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

+ **CRL.A. No.514/2000**

Date of Decision : 22nd December, 2016

SURAJ BHAN & ANR. APPELLANTS

Through Mr.M.L. Yadav, Adv.

versus

CENTRAL BUREAU OF INVESTIGATION ...RESPONDENT

Through Mr.Narender Mann, Spl.P.P. with
Mr.Manoj Pant, Adv.

CORAM:

HON'BLE MR. JUSTICE P.S.TEJI

P.S.TEJI, J

1. Aggrieved by the judgment of conviction dated 7th August, 2000 convicting the appellants finding them guilty under Sections 8/20 of the Narcotic Drugs & Psychotropic Substances Act, 1985 (hereinafter referred to as NDPS Act, 1985) and order on sentence dated 9th August, 2000 vide which the sentence was passed to undergo rigorous imprisonment for a period of ten years and to pay a fine of Rs.1,00,000/- for the offence punishable under Section 20 of the NDPS Act, in default of payment of fine, convict was to undergo further simple imprisonment for three years, the present appeal has been preferred by the appellants.

2. The facts in brief are that on the basis of the Source

Information Report (SIR) received, Mr.J.R. Kotty, the then Deputy Superintendent of Police (DSP) of Central Bureau of Investigation, SIU XI, New Delhi, on 7th February, 1995 at about 3.15 p.m., apprehended the appellants Suraj Bhan and Iqbal Ahmed. As per the informer, on 7th February, 1995, both the accused were to supply huge quantity of charas to some unknown person in Greater Kailash area near a park besides Lady Shri Ram College, New Delhi at about 3.00 p.m. Notice under Section 50 of the NDPS Act, 1985 was issued and on a search, six rolls of charas weighing six kilogram was alleged to have been recovered from their possession. The recovered charas was kept inside the airbag and was converted into a parcel which was thereafter sealed. Thereafter out of six kilogram charas recovered, samples of 50 grams was taken out from each of the roll while remaining charas was kept in the same bag and wrapped in a white cloth and thereafter sealed. A search memo; seizure memo and personal search memo were prepared; R.C. No.03/95 SIU (XI) was registered under Section 8/20 NDPS Act and the appellants were arrested. It emerges from the record that charge under Section 20 of the NDPS Act was framed against the accused persons to which they pleaded not guilty and claimed trial.

3. The prosecution had examined as many as nine witnesses

namely PW 1 S.M. Aggarwal; PW 2 Laxman Dass; PW 3 Mr.J.R. Kotty; PW 4 ASI Ram Kumar; PW 5 I.C. Varshney; PW 6 Const.Jagat Singh; PW 7 Const.Phara Singh; PW 8 Inspt.R.K. Sinha & PW 9 Mahinder Kumar Hasija. The statement of the accused Suraj Bhan & Iqbal Ahmed were recorded under Section 313 of the Cr.P.C.

4. The appellants were held guilty by the learned Special Judge, Delhi and by an order dated 9th August, 2000, sentenced to undergo rigorous imprisonment for ten years and fine of rupees one lakh for the offence punishable under Section 20 of the NDPS Act, 1985.

GROUND OF CHALLENGE

(a) The main ground of challenge is that the mandatory provision of Section 50 of the NDPS Act has not been duly complied with. Notice under Section 50 of the NDPS Act in writing was not given to the appellants at the time of their search. The other ground taken is that the investigating officer had drawn the sample weighing 50 grams while the report of the CFSL reflects that the sample received was weighing 61 grams which shows tampering with the sample. Further ground taken is that the public witnesses examined were stock witnesses, therefore, their testimony cannot be relied upon. The investigating officer was

incompetent to conduct raid and make search of the appellants.

5. Apart from challenging the judgment of conviction, learned counsel for the appellants further submitted that in the nominal roll filed by the the Deputy Superintendent, Central Jail, Tihar, on 21st August, 2004, it was mentioned that as on 16th August, 2001, the appellant Suraj Bhan had undergone sentence of six years, six months and six days. So far as convict Iqbal Ahmad is concerned, in the nominal roll filed by the Deputy Superintendent, Central Jail, Tihar, on 6th July, 2004, it was mentioned that as on 27th August, 2002, the appellant Iqbal Ahmad had undergone sentence of seven years, six months and seventeen days. It further reflects that on 27th August, 2002, the convict Iqbal Ahmad was released on bail which was granted by this Court vide order dated 9th August, 2002 in CrI.Appeal No.514/2000.

