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

+ **CRL.A. 570/2012**

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Judgment reserved on 11th July, 2017

Judgment pronounced on 11th August, 2017

RATNESH

..... Appellant

Through : Ms. Sunita Arora, Advocate.
Appellant produced from JC

versus

STATE

..... Respondent

Through : Ms. Aashaa Tiwari, APP for the
State with Inspector Rajesh
Kumar Bush and ASI Surender
Kumar.

CORAM:

HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

SANGITA DHINGRA SEHGAL, J.

1. The present appeal has been instituted under Section 374(2) of the Code of Criminal Procedure against the impugned judgment dated 08.08.2011 and order on sentence dated 10.08.2011 by which the appellant has been convicted for the offence under Section 20(b)(C) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as 'NDPS Act'). The appellant has been sentenced to undergo rigorous imprisonment for a period of 10 years with fine of Rs.1 lakh, in default thereof to further undergo imprisonment for six

months.

2. Before the rival submissions of the parties are considered, it is appropriate to mention the facts of the prosecution, as has been noticed by the learned Trial Court:

“ On 12/09/2009 SI Anuj Nautiyal was patrolling in the area and who reached at Central bridge , NDRS at 12.05 pm where he met HC Davis, HC Jagdish and Ct. Gyanender also patrolling in the area. They all started patrolling together and reached at platform no. 1 toward nizzamuddin side where they saw accused coming with 2 trolly bags. On seeing the police party, accused is alleged to have turned back and walked at fast pace. Thus on suspicion he was apprehended by SI Anuj Nautiyal with accompanying staff at about 12.30 pm.

It is alleged that 2 trolly bags in possession of the accused were found containing Ganja and information to this effect was given by SI Anuj Nautiyal to the SHO. Total Ganja in the 2 bags was founded to be 22 kg. Separate sample was drawn from Ganja in each bag, they were marked and sealed in separate pullandas. Remaining ganja was kept as it is in the respective trolly bags and were also sealed in the pullandas and pullandas were formally seized.

FIR was registered on the basis of rukka prepared by SI Anuj Nautiyal and investigation was assigned to ASI Ashok Kumar who reached at the spot and completed the proceedings including formal arrest of the accused. Samples were sent to FSL for opinion during investigation and after completion of investigation charge-sheet was filed in the court.”

3. The prosecution has examined 11 witnesses, in all. The statement of the appellant was recorded under Section 313 of the Code of Criminal Procedure wherein the appellant stated that on 12.09.2009 he was returning from Bhubaneshwar by Rajdhani train and did not

carry any trolly bags with him. He denied recovery of any Ganja from his possession. The appellant claimed he was innocent and had been falsely implicated in the present case.

4. Ms. Sunita Arora, learned counsel for the appellant has contended that the order of the Special Judge, NDPS, is bad in law as the Special Judge failed to appreciate the substantial difference in the weight of the samples sent by the prosecution to FSL and the weight mentioned in the FSL report; that as per the definition of *ganja* the seeds and leaves of the same are to be excluded and thus from the discrepancies in the weight of samples as also the exclusion of seeds, it is clear that the prosecution has not established its case beyond reasonable doubt; that there are contradictions in the statement of prosecution witnesses PW2, PW7, PW9, PW10 pertaining to search, seizure and arrest of the appellant; that no DD entry was made regarding the weight, scale and sealing material; that no independent witness had joined the proceedings even though the spot was over crowded during the day; that there was a delay of 12 days in sending the sample to FSL; that the prosecution has not conducted any investigation to ascertain the origin of contraband; that as the prosecution has not proved its case beyond reasonable doubt, the appellant deserves to be acquitted.

5. To substantiate her arguments, learned counsel for the appellant relied upon the judgments titled **Suresh Kumar Vs. State (Govt. of NCT of Delhi)** (Crl Appeal No. 767/2011) decided by this Court on 25.02.2016, **Upender Singh Vs State** (Crl Appeal No. 267 of 2012) decided by this Court on 29.07.2015 to show that the discrepancies in

the contraband recovered (exclusion of seeds) give rise to the benefit of doubt to the accused whereby the substantive sentence of the appellant was modified, **Ram Prakash Vs State** (Crl Appeal No. 1363 of 2014) decided by this Court on 10.12.2014, **Jarnail Singh Vs State of Punjab: 2008 (4) RCR (Criminal) 294, Rajesh Kumar @ Sanjay Vs State of NCT Delhi (2014) 0 Supreme Court (Del) 39186** to show that the case of the prosecution could not be said to have been proved without reasonable doubt and the appellant was acquitted of the offence under Section 20 of the NDPS Act.

