* IN THE HIGH COURT OF DELHI AT NEW DELHI

RESERVED ON : 5th DECEMBER, 2016
DECIDED ON : 3rd MARCH, 2017

\+ **CRL.A.432/2013**

SETE NEPALI ..... Appellant
Through : Ms.Sunita Arora, Advocate.

VERSUS

B.N.MEENA ..... Respondent
Through : Mr.P.C.Aggarwal, Advocate.

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

S.P.GARG, J.

1. Challenge in this appeal is a judgment dated 31.10.2012 of learned Addl. Sessions Judge in Sessions Case No.01/03/2010 by which the appellant – Sete Nepali @ Sarki was held guilty for committing offence punishable under Section 20(c) of Narcotic Drugs & Psychotropic Substances Act, 1985 (In short 'NDPS Act'). By an order dated 19.11.2012, he was sentenced to undergo RI for ten years with fine ₹1 lac.

2. Shorn of necessary details, the prosecution case was that on 25.11.2009 at about 12.45 p.m. the appellant was intercepted by the Custom Officers at the office of Himalyan Courier Company at House No.193, Shop No.17, New Camp, Majnu Ka Tila, Delhi-54 and was found in possession of 20.774 kgs (net weight) of Hashish illegally.

3. In the complaint case filed by complainant – B.N.Meena, Air Customs Officer, it was averred that on 22.11.2009 a consignment of 8.834

kgs of Hashish booked in the name of Rahul r/o F-26, Okhla Phase-I, New Delhi, was detected at Courier Terminal, IGI Airport, New Delhi. It was concealed under the cover of Tibetan religious books to be exported to France. PW-4 (Mohd.Iftakhar Alam), owner of Himalyan Cargo & Courier Company was summoned and he informed that one more shipment of similar type was likely to be received at his office at House No.193, Shop No.17, New Camp, Sakya House, Majnu Ka Tila, on 25.11.2009. A raiding party was constituted and two panch witnesses were associated. The raiding team reached near the office of Himalyan Cargo & Courier Services at around 09.00 / 09.30 a.m. to mount surveillance. At 12.45 p.m. the appellant came in a rickshaw and went inside the Courier Shop along with two black colour bags in his possession. Finally, on checking each bag, these were found containing 41 books wrapped in a yellow colour cloth. One of the religious books was taken out from the bag and upper and lower cover of the book was cut open which resulted in recovery of a strip wrapped in an aluminium foil. On removal of the aluminium foil, a black colour cake like material wrapped in the transparent polythene was recovered which on testing gave positive result for Hashish. Six samples of 25 gms each were taken out from the contraband and sealed. Necessary proceedings were conducted.

4. Further case of the prosecution is that pursuant to summons under Section 67 NDPS Act, the appellant tendered his statement voluntarily in NCB office; thereafter he was arrested. Compliance of Section 57 NDPS Act was made. Exhibits were sent to CRCL through Sanjeev and report (Ex.PW-9/A) was collected. Statements of the witnesses conversant with the facts were recorded. Upon completion of investigation, the appellant

was sent for trial for commission of offence punishable under Section 21(c) NDPS Act.

5. The prosecution examined eighteen witnesses in all to establish its case. In 313 Cr.P.C. statement, the appellant denied his involvement in the crime and pleaded false implication at PW-4 (Mohd.Iftakhar Alam)'s behest. The trial resulted in conviction as aforesaid. Being aggrieved and dissatisfied, the instant appeal has been preferred.

6. I have heard the learned counsel for the parties and have examined the file. Appellant's counsel urged that the Trial Court did not appreciate the evidence in its true and proper perspective and fell into grave error to base conviction on the statements of the official witnesses without independent corroboration. The local police was not informed about the recovery of the contraband. The real perpetrator of the crime was PW-4 (Mohd.Iftakhar Alam) and he was involved in trafficking of the contraband. Material discrepancies and contradictions emerging in the statements of the official witnesses were overlooked without any cogent reason. The appellant was not in conscious and intelligible possession of the contraband. Learned APP controverting the arguments urged that huge quantity was recovered from the appellant's possession and the statements of the official witnesses supported by independent panch witnesses cannot be discarded.

