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

+ **CRL.A. No.495/2001**

Date of Decision : 16th MARCH, 2017

KANWAR PAL@MAMA APPELLANT
Through Mr.Sunil Tiwari, Adv.

versus

STATE RESPONDENT
Through Mr.Panna Lal Sharma, 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 12th July, 2001 convicting the appellant finding him guilty under Sections 21/61/85 of the Narcotic Drugs & Psychotropic Substances Act, 1985 (hereinafter referred to as NDPS Act, 1985) and order on sentence dated 12th July, 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 Sections 21 of the NDPS Act, in default of payment of fine, convict was ordered to further undergo simple imprisonment for three years, 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 8th September, 1998 at about 01.35 p.m., apprehended the accused Kanwar Pal@Mama at Nizamuddin side from Platform No.12, New Delhi Railway Station (NDRS). Notice under Section 50 of the NDPS Act, 1985 was served to which the accused Kanwar Pal@Mama refused to exercise the said option and his refusal was recorded in writing.

Thereafter, on the direction of SHO, raid was conducted; search of the accused Kanwar Pal@Mama was effected and a polythene packet containing a bigger paper packet besides other ten small packets containing contraband was recovered from the right side pocket of the wearing pant of the accused, which when opened was found to contain smack to the tune of five grams in total. Out of five gram smack recovered, one gram was taken out as sample which was kept in a piece of paper while the remaining smack was kept in the paper of the larger packet along with the ten paper packets which were converted into two separate parcels. It appears from the record that the case property was seized vide seizure memo Exh.PW 1/C along with CFSL form; rukka was prepared (Ex.PW3/A); FIR No.1039/98 was registered; case property was handed over to the SHO through Ct.Amar Singh; accused was arrested; the sample was 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 Sections 21/61/85 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 Ct.Amar Singh; PW 2 HC Vinod Kumar; PW 3 ASI Joginder Singh; PW 4 Dr.R.M. Tripathi; PW 5 Inspt.Rajender Singh; PW 6 HC Shashi Bhushan; PW 7 HC Ashok Kumar & PW 8 Ct.Ramsharan Meena. The statement of the accused Kanwar Pal@Mama was recorded under Section 313 of the Cr.P.C.

4. The appellant was held guilty by the learned Special Judge, Delhi and by an order dated 12th July, 2001, sentenced to undergo rigorous imprisonment for ten years and fined rupees one lakh for

the offence punishable under Section 21 of the NDPS Act, 1985. In default of payment of fine, the convict was to further undergo simple imprisonment for a period of three years.

5. The learned counsel for the appellant stated that the appellant was apprehended from a busy place of platform no.12 of New Delhi Railway Station, however, only one public witness i.e. Niaz Ahmed had been cited that too during trial. Therefore, no sincere effort was made to join other independent public witnesses. Mandatory provisions of Section 50 of the NDPS Act were not followed inasmuch as it was not mentioned in the notice that the accused had the right to call a Gazetted Officer or a Magistrate for the purpose of his search. Notice under Section 50 as well as the recovery memo bore the number of the FIR which reflected that these documents were prepared after the registration of the case. CFSL form was neither prepared at the spot nor deposited in the malkhana nor sent to the CFSL office. Non-compliance of provisions of Sections 42, 52, 53 & 57 of the NDPS Act. Tampering in the pullandas before reaching the hands of the analyst. Investigation after recovery had not been transferred to the other police officer.

6. Apart from challenging the judgment of conviction, learned counsel for the appellant further submitted that vide order dated 28th November, 2002 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.

7. In support of his contentions, learned counsel for the appellant relies on the pronouncements of the Supreme Court in ***E. Michael Raj Vs. Intelligence Officer, Narcotic Control Bureau*** decided in CrI.A. No.1250/2005 on 11th March, 2008 as well as in

Ved Prakash Vs. State of Delhi 2011 [1] JCC [Narcotics] 77.

8. Per contra, argument advanced by learned Additional Public Prosecutor for the State is that the appellant was rightly held guilty under Section 21 of the Narcotic Drugs and Psychotropic Substances Act, 1985. It is submitted that on 8th September, 1998, a secret information was received by PW 3 ASI Joginder Singh who along with PW 1 Const.Amar Singh, PW 2 Vinod & Const.Balvinder Singh, apprehended the appellant with smack from the bushes at about 100 yards away from platform no.12, New Delhi Railway Station, towards Nizammudin side. It is submitted by APP that search of the accused person was effected and that smack weighing five grams was recovered from his possession.

