

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

Reserved on: 26.08.2015

Date of decision: 01.09.2015

+ CRL.A. 510/2011

SABIR ALI

..... Appellant

Through **Mr.R.K. Bachchan, Adv.**

versus

GOVT OF NCT OF DELHI

..... Respondent

Through **Ms. Alpana Pandey, APP for
the State.
SI Shiv Darshan Narcotics Cell/
Crime Branch.**

CORAM:

HON'BLE MR. JUSTICE ASHUTOSH KUMAR

ASHUTOSH KUMAR, J.

1. Sabir Ali has been convicted under Section 20 of the Narcotic Drugs and Psychotropic Substances Act (for short 'NDPS Act'), for being in possession of 4.300 Kg of Charas by judgment dated 04.02.2011 passed by Special Judge NDPS, Rohini Courts in sessions case no. 51/2007, arising out of FIR No. 13/2007 (PS Narcotics Branch).
2. By order dated 05.02.2011, Sabir Ali has been directed to suffer RI for 10 years and a fine of Rs. 1 Lakh and in the event of non-payment of the fine to further undergo RI for 6 months.
3. The aforesaid judgment and order of the court below is under challenge in the present appeal.

4. The appellant along with co-accused Mohan Prasad @Vijay and Mohammad Suhail @Prem were apprehended on 04.02.2007, from near Vijay Dharam Kanta, Mubarakpur, Delhi. From the possession of the appellant 4.300 Kg of Charas was recovered. Whereas from the possession of the co-accused Mohan Prasad @Vijay 8.700 Kg of Charas was recovered. Nothing was recovered from Mohammed Suhail who was found to be a juvenile and his case was sent to the juvenile justice board. Co-accused Mohan Prasad @Vijay was put on trial along with the appellant but he later stopped appearing before the court and was declared a Proclaimed Offender vide order dated 22.10.2010.

5. The prosecution, in order to bring home the charges under Section 20 of NDPS Act, as against the appellant, has examined 10 prosecution witnesses. The prosecution has primarily relied upon Ct. Joginder (PW.3), HC Jagdish Prasad (PW.4) and Sub-Inspector Sunil Jain (PW.9) for proving the factum of recovery of 4.300 Kg of Charas from the appellant.

6. The defence of the appellant during trial has been two fold. It has been contended on his behalf that no sincere effort was made by the prosecuting agency to join public persons at the time of search and seizure which completely discredits the version of the prosecution that recovery of contraband was effected after full compliance of the mandatory provisions of Section 42, 50 and 55 of NDPS Act; and the testimony of Nahida Khatoon (DW1), daughter of the appellant who deposed before the court that the appellant had come from Sitamarhi,

Bihar for treatment of asthma, but he was illegally picked up from her residence and only after about 5 days, she came to learn that her father was lodged in jail in connection with a case.

7. Let us now examine whether the contraband was recovered from the possession of the appellant, after complying with the provisions of NDPS Act.

8. Sub-Inspector Sunil Jain (PW.9) has deposed that on 04.02.2007, he was posted at PS Narcotics Branch. On that day, at about 04:30 AM he was informed through a secret informer that the appellant and others are likely to exchange the contraband near Vijay Dharam Kanta, Mubarakpur, Delhi between 06:30 - 07:30 AM. The informer was produced before the Kharak Singh (PW.5), the SHO, who after being satisfied about the genuineness of the information, referred the matter to the ACP. An oral direction was giving for conducting a raid. Such information was recorded as DD No. 4A and a copy of the same was produced before PW.5 as per the provisions under Section 42 of NDPS Act. The aforesaid statement is Ex.PW.5/A.

9. A raiding team was thereafter constituted comprising him, HC Jagdish Prasad (PW.4), Ct. Joginder (PW.3), Ct. Om Prakash (PW.7), Ct. Yogesh and a lady constable Parmod. At about 6:45 AM, two persons were spotted coming towards Dharam Kanta from the side of the railway crossing, Nangloi. The aforesaid persons were identified by the informer as Mohan Prasad @Vijay and co-accused Mohammed Suhail @Prem. After about five minutes another person, identified as

the appellant, also arrived. The appellant was handed over a mud coloured bag, who thereafter left the place. It has been stated that at that time the appellant and others were accosted, and were told about the information which the raiding team had with respect to them. The accused persons including the appellant were, made aware of their legal rights of being searched in presence of a Gazetted officer or a Magistrate and their right to search the members of the raiding party and the government vehicle before the appellant and other were searched. A written notice under Section 50 of NDPS Act (Ex.PW.3/A) was served. Since the appellant was illiterate therefore, PW.9 recorded his refusal in his own handwriting on the dictation of the appellant which was read over and explained to him. The refusal of the appellant is Ex.PW.3/B which bears the signature of PW.9. The other accused persons also were served with a notice and they also refused to exercise their option of being searched before a Gazetted officer or Magistrate.

