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

+ **CRL.A. No.455/2001**

Date of Decision : 7th MARCH, 2017

INDUL SHAH APPELLANT

Through Mr.M.L. Yadav, Adv. with
appellant in person.

versus

STATE RESPONDENT

Through Mr.Ashish Dutta, Additional
Public Prosecutor for the State.

CORAM:

HON'BLE MR. JUSTICE P.S.TEJI

P.S.TEJI, J

1. Aggrieved by the judgment of conviction dated 25th April, 2001 convicting the appellant finding him guilty under Section 20 of the Narcotic Drugs & Psychotropic Substances Act, 1985 (hereinafter referred to as NDPS Act, 1985) and order on sentence dated 28th April, 2001 vide which the sentence was passed against the appellant 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 ordered to further undergo rigorous imprisonment for one year, the present appeal has been filed.

2. The facts in brief are that a secret information was received on the basis of which the police on 23rd September, 1999 at about 06.45 p.m., apprehended two persons namely Indul Shah (appellant herein) and Munna, from Chatta Rail chowk, Delhi. Notice under Section 50 of the NDPS Act, 1985 was served to which the accused persons refused to exercise the said option and their refusal was

recorded to writing. Thereafter, on the direction of Additional SHO, who also reached the spot after receiving a wireless message, search of the accused Indul Shah was effected and one polythene packet of light green colour was recovered from the right hand pocket of the pant of the accused, which when opened was found to contain charas in the shape of sticks to the tune of 950 grams. Out of 950 gram charas recovered, 100 gram was separated as sample which was kept in white paper and the remaining charas was kept in the light green colour polythene and kept in two separate parcels. Thereafter, search of the accused Munna was effected by the same ASI but no incriminating article was found from his possession. It appears from the record that the case property was seized vide seizure memo Exh.PW 5/D; CFSL form was filled in and sealed; tehrir was prepared Ex.PW 11/A; FIR No.581/99 was registered; case property was handed over to the SHO; accused was arrested; the sample was got chemically analysed and after completion of the investigation, accused was sent for trial to the court. It further emerges from the record that charge under Section 20 of the NDPS Act was framed against the accused to which he pleaded not guilty and claimed trial.

3. The prosecution had examined as many as eleven prosecution witnesses namely PW 1 Kamlesh Miglani; PW 2 Const.Satish Kumar; PW 3 HC Babu Lal; PW 4 HC Purshotam; PW 5 HC Dalbir Singh; PW 6 Const.Satbir Singh; PW 7 HC Prem Kumar; PW 8 Const.Kavinder; PW 9 Const.Yashbir; PW 10 SI Sanjay Sharma & PW 11 ASI Satpal. The statement of the accused Indul Shah was recorded under Section 313 of the Cr.P.C.

4. The appellant was held guilty by the learned Additional Sessions Judge, Delhi and by an order dated 28th April, 2001,

sentenced to undergo rigorous imprisonment for ten years and fined rupees one lakh for the offence punishable under Section 20 of the NDPS Act, 1985. In default of payment of fine, the convict was to further undergo rigorous imprisonment for a period of one year.

GROUND OF CHALLENGE

(a) There was no evidence of independent witnesses though the spot wherefrom the appellant was apprehended, was a busy market area. There have been material contradictions and infirmities in the evidences of the various witnesses. The statement of Malkhana Moharrar i.e. PW 4 HC Purushottam was not recorded by the investigating officer and that the said witness was totally silent about the deposit of case property and samples in the malkhana, till 3rd November, 1999. It was also alleged that there was violation of Sections 50 of the NDPS Act inasmuch as before the appellant was apprehended, the investigating officer had registered the case and the FIR was already registered. The investigating officer had not drawn the representative samples as per law. The provisions of Section 42 as well as Sections 55 & 57 of the NDPS Act were not complied with. The defence evidence has not been taken into consideration and that the public prosecutor could not get anything from the cross-examination. The prosecution has missed the vital link of proving its case because the sample in the entire trial was not exhibited.