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

10. PW 3 ASI Joginder Singh in his statement stated that on 8th September, 1998 while he was posted at Police Station New Delhi Railway Station, he received a secret information to the effect that a person having smack, would come to bushes about 100 yards away from platform no.12, New Delhi Railway Station and the same was reduced to writing in daily diary at serial number 46-B. PW 3 brought this information to the knowledge of PW 5 Inspt.Rajender Singh, SHO, who directed for conducting raid. This witness, thereafter, organised a raiding team constituting of himself; PW 2 HC Vinod; PW 1 Ct.Amar Singh & Ct.Balvinder Singh and that the raiding team along with the informer reached the spot. This witness had a kit for investigation which he kept at a pan stall. Thereafter, at the pointing out of the informer, the accused Kanwar Pal@Mama was apprehended at about 1.35 p.m.

from the bushes at about 100 yards away from platform no.12, New Delhi Railway Station. This witness further stated that he requested four to five passersby to join them upon which one public person namely Niyaz Ahmad joined him. PW 3 further informed the accused that he had a right to be searched either before a Gazetted Officer or a Magistrate to which the accused person refused and the same was marked as Ex.PW 1/B bearing signature at point 'A'. Thereafter, notice (Ex.PW 1/A) under Section 50 of the NDPS Act was served upon him. Thereafter, PW 3 effected search of the accused upon which a polythene packet was recovered from the right side pocket of the wearing pant of the accused. This packet contained a bigger paper packet and ten small packets which all were found to contain contraband i.e. smack weighing five gram. Out of the five grams smack recovered, one gram was taken as a sample which was kept in a piece of paper while the rest was kept in the paper of the larger packets along with ten papers. This witness stated that the sample packet was sealed with the seal of JSC which was kept in a cloth parcel; CFSL form was filled in on the spot which was sealed with the seal of JSC; case property was taken into possession vide memo Ex.PW 1/C; rukka (Ex.PW 3/A) was prepared by this witness and that CFSL form along with rukka, two parcels and copy of the seizure memo were handed over to PW 1 Ct.Amar Singh to be given to PW 5 Inspt.Rajender Singh. Thereafter, the accused was formally arrested (vide arrest memo Ex.PW 3/C) and his personal search was taken vide memo Ex.PW 3/C. PW 3 prepared inspection memo (Ex.PW 3/D); arrest memo (Ex.PW 3/C); special report (Ex.PW 3/E) sent to the ACP through PW 5 Inspt.Rajender Singh, SHO and sample was sent to CFSL

thereafter.

11. PW 1 Ct.Amar Singh in his statement stated that while posted at Police Station Railway Station, on 8th September, 1998, PW 3 ASI Joginder Singh, had received a secret information regarding possession of contraband with the accused on the basis of which the investigating officer joined him. This witness corroborated and testified the statement of PW 3 Joginder Singh with regard to joining the public witness i.e. Niyaz Ahmed; apprehension of the accused Kanwar Pal@Mama; service of notice under Section 50 of the NDPS Act; recovery of polythene from the right side pocket containing five gram of smack and sealing and sending of the sample smack to the CFSL. This witness stated that both the seal parcel and CFSL form bore his signature at point 'A'. This witness further stated that rukka along with sealed parcel and CFSL form, were handed over to him which he produced to PW 5 Inspt.Rajinder Singh, SHO who sealed the same with the seal of RS. This witness, after getting the case registered, returned to the spot. PW 1 further stated that the accused was formally arrested vide Ex.PW 1/D which bore his signature at point 'A'.

12. PW 2 HC Vinod Kumar who on 8th September, 1998 was posted at police station New Delhi Railway Station, corroborated and testified the statement of PW 3 ASI Joginder Singh as well as PW 1 Ct.Amar Singh with regard to apprehension of the accused Kanwar Pal@Mama from New Delhi Railway Station; serving of notice under Section 50 of the NDPS Act; recovery of five gram of smack from the possession of the accused Kanwar Pal@Mama as well as the further proceedings conducted at the spot. The two parcels and the CFSL form which were taken into possession vide memo Ex.PW 1/C, bore the signature of this witness at point 'B'.

13. PW 5 Inspt.Rajender Singh in his statement stated that while posted as SHO, Police Station New Delhi Railway Station, on 8th September, 1998 at about 12.35 p.m., he received information from PW 3 ASI Joginder Singh to the effect that a man aged about thirty years having wheatish complexion, sitting in front of bushes hundred yards away from platform no.12 on Nizamuddin side, would be selling smack to the pick-pocketers upon which he directed him to take legal action. This witness further stated that at about 3.45 p.m., PW 1 Ct.Amar Singh brought two sealed parcels sealed with the seal of JSC along with CFSL form and handed it over to him and that after satisfying himself, this witness put his own seal of RS on both the pulandas and CFSL form who in turn, deposited the same along with seizure memo in malkhana and recorded DD No.20-A copy whereof was marked as Ex.PW 5/A in his own handwriting.