10. It has been categorically stated by PW.9 that 4 passersby were requested to join the police proceeding but none of them were agreeable.

11. On search of the appellant 4.300 Kg of Charas was found. From the possession of accused Mohan Prasad @Vijay 8.700 Kg of Charas was found. Two samples of 100 grams each, of the recovered contraband, were randomly drawn and made into Pullandas which were marked separately. The FSL forms were also filled up. The Rukka (Ex.PW9/A) was prepared and the same was handed over to Ct.

Joginder (PW.3) for registration of the case. He was also handed over the case property, FSL forms and the carbon copies of seizure memos with a direction to hand over the Rukka to duty officer for registration of the case and rest of the materials to Inspector Kharak Singh (PW.5), the SHO, for depositing in the Malkhana.

12. PW.9 has, however in his cross-examination, stated that he did not call anybody from the residential houses surrounding the police station, while he along with the raiding team left for the site which was about 30-32 Kms. away from the police station. It has also been admitted by PW.9 that the place where the appellant was apprehended is also surrounded by residential houses and shops. The Dharam Kanta was found to be closed at the time when the raiding team had reached the spot.

13. PW.9 categorically denied the suggestion that the appellant was picked up from the house of DW.1, the daughter of the appellant.

14. Ct. Joginder (PW.3) who was part of the raiding team, has deposed that the appellant and others were apprehended and after giving notice to them under Section 50 of NDPS Act and on their refusal to exercise their option, they were searched. From the possession of the appellant 4.300 Kg of Charas was recovered. He has further stated that he handed over the Rukka, which was given to him by PW.9, to the duty officer and gave the sealed Pullandas, FSL forms and seizure memos to the SHO (PW.5). The SHO inspected the aforesaid items and affixed his own seal on all the Pullandas and FSL forms and also mentioned the FIR number on such Pullandas.

15. PW.3 has categorically stated that no one was called from the Dharam Kanta to witness the proceeding as the Dharam Kanta was closed at that time. He has further deposed that the I.O. had asked public persons who had gathered at the site to join the proceedings but no one agreed to become a witness. However, he has admitted that no notice was issued to any public person to join the proceedings and no legal action also was taken against them on their refusal.

16. HC Jagdish Prasad (PW.4) has supported the prosecution version and has affirmed that the notice under Section 50 of NDPS Act which was given to the appellant (Ex.PW3/A) has been signed by him also. It is stated by PW.4 that the contraband recovered was tested with a field testing kit and it was weighed on the electronic scale. The samples were drawn and FSL forms were filled up in his presence. The aforesaid witness has however stated that public persons had not gathered at the spot as the search was made in the early hours and no shops nearby were open at that time. He has categorically denied that the suggestion that the appellant was lifted from the house of his daughter at Nangloi or that any money was demanded from him.

17. Inspector Kharak Singh (PW.5) has deposed that he was the SHO of the Narcotics Branch Delhi on 04.02.2007. At about 4:45 AM on the same day, PW.9 produced one secret informer before him, who disclosed that the appellant and others are expected to arrive at Vijay Dahram Kanta for supply of Charas. After being satisfied about the genuineness of the information, the aforesaid witness informed the ACP, who in turn directed for conducting the raid. DD No.4A, carbon

copy of which is Ex. PW5/A was handed over to him by PW.9 for compliance of Section 42 of NDPS Act, which he signed and forwarded to the senior officers.

18. After the raid, at about 12:30 PM Ct. Joginder (PW.3) gave him the sealed parcels, FSL forms and the seizure memos on which he affixed his own seal and put the FIR number.

19. Thus from the deposition of the aforesaid witnesses, it stands established that on 04.02.2007, PW.9 was told by a secret informer about the appellant and others having made plans to come near Vijay Dharam Kanta. After the compliance of Section 42 of NDPS Act, raid was conducted. After full compliance of Section 50 of NDPS Act, the appellant was searched and contraband was recovered from his possession. The samples were drawn properly in accordance with the provisions under the NDPS Act. Thus the recovery of the contraband from the possession of the appellant stands confirmed and established fully.