7. Material and crucial testimony to infer the appellant's guilt is that of PW-2 (Naveen Kumar) posted as Inspector at New Courier Terminal near IGI Airport, New Delhi on 22.11.2009. He testified that, that day, they had seized a shipment from New Courier Terminal reached through CNC Courier Services and it was found containing Hashish in the covers of some religious books. In the follow up of that case, they came to know that the

said shipment was sent by Himalyan Courier through CNC Courier. Anil Madan, Superintendent Custom, made inquiries from Mohd.Iftakhar Alam, owner of Himalyan Courier on 23.11.2009. He revealed that one more shipment of similar type was expected to be received on 25.11.2009. Accordingly, on the directions of the Superintendent Anil Madan, a raiding team was constituted and it reached Himalyan Courier Services at Majnu Ka Tila to mount surveillance. At about 12.45 p.m. they noticed the appellant coming on a rickshaw near the office of Himalyan Courier Services along with two bags loaded on the rickshaw. Finally, the appellant was apprehended and on checking the bags, they were found containing certain cloth pieces. Out of one bag, Hashish was found wrapped in a transparent polythene. Finally, on checking the bags Hashish was found in 41 books each wrapped and kept in two bags and its total quantity was approximately 21.68 kgs. The collective weight was 20.774 kgs. Necessary proceedings were conducted and panchnama (Ex.PW-2/A) was prepared.

8. He further deposed that on 27.11.2009, he prepared test memos in triplicate. PW-Surenderjeet authorized PW-Sanjeev Dua to carry the samples to CRCL. Compliance of Section 57 NDPS Act was made. On 28.11.2009, the appellant was medially examined at RML Hospital. PW-2 (Naveen Kumar) identified the appellant to be the individual who was apprehended at the spot and from whose possession the contraband was recovered. This witness was cross-examined at length. In the cross-examination, he admitted himself to be a member of the team who had prepared 'panchnama' in respect of recovery on 22.11.2009. He fairly admitted that no identification document of the appellant was affixed with the consignment seized on 22.11.2009. He elaborated that panch witnesses

were called by him from the courier terminal and they had joined them at about 08.00 or 08.30 a.m. He further admitted that no independent public witness was associated from the shops adjacent to Himalyan Courier Company and the local police was not intimated. He further admitted that statement of rickshaw pullar was not recorded. Panchnama (Ex.PW-2/A) was got typed. The substance recovered from the bags was in the shape of layers in wet condition. He denied the suggestion that no proceedings were conducted at the terminal / custom office or that the appellant was not apprehended at the spot. He further denied the suggestion that Mohd.Iftakhar Alam was involved in the consignment seized on 22.11.2009.

9. On scanning the entire testimony of the crucial witness, it reveals that despite searching cross-examination, nothing material could be elicited to discard his statement. The appellant did not put any suggestion as to from where else he was apprehended and implicated in the instant case. He did not elaborate as to when he had travelled from Nepal to India, and if so, for what specific purpose. He did not deny his acquaintance with PW-4 (Mohd.Iftakhar Alam). No ulterior motive was assigned to the witness for falsely implicating him in this case. In the absence of prior animosity or acquaintance, the appellant who was a native of Nepal was not imagined to be implicated falsely in this case. It is unbelievable that huge quantity of Hashish / Charas would be planted upon the appellant by the official witnesses.

10. PW-2 (Naveen Kumar)'s statement has been corroborated in its entirety by another member of the raiding team PW-3 (Anil Madan). He too implicated the appellant for recovery of the contraband from his possession on 25.11.2009. Similar is the testimony of PW-11 (Surender Jeet Singh).

The Court cannot disbelieve the testimony of official witnesses solely on the presumption that a witness from the department should be viewed with distrust. There is no acceptable reason to discard their testimony which is otherwise reliable and trustworthy.