6. Contrarily, Ms. Aashaa Tiwari, learned APP for the State submitted that *Ganja* was found in possession of the appellant which is prohibited under the NDPS Act; that all the four police witnesses have deposed consistently pertaining to the recovery of two trolly bags containing *Ganja*; that the testimony of police witnesses cannot be discarded merely on the ground that no independent witnesses corroborated the same.

7. I have heard learned counsel for both the parties and have also perused the material available on record.

8. The learned Special Judge, NDPS convicted the appellant under Section 20(b)(C) of NDPS Act for being in possession of 22 kgs of *Ganja* which is the commercial quantity. Section 20(b)(C) of the NDPS Act reads as under:

“(b) produces, manufactures, possesses, sells, purchases, transports, imports inter-State, exports inter-State or uses cannabis, shall be punishable— (i) where such contravention relates to clause (a) with rigorous imprisonment for a term which may extend to

ten years and shall also be liable to fine which may extend to one lakh rupees; and

(ii) where such contravention relates to sub-clause (b),—

(A) and involves small quantity, with rigorous imprisonment for a term which may extend to six months, or with fine, which may extend to ten thousand rupees, or with both;

(B) and involves quantity lesser than commercial quantity but greater than small quantity, with rigorous imprisonment for a term which may extend to ten years and with fine which may extend to one lakh rupees;

(C) and involves commercial quantity, with rigorous imprisonment for a term which shall not be less than ten years but which may extend to twenty years and shall also be liable to fine which shall not be less than one lakh rupees but which may extend to two lakh rupees: Provided that the court may, for reasons to be recorded in the judgment, impose a fine exceeding two lakh rupees.”

Testimonies of Prosecution witnesses

9. At this stage, it is relevant to examine the statements of PW7 HC Jagdish Prashad, PW8 ASI Ashok Kumar, PW9 Ct. Gyanender Kumar, PW10 SI Anuj Nautiyal. PW7 Jagdish Prashad testified as under:

“On 12.09.2009 I was posted at PS NDRS. On that day I along with HC Davis and Ct. Gyanender was on patrolling duty in that area. At about 12.05pm we were present Central Foot-over bridge of New Delhi Railway Station. Meanwhile SI Anuj Nautiyal came there and joined us in the patrolling. Thereafter we went on platform no.1 towards Nizamuddin side. We saw a person coming with two trolly bags from Nizamuddin side. On seeing the police party the said person turned and started retreating. On suspicion SI

Anuj Nautiyal stopped him. The said person is present in the Court today (Witness has correctly identified the accused persons Ratnesh). Accused was asked about his unusual behavior. He remained silent. Both the trolley bags were opened and searched. Both the trolley bags contained Ganja wrapped in Panni. SI Anuj Nautiyal informed SHO on the wireless. SHO expressed his inability to reach at the spot and directed to take further action under NDPS Act.

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SI Anuj sent Ct. Gyanender to bring the scale and the weight Ct. Gyanender brought the same. The contents of both the trolley bags i.e. the Ganja was taken out and weighed with the help of weight and scale brought by Ct. Gyanender. The weight of Ganja recovered from one trolley bag was 12 kg and the weight of Ganja recovered from second trolley bag was 10 kg. One kg of Ganja was taken out as sample from each trolley bag. These samples were kept in two separate white polythene bags and converted into pulandas. Seal of 'AN' was applied on both these pulandas. The remaining Ganjas were kept in a respective trolley bags and made into separate pulandas. Both the trolley bags pulandas were also sealed with the seal of 'AN'. The sample pulanda was given marks S-1 and S-2. The remaining Ganja in trolley bag pulanda were given serial no.A-1 (remnant 11 kg Ganja) and A-2 (remnant 9 kg Ganja). Form FSL was filled at the spot. Seal of 'AN' was applied on it."

10. PW8 ASI Ashok Kumar testified that:

"At this stage MHC(M) has produced a sealed pulanda A-1 bearing seals of the court (seals intact). The pulanda is opened by breaking the seals which contains a grayish black color trolley bag bearing tag of "BHARAT BAG HOUSE. The trolley bag opened by opening the zip. It contains brownish dry vegetative type contents (dried stems, leaves, flowering parts). Witness identified that the contents was ganja which was recovered from the p[ossession from the accused.

The ganja along with the trolley bag pulanada A1 is Ex. P-1 (already exhibited).

