

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

Date of decision: June 08, 2017

+ CRL.A. 813/2012

KESH BAHADUR GAURANG

..... Appellant

Through: Ms. Rakhi Dubey, DHCLSC panel
counsel

Versus

STATE

..... Respondent

Through: Ms. Meenakshi Chauhan,
Additional Public Prosecutor for
respondent-State with ASI Yasin
Khan, Crime Branch (Narcotics)

CORAM:

HON'BLE MR. JUSTICE SUNIL GAUR

JUDGMENT
ORAL

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1. The impugned judgment of 30th September, 2011 holds appellant guilty for the offence under Section 20 of the *Narcotic Drugs and Psychotropic Substances Act, 1985* (hereinafter referred to as the “NDPS Act”) and vide impugned order of 7th October, 2011, appellant has been sentenced to rigorous imprisonment for ten years with fine of ₹1,00,000/- and in default of payment of fine, appellant has been directed by the trial court to undergo rigorous imprisonment for one year, as on 25th March, 2010, appellant was found to be in illegal possession of 2.5 kgs of *charas*.

2. The facts as noted in the impugned judgment are as under:-

“Story of prosecution in brief is that on 25.03.2010, SI Satyawar received an information from Naveen Tomar on telephone that on 22.03.2010, one parcel stated to be having gramophone in it, was got booked by one Kesh Bahadur Gurang, a Nepali person and that parcel was returned back from the Head Office and is having smell of charas. Naveen Tomar also told SI Satyawar on phone that said Kesh Bhadur Gurang has given his address of 17/6, Sangam Vihar and his mobile number is 9891071475 and he will come between 12:00 noon to 12:30 pm to receive the said parcel back and he could be apprehended along with parcel, if raided. On receipt of this information, SI Satyawar passed on the same to Ins. M.L. Sharma- Inspector Narcotics, who talked with ACP (N & CP) Sh. S.R.Yadav on telephone and thereafter Ins. M.L.Sharma directed SI Satyawar to conduct the raid. Secret information was reduced to writing. On the direction of senior officer, SI Satyawar constituted a raiding party comprising himself, HC Om Prakash and Ct. Sohan Pal. Raiding team reached the spot i.e. office of DTDC Courier Cargo Company, no. 85-87, GTB Nagar, Delhi. Public persons were requested to join the raiding party, but none agreed. After some time, accused came there and when he was returning from the courier office and was coming upstairs having a heavy plastic katta on his left shoulder, he was apprehended by the police on the pointing out of Naveen Tomar. The plastic katta was checked and from the possession of accused Kesh Bahadur Gurang, 2.5 kg charas was recovered. Mandatory provisions of NDPS Act were complied with. Samples were taken. FSL Form was filled in. The accused was arrested. After completion of the investigation, the charge sheet against the accused was filed in the Court. The copies were supplied.”

3. To prove the charge of illegal possession of 2.5 kgs of charas,

prosecution has relied upon deposition of seventeen witnesses and out of them, SI Satyawar (PW17) is the one who had conducted the proceedings at the spot along with public witness *Naveen Tomar* (PW12) and other police officials. It is pertinent to note that raiding party comprised of SI Satyawar (PW17), public witness *Naveen Tomar* (PW12), Head Constable Om Prakash (PW16) and Constable *Sohan Pal* (PW13). After completion of investigation and upon obtaining of FSL Report, the charge sheet in this case had been filed by Investigating Officer (PW14).

4. The stand of appellant before trial court is of simplicitor denial and appellant had not led any evidence before the trial court. While discarding the stand of appellant-accused, the trial court vide impugned judgment has relied upon the prosecution evidence and has convicted appellant as noted hereinabove.