5. Apart from challenging the judgment of conviction, learned counsel for the appellant further submitted that vide order dated 30th May, 2003 passed by this court, given the facts and circumstances of the case, the sentence of the appellant was suspended during the pendency of the appeal.

6. Per contra, argument advanced by learned Additional Public Prosecutor for the State is that the appellant was rightly held guilty under Section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985. It is submitted that on 23rd September, 1999, a secret information was received by PW 11 ASI Satpal who along with PW 5 HC Dalbir Singh and PW 6 Ct.Satbir Singh, was on vehicle checking duty at Bharti Daftar, Lower Subash Marg near Mor Sarai Road and that the appellant was apprehended with charas at Chatta Rail Chowk. It is submitted by APP that search of the accused persons was effected and that charas weighing 950 grams was recovered from his possession.

7. Upon hearing the rival contentions of the parties at length, evidence led is being examined.

(I) PW 11 ASI Satpal in his statement stated that on 23rd September, 1999 he was posted at police chowki, Red Fort in PS Kotwali and while he along with PW 5 HC Dalbir Singh and PW 6 Ct.Satbir Singh were on vehicle checking duty in front of Bharti Daftar, he received a secret information to the effect that two persons having charas, would come from the side of Chatta Rail and would go towards Angoori Bagh, which information was reduced to writing vide Ex.PW 5/A and bore the signature of this witness at point 'X'. After recording this information, PW 11 ASI Satpal gave a wireless message to Addl.SHO Umesh Singh and called him to the spot. He further stated that he requested four to five passersby to join them but nobody agreed. PW 11 stated that thereafter at about 6.25 p.m., two boys were seen coming from Chatta Rail side whom secret informer identified and pointed it out to him. Thereafter on seeing them, both the accused persons started running back but they were apprehended after ten-fifteen

paces and disclosed their names as Indul Shah and Munna. Thereafter, PW 11 Satpal disclosed about the information and gave an offer of search to both of them. The accused persons were also offered to be searched before the Magistrate or Gazetted officer. Thereafter, notice under Section 50 of the NDPS was served upon Indul Shah (Ex.PW 5/B). The accused Indul Shah in reply, stated that he need not be searched in the presence of Magistrate or Gazetted Officer for the reason that he had been found in possession of charas which was written by the accused on the notice at point 'B' (Ex.PW 5/B). This witness offered his personal search to the accused persons but they did not find any contraband vide memo Exh.PW 5/C. Thereafter, at about 6.55 p.m., Addl.SHO also reached the spot who was apprised of the information and the accused were produced before him. Thereafter, PW 11 Satpal effected search on the accused Indul Shah and from the right side dub, one polythene of light green colour was recovered, which when opened by this witness, was found to contain charas in the shape of sticks weighing 950 grams. PW 11, further, deposed that 100 gram was separated on a white paper and converted into a separate parcel while the remaining charas was kept in the same polythene and converted into a separate parcel and sealed with the seal of S.S. This witness, thereafter, filled in CFSL form; Inspt.Umesh Singh affixed his seal on both the parcels as well as CFSL form; possession was taken vide seizure memo Ex.PW 5/D; two parcels and CFSL form were handed over to Inspt.Umesh Singh; tehrir (Ex.PW 11/A) was prepared by this witness vide Ex.PW 11/A for the purpose of registration of the case which was handed over to PW 6 Ct.Satbir Singh; further investigation was marked to PW 10 SI Sanjay

Sharma, Incharge of police post, Red Fort. Thereafter, PW 10 SI Sanjay Sharma with PW 6 Ct.Satbir Singh reached the spot along with copy of FIR; PW 10 SI Sanjay Sharma prepared site plan; accused Indul Shah was arrested by PW 10 SI Sanjay Sharma who conducted his personal search upon which one copy of notice was recovered from left side pocket of the accused Indul Shah & personal search memo bore signature of this witness at point 'X'.

(II) PW 5 Dalbir Singh & PW 6 Ct.Satbir Singh in their statement reiterated and corroborated the statement given by the investigating officer PW 11 Satpal with regard to the incident of 23rd September, 1999 in which the accused Indul Shah was apprehended with charas weighing 950 grams.