At this stage MHC(M) has produced a sealed pulanda A-2 bearing seals of Court(seal intact). The pulanda is opened by breaking the seal which contains a a blue black color trolley bag with words "LOOKS" embroided on it bearing tag of "MODI BAG" the trolley bag opened by opening the zip. It contains brownish, dry vegetative contents (dried stems, small twigs, leaves flowering parts) witness identified the contents of the trolley bag as ganja which was recovered from thew possession of the accused. The ganja along with this trolley bag pulanda A2 is Ex. P-3 (already exhibited)..."

11. PW8 in his cross examination stated :

" ...It is correct that there are offices of the railway at the platform. It is correct that none official from any of the office was asked to join the investigation.

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The weighing scale was made of iron. The contents of the trolley bag BHARAT was weighed two times by using weight of 5 kg and once by using the weight of 2 kg. The Ganja was first taken out from the bag and then it was weighed and thereafter the sample was taken out. In the same manner the Ganja recovered from other bag was first taken out and then weighed by using 5 kg weight twice and then sample was taken out from this Ganja.

I do not remember the total number of AN's seal put on the parcels. No addition or alteration was done by SI Anuj Nautiyal after preparing the seizure memo. ASI Ashok Kumar came with me at the spot. I do not remember at what time SI Anuj Nautiyal left the spo. The statement of SI Anuj Nautiyal was got recorded by ASI Ashok Kumar at the spot. SI Anuj Nautiyal asked few public persons but non accepted. No notice was

served to those public persons. ASI Ashok Kumar did not ask any person to join the investigation...”

12. PW9 Ct. Gyanender Kumar deposed that:

“ On 12.09.2009 I was posted at PS NDRS as Constable. On that day I was on patrolling duty with HC Davis and HC Jagdish and at about 12.05 pm we were present at Central Footover bridge, NDRS. At that time SI Anuj Nautiyal met us and joined the patrolling. When we were going on platform no.1 towards Nizamuddin side we saw a person coming with two trolly bags. After seeing the police party he started retreating. Upon suspicion he was apprehended. That person is today present in the court. (Witness has correctly identified the accused). After making enquiry both the bags were checked by opening them. Both the bags were containing the Ganja. SI Anuj Nautiyal conveyed the information on wireless to SHO. After receiving the directions Si Anuj Nautiyal started the proceedings. I went to the police station NDRS and brought weight and scale. The scale was having two panes and the weights were of denomination 5kg, 2kg and 1kg. after about 15-20 minutes I came back at the spot.

On the one bag BHARAT BAG was written. The Ganja recovered from this bag was weighed. The weight was 12kg. a sample of 1 kg was taken out and was kept in the white polythene. It was converted into a clean cloth parcel and was marked S-1. The remaining Ganja was again kept in same trolly bag and was also converted into a cloth parcel and was mark A-1.

The other trolly bag was of blue and black colour on which LOOKS BAG was written. Upon weighing the total weight of Ganja was 10kg out of which 1kg was taken as sample. The sample Ganja was kept in white polythene and was converted into a parcel and was given mark S-2. The remaining Ganja was again kept in same trolly bag and was converted into a parcel and was given marks A-2. Form FSL was filled. Seal of ‘AN’ was applied on each cloth parcel and form FSL.

Seal was given to HC Davis. All the sealed parcels and form FSL were seized vide memo Ex. PW-2/B (already exhibited) bearing my signature at point Z. SI Anuj Nautiyal prepared rukka.....”

13. PW10 SI Anuj Nautiyal in his examination-in-Chief deposed as under:

“On 12.09.2009, I was posted at P.S. NDRS at Sub Ins. On that day at about 12.05pm, I came to Central foot over bridge during my patrolling vide DD No.14-A Mark A. At Central foot over bridge HC Davis and HC Jagdish met me along with Cons. Gyanender. Thereafter, we all started patrolling. When we were going on platform no.1 towards Nizamuddin side we saw a person coming with two trolly bags. After seeing the police party he started retreating. Upon suspicion he was apprehended. That person is today present in the Court. (Witness has correctly identified the accused). After making enquiry both the bags were checked by opening them. Both the bags were containing the Ganja. I after confirming the substance to be ganja conveyed the information on wireless to SHO.

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On the one bag BHARAT BAG was written. The Ganja recovered from this bag was weighed. The weight was 12 kg. A sample of 1 kg was taken out and was kept in the white polythene. It was conveyed into a cloth parcel and was marked S-1. The remaining Ganja was again kept in same trolly bag and was also converted into a cloth parcel and was given mark A-1.