5. In pursuance to the production warrants issued against appellant, he has been produced in court in custody.

6. Impugned conviction and sentence awarded to appellant is challenged by learned counsel for appellant on the ground that the parcel in question, found to be containing contraband when it was in possession of the concerned courier company and it had remained with them from 22nd March, 2010 till 25th March, 2010 and so, possibility of tampering cannot be ruled out. It is pointed out by learned counsel for appellant that as per deposition of *Naveen Tomar* (PW12), who was working in the concerned courier office, he had received the parcel in question from appellant on 22nd March, 2010 and had informed the appellant to take it back on 25th March, 2010, as some smell was coming out of it. It is

submitted by appellant's counsel that the parcel in question was properly packed and so, there was no question of any smell coming out of it and the fact of smell coming out of the said parcel clearly indicates that the parcel had been tampered with. It is pointed out that the erstwhile Franchisee of the courier company in question i.e. DTDC Courier has stepped into witness box as *PW-10* and had deposed that he had sold the said Franchise to *Naveen Tomar (PW12)* in January, 2010 and so, on the date of incident in question, *Naveen Tomar (PW12)* was the owner of courier officer in question. It is pointed out that the raiding team comprised of Investigating Officer SI *Satyawan (PW17)*, who in his cross-examination has admitted that he did not call anybody from the nearby shops to join the raid proceedings and so, non-joining of public witness is fatal to the prosecution case. It is asserted by appellant's counsel that FSL form required to be sent with sample, has not been sent. To submit so, attention of this Court is drawn to the Road Certificate (*EX.PW2/D*) and the extract of *Malkhana* Register (*EX PW2/C*). It is pointed out that the MHC(M) (*PW-2*) has deposed in his cross-examination that he did not mention in Register No.19 as well as in Road Certificate that FSL form with the sample was also sent to the concerned laboratory.

7. Attention of this Court was also drawn by appellant's counsel to the FSL report to point out that after examination, the remnants of the exhibits were sealed with the seal of "*MS FSL Delhi*" and when during the course of evidence, the case property was shown to *Naveen Tomar (PW-12)*, it was found that the case property in a paper envelope which

was having the seal of FSL MS Delhi, and it was produced by MHC(M) and inside the envelope there was another envelope having the seal of KSY, which was cut from one side. It is submitted that the seal of FSL found on the case property does not match with the seal impression as deposed by this witness and so, it is urged that benefit of doubt accrues to appellant on this ground. To submit so, reliance is placed on a decision of a Coordinate Bench of this Court in Crl.A. 941/2004 *Kamrul Haq Vs. State*, 2011 SCC OnLine Del 819. Lastly, it is submitted by appellant's counsel that appellant is a poor person and has a family to support and by now, he has already undergone sentence of more than seven years and so, a lenient view be taken on the point of sentence.

8. On the other hand, learned Additional Public Prosecutor for respondent-State supports impugned judgment and order on sentence and submits that the value of article (*Gramophone*) sought to be sent by appellant through courier was of ₹3,000/- whereas the courier charges for sending it were more than ₹3,000/- and for this reason, the concerned courier company became suspicious and had decided to return back the parcel to sender i.e. the appellant. It is also submitted by learned Additional Public Prosecutor for respondent-State that no suggestion was given to any of the prosecution witnesses on behalf of appellant-accused that the sample in question was tampered with. It is pointed out that FSL report on record rules out the allegation of tampering of sample. It is also pointed out that there is no discrepancy between the seal impression on the case property after it was received back from the FSL and in the evidence *Naveen Tomar (PW-12)*, it has been inadvertently recorded as

FSLMSDELHI instead of “*MS FSL DELHI*”. It is submitted by learned Additional Public Prosecutor for respondent-State that non-mentioning of sending of FSL form along with the case property to FSL is a *bona fide* omission and its benefit does not flow to appellant-accused for the reason that MHC(M) (PW2) in his chief examination has categorically stated that the case property along with FSL form was sent to the FSL.

9. Regarding non joining of public witnesses at the time of search of appellant, it is submitted by learned Additional Public Prosecutor for respondent-State that it has come in chief examination of SI *Satyawan* (PW17) that many public persons had gathered at the spot and he had requested seven-eight persons to join the search proceedings but none of them had agreed and they left the place without disclosing their addresses.

