

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

% *Judgment reserved on : 14.07.2015*
Judgment delivered on : 23.07.2015

+ **CRL.A. 906/2012**

RAJ NANDAN SAHNI Appellant

Through Mr.Sumeet Verma and Mr. Amit
Kala, Advocates.

versus

STATE

..... Respondent

Through Mr.O.P.Saxena, APP for the State
along with SI Rajiv Kumar.

CORAM:
HON'BLE MS. JUSTICE INDERMEET KAUR

INDERMEET KAUR, J.

1 This appeal is directed against the impugned judgment and order of sentence dated 17.03.2012 wherein the appellant has been convicted under Section 20 (b) (ii) (C) of the Narcotic Drugs and Psychotropic Substances Act and has been sentenced to undergo for a period of 10 years and to pay a fine of Rs.1 lac, in default, to undergo SI for 6

months.

2 The version of the prosecution is that a secret information was received in police station Jaitpur at about 8.30 p.m. on 23.3.2010 to the effect that a person wearing a pink shirt would be coming from the side of Lohia Pul, Ali Vihar going towards Sourabh Vihar and would be carrying a white coloured plastic bag containing ganja. This information was received by Investigating Officer Ashish Kumar (PW-10). He conveyed this information to his senior officer on telephone and on their directions a raiding party comprising of PW-5, PW-9 and PW-10 was organized. They were already on patrolling duty in that area. Passersby were asked to join the investigation but none agreed. At about 9.00 p.m. accused was apprehended. He was found carrying a plastic bag on his shoulder. He was apprised of the police party having received a secret information and the need of his search. It was informed to him that he had a legal right to get search conducted in the presence of a Gazetted Officer or an SDM. Notice under Section 50 (Ex.PW-5/A) was given to the accused. His written reply (Ex.PW-5/B) was recorded. He refused. On search of the accused a plastic bag

containing 21 kg 700 grams ganja was seized by the investigating officer (PW-10). A sample of 1 kg. was taken out and kept in a plastic jar and sealed with a cloth pullanda. The sample and the remaining contraband was sealed with the seal of SKB. The case property was taken into possession vide memo Ex.PW-5/C. Compliance of Section 57 of the NDPS Act was effected by sending this information to the DCP. The sealed parcel and the case property was sent to the Malkhana. The sealed sample parcel was sent to the FSL. The FSL vide its report Ex. PW-6/B opined the contraband to be ganja.

3 After completion of investigation, charge sheet was filed. The prosecution has examined 11 witnesses; of whom the members of the raiding party were examined as PW-5, PW-9 and PW-10. Second Investigating Officer SI Brijesh Malik was examined as PW-11. SHO was examined as PW-3. He was in-charge of the entire operation. ACP V.K.Kalia was examined as PW-8. Malkhana Mohrar H.C. Kanwar Singh was examined as PW-2. He proved the entries in Register no.19 as Ex.2/A. The road certificate was proved as Ex.PW-2/B. Constable Sunil Kumar (PW-1) had taken the sample pullanda

from Malkhana to the FSL. The FSL had examined the sealed pullanda through Dr. Rajender Kumar, Assistant Director, Biology, (PW-6). His report was proved as Ex.PW-6/B. Another expert from the said department Ms. Kavita Goyal, Senior Scientific Officer (Chemistry) was examined as PW-7.

4 In the statement of the accused recorded under Section 313 Cr.P.C. he had pleaded innocence. He, however, did not lead any evidence in defence.

5 On the basis of the aforementioned evidence adduced by the prosecution, the accused was convicted and sentenced as aforementioned.

6 Arguments have been heard in detail.

7 The foremost arguments propounded by the learned counsel for the appellant is his submission that compliance of Section 42 of the NDPS Act has not been effected. To support this argument learned counsel for the appellant has placed reliance upon 2009 (4) JCC [Narcotics] 170 Karnail Singh Vs. State of Haryana ; 2011[3] JCC [Narcotics] 202 Rajender Singh Vs. State of Haryana and 2000 1 AD

(S.C.) 321 Abdul Rashid Ibrahim Mansuri Vs. State of Gujarat. His second submission is that the case property has been tampered with. The third argument relates to the weight of the contraband; submission being that the contraband was just over the mid quantity; there is sufficient evidence to show that the contraband was not accurately weighed; the case of the appellant at best falls in the mid bracket for which the sentence would have been much lesser.

8 Arguments have been heard. Record has been perused.

9 The first submission of the learned defence counsel that the mandate of Section 42 of the NDPS Act has not been complied with shall be answered first. Admittedly, as per the version of the prosecution the present FIR had been registered on a secret information which had been received by PW-10.

