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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **CRL.A. 325/2012**

Judgment reserved on: 18th August, 2017
Judgment pronounced on: 21st August, 2017

SUNIL @ SONUAppellant
Through: Ms. Saahila Lamba, (Advocate) Amicus
Curiae

versus

STATE NCT of DELHI Respondent
Through: Ms. Aashaa Tiwari, APP for the State with
ASI Pawan Kumar, PS-Crime Branch.

CORAM:
HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

1. The present appeal has been instituted under Section 374 (2) of the Code of Criminal Procedure against the impugned judgment dated 23.05.2011 and order on sentence dated 24.05.2011 by which the appellant has been convicted for the offence punishable under Section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as 'NDPS'). The present appellant has been sentenced to undergo rigorous imprisonment for a period of 10 years with fine of Rs.1 Lakh, in default thereof further undergo rigorous imprisonment for a period of one year.
2. The case of the prosecution as observed by the Special Judge, NDPS is that:

“2.... on 03.09.2009, at about 3.15 PM, a secret informer came to Narcotics Cell, Shakarpur, Delhi and informed SI Satyawan that one person namely

Sunil, a resident of village, situated near Gohana, Haryana, who used to supply charas, would come today to supply charas in huge quantity in from of GTK Bus Depot, between 4.30 PM to 5.00 PM and if raid is conducted, he can be apprehended with contraband. On receipt of this information, SI Satyawar produced the secret informer before Ins. M.L. Sharma, who after satisfying himself, informed ACP Sh. S.R. Yadav and ACP gave instructions to proceed in accordance with law. Secret information was reduced into writing. On direction of senior officer, SI Satyawar constituted a raiding party comprising himself, HC Ramesh and Ct. Harender Singh. Raiding Team along with secret informer reached the spot. Public persons were asked to join the raiding party, but none agreed. Accused was apprehended. From his possession, four kilograms charas was recovered. Mandatory provisions of NDPS Act were complied with. Samples were taken. FSL form was filled in. Accused was arrested. After completion of the investigation, the charge sheet against the accused was filed in the Court. The copies were supplied.”

3. The prosecution in all examined 10 witnesses. Statement of the appellant was recorded under Section 313 of the Code of Criminal Procedure wherein the appellant denied all allegations and asserted that nothing was recovered from his possession and in fact the contraband was planted upon him. He further stated that he was innocent and he was lifted from the house of one Raju in Gopal Nagar, Najafgarh on 03.09.2009 at about 11.30 am. He further stated that he has been falsely implicated by Raju, after obtaining his signatures on blank papers. However, no witness was examined in his defence.

4. On appreciation of evidence and after considering the rival contentions of the parties, the learned Special Judge found that the recovery of 4 Kg. of Charas from the appellant was fully established and thus, held the appellant guilty for the offence punishable under Section 20 of the NDPS Act.
5. Ms. Saahila Lamba, Amicus Curiae contended that the prosecution had failed to join any public witnesses in the recovery of the alleged charas; that the appellant was apprehended in a public place but the prosecution did not make any sincere efforts to join any independent witnesses to the alleged recovery; that there are material discrepancies in the testimonies of PW2 and PW5 showing that the appellant was not arrested in the manner as described by these witnesses and there was no recovery from the appellant; that there is a considerable delay of 12 days by the prosecution in depositing the parcel with the FSL; that the prosecution failed to comply with the provisions of Section 50 and 55 Of the NDPS Act; that the prosecution has failed to prove its case beyond reasonable doubt.
6. Per Contra, Ms. Aashaa Tiwari, learned APP for the State contended that after compliance of the mandatory provisions of NDPS Act the formal search of the appellant was conducted; that during the search 4 Kg. of Charas was recovered from his possession which is more than the commercial quantity; that the sample sent to FSL shows the presence of Charas; that the conviction of the appellant is based on sound and cogent reasons.