10. Learned Additional Public Prosecutor for respondent-State relies upon decision in *Ajmer Singh Vs. State of Haryana* 2010 (2) Scale 362 to submit that non-joining of public witnesses is not *per se* fatal to the case and the evidence led has to be appreciated by the Court. Reliance is also placed by learned Additional Public Prosecutor for respondent-State upon decision in *State of Govt. of NCT of Delhi Vs. Sunil & anr.* (2001) 1 SCC 652 to submit that it is not a legally approved procedure to presume the police action is unreliable merely because police did not collect signature of independent persons on documents. Learned Additional Public Prosecutor for respondent-State also relies upon decision in *Union of India Vs. OKPO* 2010 (4) JCC (Narcotics) 188 to point out that in cases where the sentence awarded is minimum, no case for reduction of amount

of fine is made out. Thus, it is submitted by learned Additional Public Prosecutor for respondent-State that there is no substance in this appeal and it deserves to be dismissed.

11. With the able assistance of counsel representing both the sides, the impugned judgment, order on sentence, evidence on record and decisions cited, have been scrutinized. After having heard both the sides at length, this Court finds that the foremost submission advanced by appellant's counsel is of tampering of recovered substance. The apprehension of tampering is neither here nor there, for the reason that the FSL report is unassailable and from this report, it becomes evident that samples were intact. Otherwise also, there is no reason as to why the concerned courier company would tamper with the samples, particularly when the concerned office of the courier company in question had become suspicious about parcel being sent by appellant, as the value of parcel disclosed was ₹3,000/- only whereas the courier charges were much more. It is pertinent to note that it is the official (PW-12) of courier company who had called appellant after booking the parcel, to take it back because it was smelling. In the considered opinion of this Court, the facts and circumstances of this case are such which clearly rule out any possibility of tampering of the recovered contraband. The submission advanced on behalf of appellant of change in ownership of courier company is also of no avail as nothing turns on it.

12. As regards the so-called discrepancy in the seal impression is concerned, I find that alleged discrepancy is not material one, as it appears that due to inadvertence, the description of seal impression has

been recorded in the evidence of SI *Satyawan (PW17)* as *FSLMSDELHI* instead of “*MS FSL DELHI*”. So reliance placed by appellant’s counsel upon decision in *Kamrul Haq (supra)* is of no avail, as the variation in the seal impression in the said case was substantial i.e. the seal impression found was of AKC and of GCD whereas it ought to have been of KMFSL, Delhi. Hence, appellant’s basic stand of the case property being tampered with is hereby repelled.

13. Regarding non-joining of public witnesses is concerned, I find that it has come in the chief examination of SI *Satyawan (PW17)* that he had asked seven or eight public persons, who had gathered on the spot, to join the proceedings but none of them agreed and they left the spot without disclosing their addresses. It is a settled legal position that even if public witnesses do not come forward to join search proceedings in a case like the instant one, then evidence already led has to be tested on its intrinsic value. So, non-joining of public witnesses in the instant case in search proceedings is not fatal to the prosecution case.

14. In view of the aforesaid, I do not find any infirmity or illegality in the impugned conviction of appellant. This court is also of the view that impugned order on sentence is not required to be interfered with because the minimum sentence, as provided in law, has been awarded to appellant for offence in question. Gravity of offence is such that even the antecedents of appellant do not persuade this Court show misplaced leniency to appellant.

15. So far as sentence of fine is concerned, I find that since the quantity of contraband recovered is commercial, so appellant is liable to pay the

minimum fine of ₹1,00,000/-. However, period in default thereof, is reduced from rigorous imprisonment of one year to simple imprisonment of six months.

16. While modifying the impugned order on sentence to the extent indicated above, this appeal is disposed of.

17. The concerned Jail Superintendent be apprised of the fate of this appeal to ensure compliance.

June 08, 2017

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(SUNIL GAUR)
JUDGE