10 Section 42 of the NDPS Act stood amended by the Amending Act of 2009 which came into effect on 02.10.2001. The amended provisions read herein as under:-

“42. Power of entry, search, seizure and arrest without warrant or authorisation. -

(1) Any such officer (being an officer superior in rank to a peon, sepoy or constable)

of the departments of central excise, narcotics, customs, revenue intelligence or any other department of the Central Government including para-military forces or armed forces as is empowered in this behalf by general or special order by the Central Government, or any such officer (being an officer superior in rank to a peon, sepoy or constable) of the revenue, drugs control, excise, police or any other department of a State Government as is empowered in this behalf by general or special order of the State Government, if he has reason to believe from persons knowledge or information given by any person and taken down in writing that any narcotic drug, or psychotropic substance, or controlled substance in respect of which an offence punishable under this Act has been committed or any document or other article which may furnish evidence of the commission of such offence or any illegally acquired property or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter V A of this Act is kept or concealed in any building, conveyance or enclosed place, may between sunrise and sunset, --”

11 Under this provision, only a seizure which is effected from any building, conveyance or an enclosed place is covered within the ambit of Section 42 of the NDPS. The instant is not one such case as admittedly the contraband had been recovered from an open place; provisions of Section 42 are wholly inapplicable. The judgments relied upon by the learned counsel for the appellant on this score are thus of no use.

12 The second submission of the learned counsel for the appellant is

bordered upon the proposition that there has been tampering of the sample. Much emphasis has been laid on the submission that the seal which was used to seal the sample and the case property was the seal of SKB. This is the version of the prosecution. However, PW-10 in his deposition had stated that it was the seal of SKV; who is SKV has not been answered. This is the discrepancy in the version of the Investigating Officer (PW-10). PW-5 and PW-9 had spoken of the seal of SKB; this creates a suspicion in the version set up by the prosecution. Possibility of tampering cannot be excluded. To advance on the same line of argument, learned counsel for the appellant points out that the samples had in fact first been sent to the FSL on 05.3.2010 but PW-1 Constable Sunil who had taken this sample to the FSL is totally silent on this aspect. He had only spoken of the date of 09.3.2010 when he had been handed over the sample alongwith the FSL form to be deposited in the FSL, Rohini. Even in his cross-examination PW-1 had stated that as per his record the sample pullanda was sent to FSL for the first time only on 09.3.2010. PW-2 (MHCM, H.C. Kanwar Singh) had also reiterated this position. Attention has been drawn to the FSL report Ex.PW-6/B wherein date of 05.3.2010 as the date on which the parcel in

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connection with the present FIR had been received in the Biological Division of the FSL, Rohini. Submission being reiterated that there is no explanation for this discrepancy which had occurred. This also advances the defence of the learned defence counsel that there is every possibility that the sample stood tampered. Whether the sample was sent to FSL on 05.3.2010 or on 09.3.2010 had neither been explained nor answered by the prosecution.

13 Needless to state that this argument has been refuted.

14 This Court finds no merit in this submission. On the later argument propounded by the learned defence counsel this Court notes that the entries in Register no.19 were produced by PW-2. This was only a extract of the part of the Register which related to the sending of the sample to the FSL along with FSL form on 09.3.2010 by PW-2 through PW-1. In his cross-examination PW-2 had admitted that as per the Register brought by him (on a subsequent date) the sample might have also been sent on 05.3.2010 but the entry in the Register no.19 had not been made as that sample pullanda had not been accepted by the FSL and the Road Certificate vide which the sample was sent was

cancelled. On the scrutiny of the Road Certificate 15/21 the witnesses had clarified that the sample pullanda had in fact been sent on 05.3.2010 but this Road Certificate was subsequently cancelled on the direction of the SHO. This Road Certificate has been proved as Ex.PW-2/DB. PW-7 the Senior Scientific Officer, FSL, Rohini also on going through the relevant record (summoned by the Court) and on seeing it had stated that the sample had first been brought on 05.3.2010 but it was returned with an objection of the Chemistry Division on the ground that the FSL Form was not proper. The objection form has been proved as Ex.PW-7/DC.

15 This ocular vision of the aforementioned witnesses coupled with the documentary evidence establishes that the sample parcel along with FSL Form was sent on 05.3.2010 to FSL, Rohini but the same was not accepted. The Road Certificate through which it was sent was cancelled. Entry in the Register no.19 was accordingly not made. After the removal of the objection it was again sent on 09.3.2010 and entry to the said effect was duly made in Register no.19 which was sent through PW-1. The explanation is wholly justifiable.