(III) PW 7 HC Prem Kumar deposed that while posted as ACP, Kotwali, on 24th September, 1999, a report under Section 57 of the NDPS was received in his office which pertained to FIR No.581/99 which was signed by him, marked as Ex.PW 7/A.

(IV) PW 8 Const.Kavinder in his statement stated that on 29th September, 1999, while he was posted at Police Station Kotwali, he obtained one sealed parcel and one form CFSL bearing the seals of S.S. & U.S. from Malkhana Moharar who deposited the same at Forensic Science Laboratory, Malviya Nagar (RC No.183/21). This witness stated that after depositing the case property, he handed over copy of road certificate to MHCM.

(V) PW 9 Ct.Yasbir in his statement stated that on 24th September, 1999, he along with PW 6 Ct.Satbir Singh and PW 10 SI Sanjay Sharma reached at House No.A-19, Gali No.2, Kait Wada, Usman Pur, Delhi when the accused Indul Shah and one Munna were also with them and that they pointed out one room in the said house. This witness further stated that one Ram Lal thakur

opened the said room and upon search, no contraband was recovered from that room.

(VI) PW 1 Kamlesh Miglani in his statement stated that while posted as Senior Scientific Officer in Forensic Science Laboratory, Delhi, on 29th September, 1999, she received one sample parcel with CFSL form bearing seals of S.S.& U.S. and the same was given to her for chemical analysis. She tallied the seals on the sample with the affixed one which were found to be the same. This witness stated that she, thereafter, opened the parcel which found to contain greenish brown solid substance and which on chemical analysis, gave positive test for Charas. The report given by this witness was marked as Ex.PW 1/A.

(VII) PW 2 Ct.Satish Kumar stated that on 23rd September, 1999, he was working as DD writer at PP, Red Fort of Police Kotwali and that he had brought Daily Diary register on 23rd September, 1999. This witness further stated that DD No.21 was written in his handwriting copy whereof was marked as Ex.PW 2/A while copy of DD No.24 was marked as Ex.PW 2/B.

(VIII) PW 3 HC Babu Lal in his statement stated that on 23rd September, 1999, while he was working as Duty Officer at PS Kotwali, at about 9.00 p.m. PW 6 Ct.Satbir Singh produced one ruqqa before him on the basis of which he recorded FIR in his handwriting and put his signatures thereon carbon copy whereof was marked as Ex.PW 3/A.

(IX) PW 4 Purshotam in his statement stated that on 23rd September, 1999, while working as Malkhana Moharar at Police Station Kotwali, Addl.SHO Umesh Singh deposited two sealed parcels and one CFSL form bearing the seal of S.S. & U.S. and seizure memo and on 29th September, 1999, this witness sent

sample parcel; CFSL form to the CFSL Laboratory through PW 8 Ct.Kavinder vide RC No.183/21. This witness further stated that he received through Ct.Mahesh, remnants of the sample and result of FSL Laboratory on 17th November, 1999.

(X) PW 10 SI Sanjay Sharma in his statement stated that on 23rd September, 1999 while he was on patrolling duty under PS Kotwali and was present near Lal Jain Mandir, at about 10.00 p.m., Ct.Satbir came to him and handed over original ruqqa along with copy of FIR of the present case and that he along with PW 11 ASI Satpal Singh reached near Bharti Daftar, Mor Sarai, Red Fort with PW 11 ASI Satpal Singh; PW 5 HC Dalbir Singh where accused persons Indul Shah as well as Munna were present. PW 10 SI Sanjay Sharma further stated that PW 11 ASI Satpal Singh handed over all the documents and memos which were prepared by him, he prepared site plan Ex.PW 10/A. This witness interrogated the accused; arrested him and effected personal search (Ex.PW 5/A). This witness recorded the statement of other witnesses and reached the police station along with accused persons. PW 10 further stated that on 24th September, 1999, he along with PW 6 Ct.Satbir & PW 9 Ct.Yasbir took the accused Indul Shah and Munna to House No.A-19, Gali No.2, Usman Pur and effected search of the room which was pointed out, but nothing incriminating was found therefrom.