11. The prosecution has examined PW-4 (Mohd.Iftakhar Alam) owner of Himalyan Cargo & Courier Company at House No.192, 193 New Camp, Majnu Ka Tila. He deposed that on 23.11.2009 at about 11.30 a.m. he was enquired about a consignment sent through his courier agency intercepted on 22.11.2009. He informed the custom officer about receipt of a telephone call from the individual who had sent the consignment intercepted on 22.11.2009 and further apprised him that he would again come on 25.11.2009 along with one shipment of the same type of religious books. He requested the custom officer to mount surveillance at his office on 25.11.2009. This information was given by him in writing (Ex.PW-3/A). He further deposed that on 25.11.2009 at around 12.45 p.m., the appellant brought two black colour bags on a rickshaw; the bags were heavy. On weighing the bags together on the weighing scale, it were found to be 84 Kgs. in weight. Necessary proceedings are conducted and he put his signatures thereon. The witness identified the case property in the Court. In the cross-examination, he disclosed that he had booked the shipment dated 20.11.2009 under his I.D. proof. He further disclosed that the accused had arrived at his office on a rickshaw. The bags were weighed along with its contents on the electronic weighing machine. The writings work was done by the custom officer in the presence of custom officials from Haj Terminal near IGI Airport. He clarified that on 25.11.2009 the appellant had brought two bags for booking whereas on 20.11.2009 some other individuals had

booked the consignment. He denied the suggestion that the appellant was falsely implicated in this case.

12. No ulterior motive was assigned to this independent public witness to falsely implicate the appellant with whom he had no prior animosity. Nothing was suggested to him if he was the perpetrator of the crime and if so how. No specific suggestion was put that the appellant had not visited his office that day or he was not apprehended in his presence.

13. Another crucial witness PW-17 (Manoj Duggal) working with Courier and Cargo Alliance at Patel Nagar had gone to Air Cargo compound in IGI airport in connection with official work. On 25.11.2009 at about 07.30 a.m. he and Vinod Kumar (PW-8) were called by Mr.Naveen Kumar, Custom Officer to join the investigation. PW-17 deposed that at around 08.00 or 08.30 a.m. on 25.11.2009, they all left the new Courier Terminal Custom Office to reach Majnu Ka Tila at around 09.00 or 09.30 a.m. At around 12.00 or 12.45 p.m., they noticed the appellant going to the office of Himalyan Courier Company after getting down from a rickshaw; he had conversation with Mr.Alam. Subsequently, the appellant was apprehended and the bags in his possession were checked; Hashish was recovered from therein. Necessary proceedings including panchnama (Ex.PW-2/A) conducted in his presence were signed by him. In the cross-examination, he disclosed that his employer Nitish Chadha had instructed him to reach Cargo Office at IGI Airport in the morning on 25.11.2009. Mr.Navin Kumar, Custom Officer was known to him for the last 5 - 6 months prior to the occurrence. He did not depose as a witness in any other case. He denied the suggestion that he and Vinod Kumar never visited Majnu Ka Tila in

connection with the present case or that the accused was falsely implicated in this case.

14. On evaluating the testimony of this independent witness associated as panch witness, it appears that no material infirmity has emerged in his cross-examination to discard his version. This independent witness had no familiarity with the accused to rope him in a false case. He also talked about the presence of another panch witness Vinod Kumar who though appeared as PW-8 and recorded part examination-in-chief was never produced thereafter to complete his testimony. It is relevant to note that since PW-8 (Vinod Kumar) was not offered for cross-examination, the learned Trial Court did not consider examination-in-chief recorded by him.

15. PW-5 (Sanjeev) was working with Nepal Manjushree Yatayat Pvt. Ltd., 125, Majnu Ka Tila. Pursuant to the summons issued under Sectioin 67 NDPS Act (Ex.PW-3/K), he appeared before the Investigating Agency and identified the appellant as the individual who was a driver attached with ABC Tour and Travels. He also deposed that photocopy of the passenger list dated 23.11.2009 mark PW-5/PX pertaining to bus No.7687 was given to the custom authorities. The aforesaid bus had arrived at Delhi from Nepal and the passenger list did not mention the appellant's name. In the cross-examination, he clarified that the appellant was known to him as 'Ramey'.

