

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

**RESERVED ON : 5th MAY, 2016
DECIDED ON : 18th JULY, 2016**

+ CRL.A.1696/2014

GUNESH KUMAR Appellant

Through : Mr.S.S.Das, Advocate.

VERSUS

STATE Respondent

Through : Mr.Raghuvinder Varma, APP.

**CORAM:
HON'BLE MR. JUSTICE S.P.GARG**

S.P.GARG, J.

1. Aggrieved by a judgment dated 26.08.2014 of learned Special Judge / NDPS Act in Sessions Case No.33/13 arising out of FIR No.45/13 PS Kamla Market by which the appellant – Gunesh Kumar was convicted for committing offence under Section 20(b)(ii)(c) of Narcotic Drugs and Psychotropic Substances Act, 1985 (In short ‘NDPS Act’), the instant appeal has been preferred by him. By an order dated 28.08.2014, he was sentenced to undergo RI for ten years with fine ₹1 lac.

2. Briefly stated, the prosecution case as set up in the charge-sheet was that on 19.03.2013 at around 03.40 p.m. by the side of public lavatory,

Pul Paharganj, Ajmeri Gate, the appellant was found in possession of 1.600 Kg. of Charas (cannibis).

3. On 19.03.2013 PW-12 (ASI Roshan Singh) along with PW-11 (HC Shailesh Kumar) and PW-10 (Const. Yogesh) left the Police Station Kamla Market for patrolling vide DD No.21A. At around 02.30 p.m. when they reached in front of Food Plaza Restaurant, Ajmeri Gate, ASI Roshan Singh received a secret information about arrival of an individual aged around 50-52 years wearing white and grey colour shirt and pant near toilet by the side of Pul Paharganj to deliver Charas to someone. This secret information was reduced into writing under Section 42 NDPS Act (Ex.PW-8/A). After apprising the staff about the secret information, the Investigating Officer sent Ex.PW-8/A to SHO Insp. Pramod Joshi through PW-10 (Const. Yogesh). The SHO directed ASI Roshan Singh to take necessary action. 4 /5 passers-by were requested to join the raiding team but none agreed. At around 03.40 p.m. the appellant was seen coming from the side of Ajmeri Gate; he stood by the side of toilet for some time. The secret informer pointed towards him. The Investigating Officer and the other staff introduced themselves to the appellant carrying a bag in his right hand. Notice (Ex.PX) under Section 50 NDPS Act was served upon the accused and vide reply (Ex.PW-7/F), he declined to get his search conducted before the Magistrate / Gazetted Officer. On search of the bag, Charas weighing 1.600 kg. was recovered. Two samples of 250 grams each were taken from the lot. Necessary proceedings were conducted at the spot. Statements of the witnesses conversant with the facts were recorded. Exhibits collected during investigation were sent to Forensic Science Laboratory for examination. Upon completion of investigation, a charge-sheet was filed

against the appellant in the Court. In order to establish its case, the prosecution examined thirteen witnesses. In 313 Cr.P.C. statement, the appellant denied his involvement in the crime and pleaded false implication. He examined DW-1 (Mukesh Kumar) and DW-2 (Javed) in defence. The Trial resulted in his conviction as aforesaid. Being aggrieved and dissatisfied, the instant appeal has been preferred.

4. I have heard the learned counsel for the parties and have examined the file. At the outset, it may be mentioned that the entire evidence produced by the prosecution consists of only of police officials. No independent public witness was associated at any stage of the investigation. True, testimony of the police officials per se without independent corroboration by public witnesses cannot be discarded. Equally it is true that the charge under the Act is serious and entails serious consequences. The minimum sentence prescribed under the Act is imprisonment for ten years with a fine. In this situation, it is normally expected that there should be independent evidence to support the case of the prosecution, though it is not absolute rule as sometimes it may not be possible to find independent witness at all place at all times. The obligation to join public witnesses is not absolute. The Court will have to appreciate the relevant evidence and will have to determine whether the evidence of the police officials was believable after taking due care and caution in evaluating their evidence.

5. In the instant case, despite having ample time to join independent public witness, no sincere efforts seen to have been made by the Investigating Agency. No plausible explanation has been offered for that. Routine response to have requested 4 / 5 passers-by to join the investigation

has been given which does not inspire confidence. It has come on record that there were number of shops nearby. But no attempt was made to associate any independent public witness from the shops etc. Under these circumstances, evidence of the police officials is to be perused with great circumspection.