The other trolly bag was of blue and black colour on which LOOKS BAG was written. Upon weighing the total weight of Ganja was 10 kg out of which 1 kg was taken as sample. The sample Ganja was kept in white polythene and was converted into a parcel and was given mark S-2. The remaining Ganja was again kept in same trolly bag and was converted into a parcel and

was given mark A-2. Form FSL was filled. Seal of 'AN' was applied on each cloth parcel and form FSL. Seal was given to HC Davis....”

FSL Report

14. Two parcels in connection with FIR No. 292/09 dated 12.09.09 under Section 20/61/85 of the NDPS Act were received in the office on 22.09.2009 through HC Prem Raj No. 386/Crime. At this juncture, it is pertinent to reproduce the FSL report Ex PX-1, which reads as under:

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

Parcels-‘S1’ & ‘S2’: Two (02) cloth parcels, sealed with the seals of ‘CRM’(04,03) & ‘A.N’(05, 07) respectively. These were found to contain exhibits ‘S1’ & ‘S2’ respectively, each kept in a transparent polythene separately.

Exhibits-‘S1’ & ‘S2’: Greenish-brown coloured, vegetative material stated to be ‘Ganja’, weight (approx.) 975.0 g & 925.0 g with polythene respectively.”

RESULTS OF EXAMINATION

(i) The sample(s) ‘S1’& ‘S2’ were examined by chemical tests and chromatography methods.

(ii)On chemical tests and chromatographic analysis gave positive results for cannabinoids including Tetrahydrocannabinol in exhibits ‘S1’& ‘S2’

(iii)Biological examination report in original is also enclosed.”

15. On careful analysis of the unswerving testimonies and the FSL report, it is abundantly clear that on 12.09.2009 the appellant came with two trolly bags at Platform no.1 towards Nizamuddin side. After

seeing the police he started retreating and thus, upon suspicion, he was apprehended by the police. After making enquiry, both the bags were checked and Ganja was found in the same. The *Ganja* recovered from the bags was weighed; one bag contained 12 kg *Ganja*, out of which a sample of 1 kg was taken out and was kept in the white polythene. The other bag contained 10 kg *Ganja*, out of which 1 kg was taken as sample to be sent for FSL. At about 3.15 pm, the rukka was given to PW8 who went to the Police Station and handed over the rukka to the Duty Officer and produced all the sealed parcels, FSL form and copy of seizure memo to the SHO C.R Meena. As per the FSL report, the sample gave positive opinion and thus after the completion of investigation, chargesheet was filed.

16. The argument of the counsel for the appellant that there was an unusual delay of 12 days in sending the samples to CFSL would not by itself be a ground to believe that the samples were tampered with during its storage in the *malkhana* or while the samples were in custody of the person who took the samples to CFSL from the *malkhana*. PW11 HC Davis stated that on 12.09.2009, 4 sealed *pullandas* alongwith FSL form and carbon copy of seizure memo were deposited by Inspector C.R. Meena, SHO PS New Delhi Railway Station. PW-6 Inspector C.R Meena testified that PW9 Ct. Gyanender Kumar came to his office and handed over all sealed parcels bearing the seals of 'ÁN' alongwith FSL form and copy of seizure memo. He stated that he had affixed seal of 'ÇRM' on each parcel and form FSL and mentioned the FIR number on them. He stated that he handed over all the sealed parcels along with connected documents to MHC (M)

who made an entry in Register No.19 in this regard which was signed by him and he lodged no. 20-A. All the *pulandas* were sealed with the seals of 'AN' & "CRM" and same impressions were there on FSL form. PW2 had handed over to PW3 two sealed *pullandas* bearing seals of 'AN' and 'CRM' for depositing at FSL which were deposited by PW3 at FSL against acknowledgment which he handed over to PW2. The above statements are corroborated by the FSL result which states two sealed *pullandas* marked as S-1 and S-2 were received at FSL, Rohini on 22.09.09 through PW3 with the seals intact and tallied with specimen seals.

17. Moreover, PW7, PW8 and PW10 identified the contents of S-1 which contained a white polythene bag containing brownish, dry vegetative type contents (dried stems, small twigs, leaves, flowering parts) as the sample of ganja which was taken from the trolley bag containing 12 kg of *ganja*. They also identified the contents of S-2 as the sample of *ganja* which was taken from the trolley bag containing 10 kg of *ganja*.

