

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

% *Judgment Reserved on: 24<sup>th</sup> January, 2018*  
*Judgment Delivered on: 12<sup>th</sup> September, 2018*

+ **CRL.A. 360/2016**

SURESH KUMAR RAI ..... Appellant  
Represented by: Mr. Akshay Bhandari and  
Mr.Parmesh Bali, Advocates.  
Versus

STATE ..... Respondent  
Represented by: Mr. Amit Gupta, APP for the  
State with ASI Pawan Kumar,  
PS Crime Branch.

+ **CRL.A. 277/2016**

MUKESH KUMAR ..... Appellant  
Represented by: Ms. Manika Tripathy Pandey  
and Mr.Ashutosh Kaushik,  
Advocates.  
Versus

STATE ..... Respondent  
Represented by: Mr. Amit Gupta, APP for the  
State with ASI Pawan Kumar,  
PS Crime Branch.

**CORAM:**  
**HON'BLE MS. JUSTICE MUKTA GUPTA**

1. The present appeals are directed against the judgment dated 11<sup>th</sup> December, 2015 passed by the learned Special Judge, NDPS whereby the appellants Suresh Kumar Rai and Mukesh Kumar were convicted for offence punishable under Section 20 (C) of Narcotics Drugs and Psychotropic Substances Act, 1985 (in short 'NDPS Act'). Vide order on

sentence dated 15<sup>th</sup> December, 2015, they were sentenced to undergo rigorous imprisonment for ten years and to pay a fine of ₹1,00,000/- and in default of payment of fine, to further undergo simple imprisonment for six months.

2. Briefly, the prosecution case is that on 5<sup>th</sup> April, 2013 at about 4:50 P.M., a secret information was received stating that two persons namely, Suresh Kumar and Mukesh Kumar would come around 5:30-6:00 P.M. behind Red Fort, opposite Electric Cremation, Nigam Bodh Ghat to supply charas. The appellants were apprehended from the spot at around 5:55 P.M. on the pointing out of the secret informer and 5 kg charas each was recovered from the appellants. Further investigation of the case was handed over to ASI Mahender (PW-8). He prepared the site plan at the instance of ASI Devender vide Ex. PW-8/A. He interrogated both the appellants. At about 3:30 A.M., he arrested Mukesh vide arrest memo Ex. PW-1/G after which he conducted the personal search vide Ex. PW-1/I and ₹150 were recovered from his possession. Disclosure statement was recorded vide Ex. PW-1/K. At about 4:15 A.M., he arrested Suresh vide arrest memo Ex. PW-1/H after which he conducted the personal search vide Ex. PW-1/J and ₹130 were recovered from him. His disclosure statement was recorded vide Ex. PW-1/L. He also produced personal search articles of the appellants before MHC (M). On 10<sup>th</sup> April, 2013, exhibits were sent to FSL Rohini and the FSL result was proved as Ex. PX during trial.

3. Assailing the conviction, learned counsel for Suresh Kumar Rai contends that there was non-compliance of mandatory provision of Section 42 of the NDPS Act as it is the admitted case of the prosecution that the alleged raid was conducted upon prior information. To buttress this

argument, reliance is placed upon the decision reported as (2000) 2 SCC 513 Abdul Rashid Ibrahim Mansuri v. State of Gujarat. Further, it is urged that the sampling procedure was erroneous and the prosecution has failed to prove that all ten packets contained charas. The sample was taken after mixing the contents of all the ten packets, thus even if one packet contained charas, liability of commercial quantity will be imputed upon the appellant which is an erroneous procedure. Reliance is placed upon the decision reported as (2012) 191 DLT 403 Basant Rai v. State. Furthermore, the burden of proving that two FSL forms were deposited with the case property and sent to the FSL was upon the prosecution. In the absence of proof of FSL form being sent to the FSL, the appellant is entitled to acquittal. Chapter XVIII of the Delhi High Court Rules explains the procedure how the parcels are to be sent to the FSL to ensure that there is no tampering with the same and it relates to the same case. While placing reliance upon the decision reported as 2013 SCC OnLine Del 1416 Hannan v. State of NCT of Delhi it is submitted that in the absence of deposition of the MHC(M) that the case property is not tampered with while in his possession, the appellant is entitled to be acquitted. There are discrepancies in the prosecution case with respect to arrest of appellant. It is the case of prosecution that the appellant was apprehended at 5:55 P.M. on 5<sup>th</sup> April, 2013 whereas the arrest memo shows the time as 3:30 A.M. on 6<sup>th</sup> April, 2013. No notice was served upon public persons to join the proceedings. There are contradictions in the testimonies of the prosecution witnesses. Hence the appellant be acquitted.