6. Number of discrepancies have emerged in the prosecution case making it unsafe to base conviction on the sole testimonies of the police officials. It is alleged that the Investigating Officer along with his staff was on patrolling duty in the area. They had set out from the police station for routine patrolling and were not having any inkling about apprehension of any individual with a contraband. It is alleged that when the police officials were on routine patrolling, at around 02.30 p.m., the secret informer apprised them about an individual disclosing his description to arrive at the spot with contraband. It has come on record that all the members of the raiding team were in civil dress and the secret informer was not acquainted with them. It is unclear as to how the secret informer suddenly approached the Investigating Officer in civil dress to apprise him about the vital exact information. Nothing was revealed to the Investigating Officer as to at what place the appellant used to reside or carry on his business; from where he had procured the contraband; to whom the contraband was to be delivered, and if so, for what consideration. It has come on record that the accused and his brothers were running a shop No.26, Ajmeri Gate. PW-8 (Insp.Pramod Joshi) admitted that he was aware that the accused had a shop in the area of Ajmeri Gate. It is surprising as to why after appellant's arrest, the shop was not raided and no search was conducted to find out any incriminating contraband or object. So much so, the residential house of the appellant was

also not searched. It was not ascertained as to from where the appellant had procured the contraband, and if so, when.

7. After the appellant's apprehension, the case property was sealed with the seal of 'SK'. PW-12 (ASI Roshan Singh) in his examination-in-chief did not claim if at the time of leaving the police station for patrolling, he had got issued any IO kit from the Duty Officer. He did not reveal if he had forgotten to bring his own seal that day. He did not explain as to whom the seal having initials 'SK' belonged. Only in the cross-examination when he was specifically confronted as to, to whom the seal 'SK' belonged, the Investigating Officer came up with the plea that the said seal was available in the IO bag which he had carried along from the police station at the time of leaving for patrolling. He did not know to whom the seal belonged. The prosecution did not examine any witness to prove as to, to whom the seal having initials 'SK' belonged or how it was in the IO's bag. PW-12 (ASI Roshan Singh) admitted that his own seal bearing initials 'RS' was not used. He attempted to explain that on that day i.e. 19.03.2013 he was not carrying his seal and had forgotten it at home. This explanation inspires no implicit confidence. PW-1 (HC Nirpal Singh), Duty Officer at Police Station Kamla Nagar, on 19.03.2013 did not state if any kit having seal 'SK' was issued to the Investigating Officer.

8. The prosecution relied upon the entries (Ex.PW-5/A) in the register No.19 maintained by PW-5 (HC Rati Ram), MHC(M). This witness was however confronted with photocopies of entries in the said register (Ex.PW-5/DA) which were at variance with Ex.PW-5/A. In Ex.PW-5/DA there are signatures of concerned SHO over rubber stamp, which are not there in Ex.PW-5/A. PW-5 (HC Rati Ram) in the cross-examination

admitted that in the original register No.19 brought by him that day, there was rubber stamp impression under the signatures of the SHO against entry No.136. He was unable to state as to on which date the rubber stamp was affixed and when signatures of the SHO along with his rubber stamp were obtained. He further admitted that at points 'B' and 'C' in note dated 15.05.2013, from point 'D' to 'D' in Ex.PW-5/DA fluid has been applied. He was unable to tell as to who had applied fluid at points 'B' and 'C'. He was further unable to disclose as to when SI Ajay had put his signatures beneath it. He was fair to state that signatures of SI Ajay were not obtained by him.

9. Inconsistent version has been given regarding FSL form. In examination-in-chief PW-5 (HC Rati Ram) categorically stated that at the time of deposit of the case property with him by the SHO, FSL form was not given to him. When further examined by the learned Addl. Public Prosecutor with Court's permission he admitted that in his statement recorded under Section 161 Cr.P.C. (Ex.PW-5/D) there was mention that the FSL form was delivered to him with the case property. He further admitted that in entry (Ex.PW-5/A) in the register No.19, there was no mention if any FSL form was delivered to him. Road certificate (Ex.PW-5/B) did not record if any FSL form was sent to be deposited with Forensic Science Laboratory.

