

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

Date of Decision: 25th February, 2016

+ **CRL.A. 767/2011**

SURESH KUMAR

..... Appellant

Through Mr Jai Bansal with Mr Pramod Kr, Adv.
versus

STATE (GOVT. OF NCT OF DELHI)

..... Respondent

Through Mr Ashok Kumar Garg, Additional Public
Prosecutor for the State

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CORAM:

HON'BLE MS. JUSTICE SUNITA GUPTA

J U D G M E N T

: SUNITA GUPTA, J.

1. This appeal is directed against the impugned judgment and order on sentence dated 21.05.2011 and 26.05.2011 respectively whereby the appellant was convicted under Section 20 (b)(C) of the Narcotics Drugs and Psychotropic Substances Act (hereinafter referred to as 'the Act') and sentenced to undergo rigorous imprisonment for a period of ten years and to pay a fine of Rs.1 lac; in default to undergo rigorous imprisonment for a period of one year.

2. The prosecution case succinctly stated is as under:

3. On 24.02.2009 at about 2.45 pm ASI Ashok Kumar, Ct. Vineet Kumar and Ct. Ved Prakash were present at Platform No. 14, Nizamuddin side. While patrolling, they saw accused sitting on a bench with a black colour bag and a blue colour trolley bag. He could not satisfactorily explain his presence at the spot and thus two bags were checked and they were found containing Ganja. Samples were drawn from the Ganja recovered from the two bags. They were sealed and formally seized. FIR was registered on the basis of tehrir prepared by ASI Ashok Kumar. Sealed pulandas of the case property alongwith the accompanying documents and parcels were handed over to Inspector Anil Jaitely, SHO PS New Delhi Railway Station at the police station. After registration of the FIR, investigation was assigned to SI Jagmal Singh, who reached at the spot and completed the proceedings including formal arrest of the accused. During the course of

investigation, sample were sent to FSL and after completion of investigation chargesheet was submitted against the accused.

4. In order to substantiate its case, the prosecution examined nine witnesses. All the incriminating evidence was put to the accused while recording his statement under Section 313 of Code of Criminal Procedure wherein he denied the case of prosecution. According to him he had returned from the village and was carrying a polythene bag containing his clothes. He was not carrying any bag. He was apprehended from the platform and thereafter falsely implicated in this case.

5. In support of his defence, he examined two defence witnesses. DW-1 Ranjeet Rai and DW-2 Trishuldhari. Both of them deposed that they accompanied the accused to New Delhi Railway Station to see him off for the village. They were waiting at platform for the train, four police men came and apprehended all of them. They gave money to the police so they were let off whereas the accused was implicated in this case.

6. After scrutinizing the testimony of the prosecution witnesses and hearing learned counsel for the parties vide the impugned judgment the appellant was convicted and sentenced as mentioned hereinbefore.

7. Assailing the findings of the learned Trial Court, learned counsel for the appellant submitted that as per the prosecution case the accused was apprehended at New Delhi Railway Station. Despite availability of number of passengers, railway staff, porters, no independent witness was joined in the proceedings. Notice under Section 50 of the Act allegedly given to the accused does not bear his signatures. Further, as per the prosecution case, accused was found to be in possession of 25 kg and 100 gm of ganja and as such it was held that he was found in possession of commercial quantity. However, the evidence adduced before the Trial Court shows that this alleged contraband also includes seeds which are excluded from the definition of ganja and thus benefit of the same ought to have been given to the accused. At best, the accused can be convicted for being in possession of mid-quantity of ganja which would entail his conviction under Section 20(b)(ii)(B) of the Act and for which the punishment could be lesser. Counsel further submits that the appellant is in custody for the last about seven years as such he be released on the period already undergone by him.

8. Per contra, learned Additional Public Prosecutor for the State submits that it was a case of chance recovery as such no notice under Section 50 of the Act was required to be served upon the accused. However, notice under Section 50 was served upon the accused and he was informed of his right to be searched before a gazetted officer but he refused and the notice bears his signatures. Moreover, independent witnesses were asked to join the proceedings but none agreed. There is no reason to disbelieve the testimony of the police officials with whom the accused is not alleging any animosity as such the impugned judgment does not suffer from any infirmity which calls for any interference.

