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

% *Date of Judgment:04.01.2016*

+ CRL.A. 635/2013
MOHD. AYUB

..... Appellant
Through Ms. Naomi Chandra, Adv.

versus

STATE OF NCT OF DELHI)

..... Respondent
Through Ms. Meenakshi Dahiya, APP for
the State

CORAM:

HON'BLE MS. JUSTICE INDERMEET KAUR

INDERMEET KAUR, J. (Oral)

1 This appeal is directed against the impugned judgment and order on sentence dated 03.12.2012 and 12.12.2012 respectively wherein appellant Mohd. Ayub stands convicted under Section 20 (C) of the Narcotics Drugs and Psychotropic Substance Act (hereinafter referred to as the 'NDPS' Act) for having been found in illegal and unlawful possession of 2.425 kgms of charas. He had been sentenced to undergo RI for a period of 10 years and to pay a fine of Rs.1 lac and in default of payment of fine to undergo RI for 1 year.

2 Nominal roll of the appellant has been requisitioned. This reflects
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that as on date, he has undergone incarceration of 5 years. His jail conduct is satisfactory.

3 The version of the prosecution is that on 27.12.2010 at 05:45 pm, ASI Khurshid Ali (PW-9), constable Tajender Singh (PW-4) and constable Anil (PW-2) while present at Mata Sundri Road in connection with patrolling duty saw two persons coming from the side of Gurudwara. On seeing the police party, they started retreating which created suspicion in the mind of the police party. The appellant and his accomplice Radhey Shyam were both carrying bags. PW-9 apprised the accused persons of their legal right that they could have their search conducted either before the Gazetted Officer or Magistrate but both of them refused this option. Written notice under Section 50 of the NDPS Act was served upon them.

4 On checking the bag of the present appellant, there were 7 black coloured bars which were found to have contained in polythene. On weighment, it was found to be of 2.425 kgms. Two samples of 50 gms each were drawn from this quantity. The samples were sent to the CFSL for examination. They tested positive for charas. Remaining contraband was sealed at the spot. On completion of investigation, challan was filed.

Charge was framed. Prosecution evidence was led and the accused/appellant was held guilty as aforesaid.

5 The main thrust of the argument of the learned counsel for the appellant is that the version of the prosecution is that 7 bars of charas were recovered from the appellant and they were homogeneously mixed and two samples of 50 gms each were drawn but the version of the recovery witnesses (when examined in Court) i.e. PW-2, PW-4 and PW-9 is otherwise. Their testimony reveals that the 7 bars were in place at the time when the contraband was produced in Court meaning thereby that the submission of the prosecution that the recovered contraband was homogeneously mixed is incorrect. Submission being that two samples of 50 gms were drawn from the two bars only and for this purpose attention has been drawn to the testimony of the aforesaid witnesses.

6 Record substantiates this submission of the learned counsel for the appellant. PW-2 has on oath deposed that from the possession of the appellant, the bag containing charas was found which was in the form of bars. They were 7 bars and two samples of 50 gms each were drawn from the two bars and the remaining charas was kept in plastic containers, converted into pulanda and re-sealed. In a further part of his

cross-examination while identifying the contraband bars, PW-2 admitted that there were 7 hard bars of different sizes containing brown solid substance which was the product which was opened in Court.

7 In this context, testimony of PW-9 is also relevant. He had deposed that 7 black bars of charas were recovered from the appellant. They were opened and the entire contraband was placed together and when weighed it was found to be of 2.425 kgms from which two samples were drawn of 50 gms each. Parcels were then re-sealed. In his cross-examination, PW-9 reiterated that the samples were drawn from the entire contraband which was mixed and not from each batti separately.

8 It is this part of the cross-examination of PW-9 which has been highlighted by the learned counsel for the appellant to substantiate that the version of the prosecution is that the entire contraband was mixed and thereafter two samples of 50 gms each were drawn but the testimony of the recovery witnesses and the contraband which was produced in Court contradicts this version. What had been produced in Court were 7 black bars and this is clear not only from the version of PW-2 and PW-9 but also from PW-4. Thus it is clearly established that

two samples of 50 gms each were drawn only from the two of the solid bars.

9 The entire contraband weighed 2.425 kgms meaning thereby that each bar approximately weighed 346 gms meaning thereby that two bars of charas would weigh approximately 692 gms. Thus the charas which was drawn as a sample was only 692 gms from the contraband which when finally tested by the CFSL had opined to be charas. Regarding the remaining bars it has not been established that they were charas as these bars had not been sent for a scientific analysis.

9 In this context, the observations of a Bench of this Court in Crl. Appeal No.807/2007 Sunil Kumar Vs. State are relevant where in a similar situation where only part of the contraband had been sent for analysis, the Court had noted that it cannot be said that the entire contraband recovered from the accused was charas and the conviction of the appellant for a commercial quantity was altered to a conviction for an intermediate quantity.

10 The Supreme Court in (1993) 3 SCC 145 Gaunter Edwin Kircher Vs. State of Goa, Secretariat Panji had in this context observed that where two pieces of charas weighing 7 gms and 5 gms were recovered

from the accused but only 5 gms had been sent for chemical analysis, the Apex Court had held that the prosecution had failed to establish that the entire recovery was of charas; only that part of the contraband from which the sample was drawn and which had been sent for analysis could be conclusively held to be charas and in that case, the conviction had been altered from one under Section 20 (b)(ii) to one under Section 27 of the un-amended Act i.e. for having been found to be in possession of contraband meant for personal consumption and the sentence of 10 years RI had been reduced to 6 months.

11 In the factual matrix of the instant case, this Court is of the view that the appellant was found to be in possession of 692 gms of charas which being in the intermediate bracket; the conviction of the appellant under Section 20 (C) for a commercial quantity is altered to one under Section 20 (B) of the NDPS Act for having been found to be in illegal possession of intermediate quantity of charas.

12 On the point of sentence, this Court notes that the appellant has undergone incarceration of 5 years. His jail conduct has been satisfactory. He was first time offender. He is 50 years of age as on date meaning thereby that he was in his mid 40's at the time of his

conviction. This Court has been informed that the appellant has a family comprising of wife and two children. The period of sentence already undergone by the appellant be treated as the sentence imposed upon him. Sentence of fine of Rs. 1 lac is reduced to Rs.50,000/- and in default of payment of fine, he shall undergo RI for a period of 6 months. He be released forthwith, if not required in any other case.

13 Appeal disposed of in the above terms.

INDERMEET KAUR, J

JANUARY 04, 2016

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