7. I have heard learned counsel for both the parties and have also perused the material available on record.
8. On the direction of the ACP, SI Satyawar constituted a raiding party comprising of PW9 SI Satyawar himself, PW8 HC Ramesh Chand, PW10 HC Harender Singh. At this stage, it is relevant to examine their testimonies.
9. PW8 HC Ramesh Chand had testified in court as under:

“In the meanwhile, we noticed a person coming on foot from the side of Jahangir Puri Metro Station wearing yellow colour shirt and Matmela colour pant carrying a plastic polythene of sky blue colour in his right hand. Secret informer identified him as Sunil. He stopped in front of the gate of GTK bus Depot at a distance of five six meters from SI Satyawar. He stopped there for about three minutes and starting moving towards Mukarba Chowk. We all apprehended him. SI signalled the driver of the vehicle to bring the vehicle on the spot. The accused was informed about the secret information by the IO and he was further explained that his search is to be conducted for the recovery of contraband and if he wants, he could be searched in the presence of Gazatted Officer or Magistrate and the notice u/s 50 NDPS Act Ex.PW-8/A was served upon the accused which bears my signatures at point A. It was also explained to the accused that it was his legal right if he want, his search can be conducted before a Gazetted officer or Magistrate. The accused declined the offer and the reply of the accused was written by the IO which is Ex.PW8/B and bears my signatures at point A. Seven or Eight persons collected at the spot and they were requested by the IO to become a witness of the proceedings but none of them agreed to join and left after expressing their reasonable helplessness. Thereafter IO took the search of the

accused and IO took the sky colour polythene bag which accused was carry in his right hand. IO opened the polythene bag and it further contained one transparent polythene and the polythene was found wrap in green colour woollen jacket. IO removed the Jacket from the polythene and checked the polythene and it contained two rectangle coloured slabs. IO tested the slabs with field testing kit and two slabs appeared like charas. IO weight the charas along with the transparent polythene on electronic weighing scale and the weight came out to be 4 KG. IO separated one sample of 25 gms from each slab i.e. 50 gms of the two slabes and kept the same in one polythene and marked as A. IO again separated one sample of 50 gms i.e. taking 25 gms. Charas from each of the slabs and kept in the polythene and marked B. IO kept the remaining charas in the same manner and it was found the woollen jacket and then kept in the sky colour polythene and it was marked C.”

10. PW9 SI Satyawar testified as under:

“At about 4.35 PM, one person wearing yellow colour T Shirt and dirty pants was seen coming from the side of Jahangir Puri Metro Station, who was pointed out by the secret informer as Sunil. The informer left the spot after pointing out the accused. That person was carrying sky blue colour polythene in his right hand. The said person passed in front of the gate and stood at a distance of 5-6 meters towards Mukarba Chowk, from me. After waiting 3-4 minutes, he started moving towards Mukarba Chowk. At that time, I with help of the raiding party apprehended him. I introduced myself and the members of the raiding party to him. Accused disclosed his name as Sunil s/o. Hari Singh r/o. Village Puthi, today present in the court, correctly identified. Accused was told about the secret information. He was told that he had come today to

supply Charas. There is possibility to recovery of Charas from him for which your search is to be conducted. But before your search, it is your legal right that if you want, your search can be conducted in the presence of a gazetted officer or a Magistrate, who can be called on the spot. He was also told that if he wants, then he can take search of the police party and the government vehicle. I prepared the notice u/s 50 NDPS Act, already Ex. PW8/A, having my signature at point B. Carbon copy of the notice was delivered to the accused. The original notice bears signature of the accused at point C. Accused after understanding about his legal rights, refused to accept the same, as accused was less educated. I recorded his refusal on the original notice. Same is already Ex. PW8/B, it was read over and explained to the accused and after understanding the same and finding it correct, he put his signature on his refusal at point B and the refusal bears my signature at point C. during this, some persons gathered on the spot, out of those, I asked 5-6 persons to join the search if the accused and the polythene bag, which he was carrying in his right hand. One transparent polythene was found wrapped in a green colour jacket, inside the sky blue colour polythene. In the transparent polythene, two black colour slabs were found, having peculiar smell. On checking on the field testing kit, it was found to be Charas. I weighed both the slabs alongwith transparent polythene and the total weight found to be 4 Kg. 25 gms Charas was taken from each slab and put in the transparent polythene. Sample of 25 gms was taken from each slab and was put in a transparent polythene. The mouth of both these polythene were tied with rubber bands. These two samples of 50 gms each were wrapped in two separate pulandas and was given mark A and B. The remaining slab alongwith the transparent polythene was again wrapped in the same polythene, put in the

sky blue colour polythene and thereafter put a white cloth pulanda of the same and was given mark C.”