8. Thus, as per the testimony of PW 11 ASI Satpal, on the date of incident, he along with PW 5 HC Dalbir Singh & PW 6 Ct.Satbir Singh apprehended the accused persons. PW 5 HC Dalbir Singh; PW 6 Ct.Satbir Singh corroborated the statement of PW 11 ASI Satpal that notice (Ex.PW 5/B) under Section 50 of NDPS Act was prepared and served upon the accused Indul Shah.

This witness apprehended the accused Indul Shah and recovered the said charas from him weighing about 950 grams. After preparing a separate sample packet, remaining smack was seized; tehrir Ex.PW 11/A was prepared; case was registered and the site plan (Ex.PW 10/A) was prepared by PW 10 SI Sanjay Sharma in presence of PW 11 ASI Satpal.

9. The testimonies of PW 11 Satpal; PW 5 HC Dalbir Singh & PW 6 Ct.Satbir Singh have been duly corroborated by the statement of other witnesses. All these witnesses in the same breath have stated that raid was conducted in which the appellant was apprehended with contraband i.e. charas. They have also stated in the same line that the proceedings were conducted at the spot by the investigating officer and the in-charge of raiding team and that recovery of charas, its seizure, search of appellant Indul Shah & Muuna, notice under Section 50 of NDPS Act were served upon the appellant and other proceedings were also conducted.

10. All the above witnesses were cross-examined at length but the defence failed to put any dent to their testimony. They remained unshaken with regard to conducting of raid and apprehension of the appellant Indul Shah with the contraband i.e. charas. They have also stated in a same voice that charas weighing 950 grams was recovered from the appellant; notice under Section 50 of the NDPS Act was served upon him and required proceedings were conducted at the spot.

11. Contention of the learned counsel for the appellant that there was no proper service of notice under Section 50 of the NDPS Act upon the appellant, is without any basis inasmuch as notice under Section 50 of the NDPS Act Ex.PW 5/B shows that after apprehension of the appellant, he was offered to get himself

searched in the presence of a gazetted officer or a Magistrate before conducting his search. This clearly proves that the contents of notice under Section 50 of the NDPS Act were duly explained to the appellant before conducting his search and thus there is mandatory compliance of Section 50 of the NDPS Act by the police before conducting search of the appellant.

12. The testimony of the raiding party members has also been duly corroborated by CFSL report which shows that when the sealed sample was opened and examined, the same was identified as charas. The CFSL report duly proves the case of the prosecution that the recovered substance from the appellant was a contraband i.e. charas.

13. The discussion made above shows that the testimony made by the police officials is trustworthy and their testimony coupled with CFSL report, brings the case of prosecution within the four corners of the alleged commission of offence which culminated into the conviction of the appellant. This court is of the considered opinion that the prosecution has successfully proven the guilt of the appellant.

14. As a result, no error or illegality is found in the view taken by the Trial Court and the judgment of conviction dated 28th April, 2001 is upheld.

15. A prayer is made by learned counsel for the appellant to the effect that a lenient view may be taken in terms of sentence awarded to the appellant keeping in view the fact that the appellant is facing trial since 1999 and that almost seventeen years have elapsed since then. Learned counsel for the appellant has further submitted that the appellant was awarded punishment under the Narcotic Drugs & Psychotropic Substances Act, 1985 which was

amended in October, 2001 and in view of the amended Act, the punishments for the offences under the Act, have been reduced. Likewise, the sentence in the present case may also be reduced.

16. In the judgment passed by the High Court of Rajasthan, it was held as under:-

“When a legislation is brought into existence, it is for the benefit of the people and the Court should give such interpretation which is not only beneficial to the person who takes benefit out of it but it should also be in consonance with the Statement of Objects and Reasons given in the Amending provisions. The Statement of Objects and Reasons appended to the Bill is as follows:

Statement of Objects and Reasons:-
Amendment Act 9 of 2001:- The Narcotic Drugs and Psychotropic Substances Act, 1985 provides deterrent punishment for various offences relating to illicit trafficking in narcotic drugs and psychotropic substances. Most of the offences invite uniform punishment of minimum ten years rigorous imprisonment which may extend upto twenty years. While the Act envisages severe punishments for drug traffickers, it envisages reformatory approach towards addicts. In view of the general delay in trial, it has been found that the addicts prefer not to invoke the provisions of the Act. The strict bail provisions under the Act add to their misery. Therefore, it is proposed to rationalise the sentence structure so as to ensure that while drug traffickers who traffic in significant quantities of drugs are punished with deterrent sentences, the addicts and those who commit less serious offences are sentenced to less severe punishment. This requires rationalisation of the sentence structure, provided under the Act. It is also proposed to restrict the application of strict bail provisions to those offenders who indulge in serious offences.

