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

% *Judgment reserved on : 03.12.2015*
Judgment delivered on : 08.12.2015

+ CRL.A. 1074/2013
SANJAY PRASAD

..... Appellant
Through Mr. Jivesh Kumar Tiwari, Adv.

versus

STATE (GOVT. OF NCT.) OF DELHI

..... Respondent
Through Mr. Tarang Srivastava, 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 on sentence dated 03.05.2013 and 13.05.2013 respectively wherein the appellant stands convicted for illegal possession of a commercial quantity of charas weighing 8 kgs and 400 gms under Section 20 of the NDPS Act. He has been sentenced to undergo RI for a period of 12 years and to pay a fine of Rs.1 lac and in default of payment of fine, to

undergo SI for 6 months.

2 Nominal roll of the appellant has been requisitioned. This reflects that as on date he has undergone incarceration of about almost 4 years & 2 months. His jail conduct has been satisfactory.

3 The version of the prosecution is that ASI Mahender Singh (PW-10) while on patrolling duty on the fateful day of 29.07.2011 along with constable Prakash Chand (PW-2) and constable Rambir Singh (PW-9), saw one person near ISBT having a khaki coloured bag in his right hand coming from the foot over bridge side towards the outer gate of the bus stop. The said person on seeing the police party, took a U turn. This created suspicion in the mind of the police. He was apprehended. His name was revealed as Sanjay Parsad. On query, the appellant stated that the bag contained charas. Public persons were asked to join proceedings but none agreed. Notice under Section 50 of the NDPS act was served upon the appellant explaining to him that he had a right to get his search conducted either before a Gazetted Officer or a Magistrate. He refused. The notice was proved as Ex.PW-2/A and his refusal was recorded as Ex.PW-2/B. On checking the bag of the accused, it was found to contain a polythene which in turn contained charas on weighing weighed, was

found to be 8 kgs and 400 gms. One sample of 200 gms was taken from the total contraband. The remaining contraband and the sample were sealed with the seal of the Investigating Officer. The FSL form was filled in at the spot.

4 The report under Section 57 of the NDPS was sent through constable Ambilli Kuttan (PW-5) and proved as Ex.PW-5/A and Ex.PW-5/B. The case property was deposited with the MHCM constable Satya Pal (PW-3) who had sent the same to the FSL on 09.08.2011 through ASI Shiv Lal (PW-7). The investigation was conducted initially by PW-10 and thereafter the same was handed over to SI Pradeep Rai (PW-6). Charge sheet was filed through him. The FSL has tested the sample contraband positive for charas.

5 The prosecution in support of its case has examined 10 witnesses.

6 In the statement of the accused recorded under Section 313 of the Cr.PC, he pleaded innocence stating that he has been falsely implicated in the present case. His defence was that money had been robbed from him and which had resulted in quarrel and his false implication.

7 In defence, one witness was produced SI Ajay Singh Negi (DW-1) to substantiate the argument that pursuant to the quarrel, a case of

theft had been lodged but Ex.DW-1/A had evidenced that no case of theft was registered.

8 On the basis of the aforementioned evidence, the Trial Court while rejecting the defence of the appellant, convicted and sentenced the appellant as aforementioned.

9 On behalf of the appellant, the foremost submission made by the learned counsel for the appellant is that the sample which was drawn was 200 gms and what had been received and examined by the FSL was 260 gms. Attention has been drawn to the FSL report wherein it has been recorded that a sample pulanda was received, the weight of the sample was 260 gms which was inclusive of the polythene. The submission of the learned counsel for the appellant being that 60 gms could not be the weight of the polythene and how a 200 gms sample became 260 gms is unexplained and unanswered. Benefit of this must accrue in favour of the appellant and he is entitled to a consequent acquittal on this ground alone. Learned counsel for the appellant in support of his submission has placed reliance upon a judgment of the Apex Court reported as AIR 2005 SC 1389 Rajesh Jagdamba Awasthi Vs. State of Goa.

10 Needless to state that these arguments have been refuted.

11 The recovery witnesses examined by the prosecution were PW-2, PW-8, PW-9 & PW-10. PW-2 has categorically on oath stated that after the appellant had been apprehended and the contraband was recovered from him which had measured 8 kgs and 400 gms. The Investigating Officer had separated a 200 gms sample of contraband which was separately packed and sealed. So also is the version of PW-9 & PW-10 both of whom have also stated that the Investigating Officer had separated a 200 gm sample of charas from the contraband. Thus the version of the prosecution is that what was drawn was a sample weighing 200 gms. The sample was thereafter deposited with MHCM on the same day i.e. on 29.07.2011. This is the version of PW-3. Relevant entries in the register had been made by him. The sample was thereafter sent through PW-7 on 09.08.2011 for depositing it in the FSL. The report of the FSL (Ex.PX) reflects that one cloth parcel sealed with three seals of 'MR.' and 4 seals of 'M.S.' was found to contain Ex.S-1, kept inside the polythene. This dark greenish brown coloured slab shaped semi solid material was found to be charas and the weight was 260 gms with the polythene. The sample which was 200 gms had now

become 260 gms and the submission of the learned counsel for the appellant that the weight of the polythene could not be 60 gms has a clear force.

12 In the judgment of the Apex Court while considering similar proposition on the discrepancy i.e. in the weight of the sample, the Apex Court in Rajesh Jagdamba (Supra) had held as under:-

“The credibility of the recovery proceeding is considerably eroded if it is found that the quantity actually found by PW-1 was less than the quantity sealed and sent to him. As he rightly emphasized, the question was not how much was seized, but whether there was an actual seizure, and whether what was seized was really sent for chemical analysis to PW-1. The prosecution has not been able to explain this discrepancy and, therefore, it renders the case of the prosecution doubtful.”

13 Thus it is clear that the credibility of the recovery would become considerably doubtful if there is a major discrepancy in the sample which was drawn and what was actually received in the FSL. The difference of 60 gms is wholly unexplained by the prosecution. A sample of 200 gms having become 260 gms does not appear to be justified. Benefit of doubt accordingly accrues in favour of the appellant as what was seized and what was finally analyzed to nail the appellant becomes doubtful.

14 Accordingly, while giving benefit of doubt to the appellant the appeal is allowed. Appellant be released forthwith, if not required in any other case.

INDERMEET KAUR, J

DECEMBER 08, 2015

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