the appellant, it would not have made any difference. From the personal search of the appellant, nothing incriminating was recovered except for a purse with a small amount of money and a Driving License. So far as recovery of a plastic gunny bag is concerned, since it was not from the person of the accused, there was no requirement of compliance of Section 50 of the NDPS Act for the same.

20. Similarly, even if two FIRs were registered when two similarly situated persons were arrested and were found to be in possession of narcotics, that by itself has not prejudiced the appellant in any way.

21. It is a matter of prudence that the sample of narcotics should not be kept for long in malkhana as there would be an apprehension of tampering of such samples. In the present case, there has been delay of 20 days in sending the samples to CFSL. However, such delay of 20 days in sending the samples to CFSL would not by itself be a ground to believe that the samples were tampered with during its storage in the malkhana or while the samples were in custody of the person who took the samples to CFSL from the malkhana. Head Constable Kuldeep Yadav (PW-2) who worked as MHC (M) in the police station has deposed that on the day of occurrence, three sealed pulandas, sealed with the seal of PS and GB were deposited with him by Inspector Pankaj Singh (PW-7). The aforesaid witness made an entry in register number 19 of such

deposit at serial No.64. On the same day, PW-11 deposited with him the personal search articles of the appellant. On 30.01.2009, he had sent the two sample pulandas to FSL, Rohini through Constable Mahmood Khan (PW-10) vide R.C No.36/21/09 and on 04.05.2009, the same was received by him through Constable Jagdeep (PW-6) along with the FSL result. The relevant entries in register No.19 regarding the deposit and movement of the case property and sample pulandas (Ex.PW-2/A) have been proved by him.

22. Constable Jagdeep (PW-6) who was deputed to collect the sample pulandas and the result from FSL, Rohini by the IO, collected the same on 04.05.2009 and handed it over to PW-2. He has testified to the fact that while the pulandas and the result of CFSL remained in his custody, the same were not tampered with.

23. Inspector Pankaj Singh (PW-7) was posted as SHO of Saket police station. He has deposed that on 10.01.2009 at about 9.15 pm, Constable Satish (PW-8) had come to the police station and had handed over the seizure memo, parcel of Ganja and two sample pulandas S1 & S2 along with FSL form bearing seal of GB. The aforesaid witness had taken the number of the FIR from the duty officer and had put the same on the pulandas and the FSL form after affixing his own seal of PS. The aforesaid case property was deposited in the malkhana vide DD No.19A.

24. Constable Satish Kumar (PW-8) has also testified the aforestated facts. Similarly, Head Constable Mahmood Khan (PW-10) has also deposed that so long as the pulandas had remained with him while they

were taken from the malkhana to be deposited in the FSL, they were not tampered with.

25. The FSL report (PW-9/A) which found the samples to be of Indian hemp plant (ganja) has been proved by Sh.V.Shankar Narayanan, Senior Scientific Officer (Biology), FSL, Delhi (PW-9).

26. Thus the offence under Section 20(b) of the NDPS Act is proved as against the appellant. Whether the case of the appellant would fall in the category of 20(b)(ii)(B) or (C) is what is debatable. As has been discussed earlier, there is discrepancy in the weighment of the samples at the time of recovery and in the FSL. In the FSL both the samples namely S1 & S2 were found to be more than 100 grams less than 1 kg which is the weight of the samples stated by the prosecution. The description of the sample also includes seeds. Such discrepancy, therefore, namely difference in weight and adding up the weight of the seeds as well makes the quantum of recovery of the narcotic from the appellant doubtful.

27. In *Rajesh Jagdamba Avasthi vs. State of Goa*, (2005) 9 SCC 773, the Supreme Court while dealing with the weighment of the recovered narcotic observed that the credibility of the recovery proceedings would be considerably eroded if it is found that the quantity actually recovered and sampled was found to be less than what was stated to have been sealed and sent to CFSL. The Supreme Court in the aforesaid case held that the question is not as to how much was seized but whether there was an actual seizure and whether what was seized was really sent for

chemical analysis. In case of prosecution not being able to explain such discrepancy, the prosecution case is rendered doubtful.

28. Thus for the reasons aforesaid, benefit of doubt is given to the appellant with regard to his being in possession of ganja which was less than the commercial quantity.

29. The appellant is stated to be in custody since 10.01.2009.

30. Accordingly, while maintaining the conviction of the appellant, the sentence imposed upon him is modified to the period which the appellant has already undergone in custody. The quantum of fine imposed upon the appellant is modified and lessened to Rs.50,000/-. If the appellant does not pay the fine, he shall suffer, a further Rigorous Imprisonment for 45 days.

31. The appeal stands partially allowed and disposed of in terms of what has been stated above.

**ASHUTOSH KUMAR, J**

**OCTOBER 06, 2015**

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