6. In support of his contention, learned counsel for the appellants relies on the pronouncement of the Hon'ble Supreme Court in ***Rajesh Jagdamba Avasthi Vs. State of Goa 2004 (3) JCC 1827*** in which the recovered contraband (charas) was sealed in two packets (samples); sent for chemical analysis and that the same was found deficient in weight although the seal was similar. This appeal was stated to be allowed.

7. Per contra, arguments advanced by learned Special Public

Prosecutor for the CBI is that the appellants were rightly held guilty under Sections 8/20 of the Narcotic Drugs and Psychotropic Substances Act, 1985. It is submitted that on a source information received by the DSP, CBI, SIU IX, New Delhi, appellants were apprehended and the IO asked the appellants that he was competent and would undertake search of the accused. The DSP also gave the accused option to be searched before a Magistrate to which the appellants declined and agreed to be searched by him and that six rolls of dark brownish substance wrapped in transparent polythene giving pungent smell weighing six kilogram of charas was recovered from their possession. It was further submitted that in the present case there was no need for serving notice under Section 50 of the Act inasmuch Section 50 of the Act applies in case of personal search of a person. It does not extend to search of a vehicle or a container or a bag or premises. In support of his contention, learned SPP relies on the decision given in the pronouncement of the Supreme Court in ***Madan Lal & Anr. Vs. State of H.P. (2003) 7 SCC 465*** which reads as under:-

“A bare reading of Section 50 shows that it only applies in case of personal search of a person. It does not extend to search of a vehicle or a container or a bag or premises. The language of Section 50 is implicitly clear that the search has to be in relation to a person as contrasted to search of premises, vehicles or articles. Hence

the contention regarding non-compliance with Section 50 of the Act is without any substance.”

8. Arguments advanced by learned counsel for the appellant as well as learned Special Public Prosecutor for the CBI have been heard.

(I) PW 1 S.M. Aggarwal, Vigilance Inspector, New Delhi Municipal Committee in his testimony deposed that on the instructions of Director Vigilance of the NDMC, he along with PW 2 Mr.Laxman Dass, joined the raiding party of the CBI. This witness in his testimony stated that the raiding party left for a place near Lady Sri Ram College, New Delhi and that a picket was laid near a park. This witness further stated that at 2.00 or 2.15 p.m., one person came from the side of a Khoka in the park, towards the railing of the park and handed over a green colour bag to another person already standing near the railing. He further stated that, thereafter, at the interception of CBI, both the accused persons were apprehended. It was stated by him that the CBI party was headed by Mr.J.R. Kotty, DSP. This witness further stated that the DSP introduced himself to the accused by showing his identity card and apprised them about the information with regard to trafficking of charas. Thereafter, the accused persons were taken to CGO complex along with him and the other panch witnesses.

This witness identified in court the accused Suraj Bhan who brought green colour air bag and gave the same to other accused. This witness further deposed that upon search of the air bag in the CGO Complex, the same was found to have contained some dark brown blackish sticks/rolls which was declared as charas by the CBI officers. PW 1 further stated that on weighing, the charas was probably four and a half kilogram to five kilogram. It was stated by this witness that two small samples were drawn from the substance so recovered and that the same were converted into two parcels which were sealed with the seal of CBI impression. PW 1 further deposed that the recovered charas was kept in the same air bag and was thereafter converted into a parcel which was sealed in the same manner. The specimen of the seal was affixed on a separate paper marked as Exh.PW 2/1. This witness further stated that the sample of 50 grams each were drawn out at the spot and thereafter search memo, seizure memo and personal search memo Exh.PW 2/3 were prepared which bears his signature at point P-4. PW 1 further stated that recovery memo Exh.PW 2/5 which runs into six pages bearing his signature at point P-3 was also prepared. He further stated that site plan Ex.PW 2/4 was also prepared at the spot which bears his signature at point X-3.

