

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

Judgment Reserved on: September 20, 2016

% *Judgment Delivered on: November 03, 2016*

+ **CRL.A. 43/2011**

SAJIVAN RAO

..... Appellant

Represented by: Ms. Rakhi Dubey, Advocate.

versus

STATE OF NCT OF DELHI

..... Respondent

Represented by: Mr. Hirein Sharma, APP for
the State.

CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA

MUKTA GUPTA, J.

1. The present appeal is directed against the judgment dated August 20, 2010 passed by the learned Special Judge, NDPS whereby the Appellant Sajivan Rao was convicted for the offence punishable under Section 20 (b) (ii) (C) Narcotics Drugs and Psychotropic Substances Act, 1985 (in short 'NDPS Act'). Vide order on sentence dated August 25, 2010, the Appellant was sentenced to undergo rigorous imprisonment for ten years and to pay a fine of ₹1,00,000/- and in default of payment of fine, to further undergo simple imprisonment for two months. Rakesh Thakur and Janeshwar Thakur were also convicted under Section Section 20 (b) (ii) (B) by the aforesaid impugned judgment. Since they have not preferred any appeal as they were awarded sentence of imprisonment for a period of 4 years which was almost undergone during trial, this Court is only concerned with the appeal of

Sajivan Rao.

2. Briefly the prosecution case is that on March 9, 2007 at about 9:30 A.M. 18 kg of Ganja was recovered from the possession of Janeshwar Thakur, 21 kg was recovered from Sajivan Rao and 15 kg was recovered from Rakesh Thakur at Hazrat Nizamuddin Railway Station. Janeshwar Thakur, Sajivan Rao and Rakesh Thakur were arrested by the police officials, the contraband was seized and samples were drawn which were sent to FSL pursuant where to charge sheet was filed.

3. Assailing the conviction, Learned Counsel for the appellant contends that the contraband which was seized was different from the one shown in the Court because seal of AK and NS was affixed to the contraband seized. However, the parcel produced in Court had the seal of SN and AK. It was further contended that the sample of 1 kg was taken, however, as per the FSL report, the quantity received was 963 gms. Handling of seal was doubtful as according to one witness, the seal was handed over to Ct. Raj Kumar, PW-5 whereas the other stated that it was handed over to Ct. Jaswant, PW-1. Lastly, relying upon the decision reported as 2015 (3) JCC (Narcotics) 141 Raj Nandan Sahni v. State, it was submitted that the appellant be released on the period already undergone as the quantity was only marginally high and that too due to the weight of the seeds and leaves.

4. Per contra Learned APP for the State while placing reliance on the decision of Division Bench of this Court reported as 172 (2010) DLT 55 (DB) Ravinder Kumar v. NCT of Delhi (State) contends that the weight of the entire seized substance has to be considered for the purpose of determining whether it is a small quantity or a commercial quantity. It is also submitted that since the seeds and leaves were accompanied by the tops,

it cannot be excluded as per the definition of “ganja” under Section 2(iii)(b) of NDPS Act.

5. PW-2 Insp. Ashok Kumar stated that on March 9, 2007, he along with PW-1 Ct. Jaswant and PW-5 Ct. Raj Kumar was checking the passengers at the exit gate DFMD (Door Fixed Metal Detector). Around 9:30 A.M., he saw three persons coming from platform no. 3 and after seeing the police, they tried to flee away in a suspicious condition. He apprehended one of them whose name was revealed as Sajivan. He was having a suitcase. Janeshwar Thakur and Rakesh Thakur, who were carrying black and red colour bags, were apprehended by the two constables. PW-2 checked the suitcase and bags and found plastic polythenes containing a substance smelling like ganja inside the bags and suitcase. He directed PW-5 Ct. Raj Kumar to arrange the IO kit bag, weigh scale and inform the SHO. He requested 4-5 passersby to join raiding party but only one Ali Murtaza agreed to join them. He thereafter informed the accuseds about their right to get their search conducted before a Magistrate/Gazetted Officer and served notices under Section 50, NDPS Act upon them. The offer of search before the Magistrate/Gazetted Officer was declined by the accuseds and their reply was written by the investigating officer on the notices which were duly signed. The recovered ganja was found to be 54 kgs on weighing. He separated three samples of 1 kg each and then prepared three parcels and the remaining case property was sealed in the same suitcase and bags. PW-8 SHO Narain Singh affixed his seal of NS and also filled in form FSL. This witness stated that the seal after use was handed over to PW-5 Ct. Raj Kumar. At the instance of PW-3 SI Arun Kumar, site plan was prepared and accuseds were arrested.