4. Learned counsel for Mukesh Kumar adopted the arguments of learned counsel for Suresh Kumar Rai.

5. Per contra, learned APP for the State while placing reliance upon the decision reported as (2009) 8 SCC 539 Karnail Singh v. State of Haryana stated that compliance under Section 42 NDPS Act has been made. To rebut the submission with respect to non-sending of FSL form, it was stated that two FSL forms were prepared by ASI Devender and affixed with the seal of 6C PS NB Delhi whereafter the SHO put his seal of KSY and the same were duly sent to FSL. The FSL report clearly specifies that there were two seals, one of PS NB 6C Delhi and another seal of KSY on the two forms. While placing reliance upon the decision reported as (2013) 1 SCC 395 Sumit Tomar v. State of Punjab, it was submitted that two samples of 50 gms each after taking out little bit substance from all the 10 packets were taken, thus, there was no irregularity in taking the samples. Furthermore, the samples were taken in consonance with the procedure provided under Clause 1.7(e) and 2.8 of Standing Order No. 1/88 issued by Narcotics Control Bureau. In view of the consistent testimonies of the prosecution witnesses the contradiction in the testimony of HC Sandeep (PW-5) is liable to be ignored. Lastly, with respect to the time of raid, HC Charan Singh deposed that ASI Devender received the secret information around 4:15 P.M., raiding party left at 5:00 P.M., reached the spot at 5:25 P.M and the documents on record corroborate the same.

6. HC Charan Singh (PW-1) deposed that on 5<sup>th</sup> April, 2013, at about 4:50 P.M., ASI Devender (whose statement could not be recorded in Court as he was suffering from lung cancer) called him along with HC Laxman, Ct. Vijender, HC Satyawar and informed them that a secret information had been received to the effect that Mukesh Kumar and Suresh Kumar, both r/o Mujjafar Pur, Bihar, would come at about 5:30-6:30 PM behind Red Fort,

opposite Electric Cremation, Nigam Both Ghat to supply charas. They reached the spot around 5:25 P.M. HC Satyawar was directed to park the vehicle 100 meters before the spot and remain in the vehicle. HC Charan Singh along with ASI Devender and the secret informer took the position on the Southern side of the bus stop whereas HC Laxman and Ct. Vijender had taken their positions on the Northern side. At about 5:55 P.M., Mukesh and Suresh were found coming from the Shanti Van side and were confirmed by the secret informer when they were 20 meters away from them. At about 6:00 P.M., they apprehended both the appellants. On inquiry, their names were revealed as Mukesh and Suresh. Investigating Officer prepared one notice under Section 50 NDPS Act (Ex. PW-1/A) and gave the carbon copy to Mukesh to which he replied (Ex. PW 1/B). Mukesh had a red coloured bag that contained 10 transparent packets of some batties/sticks. These packets were tied with a yellow coloured tape. The contents were found to be charas when checked by the Investigating Officer with the help of field testing kit and the entire quantity weighed was 5 kgs. Two samples of 50 gm charas each as portion from each stick and the remaining charas were kept in a transparent polythene which was later put in cloth parcels. Investigating Officer prepared FSL form and also prepared seizure memo vide Ex. PW1/C. Investigating Officer prepared one more notice under Section 50 NDPS Act in duplicate (Ex. PW-1/D) and gave the carbon copy to Suresh. Suresh replied to the notice vide Ex. PW-1/E. Suresh was carrying a black colored rexine bag containing 10 packets of charas weighing 5 kgs. Two samples of 50 gms charas each as portion from each stick were taken, whereafter the remaining contraband and samples were kept in polythenes and put in cloth parcels and sealed. After preparing the

FSL Form, the parcels were seized vide Ex. PW1/F.

7. Ct. Vijender (PW-7) corroborated the testimony of HC Charan Singh.

8. Contention of learned counsel for the appellants that Section 42 of NDPS Act was not complied deserves to be rejected. As noted above ASI Devender who received the secret information and conducted the raid could not be examined in the Court as he was suffering from lung cancer however, with regard to compliance of Section 42 NDPS Act prosecution has examined ASI Om Prakash (PW-4) who on 5<sup>th</sup> April, 2013 was posted as a reader to the ACP, Narcotics Cell Shri Zile Singh. He deposed that on the said date copy of the DD No.24 dated 5<sup>th</sup> April, 2013 duly forwarded by Inspector Sanjay Gadhe was received in the office of ACP Narcotics Cell vide diary No.824 dated 5<sup>th</sup> April, 2013 which was duly put up to ACP who signed the same. Copy of the DD No.24 dated 5<sup>th</sup> April, 2013 duly signed by ACP at point 'A' was exhibited as Ex.PW-4/A and copy of the diary where at serial No.824 at point 'A' the receipt of the same was mentioned was exhibited as Ex.PW-4/B. In cross-examination ASI Om Prakash denied the suggestion that entry No.824 or the other entries, that is, 835 and 836 were manipulated entries.