12. This Statement of Objects & Reasons itself is beneficial for the interest of the accused who are languished in jail for a considerable time on account of being minimum ten years punishment in contraband drugs and are denied right of bail as against those who are indulged in large scale quantity of drugs trafficking. This Amendment provides rationalization in the matter of grant of bail as well as in the matter of awarding sentence by distinguishing the narcotic drugs & psychotropic substances in three categories viz; (i) small, (ii) commercial and (iii) in between small & commercial. If the legislation is silent on a particular issue which is apparently in the present case about applicability of the Amending Act' In case where sentence has been passed prior to Amendment and no appeal has been filed after the Amendment, then the Court should give that interpretation which is in furtherance of the intention of the legislature given under its preamble or Statement of Objects & Reasons."

[Prema alias Prem Singh Vs. State of Rajasthan in S.B. CrI.J. Appeal No.738/2001 Dt.19.07.2007]

17. This Court on similar facts and circumstances, has held as under:-

"It is a fundamental right of every person that he should not be subjected to greater penalty than what the law prescribes, and no ex post facto legislation is permissible for escalating the severity of the punishment. But if any subsequent legislation would downgrade the harshness of the sentence for the same offence, it would be a salutary principle for administration of criminal justice to suggest that the said legislative benevolence can be extended to the accused who awaits judicial verdict regarding sentence."

[Sultan Vs. State 2004 (73) DRJ 460]

18. *India is a party to three United Nations Drug Conventions*

and to give effect to the treaties, NDPS 1985 enacted in order to provide adequate penalties for drug trafficking, strengthen enforcement powers, implement international conventions to which India was a party and enforce controls over the contraband. NDPS Amendment Act 1989 came into effect to combat drug trafficking which was influenced by the signing of 1988 Convention by India. After this amendment, people caught with small amounts of drugs faced long prison sentences and hefty fines. The said amendment of 1989 was criticized for harsh and disproportionate sentencing structure and a momentum for reform was created. By way of amended Act of 2001, scale of sentencing and fine was reduced depending upon the substance and quantity found. It basically provides for determining the amount of drugs involved in an offence while sentencing an accused. It also provides for deterrent punishment for the drug traffickers while a reformatory approach towards addicts has been adopted. Therefore, three different quantity of drugs have been involved i.e. small, commercial or intermediate while sentencing. The legislature was wise enough to provide different punishments for possessing small or commercial quantity of drugs.

19. ***The amended Act of 2001 is a beneficial legislation which provides for lesser punishment in case of drug addicts who are found with the lesser quantity of prohibited substance as compared to the drug traffickers who are found having commercial quantity of contraband which attracts harsh punishment and hefty fines.***

20. In the present case, the appellant has already undergone about three years eight months and six days incarceration for possessing 950 grams of charas. The peculiar circumstances of the

present case are that the appellant was arrested on 23rd September, 1999 and as per the sentence awarded to him, he would have completed ten years in the year 2009 if he remained confined in jail for the said period. Keeping in view the judgment in the case of **Sultan (supra)** and the beneficial provisions of the amended NDPS Act of 2001, the sentence awarded to the appellant is reduced to nine years with fine of Rs.90,000/-. In default of payment of fine, the appellant shall undergo simple imprisonment of six months.

21. The appellant is directed to surrender immediately before the trial court concerned to serve the remaining sentence of imprisonment.

22. With the above modification in the sentence of imprisonment, the present appeal is disposed of.

(P.S.TEJI)
JUDGE

MARCH 07, 2017

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