11. PW10 HC Harender Singh

“SI Satyawar checked the sky blue polythene, which he was carrying in his right hand. In the polythene, one green colour jacket was found and one transparent polythene was found under the jacket. In the transparent polythene, two black colour polythene were found. Those were tested on field testing kit and same was found to be charas. Both the slabs alongwith the transparent polythene were weighed and was found to be 4 kgs. From each slab, 25 gms Charas was separated and was put in a transparent polythene. Again 25 gms Charas was separated from each bag and was put in a transparent polythene. Both these samples were wrapped in white cloth and were marked as Mark A and B. The remaining Charas was put in the same sky blue colour polythene under the green colour jacket. It also wrapped in white cloth and was given mark C. SI Satyawar thereafter filled the form FSL. SI Satyawar affixed the seal of 7 APS NB Delhi on the three pulandas and the FSL Form. Seal after use was handed over to HC Ramesh. SI Satyawar seized the three parcels and FSL form vide seizure memo Ex. PW8/D, having my signatures at point D. Thereafter, SI Satyawar prepared the tehrir Ex. PW9/B. SI Satyawar handed over the original rukka, the three sealed parcels and FSL form and carbon copy of seizure memo to me with direction to hand over the rukka to the Duty Officer and case property along with documents to the SHO, PS Crime Branch. I left the spot at 7.40 PM in government vehicle no. DL1C-J-3481, driven by ASI Rajbir Singh. I reached PS Crime Branch at 9.00 PM and handed over the rukka to the Duty Officer. Thereafter, SHO called the MHCM HC Chand Ram alongwith Register No.19 in his room. SHO handed over the case

property, FSL Form and carbon copy of seizure memo to MHCM, who made the entries in Register No.19. SHO before handing over the case property to the MHCM also put FIR number on the pulandas and put his signatures on the pulandas. SHO also signed in Register No.19”.

12. In order to check what the slabs recovered from the appellant contained, sample of 25 gms of the alleged recovery was taken from each slab and put in the transparent polythene. Again 25 gms was separated from each bag and put in transparent polythene. Both the samples were wrapped in a white cloth and marked as A and B. The remaining quantity recovered was also wrapped in a white cloth and marked as Mark C. The FSL report is reproduced as under:

“DESCRIPTION OF ARTICLES CONTAINED IN THE PARCEL(S)/EXHIBIT(S)

Parcel-‘A’ : One (01) cloth parcel sealed with the seals of “AK” (01) & “7A/P.S./N.B.DELHI” (01). It was found to contain exhibit ‘A’, kept in a transparent polythene.

Exhibit-‘A’ :Dark greenish-brown coloured, brittle material stated to be Charas, weight approx.. 54.0 gm with polythene.

RESULTS OF EXAMINATION/OPINION

- (i) The sample(s) ‘A’ was examined by microscopic, chemical tests, chromatography and instrumental methods.
- (ii) One examination, the exhibit(s) ‘A’ gave weak odour of cannabis. Microscopy revealed the presence of characteristic cystolithic hair, glandular hair, resin glands of cannabis plant.

(iii) Solvent extraction showed resin with lots of straw material. Chemical tests and chromatographic analysis gave positive results for cannabinoids including tetrahydrocannabinol in exhibit 'A'.

(iv) On the basis of the above examination exhibit(s) 'A' was found contain 'Charas'"