(II) PW 2 Laxman Dass corroborated the testimony of PW 1. In

his statement this witness stated that while working as Superintendent (Vigilance) in NDMC, New Delhi, he was called in the office of the CBI where Mr.J.R. Kotty, DSP, CBI asked him to accompany for the trap of two persons namely Iqbal Ahmed & Suraj Bhan, who were having contraband i.e. charas with them. This witness stated that they all reached the spot at 2.20 p.m. and that members of the raiding party were deployed at different places. This witness further stated that at about 3.15 p.m., the informer told that the accused were coming. As per the information, Suraj Bhan as well as Iqbal Ahmed with bag hanging on his left shoulder, reached the spot. This witness further deposed that the accused persons stayed for some time at the crossing near Lady Shree Ram College and thereafter Iqbal Ahmed gave a military colour bag to Suraj Bhan. This witness further stated that the raiding party which was headed by Mr.J.R. Kotty, surrounded the accused persons and disclosed them their identity. Thereafter, the raiding party enquired about the contents of the bag to which the accused disclosed that there was six kilogram charas in the bag. PW 2 further stated that Mr.J.R. Kotty, DSP gave the accused persons an opportunity to be searched before a gazetted officer or a Magistrate or before him, being a gazetted officer, to which the accused persons stated that they had no objection to be searched

before him. This witness deposed that Mr.Kotty searched the bag in possession of Suraj Bhan at that time; found that the same was containing six rolls of charas; tested the recovered contents and apprised that the said contents were the contraband i.e. charas and thereafter weighed the contraband which came to be six kilogram. PW 2 further stated that Mr.Kotty drew samples of 50 grams from each roll and his signatures were taken on sample packet which was marked as 'A'. The remaining contraband i.e. charas was kept in the same bag; wrapped in white cloth and sealed by marking A 1 & A 2 respectively carrying the impression of CBI/MS 6/94. This witness identified his signature on the piece of paper Ex.PW 2/1 which was the specimen obtained using the seal. PW 2 further deposed that on the personal search (Exh.PW 2/3) of accused Iqbal Ahmed, a piece of paper was recovered which was signed by him and marked as Exh.PW 2/2; site plan PW 2/4 was prepared along with recovery memo which was marked as Exh.PW 2/5. This witness further stated that the said seal was handed over to PW 1 Mr.S.M. Aggarwal against receipt which was marked as Exh.PW 2/6.

(III) Further corroboration is by PW 3 J.R. Kotty, DSP, CBI who in his statement stated that while working as DSP, CBI, SIU, Narcotics Branch, he received information on 7th February, 1995 at

3.00 p.m. that two persons namely Suraj Bhan and Iqbal Ahmed were arriving in Delhi from U.P. for the purpose of delivery of contraband i.e. charas to an unknown person near Lady Shri Ram College, Delhi. This witness further deposed that he called two independent witnesses i.e. PW 1 Mr.S.M. Aggarwal & PW 2 Laxman Dass from the office of the Deputy Director (Vigilance). PW 3 further stated that three to four members from SIU XI Branch along with PW 1 & 2 were briefed about the said information of delivery of contraband i.e. charas whereafter they left for the spot at around 2.00 p.m. This witness deployed the raiding party members at strategic points in and around the spot. Thereafter the informer apprised him about the accused persons visiting the spot. The said witness thereafter stated that the accused Iqbal Ahmed was seen handing over the military coloured bag to Suraj Bhan and thereafter the accused persons appeared to be waiting for an unknown third person. Thereafter the said witness along with Laxman Dass, PW 2 confronted the accused persons and enquired about the contents of the bag to which Suraj Bhan stated that the bag contained about six kilogram of contraband i.e. charas which they had brought from Nepal Border. This witness gave the accused persons an opportunity to be searched before a gazetted officer or a Magistrate or before him,

being a gazetted officer, to which the accused persons stated that they had no objection to be searched before him. This witness further deposed that on opening the said bag, six rolls of dark brown substance emanating pungent smell were found wrapped in a transparent polythene. The said contents were analysed by this witness through a Field Test Kit which gave positive result. Thereafter, this witness stated that two samples of 50 grams each were drawn from the rolls by taking a small portion from each of the six rolls and that the said packet was sealed and marked with the CBI seal impression 'CBI/MS/6/94' and signatures of PW 2 & independent witnesses were affixed. Thereafter, this witness obtained specimen seal impression on two-three papers which was handed over to PW 1 Sh.S.M. Aggarwal against receipt which was marked as Exh.PW 2/1. This witness prepared a rough site plan Exh.PW 2/4 and effected personal search & arrest memo which was marked as Exh.PW 2/3. Thereafter, recovery memo was prepared by this witness which was marked as Exh.PW 2/5. Thereafter, the two accused persons were arrested by this witness after being informed of the ground of arrest who were thereafter taken to the CBI office at around 6.00 p.m. The said contraband and sealed items were deposited in the malkhana of SIU XI and a written complaint Exh.PW 3/1 was submitted to S.P., SIU, XII on

whose direction, the case was registered and investigation was handed over to PW 8 Mr.R.K. Sinha, Inspector, CBI. Thereafter on the basis of the afore-said complaint, the case was registered which was marked as Exh.PW 3/2.