16 The submission of the learned defence counsel that there is a

discrepancy in the seal and whether it was sealed with the seal of SKV or SKB has not been explained is also an argument which deserves no merit. The investigation has been conducted by PW-5 (H.C.Surender Kumar) along with PW-9 (H.C.Jeet Singh) and PW-10 (Investigating Officer Ashish Dalal). Seal of SKB was the seal of H.C.Surender Kumar. PW-5 has categorically stated so; so also PW-9 who was also the member of the raiding party; he has also deposed that the sample and the contraband were sealed with the seal of SKB. PW-9 had admitted that the seal of SKB did not belong to SI Ashish Dalal. This was the seal of PW-5, merely because in the version of PW-10 at one point the seal has been mentioned as the seal of SKV and not SKB it cannot in any manner be said to be a contradiction as obviously this is a typographical error. "B" has been typed as "V". This has also been explained in the cross-examination of PW-10 who has stated that the seal used to seal the contraband did not belong to him; it belongs to H.C. Surender.

17 It is also the case of the appellant that the samples when received in the FSL were tampered with or were not intact. In fact the FSL

through PW-7 (Senior Scientific Officer, Chemistry, FSL, Rohini) and PW-6 (Assistant Director, Biology, FSL, Rohini) had stated on oath that the samples were received in their department duly sealed along with the forwarding letter. The documents in this regard Ex. PW-6/B and Ex. PW-7/A also state that one sealed parcel marked as “1” with the seal intact and tallied with the specimen seals as per the forwarding letter was brought in the FSL. This argument is without any merit.

18 The last submission of the learned defence counsel on this score is that the contraband when produced in Court was in a semi torn condition. Version of the prosecution is that the sample had been put into a plastic container and thereafter it was kept in a cloth pullanda so also the remaining contraband. Attention has been drawn to the version of PW-5 on this score who had stated that the plastic container was then converted into a cloth parcel and sealed with the seal of SKB. It was his version that when the case property was produced it was in an unsealed condition. It was torn at various places and the ganja was leaking. This also establishes the argument of tampering.

19 This argument is noted only to be rejected. The seizure in this

case was effected on 23.02.2010. Balance contraband had been produced in Court on 25.11.2010 i.e. after a gap of 8 months. It was not the case of the defence counsel that there was no seal upon it. The Court had in fact noted that the plastic bag was in an unsealed condition but it contained another plastic bag which was torn at some places but duly sealed with the seal of SKB. Some loose ganja was coming out from some portion, but it had been patched up. The Court had noted that the seals affixed on the plastic bag were intact. It was only after the breaking open of the seal that the contents of the contraband were shown to the witnesses who identified the same as the ganja which had been recovered from the accused. The bag is Ex. P-1. It was also not the case of the defence counsel that the sample which was retrieved from the ganja recovered from the appellant and which had been sent to the FSL was not sealed effectively. At the cost of repetition, the sample retrieved from the recovered ganja had been examined by the FSL who had tested it positive for this contraband. This argument of the learned defence counsel is also rejected.

20 The last submission of the defence counsel is that the contraband

which had been recovered from the appellant as per the prosecution weighed 21.700 kg. The members of the raiding party were examined as PW-5, PW-9 and PW-10. The weighment was done with a spring actuated balance. This has come in the version of the witnesses of the prosecution. Such kind of balances are used to weigh gas cylinders. This has also come in the version of PW-10. Submission being that there could not have been complete accuracy in the weighing and 20 kg. and above of the recovered contraband brackets the appellant in a commercial quantity. Had it been below 20 kg. it would be mid quantity and his sentence would accordingly be lesser.

21 This argument has to be decided on the anvil of ocular version of the witnesses of the prosecution as also the documents relied upon by the prosecution.

22 PW-5 was a member of the raiding party. He deposed that when the accused was apprehended he had a plastic bag which on checking was found to contain ganja. It was weighed and found to be 21.700 grams; 1 kg. ganja was separated as a sample and was put separately in a plastic container. The accused was apprehended by SI Ashish Dalal

(PW-10). The time of apprehension is 8.30 p.m. The entire writing work was completed at the spot in the street light of the service road. PW-5 had admitted that weighing scale was already with PW-10 (SI Ashish Dalal) in the IO kit. It was a black colour bag; the size of the bag was 18" x 12" x 18". This weighing scale was of a hook and spring which is generally used for weighing LPG gas cylinders. The contraband substance was weighed first and the seizure memo was prepared subsequently. He had further admitted that the ganja recovered from the accused was having leaves as well as flowered portion.

23 PW-9 was the second member of the raiding party. He has reiterated that the recovered ganja was weighed by SI Ashish Dalal and it was found to be 21 kg 700 grms. In his cross-examination he denied the suggestion that weight of 700 grams cannot be weight by the weighing scale mentioned by him in his examination-in-chief.

