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

% *Judgment reserved on : 05.10.2015*
Judgment delivered on : 13.10.2015

+ CRL.A. 731/2012
DAYA SHANKAR GUPTA

..... Appellant
Through Mr.Arvind Kumar, Advocate.

versus

STATE

..... Respondent
Through Ms.Neelam Sharma, APP along
with ASI Narender Kumar.

+ CRL.A. 825/2012
SANJAY SHAH

..... Appellant
Through Mr.Arvind Kumar, Advocate.

versus

STATE GOVT. OF NCT OF DELHI

..... Respondent
Through Ms.Neelam Sharma, APP along
with ASI Narender Kumar.

CORAM:
HON'BLE MS. JUSTICE INDERMEET KAUR

INDERMEET KAUR, J.

1 These appeals are directed against the impugned judgment and order on sentence dated 31.10.2011 wherein appellants Daya Shankar Gupta and Sanjay Shah stood convicted under Section 20 (b)(ii)(C) of the Narcotics Drugs and Psychotropic Substance Act (in short NDPS Act). Each of them 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 a period of 6 months. Benefit of Section 428 of the Cr.PC had been granted to the convicts.

2 Nominal rolls of the appellants reflect that as on date, each of them has undergone incarceration of 6 years and 4 months; remission being inapplicable to a convict under the NDPS Act.

3 The version of the prosecution is that pursuant to a secret information received on 07.07.2009 (reduced into writing and forwarded to its senior officer), a raiding party was constituted comprising of PW-3 (HC Sanjiv Kumar), PW-6 (HC Kanwal Singh) and PW-10 (SI Bhagwan Singh). They reached the spot i.e. bus stand Seema Puri bus depot opposite the bus depot, via Pushta Road, Gandhi Nagar, G.T. Karnal Road. 5-6 passersby were asked to join the raid but none had agreed. The members of the raiding party were briefed about the secret

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information which was to the effect that two persons would be coming through that way carrying huge quantities of contraband. Nakabandi was done. At the pointing out by the secret informer, the accused persons who were seen at a distance of 6-7 meters were apprehended. They were holding red-white and green bags respectively in their left hand. The person holding the green bag was identified as Daya Shankar and the person holding the red white bag was Sanjay Shah. PW-10 introduced himself to the accused. The secret information was also disclosed to them. It was informed to them that they had a right to get themselves searched either in the presence of a Gazetted Officer or a Magistrate and a notice in writing under Section 50 of the NDPS Act was served upon them. On the search of the accused, the green coloured bag was found to contain a while blue coloured check-dar cloth which contained slabs with a khakhi coloured tape; they were 12 in number. There was a black coloured substance and on testing it with the field testing kit, it tested positive for charas. It was weighed on an electronic scale; it weighed 6 kgs. Two samples of 50 gms each were taken from this quantity of charas and they were separately seized and sealed. The remaining contraband was also seized and sealed. From the search of accused

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Sanjay Shah who was carrying a red white coloured bag, a blue coloured cloth sheet was found in the bag which also contained slabs wrapped in a khakhi coloured tape; they were also 12 in number. This was also a black coloured substance and on testing it with a field testing kit it also tested positive for charas. It was also weighed on an electronic scale and measured 6 kgs. Two samples of 50 gms each were also taken from this quantity of charas and they were separately seized and sealed. The remaining contraband was also seized. The disclosure statements of the accused was recorded. The case property was handed over to the MHCM HC Chand Ram (PW-8) who deposited it in the malkhana on the same day through Inspector Akshay Kumar (PW-5). The sealed sample along with the FSL form was sent to the CFSL on 22.07.2009 through HC Narender (PW-7). The samples after testing, tested positive for charas. Compliance of Section 57 of the NDPS Act was also made.

4 In the statement of the accused recorded under Section 313 of the Cr.PC, they pleaded innocence; submission being that they had been lifted from the bus stop and this case has been falsely planted upon them. No evidence was led in defence.

5 On the basis of the aforementioned evidence, both oral and

documentary, the accused were convicted and sentenced as aforesaid.

6 On behalf of the appellants, arguments have been addressed by Mr. Arvind Kumar. The first submission of the learned counsel for the appellants is that there is no explanation as to why no public person had joined the raid. The statement of the Investigating Officer (PW-10) that 5-6 persons were asked to join the raid but none had agreed is a routine statement which is made in almost all cases relating to the NDPS Act; there was no compliance in true letter and spirit; the version of the prosecution suffers from severe infirmities especially in the context that the place of search being a busy bus stand at Seema Puri and being the afternoon time (04:30 pm) when the traffic was heavy on this road. The second submission of the learned counsel for the appellants is that even as per the version of the prosecution which is evident from the testimony of the Investigating Officer (PW-10), the seal remained with PW-6 up to 23.07.2009; he was a member of the raiding party who was interested in the success of the case; there was every possibility of tampering of the sample; this possibility cannot be excluded. The Register No. 19 shows that the case property had been deposited by the Investigating Officer (PW-10) and not by PW-5 (Inspector Akshay Kumar) as is the version

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of the prosecution. This also throws doubt on the veracity of the version of the prosecution. To support these arguments, reliance has been placed upon 2014 (4) JCC 3038 Firoz Khan Vs. The State (NCT of Delhi) as also another judgment of a Bench of this Court reported as 2012 (3) JCC (Narcotics) 81 James Eazy Franky Vs. D.R.I. On all these counts, the appellants are entitled to a benefit of doubt and a consequent acquittal.