9. In order to appreciate the rival submissions of learned counsel for the parties, it will be in the fitness of things to have a brief narration of the testimony of material prosecution witnesses.

10. ASI Ashok Kumar (PW8) testified that on 24.02.2009 he alongwith Ct. Vineet Kumar (PW-2) and Ct. Ved Prakash (PW-3) was patrolling in the area. At about 2.45 pm when they reached at platform no. 14 towards Nizamuddin side they saw accused sitting on an iron bench with a blue colour trolley bag and black colour raxine bag by keeping his hand on those bags. He inquired from him about the purpose of his sitting over there and what was kept in the bags. The accused could not satisfactorily explain the contents of the bag. On suspicion, the bags were checked. In the trolley bag, two polythene packets tied with sutli were found. In the raxine bag, one blue polythene packet tied with sutli was found. All the three packets gave a smell and appearance of ganja. The SHO was informed and requested to come to the spot. However, due to his official engagements, he directed him to take necessary action under NDPS Act. Ct. Ved Prakash was sent to Police Station to bring a weighing scale and sealing material. Five/six passengers were requested to join the proceedings but none agreed to join the same. The accused was further informed that his search is required to be conducted because there was likelihood of more psychotropic substance in his possession. He was informed of his right to get himself searched in the presence of a Gazetted Officer or a Magistrate vide notice under Section 50 of the Act (Ex.PW2/B). However, accused refused to avail this right by writing the same himself vide Ex.PW2/A. The two bundles found in the trolley bag were opened and their contents were mixed. The total weight came as 19 kg while the polythene bag contained in the raxine bag weighed 6 kg

and 100 gm. The total weight of Ganja recovered from three bundles was 25 kg and 100 gm. 500 gm was taken out as sample from the ganja recovered from the two bags each. The remaining ganja was kept in the respective bags. All the pulandas were sealed with the seal of 'AK' and were seized vide seizure memo Ex.PW2/C. Ct. Ved Prakash was sent to Police Station alongwith tehrir for getting the case registered alongwith a copy of seizure memo and form FSL. Sub Inspector Jagmal came to the spot after registration of FIR. Further investigation was carried by him who arrested the accused, took his personal search, forwarded the information under Section 57 of the Act and sent the same to ACP through SHO. On 16.03.2009, the two sample pulandas were sent to FSL through Ct. Chanderbhan. The FSL report Ex.PX1 and PX2 were received opining the articles contained in the parcels to be ganja falling under Section 2(iii)(b) of NDPS Act, 1985.

11. Regarding the submission of learned counsel for the appellant that refusal by accused to be searched in the presence of a Gazetted Officer or Magistrate notice under Section 50 of the Act does not bear the signatures of accused, same is belied by the record as a perusal of notice Ex.PW2/B goes to show that underneath the notice, there is a handwriting Ex.PW2/A in the hand of accused wherein he refused to be searched before a Magistrate or a Gazetted Officer on the ground that ganja has already been recovered from him and he has faith in the police. Same also bears his signatures at point 'Y1'. There is force in the submission of learned Additional Public Prosecutor for the State that it was a case of chance recovery; that being so there was no requirement of compliance of Section 50 of the Act as held in *Sorabkhan Gandhkhan Pathan & Anr. v. State of Gujarat*, (2004) 13 sCC 608; *State of Punjab v. Baldev Singh*, 1999 SCC (Crl.) 1080; and *State of Himachal Pradesh v. Sunil Kumar*, (2014) 4 sCC 780. In any case, the police officials suspected that some contraband may be recovered from his personal search, therefore, notice under Section 50 of the act was served upon him apprising him of his right to be searched before a gazetted officer or a Magistrate, to which he declined.

