

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

% *Judgment reserved on : 20.8.2015*
Judgment delivered on : 24.8.2015

+ CRL.A. 1148/2012

PRAKASH SINGH AND ORS. Appellants

Through Mr. Shubhankar Jha, Adv.

versus

STATE 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 of sentence dated 23.4.2012 wherein the appellants Prakash Singh and Moti Khan have been convicted under Section 20(b)(ii) (C) read with Section 29 of the NDPS Act; each of them have been sentenced to undergo RI for a period of 10 years and to pay a fine of Rs.2 lac in default of payment of fine to undergo SI for 12 months.

2 The version of the prosecution is that at about 8.45 P.M., a black colour Pulsar motorcycle driven by accused Prakash Singh with Moti

Khan as the pillion rider, reached in front of the under construction community hall near Netaji Nagar. Inspector Bal Kishan along with SI Balihar Singh, ASI P.D. Meena (PW-8), H.C.Abdul Hakim (PW-9), H.C. Jasraj (PW-5), H.C.Pramod Kumar (PW-4), Constable A.Rehman (PW-7), Constable Joginder who were on patrolling duty being member of AATS, District South became suspicious as they noticed that there were three army bags kept on the motorcycle. The motorcyclist was asked to stop. Each of the two appellants had one bag with them and the third bag was lying on the motorcycle. PW-8 and the other members of the raiding party introduced themselves to the appellants. They tried to slip away but they were apprehended. Accused Prakash Singh was apprehended by PW-8 and accused Moti Khan was apprehended by PW-4. On checking the bags of the appellants, it was found that the bags contained contraband which was in the shape of grass leaves like objects which was later revealed to be ganja. The packets were weighed separately. Each of the three bags contained two packets each. 50 gram samples from each packet were obtained. The total numbers of samples which were drawn from the contraband were 12 and each of them were described separately as A-1, A-2 to G-1 and G-2. The samples as also

the remaining contraband was seized and sealed. The disclosure statements of the accused were recorded. They were formally arrested.

3 Further investigation of this case was marked to PW-3. He had also reached the spot. The contraband and the samples were deposited in the Malkhana by PW-6 and entries in the relevant Registrar No.19 were proved. The FSL had tested the samples positive for ganja.

4 On the basis of the aforementioned evidence collected by the prosecution, the appellants were chargesheeted and sentenced as aforementioned.

5 On behalf of the appellants, arguments have been heard in detail. The ground of appeal argued by the learned counsel for the appellant is that the mandate of Section 55 of the NDPS Act has not been complied with; when was the case property deposited? by whom and how the samples were taken to the FSL has not been explained; the link evidence is missing. It is pointed out that notice under Section 50 of the NDPS Act was also not served upon the accused which is a mandatory requirement. The next submission made by learned counsel for the appellant is that there are glaring contradictions in the versions of the prosecution witnesses; they are all police officials; there is no

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explanation as to why no public witness was joined when admittedly it was a public place where the offence had taken place. On all the aforenoted grounds, the appellants are entitled to benefit of doubt and a consequent acquittal.

6 These arguments have been refuted by learned APP for the State. She has drawn attention of this Court to the testimony of PW-6 who had on oath deposed that he had deposited the case property including FSL form in the Malkhana. Further submission is that since this was a case of chance recovery, notice under Section 50 of the NDPS is not a mandatory requirement. The last submission made by the learned counsel for the State is that the public witnesses were asked to join the proceedings but since they had refused to join and there being no inconsistency in the testimony of the members of the raiding party their versions cannot be disbelieved only on the ground that public witnesses have not been joined.

7 Arguments have been heard and record has been perused.

8 Admittedly this is a case of chance recovery. The members of the raiding party which included, PW-4, PW-5, PW-7, PW-8 and PW-9 have all deposed that they were on patrolling duty at the time when the

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appellants were going on a motorcycle, and on chance they were apprehended and the contraband was recovered from their possession i.e. from their baggage and not from their person. In such a scenario, provisions of Section 50 of the NDPS Act are inapplicable. This has been held by the Constitution Bench of the Apex Court in 3(1999) 6 SCC 172 State of Punjab V. Baldev Singh as under:

“Sec.50 would come into play only in the case of a search of a person as distinguished from search of any premises etc. However, if the empowered officer, without any prior information as contemplated by Sec. 42 of the Act makes a search or causes arrest of a person during the normal course of investigation into an offence or suspected offence and on completion of that search, a contraband under the N.D.P.S. Act is also recovered, the requirements of Sec. 50 of the Act are not attracted.”