24 PW-10 was the Investigating Officer, it was his weighing scale in his IO Kit which was used to weigh the contraband. He had deposed this ganja like substance was weighed with the weighing scale in his

bag. It measured the ganja to be 21kg.700grams. 1 kg. of ganja was taken out for the purposes of sample and separately sealed. He denied the suggestion that nothing incriminating was recovered from the appellant.

25 In this context certain documentary evidence is relevant. The version of the prosecution as noted supra was that 1 kg. of ganja was sent to the FSL. FSL in its report (Ex.PW-6/B) had noted that one sealed polythene bag parcel sealed with the seal of KG FSL Delhi containing exhibit “1” wherein approximately 1150 grams of dried, greenish, brownish flowery vegetative material along with seeds described as ‘Narcotic substance (Ganja) was received in the department in a plastic container. Ex.PW-7/A dated three days later i.e. 21.5.2010 has however noted that the dried greenish brown flowering and fruiting vegetative material received in the department along with a plastic container weighed approximately 1200 grams. Thus these two reports had a discrepancy. The sample taken from the recovered ganja was 1 kg. Along with the plastic container, it approximately weighed 1200 gms. Submission of the learned defence counsel that a plastic jar would at best weigh 30-40 gms and not 200 gms is a submission which also

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cannot be brushed aside straightway. That apart, this Court notes that in one report of the FSL, it weighed the sample at 1200 gms and another had weighed it at 1150 gms.

26 Ganja has been defined in the NDPS Act under Section 2(iii)(b) which reads herein as under:

“2. Definition.- In this Act, unless the context otherwise requires,-

.....

(iii) “cannabis(hemp)” means-

.....

(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;.....”

27 This definition of ganja as contained in the Act clearly means that the ganja/contraband would be the flowering or fruiting tops of the cannabis plant which excludes seeds and leaves when not accompanied by the tops.

28 Testimony of PW-5 is relevant on this score. He had deposed that the ganja recovered from the accused was having leaves. Leaves do not come within the definition of ganja. That would not be a contraband. Thus to this extent, benefit can be given to the accused as the entire

recovery which included the flowered portion as also leaves cannot be defined as ganja within the meaning of the NDPS Act. The leaves and seeds not accompanied by tops have to be specifically excluded. The scale which had been used to weigh the contraband was admittedly a spring actuated balance. A spring balance is a device in which an object can be weighed. It consists of coil springs which are fixed to a support on one hand and with a hook on the other to which the body to be weighed is applied and the distance to which it is stretched is directly proportional to the weight of the applied body. It however does not retain its accuracy permanently for no matter how carefully it is handled, the spring gradually uncoils. The accuracy and precision of the weight of the contraband which was just over and above the commercial quantity; commercial quantity being 20 kgs and above and the recovered contraband was 21.7 kgs thus being just above the commercial quantity this Court is inclined to give benefit of the same to the appellant.

29 This Court is persuaded to arrive at this conclusion keeping in the mind the discrepant weights which were noted by the two FSL reports noting a difference of 50 gms in the two samples which had been

received in their department coupled with the fact that PW-5 has admitted that leaves had also formed a part of the contraband which had been recovered from the appellant. The definition of ganja as noted supra specifically excludes leaves and seeds when not accompanied by fruit tops. Benefit of this must also accrue in favour of the appellant.

30 The Apex Court in 2009(2) ACR 1448 Shiv Kumar Mishra Vs. State of Goa though Home Secretary has noted that the definition of ‘ganja’ as given in Section 2(iii)(b) of the Act excludes seeds and leaves when not accompanied by tops.

31 In 2004 (3) JCC 1827 Rajesh Jagdamba Avasthi Vs. State of Goa where the weight of the two samples sent to the CFSL were discrepant from one another and 100 gms of charas which was recovered and the substance weight was found to be 98.16 gms; and the second packet allegedly contained 115 gms of charas was found to weigh 82.54 gms, the Court had granted benefit of this difference to be read in favour of the appellant noting that the NDPS Act is a stringent law and if there any discrepancy, the benefit of the same must accrue to the accused.

32 Since the weighment procedure in the instant case was also not

exactly accurate and carried out with a precise precision as the coil of the spring balance over time loses its accuracy; further if the leaves which were also a part of the recovered material are excluded from the actual contraband which was recovered from the appellant, the recovery could well fall within the mid quantity i.e. within the bracket of 20 kg.

33 Accordingly, conviction of the appellant is modified. He is convicted under Section 20 (b) (ii) (B) of the NDPS Act.

34 Nominal roll of the appellant reflects that as on date, he has undergone incarceration of almost six years. In view thereof, the sentence already undergone by the appellant be treated as the sentence imposed upon him. He be released forthwith, if not, required in any other case.

35 Appeal disposed of in the above terms.

INDERMEET KAUR, J

JULY 23, 2015

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