16. PW-6 (Rakesh Prashad Meena) has supplemented the statements of other material prosecution witnesses. On 25.11.2009, he was posted at DHL Cargo IGI Airport as an agent and had recorded the statement of one Ganesh Manshreshth under Section 67 NDPS Act at the instance of custom officer as he did not know how to write Hindi. Similarly, PW-10

(Gopal Shakti) posted as Superintendent, Customs (P) at New Courier Terminal, near IGI Airport, had recorded the statement of the appellant under Section 67 NDPS Act when he expressed his inability to write it in Hindi. He deposed that he had taken the assistance of Rama Shankar, a public person, who wrote the statement of the appellant in Hindi. PW-16 (Vijay Kumar) working with Frontline Facility and Security Company as Field Officer proved the statement (Ex.PW-3/C) recorded by him in his hand writing as the appellant did not know how to write Hindi.

17. On scrutinizing the statements of crucial and material witnesses referred above, it stands established that the appellant was found in possession of 20.774 kgs of Hashish at the relevant time and date. Statements of all the prosecution witnesses are consistent and despite searching cross-examination, no infirmities have been elicited. The appellant, a native of Nepal did not explain as to how and under what circumstances, he visited India. He did not furnish plausible explanation to the incriminating circumstances proved against him in 313 Cr.P.C. statement. The defence taken by the appellant is conflicting and contradictory. Suggestions were put to PW-2 (Naveen Kumar) and PW-3 (Anil Madan) that the appellant was not arrested at the spot and no recovery was effected from his possession. However, in the cross-examination of PW-4 (Mohd.Iftakhar Alam) and PW-17 (Manoj Duggal), it was suggested that on phone the appellant was called by PW-4 (Mohd.Iftakhar Alam) at his office where two bags were already lying. Subsequently, he was implicated in this case. The appellant has failed to reconcile the two contradictory statements regarding his presence in India and at the spot at the relevant time. Otherwise the appellant had no justification to visit PW-4

(Mohd.Iftakhar Alam) on his asking on phone. It shows that there was familiarity between the two before the incident.

18. Besides the seizure of the contraband substances from the two bags recovered from the possession of the accused, there is also a statement u/s 67 of NDPS Act (Ex.PW3/C) which was tendered by the appellant in response to the summons (Ex.PW-3/B) served upon him. The statement was recorded by Anil Madan (PW-3). The statement was written with the help of public person PW-16 (Vijay Kumar) as the appellant had expressed his inability to write his statement. He did not specifically allege that he was forced to give the confessional statement. The Trial Court has dealt with this aspect minutely and found that the confessional statement was made voluntarily by the accused. In the absence of prior animosity or ill-will, Customs Officials were not expected to fabricate his confessional statement. Statement under Section 67 NDPS Act is admissible in evidence and can be relied upon by a Court against an accused provided it is found to be made by the accused voluntarily. Moreover, a perusal of the statement goes to show that certain facts were disclosed by the accused which could only be within his special knowledge. In this statement he disclosed the source from where he got two bags and that the same were given to him by a Lama of Kathmandu for sending through courier and for that he was paid ₹ 5,000/-. He could not tell the actual identity and address of the sender. He was having the slip where the books were to be sent. The statement also contained the details of his family. The prosecuting agency could not be expected to be aware of the particulars of the family of the accused. He further disclosed that he had brought this material to Delhi three times earlier also. Earlier when he brought this material he worked as a driver but

that time he had brought it in the capacity of a passenger. All this shows that the statement was made by the appellant voluntarily. It is well settled that confessional statement of the accused, if found voluntary and truthful and has substance, can be used as incriminating material. If the confessional statement of the accused stands proved, there is no need of corroboration.

19. The prosecution was able to prove that the appellant's possession of the contraband was conscious and he had complete control over it. Once possession is established, the person who claims that it was not a conscious possession has to prove it. It has not been done by the appellant. The contraband was concealed in covers of religious books to avoid its detection. Statutory presumption under Sections 54 and 35 of the Act operates against him and it has not been rebutted.

20. The impugned judgment based upon fair appraisal of the evidence deserves no intervention and is affirmed.

21. Sentence Order is modified to the extent that default sentence for non-payment of fine ₹1 lac will be SI for one month instead of SI for six months. Other terms and conditions of the Sentence Order are left undisturbed.

22. The appeal stands disposed of in the above terms.

23. Trial Court record be sent back forthwith with the copy of the order. Intimation be sent to the Superintendent Jail.

(S.P.GARG)
JUDGE

MARCH 03, 2017 / *tr*