20. It has been argued on behalf of the appellant that all the aforesaid witnesses have asserted the fact that on way from the police station to the site, there were residential colonies and commercial establishments. However, no sincere efforts were made for involving public persons in the search proceedings. It has been submitted that no reliance could be placed on such recovery in the absence of the search proceedings not being joined by public persons. In the absence of any written request by PW.9 to the public persons, it could be said with certainty that no effort was made by the raiding team to make the

search proceedings transparent. As a result, it has been argued, the entire recovery stands vitiated.

21. The Trial Court has rejected such an argument and rightly so. The witnesses have made categorical statements that public persons were asked to join the raiding party but nobody came forward to become a witness. Judicial notice could be taken of the fact that generally public persons are loathe in becoming witnesses in such proceedings and the reason for it, primarily, is that in case they become a witness, they would be required to appear in courts of law in support of the prosecution version.

22. As a matter of prudence, public persons should be requested to join the search proceedings but non joining of public persons would not render the recovery doubtful in all circumstances. It cannot be disputed that the testimony of the police officials cannot be disregarded or discredited merely on the ground that independent witnesses are not available. At the same time in the absence of independent witnesses the testimony of police officials has to be scrutinized with caution. The law is well settled, that if the investigating officer makes an effort to produce an independent witness but fails because of the refusal by independent persons, then in that eventuality their testimony can be relied upon, but only when there is strict compliance with the provisions of law regarding search and seizure.

23. In *Ajmer Singh vs. State of Haryana*: (2010) 3 SCC 746; the Supreme Court has held as here under-

"19. The learned counsel for the appellant has submitted that the evidence of the official witnesses cannot be relied upon as their testimony, has not been corroborated by any independent witness. We are unable to agree with the said submission of the learned counsel. It is clear from the testimony of the prosecution witnesses PW 3, Paramjit Singh Ahalwat, DSP, Pehowa; PW 4, Raja Ram, Head Constable and PW 5, Maya Ram, which is on record, that efforts were made by the investigating party to include independent witness at the time of recovery, but none was willing. It is true that a charge under the Act is serious and carries onerous consequences. The minimum sentence prescribed under the Act is imprisonment of 10 years and a 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.

20. 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."

24. Similarly in *Ram Swaroop vs. State (Government of NCT of Delhi)*: (2013) 14 SCC 235; it has been held as follows:

"7. To appreciate the first limb of submission, we have carefully scrutinized the evidence brought on record and perused the judgment [Ram Swaroop v. State (Govt. of NCT

*of Delhi), Criminal Appeal No. 394 of 2007, decided on 4-5-2009 (Del)] of the High Court and that of the trial court. It is noticeable that the evidence of PW 7, namely, Ritesh Kumar, has been supported by Balwant Singh, PW 5, as well as other witnesses. It has come in the evidence of Ritesh Kumar that he had asked the passers-by to be witnesses but none of them agreed and left without disclosing their names and addresses. On a careful perusal of their version we do not notice anything by which their evidence can be treated to be untrustworthy. On the contrary it is absolutely unimpeachable. We may note here with profit that there is no absolute rule that police officers cannot be cited as witnesses and their depositions should be treated with suspicion. In this context we may refer with profit to the dictum in *State of U.P. v. Anil Singh* [1988 Supp SCC 686: 1989 SCC (Cri) 48] 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.*

[Emphasis supplied]

8. *At this juncture a passage from State (Govt. of NCT of Delhi) vs. Sunil [(2001) 1 SCC 652: 2001 SCC (Cri) 248] is apt to quote: (SCC p. 662, para 21)*

“21. We feel that it is an archaic notion that actions of the police officer should be approached with initial distrust. We are aware that such a notion was lavishly entertained during the British period and policemen also knew about it. Its hangover persisted during post-independent years but it is time now to start placing at least initial trust on the actions and the documents made by the police. At any rate, the court cannot start with the presumption that the police records are untrustworthy. As a proposition of law the presumption should be the other way around. That official acts of the police have been regularly

performed is a wise principle of presumption and recognized even by the legislature. Hence when a police officer gives evidence in court that a certain article was recovered by him on the strength of the statement made by the accused it is open to the court to believe the version to be correct if it is not otherwise shown to be unreliable. It is for the accused, through cross-examination of witnesses or through any other materials, to show that the evidence of the police officer is either unreliable or at least unsafe to be acted upon in a particular case. If the court has any good reason to suspect the truthfulness of such records of the police the court could certainly take into account the fact that no other independent person was present at the time of recovery. But it is not a legally approvable procedure to presume the police action as unreliable to start with, nor to jettison such action merely for the reason that police did not collect signatures of independent persons in the documents made contemporaneous with such actions.”