13. Perusal of the statements shows that on 03.09.2009, PW9 was posted at Narcotics Cell, Shakarpur. At about 3.15 PM, one secret informer gave him information pertaining to the appellant who was going to supply Charas in huge quantity in front of GTK Bus Depot, between 4.30 PM to 5.00 PM. After satisfying himself, he produced the informer before inspector Sh. M.L. Sharma who thereon made inquiry from the informer and after satisfying himself, informed ACP S.R. Yadav. ACP gave instructions to proceed according to law. Thereafter, he reduced the secret information in the Rojnamcha vide DD no.19 and formed the raiding party comprising of PW8 HC Ramesh, PW9 SI Satyawan and PW10 HC Harender. Thereafter they left the office vide DD No.20 in vehicle No. DL1C-J-3481, driven by ASI Rajbir Singh. At about 4.35 PM, one person wearing yellow colour T Shirt and pants was seen coming from Jahangir Puri Metro Station, who was pointed out by the secret informer as, the appellant. He was carrying a sky blue colour polythene in his right hand. Upon opening the same, there was a green colour jacket in which there was a transparent polythene bag. In the transparent polythene two black colour slabs were found, having a peculiar smell. On checking with the field testing kit, it was found to be Charas. The

sample was sent to the FSL and upon testing the said samples gave positive results for cannabinoids including Tetrahydrocannabinol and thus the exhibit 'A' was found to contain 'Charas'.

14. The appellant approached this court challenging the order of conviction. The grounds of challenge by the counsel in his present appeal have been previewed and are dealt as under:

Non joining of Independent public witnesses

15. It was urged by the counsel for the appellant that the appellant was apprehended in a public place but the prosecution did not make any sincere efforts to join independent witnesses to the alleged recovery, making the case of the prosecution doubtful.
16. The record shows that the raiding party comprising of PW-8, PW-9 and PW-10 stated that the IO had requested seven or eight public persons who had collected at the spot to become a witness of the proceedings but none of them agreed to join and left after expressing their reasonable helplessness. In this context, it is necessary to examine whether in the absence of corroboration from independent witnesses, the evidence of only police officials should not have been given credence to.
17. In view of the judgment in *Ajmer Singh vs. State of Haryana* reported in **2010 (2) SCR 785**, it is settled position of law that the obligation to take public witnesses is not absolute. If after making efforts which the court considered in the circumstances of the case reasonable, the police officer is not able to get public witnesses to associate with the raid or arrest of the culprit, the arrest and the recovery made would not be necessarily vitiated. In view of the

above judgment, it is clear that the mere fact of non-joining of a public witness, would not ipso- facto make the evidence of the police witnesses unreliable or untrustworthy. Thus, this contention of the counsel does not hold good especially when the IO made genuine efforts to join independent witnesses.

Material discrepancies

18. The next plea raised by the counsel for the appellant is that there were material discrepancies in the testimonies of PW2 and PW5 pertaining to reaching the spot and the manner of arrest of the appellant.
19. It was submitted that as per PW2, SI Bhagwan Singh went to the spot alongwith ASI Rajbir Singh in Govt Vehicle DL 1CJ 3481. It was further stated by PW2 that he reached the spot at about 10.30 pm whereas as per PW5 (Inspector M.L Sharma), SI Satyawar constituted a raiding party including HC Ramesh and Ct. Harinder and proceeded to the spot in Government Vehicle No.DL 1 CJ 3481.
20. This argument cannot be accepted in view of the consistent testimonies of the raiding party, which goes on to show that PW9SI Satyawar formed the raiding party comprising of himself and HC Ramesh and Ct. Harender. He then left the office with the raiding party in the government vehicle no DL 1C-J-3481, driven by ASI Rajbir Singh. At about 4.35 PM, the appellant was seen coming from Jahangir Puri Metro Station, carrying a sky blue colour polythene in his right hand, which contained Charas. After the seizure was effected, Ct. Harender left the spot in the same

government vehicle No. DL 1C-J-3481 driven by ASI Rajbir Singh. SI Bhagwan Singh then arrived on the spot in that government vehicle itself. SI Bhagwan Singh arrested the accused vide arrest memo Ex. PW2/B bearing his signatures. Thus, it is amply clear that there is no discrepancy as to the version of the prosecution pertaining usage of the government vehicle, bearing no. DL 1C-J-3481 by the raiding party and SI Bhagwan Singh and ASI Rajbir Singh and the arrest of the appellant.