14. PW 4 Dr.R.M. Tripathi in his statement stated that while posted as Sr. Scientific Officer, on 25th September, 1998, a parcel duly sealed with the seal of JSC & RS, was received in his office through PW 8 Ct.Ramsharan which was marked to him for chemical examination. This witness further stated that the parcel contained one matchbox containing light brown coloured powder in a polythene packet which, on examination, found the substance of Diacetylmorphine (heroin). The detailed report of PW 4 is Ex.PW 4/A which bore his signatures at point 'A'.

15. PW 6 HC Shashi Bhushan in his statement stated that on 8th September, 1998 while he was posted as Duty Officer at Police Station New Delhi Railway Station, he received a rukka from PW 1 Ct.Amar Singh which was sent by the investigating officer i.e. PW 3 ASI Joginder Singh on the basis of which he recorded in his

own handwriting, a formal FIR No.1039/98 under Sections 21/61/85 of the NDPS Act, which bore his signatures carbon copy whereof was marked as Ex.PW 6/A. This witness recorded DD No.19A in the register regarding recording of FIR.

16. PW 7 HC Ashok Kumar in his statement stated that on 8th September, 1998, while posted as MHC(M) at Police Station NDRS, he deposited in Malkhana two sealed parcels and CFSL form which were duly sealed with the seal of RS and JSC and that this witness made entry in Ex.PW 7/A. This witness further stated that on the same date, PW 3 ASI Joginder Singh deposited articles of personal search i.e. Rs.150/- cash regarding which he made entry at serial no.24222 (Ex.PW 7/B). PW 7 stated that on 25th September, 1998, forwarding letter along with sample parcel and CFSL form were sent to CFSL, Chandigarh by PW 8 Ct.Ramsaran (RC No.71/21) entry whereof was made in register no.19.

17. PW 8 Ct.Ramsharan Meena in his statement stated that on 25th September, 1998 while posted as Constable at Police Station NDLS, he took a sample parcel and CFSL form sealed with the seal of JSC and RS and deposited the same at CFSL Chandigarh. This witness handed over the receipt copy of RC to MHC (M).

18. Thus, as per the testimony of PW 3 ASI Joginder Singh, on the date of incident, he along with PW 1 Ct.Amar Singh, PW 2 HC Vinod & Ct.Balvinder Singh apprehended the accused Kanwar Pal@Mama with contraband i.e. smack weighing five grams. PW 1 Ct.Amar Singh & PW 2 HC Vinod corroborated the statement of PW 3 ASI Joginder Singh that notice (Ex.PW 1/A) under Section 50 of NDPS Act was prepared and served upon the accused Kanwar Pal@Mama. PW 3 Joginder Singh apprehended the accused Kanwar Pal@Mama and recovered the said smack from

him weighing about five grams. After preparing a separate sample pack, remaining smack was seized; rukka Ex.PW 3/A was prepared; case was registered; two parcels along with copy of seizure memo were handed over to PW 1 Ct.Amar Singh for the purpose of giving the same to PW 5 Inspt.Rajender Singh, SHO.

19. The testimonies of PW 3 ASI Joginder Singh; PW 1 Ct.Amar Singh & PW 2 HC Vinod 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. smack. 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 smack, its seizure, search of appellant Kanwar Pal@Mama, notice under Section 50 of NDPS Act were served upon the appellant and other proceedings were also conducted.

20. 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 Kanwar Pal@Mama with the contraband i.e. smack. They have also stated in the same voice that smack weighing five 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.

21. 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 1/A 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.

22. 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 Diacetylmorphine (heroin) or smack. The CFSL report duly proves the case of the prosecution that the recovered substance from the appellant was indeed contraband i.e. smack.

23. 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.

24. As a result, no error or illegality is found in the view taken by the Trial Court and the judgment of conviction dated 12th July, 2001 is upheld.

25. 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 was apprehended with small quantity of smack; he is facing trial since 1998 and that almost eighteen 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.

26. 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]

27. 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]

28. *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.

29. 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.

30. In the present case, the appellant has already undergone one year eleven months and fourteen days incarceration for possessing five grams of smack. The peculiar circumstances of the present

case are that the appellant was arrested on 8th September, 1998 and as per the sentence awarded to him, he would have completed ten years in the year 2008 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 the sentence already undergone.

31. With the above modification in the order on sentence, the present appeal is disposed of.

(P.S.TEJI)
JUDGE

MARCH 16, 2017
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