9. *In Ramjee Rai v. State of Bihar [(2006) 13 SCC 229: (2007) 2 SCC (Cri) 626 it has been opined as follows: (SCC p. 236, para 26)*

“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.”

25. Keeping the aforesaid in mind, it can safely be stated that in the present case, there is no reason to hold that non examination of independent witnesses has adversely affected the prosecution case.

26. In the context of recovery of the contraband from the appellant, it would be necessary to examine the testimony of Nahida Khatoon, daughter of the appellant, who has been examined as DW.1. She has stated that on 04.02.2007 at about 04:30AM her father was lifted from her house by four male persons and one female. Her father had come to Delhi only three days prior from Bihar for getting himself treated for asthma. When the father of DW.1 was being taken away, her sister, Chaman Tara, wanted to know from those persons as to where was their father being taken away. They were told that their father would be sent back within 10 minutes. It was only after fifth day from 04.02.2007, that DW.1 and her sister were informed, on telephone, that her father has been lodged in jail.

27. In her cross-examination, DW.1 has admitted that no complaint whatsoever was made to any senior police officer of authority when her father was taken away and his whereabouts were not known for about 4 -5 days. No missing report was lodged by any one of the daughters of the appellant. Thus her statement does not appear to be correct. It is not expected of a daughter or any close relative to sit tight over such information and not complain against the abduction to any superior police authority or to any person in authority.

28. Learned counsel for the appellant drew the attention of this court to certain contradictions in the testimony of the witnesses. Ct.

Joginder (PW.3), has stated before the court that he took the case property and Rukka to the police station and thereafter he remained in the police station. During cross-examination, PW.3 has stated that the personal search of the appellant was conducted in his presence. It has further been stated that PW.3 stated that the appellant reached the spot after 25 - 30 minutes of arrival of other accused persons but other witnesses to the recovery, especially PWs. 4 and 9, have spoken about the appellant having reached the spot barely within five minutes of the arrival of other accused persons. It was thus argued that such contradictions make the witnesses highly unreliable and unsafe to be relied upon.

29. The contradictions which have been pointed out by the learned counsel of the appellant are of a minor nature and such divergence in statements of fact do not at all go to the root of the matter. Such contradictions do not undermine the veracity of the prosecution version.

30. ASI Paramjeet Singh (PW.1) is the I.O. of the case. He has deposed that on 01.03.2007, Ct. Dilbag Singh (PW.10) deposited the sealed sample along with the FSL form, with the Forensic Science Laboratory, Rohini vide RC No. 190/21. He has further stated that he had collected the FSL result (Ex.PW1/M) and placed it on the file.

31. HC Ishwar Singh (PW.2) was posted as MHC (M) at PS Narcotics Branch, Shakarpur on 04.02.2007. He is stated to have made relevant entries in register number 19 at serial number 617 and deposited the sealed Pullandas, FSL forms and seizure memos in

Malkhana. He has further stated that on 01.03.2007, the sealed parcels were sent to FSL Rohini through Ct. Dilbag (PW.10). After depositing the sealed samples with FSL Rohini, the receipt was handed over to him by PW.10. There was no tampering with the seals of the parcels.

32. Ct. Dilbag (PW.10) has reaffirmed the fact that on 01.03.2007, on the instructions of the SHO, he deposited the sealed Pullandas along with the FSL forms with FSL, Rohini and obtained a proper receipt.

33. Thus from the deposition of the aforementioned witnesses there does not appear to be any doubt that the samples were properly sealed and preserved and sent for the forensic examination.

34. Section 20 of NDPS Act provides for punishment for contravention in relation to cannabis plant and cannabis-

"20. Punishment for contravention in relation to cannabis plant and cannabis.- *Whoever, in contravention of any provisions of this Act or any rule or order made or condition of licence granted thereunder,-*

(a) cultivates any cannabis plant; or

(b) produces, manufactures, possesses, sells, purchases, transports, imports inter-State, exports inter-State 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 but 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."

35. The minimum sentence provided under Section 20 (ii) of NDPS Act is 10 years and a fine of not less than Rs. 1 Lakh.

36. This court does not find any flaw with the finding of guilt as also the sentence imposed on the appellant by the Trial Court.

37. For the reasons afore recorded, I do not find any merit in the present appeal.

38. The same stands dismissed.

39. Trial Court records be returned.

Crl.M.B. No.2550/2013

In view of the appeal having been dismissed, the application has become infructuous and the same is dismissed as such.

ASHUTOSH KUMAR, J

SEPTEMBER 01, 2015/as