12. As regards, non-joining of independent witness, it has come in the testimony of the police officials that some passengers were asked to join the proceedings but they refused to join the same. Although, it is true that there were passengers, porters and railway staff but their non-joining in the proceedings does not raise any adverse

inference against the police officials as there is no presumption that the police officials are liars. In **Ram Swaroop v. State (GNCTD) of Delhi**, MANU/DE/0556/2009, it was held by this Court:

“12. As regard non-examination of public witnesses, the learned Additional Sessions Judge has rightly held that once an opportunity is granted and nobody is found agreeable to join the proceedings, no fault can be found with the investigation. Similarly, the argument that SHO and ACP were not informed or called at the spot, the Additional Sessions Judge has rightly held that it was a case of chance recovery, which is supported by the testimony of PW-5 and 7. The argument that the case particulars were not mentioned in the notice under Section 50 is of no consequence because at that stage the FIR was not recorded. As regard contradictions, it is rightly held that they were minor in nature and does not affect the case of the prosecution. I may also observe here that merely because the case of recovery of contraband in this case is based upon the sole testimony of the police witnesses it does not make the testimony inadmissible in evidence. Reference can be made to a judgment delivered in the case of Abdul Majid Abdul Hak Ansari Vs. State of Gujarat¹. Relevant observations are reproduced hereunder:-

“Mrs K. Sarada Devi, learned counsel appearing for the appellant contended before us that the prosecution has not examined any independent witness in the case, and that the prosecution case is based on the evidence of police witness only, therefore, it is not safe to rely on such evidence to hold that the said charas was seized from the appellant. She also pointed out that only one panch witness was examined and he too has not supported the prosecution case. Though it is true that the prosecution has relied on the police witness only, both the courts below after considering this evidence have placed reliance on the same and we find no error in the same. Having considered the evidence, we agree with the courts below that the prosecution has proved beyond reasonable doubt that the charas was seized from the person of the appellant and the same was properly sent to the Forensic Science Laboratory for the purpose of analysis and the same was found to be a contraband article, sale of which is prohibited under the provision of the Act and the appellant was found possessing the said quantity of charas for the purpose of sale. For the said reason we find no error in the finding of the courts below, hence this appeal has to fail.”

¹ (2003) 10 SCC 198

13. Similar view was taken in *Ajmer Singh v. State of Haryana*, 2010 (2) SCR 785; *UOI v. Victor Nnamdi Okpo*, 2010 (4) JCC (Narcotics) 188. Therefore, the prosecution case cannot be disbelieved merely on the ground of non-joining of the public witnesses if the deposition made by the police witnesses are found to be convincing and credible. A perusal of testimony of prosecution witnesses reveals that despite cross examination, nothing material could be elicited to discredit their testimony. Moreover, the accused has not alleged any animosity, ill-will or grudge against any of the police officials for which reason he would be falsely implicated in this case. No reliance can be placed on the testimony of DW1 and DW2 who admitted in their cross examination that they did not make any call to 100 number nor lodged any complaint either to the police or to any judicial authority that the accused has been falsely implicated in this case. They also admitted that they did not bring the platform tickets in order to prove that they had gone to see off the accused at the railway station.

14. As regards the last limb of arguments, the same deserves merit as according to ASI Ashok Kumar, he had sent Ct. Ved Prakash to Police Station to bring the weighing scale and sealing material and Ct. Ved Prakash returned from the Police Station with *baats*, *taraju* and clothes. It is further the case of prosecution that the total ganja recovered from the accused was 25 kg and 100 gm, 500 gm of ganja was taken out as sample from the ganja recovered from the two packets each. However, as per Ex.PX2 dated 17.04.2009, two sealed envelopes sealed with the seal of MS, FSL, Delhi containing Ex.S1 and S2 were received in FSL on 02.04.2009. Ex.S1 contained approximately 417.5 gm (with polythene) of dried greenish brownish flowery vegetative material with seeds while parcel Ex.S2 contained approximately 471.8 gm of greenish brownish flowery vegetative material with seeds. As per the report Ex.PX1 dated 23.04.2009, the description of the articles contained in the parcel and their weight with polythene Ex.S1 was reported to be 451.35 gms and Ex. S2 was 503.2 gms. It was reported that Ex.S1 and S2 were identified to be Dried Indian Hemp i.e. Ganja (*Cannabis*).

15. Ganja has been defined in Section 2(iii)(b) of the Act which reads 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;....”*

16. This definition of ganja as contained in the Act clearly means that ganja would be the flowering or fruiting tops of the cannabis plant which excludes seeds and leaves when not accompanied by the tops. The report of FSL Ex.PX2 clearly states that what has been received in the FSL for examination includes greenish brownish flowery vegetative material with **seeds**. Seeds do not come within the definition of ‘ganja’ and therefore have to be excluded.