Manipulation and Tampering of seized material

21. The counsel for the appellant contended that there is a considerable delay of 12 days by the prosecution in depositing the parcel with the FSL and thus the seized material was infact tampered with.
22. The record shows that on 03.09.2009 PW9 SI Satyawar, filled the FSL form and affixed the seal of 7 APS NB Delhi on the three pulandas and the FSL form. All the three sealed pulandas along with FSL form and other documents were handed over to PW10 Harender Singh, who then handed it over to the SHO Akshay Kumar. SHO then affixed his seal of 'AK' on all three pulandas and FSL form. He also wrote the FIR number on all the pulandas, FSL form and carbon copy of seizure memo and, handed it over HC Chand Ram. HC Chand Ram made entries in this regard in the register no. 19 at serial no. 426 and kept all the case property in the malkhana. On 15.09.2009, PW4 Satpal collected the pulanda Mark A bearing the seals, 7 APS NB DELHI and AK, and FSL form along with other documents from the Malkhana. He then deposited

the above articles to the FSL on the same day. This fact is corroborated from the FSL report which states that one sealed parcel marked as 'A' was received on 15.09.2009 through Ct. Satpal which was found to be intact and tallied with the specimen seals. Mention may be made to the case of ***State of Punjab Vs. Lakhwinder Singh and another*** reported in (2010) 4 SCC 402 wherein the Apex Court has held:

“16....There was merely a delay of about seven days in sending the samples to the Forensic Examiner and it is not proved as to how the aforesaid delay of seven days has affected the said examination when it could not be proved that the seal of the sample was in any manner tampered with. The seal having been found intact at the time of the examination by the Chemical Examiner and the said fact having been recorded in his report, a mere observation by the High Court that the case property might have been tampered with, in our opinion is based on surmises and conjectures and cannot take the place of proof.

17. We may at this stage refer to a decision of this Court in Hardip Singh v. State of Punjab reported in: (2008) 8 SCC 557 in which there was a delay of about 40 days in sending the sample to laboratory after the same was seized. In the said decision, it was held that in view of cogent and reliable evidence that the opium was seized and sealed and that the samples were intact till they were handed over to the Chemical Examiner, the delay itself was held to be not fatal to the prosecution case. In our considered opinion, the ratio of the aforesaid decision squarely applies to the facts of the present case in this regard.”

23. In this backdrop, I do not find the delay of twelve days in sending the samples to the FSL as relevant when it is proved that the seals

were intact when the samples reached the office of the laboratory. Thus the contention of the appellant pertaining to the tampering of the seized material is fallacious.

Non Compliance of the statutory provisions

24. The next submission of the counsel for the appellant that the prosecution failed to comply with the provisions of Section 50 and 55 Of the NDPS Act is rejected as the raiding party categorically stated that the appellant was informed about the secret information by the IO and he was further explained that his search is to be conducted for the recovery of contraband and if he wants, he could be searched in the presence of a Gazetted Officer or Magistrate and the notice u/s 50 NDPS Act Ex.PW-8/A was served upon the appellant. It was also explained to the appellant that it was his legal right to have his search conducted before a Gazetted officer or Magistrate. However, the accused declined the offer. Also, during the personal search of the appellant, the carbon copy of notice U/s 50 of NDPS Act was recovered which further corroborates the story of the prosecution. As far as the seized articles and the delivery of the same is concerned, the officers kept the seized articles in safe custody and also affixed their seal bearing “AK” & “7A/P.S./N.B.DELHI” to the samples taken from the slabs of the recovered Charas.

Recovery

25. In the instant case, all the procedural safeguards provided under the statute have been strictly complied with. That apart, the consistent testimonies corroborated with the report of the FSL shows that

4kgs of charas was recovered from the appellant. Also, the quantity recovered from the appellant amounted to commercial quantity. Therefore, prosecution has discharged its burden of proving its case against the appellant beyond all reasonable doubt.

26. The impugned judgment of the Special Judge, NDPS for imposition of minimum punishment prescribed under Section 20 (b)(ii)(C) of 10 years rigorous imprisonment together with a fine of Rs. 1 lakh cannot be interfered with. I find no merit in the appeal and the same is liable to be dismissed.
27. Consequently, the appeal is hereby dismissed.
28. The appellant be informed through the Superintendent Jail. Trial Court record be sent back forthwith along with a copy of this judgment.

SANGITA DHINGRA SEHGAL, J.

AUGUST 21st, 2017

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