9 This has also been upheld in 2005 SCC (Cri.) 943 State of H.P.V. Pawan Kumar, as under:

“Sec. 50 will come into play only in the case of personal search of the accused and not of some baggage like a bag, article or container, etc. which he may be carrying.”

10 The members of the raiding party as noted supra were PW-4,

PW-5, PW-7, PW-8 and PW-9. They have all deposed consistently. PW-4 has on oath deposed that when he, along with the members of the raiding party were on a patrolling duty in the area in a Government Bus they noticed that a pulsar motorcycle on which two persons were seated and that there were three bags of green colour in between them. On suspicion, they were asked to stop. PW-8 introduced himself to them and asked them to search their bags. They attempted to flee but they were apprehended. The person who was driving the motorcycle gave his name as Prakash Singh. He was apprehended by PW-8. He was having one bag. The other person Moti Khan was having a bag in his hand. On checking these three bags, each of them was found to contain two plastic containers having ganja. The ganja was measured on a scale by the Investigating Officer. It appeared to be a grassy type object. Each of these bags were separately weighed and 50 grams samples were drawn from each of the packet making them 12 samples in each. The case property was seized vide memo Ex.PW-4/A. FSL form was filled up at the spot. Arrest memo of appellant Prakash Singh was proved as Ex.PW-3/C and arrest memo of appellant Moti Khan was proved as Ex.PW-3/D. Their personal search was also conducted. In his cross-Crl. Appeal No.1148/2012

examination he stuck to his stand and categorically stated that each sample was drawn separately from each packet and they were all sealed with the seal of “PDM” and “RR”. Nothing has also been pointed out in the cross-examination of the aforementioned witnesses which could discredit his otherwise cogent version. The other members of the raiding party namely PW-5, PW-7, PW-8, PW-9 corroborated the version of PW-4. PW-8 has categorically stated that the public persons were asked to join the raid but none agreed; he had not noted the name of the persons who had refused to join the raid. The entire weighment took about one hour. He left the spot at about 3.00 a.m. in his vehicle and went back to his office. The samples and the pullandas were deposited.

11 The non-joining of the public witnesses has been explained by PW-8. It is also a well-known fact that public persons are wary of joining police raids as they know that this is a cumbersome procedure; not only do they have to spend time in the proceedings at the spot but they would also be called to the Court later on for deposition. This is largely the reason which discourages public persons from joining these proceedings. In these circumstances, the non-joining of public witnesses would not affect the version of the members of the raiding

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party who had otherwise given a coherent version. The observations of the Apex Court in *AIR 2013 3SC 3995 Gian Chand & Ors. Vs. State of Haryana* are relevant in this context and read as under:

“ mere non-joining of an independent witness where the evidence of the prosecution witnesses may be found to be cogent, convincing, creditworthy and reliable, cannot cast doubt on the version forwarded by the prosecution if there seems to be no reason on record to falsely implicate the Appellants.”

12 The case property, the samples and the FSL Form were deposited in the Malkhana by Inspector Ritu Raj (PW-6) who has deposed that she had affixed the seal on the parcels and thereafter deposited the case property and the FSL Form along with the samples in the Malkhana. DD entry to this effect had been recorded. PW-7 Constable A.Rehman had taken these samples along with the FSL form to the FSL on 16.10.2009 and entries in the Register No.19 to the said effect have been proved by H.C.Atar Singh (PW-1). The FSL vide its report tested the samples positive for ganja.

13 This Court, further notes that the contraband which had been recovered from the accused measured 58.50 kg. which falls within the definition of a commercial quantity. The illegal possession of ganja for

which offence the appellants had been convicted under Section 20(b)(ii)(C) of the NDPS Act and were awarded the sentence which was the minimum. On no ground does the impugned judgment call for any interference. Appeal dismissed.

INDERMEET KAUR, J

24th AUGUST, 2015
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