9. Contention of learned counsel for the appellants that prosecution has not discharged the burden that two FSL forms were filled, deposited with the case property and were sent to FSL also deserves to be rejected. After the samples were taken from the case property from appellant Mukesh Kumar, they were kept in transparent polythene and were numbered as 'A' and 'B', and the remaining charas was kept in the transparent polythene which was later kept in the same bag and the bag was kept in white cloth parcel and given mark 'C'. The samples drawn from the recovery from Suresh Kumar

Rai were put into separate transparent polythene tied with a rubber band and kept in separate bag marked 'A1' and 'B1' and the remaining charas was then kept in a transparent polythene, then in the same bag and thereafter in a white cloth parcel given mark 'C1'. All the six parcels were affixed with the seal of 6C PS NB DELHI which was also affixed on the two FSL forms. The six sealed parcels, two FSL forms and carbon copy of the seizure memos were handed over to Constable Vijender to be handed over to the SHO who proceeded from the spot at about 10:00 PM.

10. Inspector Kuldeep Singh who appeared in the witness box as PW-6 stated that on 5<sup>th</sup> April, 2013 while he was posted at PS Crime Branch as SHO concerned at 5.00 PM, Constable Vijender Singh came to his office and handed over six pulandas along with carbon copies of two seizure memos and two FSL forms. The pulandas marked 'A', 'B', 'C', 'A1', 'B1' and 'C1' were sealed with the seal of 6C PS NB DELHI one on each. Same specimen seals were affixed on both the FSL forms. He counter-sealed the pulandas and documents with his seal KSY which was also affixed on the FSL forms and called the MHC (M) along with the register No.19 and deposited the pulandas along with the documents with malkhana and signed the register No.19. In this regard he also lodged DD No.20 at 11.50 PM in the daily diary of PS Crime Branch which was exhibited as Ex.6/A. He stated that till the property remained in his possession the same was not tampered with nor was it allowed to be tampered with.

11. HC Jag Narain (PW-2) who was acting as Moharar Malkhana also deposed that on 5<sup>th</sup> April, 2013 at about 11.15 PM he was called by Inspector Kuldeep Singh, SHO PS Crime Branch in his office along with register No.19. He was handed over six pulandas 'A', 'B', 'C', 'A1', 'B1'

and 'C1' and two FSL forms duly sealed with the seal of 6C PS NB DELHI and KSY and two carbon copies of the seizure memo for which he made entry in Register No.19 at Sr. No.1682. He produced the original register No.19 and exhibited the photocopy of the entry vide Ex.PW-2/A. Though this witness did not state in his examination-in-chief that when the property was in his possession the same was not tampered with however, in his cross-examination it has been elicited that when the property was in his possession the same was not tampered with.

12. Further HC Sandeep Kumar (PW-5) deposed that on 10<sup>th</sup> April, 2013 while posted at Narcotics Cell, Shakarpur he was asked by ASI Mahinder to deposit the pulandas and FSL form. Thus on his directions he took the pulandas and FSL forms from PS Crime Branch and deposited the same in FSL. He deposed that as long as the case property remained in his possession the same was not tampered with nor allowed to be tampered with. The fact that FSL forms were deposited with the FSL is evident from the report of FSL which states that seals were found to be intact and tallied as per forwarding authority specimen seal which can be deciphered only from the FSL form. Thus the contention of learned counsel for the appellants that the prosecution has not been able to prove that the two FSL forms were filled or that they were deposited in the malkhana or that they were deposited with the FSL or that the prosecution has not proved the link evidence deserves to be rejected.

13. Learned counsel for the appellants relied upon the decision of this Court in Basant Rai v. State (supra) to contend that if articles are in different packets, thus samples should be drawn from each packet so that the accused is not burdened with the liability of an offence for accumulated contraband

as mixing the entire quantity and then taking the samples would be detrimental to the accused.

14. In this regard it would be appropriate to note the testimony of HC Charan Singh who deposed that after notice under Section 50 NDPS Act was served on Mukesh Kumar; the search of the red colour bag on his shoulder was taken which on opening was found to be containing 10 packets. Each packet contained some battis/sticks and these packets were tied with yellow color tape. All these battis/sticks were kept in transparent polythene; investigating officer checked the same on field testing kit and it was revealed to be charas. The total quantity of charas was 5 kgs. The Investigating Officer took out two samples of 50 grams each after taking little bit substance of charas from each stick, thus it is not the case where after mixing, the identity of the article in each packet got lost. Similar procedure was adopted in the recovery from S.K.Roy where again on weighing the contents of ten packets found to be having charas of 5 kgs, two samples of 50 grams each with little bit substance of charas were taken out from each stick. Decision in Basant Rai (supra) thus has no application to the facts of the present case.