7 Needles to state that these arguments have been refuted by the State.

8 Arguments have been heard. Record has been perused.

9 The version of the prosecution is that a secret information was received by PW-10 which had been reduced into writing vide DD No. 16. This information was received at 02:30 PM. This information by way of DD No. 16 was forwarded to the senior officer and the proof of the same was exhibited as Ex.PW-1/B. There was no cross-examination on this aspect. Compliance of Section 42 of the NDPS Act which is a mandatory provision stood effected.

10 Section 50 of the NDPS Act has also been complied with. Although a cursory argument has been raised by the learned counsel for the appellant that there was no compliance of Section 50 in true letter

and spirit, this is negated by the notice served upon each of the appellants which was in writing and the testimony of PW-10 that this notice was served upon the accused persons prior to their search and they were apprised of their legal right to get their search conducted either before a Gazettted Officer or a Magistrate. These notices were read over and explained to them (Ex.PW-3/A and Ex.PW-3/B). The averment of the Investigating Officer (PW-10) was the fact that the contents of the said notice were explained to the accused but inspite of that, they declined to exercise this option; their separate replies were also recorded by HC Sanjiv Kumar (PW-3) in his own writing and since both the accused persons being semi-illiterate, these replies were written by PW-3. Compliance of Section 50 of the NDPS Act also stood effected.

11 The argument of the learned counsel for the appellant that there is no explanation for non-joining of the public persons in the raid is answered in the version of PW-10 who deposed that after the accused persons were apprehended, 5-6 persons were asked to join the raid but none had agreed. This position has been reiterated in his cross-examination. The other members of the raiding party i.e. PW-3 and

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PW-6 have also made a categorical averment to the same effect. PW-3 has on oath stated that 5 passersby were asked to join the raid at the spot but none had agreed. They left the spot without disclosing their names and addresses. PW-6 another member of the raiding party also reiterated this position. He on oath deposed that 5-6 persons were asked to join the raid by PW-10 but they did not agree to do so. This version of PW-6 is corroborated by the testimony of PW-3. Thus in this factual matrix, the non-joining of the public witnesses due to their disagreement would lead to the drawing of an adverse inference against the prosecution. In this context, it is worthy to note that the prosecution had made every possible effort to get the public persons to join the raid. It is also a well recognized fact that public persons are wary of joining raids being both time-consuming and pressure-building and thus if the version of the members of the raiding party is cogent and coherent, there is no reason not to rely upon these versions.

12 In this context, the observations of a Bench of this Court reported as *Tahir v. State (Delhi) (1996) 3 SCC 338*, are relevant; they read as under:-

6. ...In our opinion no infirmity attaches to the testimony of the police officials, merely because they belong to the police force and there is no rule of law or

evidence which lays down that conviction cannot be recorded on the evidence of the police officials, if found reliable, unless corroborated by some independent evidence. The Rule of Prudence, however, only requires a more careful scrutiny of their evidence, since they can be said to be interested in the result of the case projected by them. Where the evidence of the police officials, after careful scrutiny, inspires confidence and is found to be trustworthy and reliable, it can form basis of conviction and the absence of some independent witness of the locality to lend corroboration to their evidence, does not in any way affect the creditworthiness of the prosecution case.”

13 The testimony of the members of the raiding party i.e. PW-3, PW-6 and PW-10 has been examined with a greater scrutiny; it suffers from no infirmity; none has also been pointed out by the learned counsel for the appellants.

14 This argument of the learned counsel for the appellants is without any merit.

15 The second argument of the learned counsel for the appellants that there is a possibility of tampering is also negated. Admittedly the raid had been conducted on 07.07.2009. The case property had been seized and sealed. From both the appellants 6 kgs of charas had been seized and from each of them, two samples of 50 gms each were drawn. The samples were seized and sealed. The seal was of the Investigating Officer. The seal after use was handed over to PW-6. The case property

was deposited on the same day in the malkhana and an entry to the said effect in Register No. 19 was proved through PW-8. This case property was deposited by Inspector Akshay Kumar (PW-5) and his signatures at point 'A' in Register No. 19 (Ex.PW-5/A) is evident from its perusal and is also corroborated by his version. There is no doubt that in the column, the name of the depositor SI Bhagwan Singh has been mentioned but it is common knowledge that entry in Register No. 19 is almost a reproduction of the seizure memo and this is how his name has been shown. In the same column, the name of Inspector Akshay Kumar (PW-5) (appearing at point 'A' and he having signed this document) clearly shows that this case property has in fact been deposited by him.

16 The sample parcel along with FSL form was sent on 22.07.2009 through PW-7 HC Narender vide road certificate No. 559, which entry also finds mention in Register No. 19 (Ex.PW-5/A). The seal of the Investigating Officer remains with PW-6 in this intervening period and as per the version of PW-10, this seal was returned to him only on 23.07.2009. This is also corroborated by the version of PW-6. Thus in this intervening period i.e. from the day of the deposit of the case property till the time when it was sent to the CFSL on 22.07.2009, the

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seal of the Investigating Officer remained with PW-6. This Court notes no irregularity in this approach. Entries in Register No. 19 are clear; there is nothing to suggest that the case property was ever taken out from the malkhana after it was deposited on 07.07.2009 till the time when it was sent to the CFSL on 22.07.2009. The report of the CFSL dated 26.11.2009 has also noted that the seals were in an intact condition and tallied with the specimen seals. Possibility of tampering was wholly excluded. This argument of the learned counsel for the appellants is also without any merit.

17 The judgments in Firoz Khan & James Eazy Franky (supra) relied upon by the learned counsel for the appellants were distinct; in each of those cases, there was a cumulative set of circumstances which had led to their acquittal; these cumulative factors are not available to the appellants in this case.

18 The impugned judgment calls for no interference. Appeals are without any merit. Dismissed.

INDERMEET KAUR, J

OCTOBER 13, 2015

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