10. The prosecution witnesses have given inconsistent version about the mobile phones in their possession. One mobile phone was recovered from the accused in his personal search vide personal search memo (Ex.PW-7/C). It has also come on record that during their stay at the spot, certain calls were made / exchanged. The Investigating Officer

however did not place on record any Call Details Record, either of the prosecution witnesses or that of the accused, crucial to establish the exact location of the accused and the police officials at the relevant time. Nothing has come on record to show if before arrival at the spot, the appellant had contacted any 'individual' to whom the contraband was delivered. The accused had moved an application before the Trial Court for appropriate orders / directions to the concerned authority to furnish the GPS location and call details of these mobile phones. The Investigating Officer SI Jai Bhagwan, however, informed the Court that the record beyond the period of one year was not available with the concerned authority. The Investigating Officer did not explain as to why the relevant Call Detail Record crucial to the recovery was not collected at the appropriate time.

11. Compliance of Section 57 is doubtful. Ex.PW-2/A contains certain over-writings. The concerned ACP to whom the information was conveyed has not been examined. It is unclear as to when the information was conveyed and when it was received at the office of ACP, and if so, by what mode. Delay in sending the sample has not been explained. FSL report (Ex.PW-7/D) shows the quantity / weight vide Ex.-IA 247.60 grams (approximately with polythene) was received. No plausible explanation has been offered as to why there was small deficiency in the weight of the sample sent to FSL. It has come on record that the contraband allegedly recovered from the appellant was in the shape of 'sticks' of different types. The prosecution witnesses have given contradictory versions about its shape and content. PW-12 (ASI Roshan Singh) deposed that the substance recovered was in the form of long and small size sticks. He thereafter at random picked up some sticks from the recovered substance and quantity of

500 grams was taken out. It was converted into two parcels of 250 grams each and were given mark 1A and 1B. In the cross-examination, he revealed that nothing was found wrapped on each 'stick'. No one counted the sticks; each stick was not separately weighed. When the sticks were shown to the witness from the case property (Ex.P1), he stated that these were lying wrapped with transparent plastic sheets. He further claimed that all the sticks recovered were almost of same diameters. However, on being shown some sticks taken out the case property (Ex.P1), he admitted that the sticks were not of same diameters. He further admitted that when the sticks were taken out by way of samples, some sticks were broken to draw samples of 250 grams. PW-11 (HC Shailesh Kumar) giving other inconsistent version, stated that the Investigating Officer took out two samples each of 250 grams from the lot, turned them into two separate parcels and gave mark 1A and 1B. In the cross-examination, he disclosed that sticks were not counted at the spot; they were of different sizes; some thick and some thin; samples were taken by picking up sticks at random without counting the numbers. PW-12 (ASI Roshan Singh) deposed that he took out two samples each of 250 grams from the lot. In the cross-examination, he also admitted that the sticks were not counted and he was unable to state if by approximation they were 100 or less than 100. He also stated that nothing was found wrapped around each stick; the sticks were of different sizes. This inconsistent version creates doubt if representative sample was drawn to establish beyond doubt that the whole quantity of the substance recovered from the appellant was 'Charas'.

12. In the light of the above referred deficiencies, inconsistencies and discrepancies, the statements of the police officials without independent

corroboration cannot be believed to base conviction for stringent provisions of the Act. The law on this aspect is that “stringent the punishment stricter the proof”, in such like cases, the prosecution evidence has to be examined very zealously so as to exclude every chance of false implication. The prosecution has failed to establish the commission of offence by the appellant beyond reasonable doubt. It cannot take benefit of appellant’s inability to establish his defence pleaded in 313 Cr.P.C. statement beyond reasonable doubt. Mere apprehension of the appellant is not enough. The evidence is scanty and lacking to establish that the contraband was recovered from the possession of the appellant in the manner alleged by the prosecution on the said date and time. The appellant deserves benefit of doubt.

13. Resultantly, appellant’s appeal is accepted. The conviction and sentence are set aside. The appellant shall be released forthwith if not required to be detained in any other case. Trial Court record be sent back immediately with the copy of the order. A copy of the order be sent to the Superintendent Jail for information / compliance.

(S.P.GARG)
JUDGE

JULY 18, 2016 / tr