17. The version of prosecution is that the samples of 500 gms from two packets was taken out which was exclusive of polythene. However, what was received in the FSL was two exhibits. Ex.S1 weighing 453.5 gms and Ex.S2 weighing 503.2 gms whereas as per Ex.PX2, Ex.S1 contained approximately 417.5 gms **with polythene** while Ex.S2 contained 471.8 gms **with polythene**. Thus there was a substantial difference in each of the samples which had been received by FSL. This clearly establishes that the weight of the contraband was not precise. A traditional scale was used to weigh a contraband. There is doubt about the actual quantity of ganja which was recovered. As per the FSL reports, material with seeds was received, but seeds do not come within the definition of ganja. Under the circumstances, the accused is entitled to get the benefit of the same.

18. Learned counsel for the appellant relied upon the judgment titled as *Upender Singh v. The State*, [Crl. Appeal No.267 of 2012, decided on 29.07.2015] wherein the facts were substantially the same. In that case, the appellant was stated to be found in possession of 25 kg of ganja. There was discrepancy in the testimony of the witnesses as to whether the contraband was weighed with a traditional scale or an electronic scale. Besides that, as per the FSL report, the samples were found to contain 871.2 gms, 868 gms and 841.3 gms of dried greenish brownish flowery vegetative material with seeds. Learned Single Judge relied upon the observations of Hon’ble Apex Court in *Rajesh Jagdamba Avasthi v. State of Goa*, 2004(3) JCC 1827 wherein the case of prosecution was that from the right shoe of accused 100 gms of charas was recovered but the substance when weighed was found to be 98.16 gms. Similarly, from the left shoe 115 gms of charas was recovered and sealed but when opened, it weighed 82.54 gms. This

discrepancy having not been explained by the prosecution, resulted in a benefit accrued in favour of the appellant. The following observations were reproduced as under:

“14. We do not find it possible to uphold this finding of the High Court. The appellant was charged of having been found in possession of Charas weighing 180.70 gms. The Charas recovered from him was packed and sealed in two envelopes. When the said envelopes were opened in the laboratory by Junior Scientific Officer, PW-1, he found the quantity to be different. While in one envelope the difference was only minimal, in the other the difference in weight was significant. The High Court itself found that it could not be described as a mere minor discrepancy. Learned counsel rightly submitted before us that the High Court was not justified in upholding the conviction of the appellant on the basis of what was recovered only from envelope 'A' ignoring the quantity of Charas found in envelope 'B'. This is because there was only one search and seizure, and whatever was recovered from the appellant was packed in two envelopes. 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.”

Relying upon this judgment, it was held that in view of the discrepancy in what is alleged to have been recovered from the accused and what was ultimately found if the quantity is less than 20 kgs, the appellant would have fallen within the mid-bracket and would have been convicted under Section 20(b)(ii)(B) of the Act. Noting the discrepancy, the conviction was modified and the appellant was sentenced to the period already undergone as he had remained in jail for more than six years.

19. Things are substantially similar in the instant case as even two FSL reports Ex.PX1 and PX2 gave different weights of ganja found in the samples S1 and S2. Moreover, the weight of ganja was with greenish brownish flowery vegetative material with seeds which are to be excluded. That being so if all these facts are taken into consideration, the discrepancies give rise to benefit of doubt in favour of accused.

Accordingly, the conviction of the appellant is modified from conviction under Section 20 (b) (C) to Section 20(b)(ii)(B) of the Act.

20. As per the nominal roll, the appellant has undergone sentence of six years eleven months and 25 days. In view of the same coupled with the fact that the appellant's conviction is modified to Section 20(b)(ii)(B) of NDPS Act in which there is no minimum sentence, the substantive sentence of the appellant is modified to the period already undergone and the default period of payment of fine of one year is modified to a period of one month.

The appeal stands disposed of accordingly with aforesaid modification.

The appellant be informed through Superintendent Jail.

Trial Court record be sent back forthwith along with a copy of this judgment.

(SUNITA GUPTA)
JUDGE

FEBRUARY 25, 2016/rd