(IV) PW 4 ASI Ram Kumar in his statement stated that while posted as Duty Officer, CBI, S.I.U. XI, on 7th February, 1995 at about 6.00 p.m., a pulanda sealed with the seal of CBI, MS/6/94 along with two samples, marked as A 1 & A 2, was given to him by PW 3 J.R. Kotty. This witness, after checking the seals on pulanda, deposited the same in the malkhana and entry (PW 4/A) in this regard was made in the concerned register through ASI Smt.Pushp Lata. PW 4 further stated that on 9th February, 1995, he gave one sample A-1 and facsimile of the seal impression to Ct.Ferray Singh for the purpose of depositing the same at CRCL, Pusa Road. This witness further stated that he received the report from the office of CRCL on 22nd March, 1995 which was accompanied with the duly sealed envelop of NDPS Control Lab Laboratory from Ct.Jagat Singh.

(V) Further corroboration is by PW 5 I.C. Warshnay who in his statement stated that while posted as Asstt. Chemical Examiner In Central Revenue Chemical Lab, Pusa Institute, New Delhi, he received the sample along with covering letter (Ex.PW 5/A), test

memo & one paper having the specimen of CBI seal (Ex.PW 2/1) on 7th March, 1995 from his incharge Mr.R.S. Malhotra, Asstt. Chemical Examiner for the purpose of chemical analysis of the sample. This witness identified the signatures of Mukesh Kumar whom he had seen writing and signing the covering letter. This witness deposed that the seals on the envelopes were in intact condition. This witness weighed the sample along with the plastic bag which measured about 61 grams. This witness also examined the sample and after examination, found the same to be charas containing 18.8% tetrahydrocannabinol. This witness thereafter got the report (Exh.PW 5/B) prepared through his Assistant. The report also bears the signature of this witness at point 'X'.

(VI) PW 6 Ct.Jagat Singh in his statement stated that while posted as Constable in CBI, SIU-XI, on 22nd March, 1995, after being authorised (Exh.PW 6/A), he went to CRCL, Pusa Road on the instruction of the Superintendent of Police for the purpose of collecting the analysed remnant sample and chemical report with the sealed cover. This witness thereafter deposited the remnant sample to the Malkhana incharge and a report in this regard was given to the Superintendent of Police of the branch.

(VII) PW 7 Ct.Phare Singh in his statement stated that while posted as Constable in CBI, SIU XI, New Delhi, on 10th February,

1995, he carried the sealed packet containing sample, a specimen with seal impression (Ex.PW 2/1) and a forwarding letter (Exh.PW 5/A), from the Incharge of the Malkhana and deposited the same at CRCL, Pusa Road.

(VIII) PW 8 Mr.R.K. Sinha in his statement stated that while posted as Inspector, CBI, SIU XI Branch, New Delhi, on 7th February, 1995, he was directed to investigate the matter relating to recovery of six kilogram of charas from Suraj Bhan and Iqbal Ahmed. An FIR being RC No.395 was registered for the same. This witness, during the course of investigation, recorded the statements of PW 2 Laxman Dass, PW 3 J.R. Kotty, PW 1 S.M. Aggarwal, Gaje Singh; PW 4 Ram Kumar; PW 6 Jagat Singh and the chemical examiner. The concerned sample was sent to CRCL (marked as A 1) and the report in this regard was received by this witness. This witness filed the chargesheet (Ex.PW 8/A) against the accused persons.

(IX) PW 9 Mr.Mahinder Kumar Hasija in his statement stated that while posted as P.A. to the Superintendent of Police, SIU XI, he received notesheet of S.I.R. (Exh.PW 3/A endorsed at point 'D') for the purpose of registering the same. This witness endorsed the remaining smack which was seized vide memo PW 3/B at point 'C'.