18. The contention of the learned counsel for the appellant that no independent witness had joined the proceedings even though the spot was over crowded during the day cannot be accepted. In the case of **Ram Murthi vs. State (NCT of Delhi)** in **Crl. Appeal No. 382/2007** decided On: 11.08.2009 it was held:

"12....I may observe here that merely because the case of recovery of contraband in this case is based upon the sole testimony of the police witnesses it does not make the testimony inadmissible in evidence since this is a case of chance recovery and therefore putting to accused about the source and its distribution is not

material while seizing the Contrabands. Reference in this regard can be made to a judgment delivered by this Court in Criminal Appeal No. 394/2007, Ram Swaroop v. State (GNCT) of Delhi decided on 04.05.2009. Reference can also be made to a judgment delivered by Apex Court in Abdul Majid Abdul Hak Ansari v. State of Gujrat 2003 (10) SCC 198.”

19. In view of the above law and keeping in mind that the present case involves chance recovery, the prosecution relied upon the testimonies of police witnesses. The perusal of the testimonies of the police witnesses are convincing and credible and thus cannot be inadmissible in evidence. Learned counsel for the appellant also submitted that the prosecution has not conducted any investigation to ascertain the origin of contraband, however this submission has no force as Section 20(b) of the NDPS Act indicates that mere possession of the contraband is prohibited under the NDPS Act.

20. As far as the next contention made by the learned counsel for the appellant that there is a substantial difference in the weight of the samples sent by the prosecution to FSL and the weight mentioned in the FSL report; that the contraband recovered from the appellant does not fulfill the criteria of the Section 20(b)(ii)(C) of the NDPS Act is concerned, it is appropriate to comprehend the term *ganja* as defined under Section 2 (iii)(b) of the NDPS Act which is as follows:

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ganja, that is, the flowering or fruiting tops of the cannabis plant (excluding the seeds and leaves when not accompanied by the tops), by whatever name they may be known or designated;...”

21. As per the report of FSL Ex PX-2, it shows that in Exhibit 'S1' approximately 800 gms with polythene of dried greenish brownish flowery vegetative material along with seeds described as *Ganja* was found and in Exhibit 'S2' approximately 750 gms with polythene of dried greenish brownish flowery vegetative material along with seeds described as *ganja* was found.

22. It is the case of the prosecution that when the *ganja* was recovered from the bags, the same were weighed. One bag contained 12 kg *ganja*, out of which a sample of 1 kg was taken out and was kept in the white polythene. The other bag contained 10 kg *ganja*, out of which 1 kg was taken as sample to be sent for FSL. However, as per the FSL report, Exhibit 'S1' contained approximately 800 gms (with polythene) of dried greenish brownish flowery vegetative material along with seeds and Exhibit 'S2' contained approximately 750 gms (with polythene) of dried greenish brownish flowery vegetative material along with seeds. It is relevant to mention here that the definition of *Ganja* as defined in the Act explicitly shows that *Ganja* would be the flowering or fruiting tops of the cannabis plant which excludes seeds and leaves when not accompanied by the tops. The report of FSL clearly states that what has been received in the FSL for examination includes dried greenish brownish flowery vegetative material along with seeds. Thus, as seeds do not come within the ambit of the definition of 'Ganja' the same have to be excluded.

23. From the perusal of the statements of witnesses pertaining mainly to the quantity of *ganja* recovered and also the FSL report, it is

clear that there was a substantial discrepancy in each of the samples which had been received by FSL. The weight of the contraband recovered was not precise. At this juncture, it is relevant to state that if the discrepancy in what is alleged to have been recovered from the appellant and what was ultimately found if the quantity is less than 20 kgs, the appellant would fall within the mid-bracket and would be convicted under Section 20(b) (ii) (B) of NDPS Act.

24. The evidence adduced in the present case shows that the contraband also included seeds which are, in fact, excluded from the definition of *ganja* and thus the benefit of the same ought to have been given to the appellant. At the best, the appellant is convicted for being in possession of mid-quantity of *ganja* which would entail his conviction under Section 20(b) (ii) (B) of the NDPS Act for which the punishment prescribed is lesser.

25. As per the nominal roll, the appellant has undergone sentence of about seven years and nine months. In view of the same, the appellant's conviction is modified to Section 20(b)(ii)(B) of NDPS Act in which there is no minimum sentence. Therefore, the substantive sentence of the appellant is modified to seven years and six months and fine of Rs.50,000/- in default thereof, to undergo imprisonment of three months.

26. The appeal stands disposed of accordingly with the aforesaid modification.

27. The appellant be informed of the order through Superintendent Jail.

28. Trial Court record be sent back forthwith along with a copy of this judgment.

SANGITA DHINGRA SEHGAL, J.

AUGUST 11, 2017

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