6. PW-1 Ct. Jaswant Singh deposed in sync with the testimony of PW-2 Insp. Ashok Kumar. During cross examination he stated that the railway tickets were not recovered from the personal search of the accuseds.
7. PW-3 SI Arun Kumar who conducted further investigation stated that after interrogating the accuseds, he conducted their personal search and sent the report under Section 57 NDPS Act through the SHO, Insp. Narain Singh PW-8 to ACP, Hazrat Nizamuddin Railway Station. He deposed that he along with Sajivan Rao, Ct. Jaswant and Ct. Raj Kumar went to Raghubir Nagar to search the person to whom the delivery was to be effected but the said person was not traceable as he had vacated the jhuggi.
8. PW-5 HC Raj Kumar also deposed in sync with PW-1 Ct. Jaswant Singh and PW-2 Insp. Ashok Kumar.
9. Regarding the affixation of seal, all the witnesses have stated in their testimonies that the seal was of AK and NS except PW-1, Ct. Jaswant who mentions it as AK and SN. Though this fact ought to have been clarified by re-examining the witness, however in view of the seals of AK and SN having been found affixed when the samples reached FSL there is sufficient corroboration to the version of witnesses and the mere error of Ct. Jaswant in saying one of the seals used was of SN instead of NS would not discredit the version of other witnesses.
10. The contention of learned counsel for the appellant that the weight of the seeds and leaves was required to be reduced which would bring the quantity below the commercial quantity deserves to be rejected. As per Section 2(iii)(b) “cannabis (hemp)” means ganja, that is, the flowering or fruiting tops of the cannabis plant excluding the seeds and leaves when not accompanied by the tops. In the testimony of none of the witnesses it has

come on record that the contraband recovered contained seeds and leaves not accompanied by the tops. Thus the weight of the entire contraband will have to be taken into account.

11. This Court in the decision reported as 172 (2010) DLT 55 (DB) Ravinder Kumar v. NCT of Delhi (State) held:

“3) Once it is determined that the seized substance is opium, then the weight of the entire substance would have to be considered for the purposes of determining whether it is a small quantity or a commercial quantity. The percentage content of morphine would have no role to play in such a determination”

12. Similar view was expressed by the Division Bench of this Court in the decision reported as 2011 Cri. L.J. 334 Dilip v. State wherein it was observed:

“20. Other tests, including thin layer chromatography, gas liquid chromatography, high performance liquid chromatography and mass spectrometry techniques have also been specified. But, from the above testing procedures indicated in the Working Procedure Manual, it is clear that the presence of cannabis can be determined by simple microscopic examination and the various colour tests which clearly reveal the presence of cannabis. It is not at all a scientific requirement to determine the content of THC in a sample of contraband to arrive at the conclusion as to whether the contraband is cannabis or not. In fact, a simple colour test also differentiates the type of cannabis, namely, whether it is charas or ganja or bhang (which has not been specifically included as cannabis under the NDPS Act). There is, therefore, no necessity of determining the percentage content of THC in a sample of cannabis, be it charas or ganja. Neither the NDPS Act nor the said notification prescribing small and commercial quantities make any reference to the purity of charas or ganja. Once the contraband has been determined to indicate cannabis, whether in the form of charas or in the form of ganja or as a mixture

containing either of the two, with or without other neutral substances, the entire weight of the contraband would have to be considered for determining whether the recovery was of a small quantity, intermediate quantity or a commercial quantity.”

13. There is however merit in the contention of learned counsel for the appellant that there is discrepancy in the weight of the sample sent to the FSL and received therein. A perusal of the testimony of the witnesses and the seizure memo reveals that 1 kg of sample was sent to the FSL for examination and when the same was received at the FSL it weighed 963 gms. The difference in the weight is for the reason that at the spot the contraband was weighed by manual scales whereas at the FSL the samples were weighed with electronic precision weighing machine. The difference in the weight of 1 kg of sample is of 47 gms and considering this factor that there could be an error in the weight of the contraband as weighed from the manual scales there could be a possible error of around 1 kg in the total contraband of 21 kgs, taking approximation from the difference in the weight by the manual scale and by the electronic precision weighing machine at the FSL. Since the weight of the contraband recovered as per the manual scale is 21 kgs which is marginally above the commercial quantity of 20 kgs and as noted there is marked difference in the weight by the manual weighing machine and the electronic precision weighing machine, the appellant is entitled to the benefit thereof. Thus holding that the recovery of the contraband made from the appellant was just less than the commercial quantity as specified by the Central Government by notification in the Official Gazette and the punishment that can be awarded is less than 10 years rigorous imprisonment, the appellant who is already undergone 9

years 7 months imprisonment is entitled to be released on the period already undergone. Similar view was expressed by this Court in the decision reported as 2015 (3) JCC (Narcotics) 141 Raj Nandan Sahni Vs. State and 2015 (4) JCC (Narcotics) 239 Lavlesh Kumar Vs. State.

14. In view of the aforesaid discussion the appeal filed by the appellant is disposed of modifying the judgment of conviction to one under Section 20 (b) (i) (B) of the NDPS Act and the order on sentence is modified directing appellant to undergo rigorous imprisonment for a period of 9 years and to pay a fine of ₹50,000/- in default whereof to undergo period of six months simple imprisonment which period the appellant has already undergone as per the nominal roll. The appellant who is in custody be released forthwith if not required in any other case.

15. Copy of this order be sent to Superintendent Central Jail Tihar for updation of the Jail record.

16. TCR be returned.

(MUKTA GUPTA)
JUDGE

NOVEMBER 03, 2016
‘vn’