9. As per the testimony of PW 1 S.M. Aggarwal, he joined the raiding party of CBI and picket was laid which was headed by PW 3 J.R. Kotty, DSP. This witness specifically stated that the accused persons were apprehended and that six kilogram of charas was recovered from their possession. PW 2 Laxman Dass in his testimony deposed that he also joined the raiding party and that raid was conducted in his presence in which the accused persons were apprehended and charas measuring six kilogram in weight was recovered from their possession. As per the testimony of PW 3 J.R. Kotty, on the date of the incident, on receipt of source information report that the appellants who were drug suppliers and were supplying the drug to a third unknown person, he organised a raiding party at strategic points in and around the spot. A raid was conducted and the accused persons were apprehended in Greater Kailash area near a park besides Lady Shri Ram College. Option was given to the appellants to get themselves searched before the Magistrate. Thereafter on search, the military uniform coloured bag recovered was found to be containing contraband i.e. charas which was in the form of dark brown substance emanating pungent smell and wrapped in a transparent polythene. On weighing, it was found to be six kilogram. After preparing separate samples of 50 grams each from the rolls, the said packet was sealed and marked

with CBI seal impression. PW 4 ASI Ram Kumar received the pulanda along with two samples sealed with the seal of CBI/MS 6/94 who deposited the same in the malkhana after making entry Exh.PW 4/A. PW 5 I.C. Warshnay, Assistant Chemical Examiner who received the sample, analysed the same and found it to be charas containing 18.8% tetrahydrocannabinol and weighed it along with the plastic bag which was measured as 61 grams. A report Exh.PW 5/B under his signature was prepared by this witness.

10. The testimony of PW 3 has been duly corroborated by other raiding party members i.e. PW 1 S.M. Aggarwal; PW 2 Laxman Dass & PW 4 ASI Ram Kumar. All these witnesses in the same breath have stated that raid was conducted in which the appellants were apprehended with the contraband i.e. smack. They have also stated in the same line that the proceedings were conducted by PW 3 J.R. Kotty and in-charge of raiding team at the spot and that recovery of charas, its seizure, search of appellants, was conducted and the other proceedings were effected.

11. All the above witnesses were cross-examined at length but the defence had failed to put any dent to their testimony. They remained unshaken with regard to conducting of raid and apprehension of the appellants with the contraband i.e. charas.

They have also stated in a single voice that charas weighing six kilogram was recovered from the appellants; compliance with Section 50 of the NDPS Act was made with regard to the proceedings conducted at the spot.

12. Contention of the learned counsel for the appellants that there was no proper service of notice under Section 50 of the NDPS Act upon the appellants, is without any basis inasmuch as after apprehension of the appellants and before conducting search, they were offered to get themselves searched and search of the bag in the presence of a gazetted officer or a magistrate. However, the appellants themselves chose not to be searched before any gazetted officer or a magistrate. Even otherwise, PW 3 Mr.J.R. Kotty was himself a Gazetted Officer. This clearly proves that the compliance of Section 50 of the NDPS Act was duly made before conducting search of the appellants as well as the search of the bag and thus there is mandatory compliance of Section 50 of the NDPS Act by the raiding officer before conducting search of the appellant.

13. The testimony of the raiding party members has also been duly corroborated by report (Exh.PW 5/B) prepared by PW 5 I.C. Warshnay. The report also bears the signature of this witness at point 'X' which shows that when the sealed sample was opened

and examined, the same was found to be charas containing 18.8% tetrahydrocannabinol. The report Exh.PW 5/B duly proves the case of the prosecution that the recovered substance from the appellant was a contraband i.e. charas.

14. The discussion made above shows that the testimony made by the raiding party members is trustworthy and their testimony coupled with report Exh.5/B of the Chemical Examiner, CRCL brings the case of prosecution within the four corners of the alleged commission of offence which culminated into the conviction of the appellants. This court is of the considered opinion that the prosecution has successfully proven the guilt of the appellants.

15. So far as the contention of the appellants to the effect that there was tampering with the sample inasmuch as according to the version of the investigating officer PW 3 Mr.J.R. Kotty, the sample taken by this witness was weighing 50 grams whereas the report of the CFSL analysis reflected that the quantity of sample given to them was weighing 61 grams, is concerned in this regard perusal of statement of PW 5 Mr.I.C. Varshney would establish that the sample weighed by him was done along with the plastic bag containing smack and when the sample was weighed by the investigating officer, the same was done without the plastic bag as is clear from the statement of PW 3 J.R. Kotty. So this plea taken

by the appellants cannot be accepted. As a result, the facts and circumstances mentioned above culminate into the guilt of the accused persons within the four corners of the offence committed.

16. As a result, no error or illegality is found in the view taken by the Trial Court and the judgment of conviction dated 7th August, 2000 is upheld.

The present appeal is dismissed.

(P.S.TEJI)
JUDGE

DECEMBER 22, 2016
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