15. Supreme Court in the decision reported as 1993 (2) SCC 145 Gaunter Edwin Kircher vs. State of Goa, Secretariat Panaji, Goa held as under

*5. The next and most important submission of Shri Lalit Chari, the learned senior counsel appearing for the appellant is that both the courts below have erred in holding that the accused was found in possession of 12 gms. of Charas. According to the learned Counsel, only a small quantity i.e. less than 5 gms. has been sent for analysis and the evidence of P.W.I, the Junior Scientific Officer would at the most establish that only*

*that much of quantity which was less than 5 gms. of Charas is alleged to have been found with the accused. The remaining part of the substance which has not been sent for analysis can not be held to be also Charas in the absence of any expert evidence and the same could be any other material like tobacco or other intoxicating type which are not covered by the Act. Therefore the submission of the learned Counsel is that the quantity proved to have been in the possession of the accused would be small quantity as provided under Section 27 of the Act and the accused should have been given the benefit of that Section. Shri Wad, learned senior counsel appearing for the State submitted that the other piece of 7 gms. also was recovered from the possession of the accused and there was no need to send the entire quantity for chemical analysis and the fact that one of the pieces which was sent for analysis has been found to contain Charas, the necessary inference would be that the other piece also contained Charas and that at any rate since the accused has totally denied, he can not get the benefit of Section 27 as he has not discharged the necessary burden as required under the said Section. Before examining the scope of this provision, we shall first consider whether the prosecution has established beyond all reasonable doubt that the accused had in his possession two pieces of Charas weighing 7 gms. and 5 gms. respectively. As already mentioned only one piece was sent for chemical analysis and P.W.I, the Junior Scientific Officer who examined the same found it to contain Charas but it was less than 5 gms. From this report alone it cannot be presumed or inferred that the substance in the other piece weighing 7 gms. also contained Charas. It has to be borne in mind that the Act applies to certain narcotic drugs and psychotropic substances and not to all other kinds of intoxicating substances. In any event in the absence of positive proof that both the pieces recovered from the accused contained Charas only, it is not safe to hold that 12 gms. of Charas was recovered from the accused. In view of the evidence of P.W.I it must be held that the prosecution has proved positively that Charas weighing about 4.570 gms. was recovered from the accused. The failure to send the other piece*

has given rise to this inference. We have to observe that to obviate this,; difficulty, the concerned authorities would do better if they send the entire quantity seized for chemical analysis so that there may not be any dispute of this nature regarding the quantity seized. If it is not practicable, in a given case, to send the entire quantity then sufficient' quantity by way of samples from each of the packets or pieces recovered should be sent for chemical examination under a regular panchnama and as per the provisions of law.

*[emphasis supplied]*

16. As regards discrepancy in the time of arrest is concerned, prosecution has prove that the information was received which was recorded vide DD No.24 at 4.45 PM which was conveyed to ACP concerned vide Ex.PW-4/A whereafter at 4.50 PM ASI Devender called HC Charan Singh, Constable Vijender and other members of the raiding party. They reached the spot on 5.25 PM and at about 5.55 PM two persons were found to be coming from Shanti Van side. At 6.00 PM they were apprehended whereafter all necessary formalities of serving notice under Section 50 of NDPS Act, checking the contraband, thereafter drawing the samples, sealing the same took place whereafter samples, FSL Forms and seizure memos were sent to SHO, PS Crime Branch at about 11.00 PM whereafter statements of the witnesses were recorded and the appellants were finally arrested at 3.30 AM and 4.15 AM on 6<sup>th</sup> April, 2013 vide arrest memos Ex.PW-1/G and PW-1/H respectively. Thus the appellants having been apprehended after around 6.00 PM, only on completion of proceedings they were arrested. Thus, there is no discrepancy in the time of arrest.

17. For the discussion as aforesaid, this Court finds no non-compliance of any statutory provision nor any lacuna in the prosecution case entailing grant

of benefit of doubt to the appellants. There being no illegality in the impugned judgment of conviction and order on sentence the same are upheld.

18. Appeals are accordingly dismissed.
19. Appellants will undergo the remaining sentence.
20. Copy of this order be sent to Superintendent Central Jail Tihar for updation of the Jail record and intimation to the appellants.
21. TCR be returned.

**(MUKTA GUPTA)**  
**JUDGE**

**SEPTEMBER 12, 2018**  
**‘vn’**