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

Reserved on: 18th August, 2018

Pronounced on: 24th August, 2018

+ CRL.A. 557/2016

BINOD KUMAR @ BINDU Appellant

Through: Ms. Naomi Chandra, Adv.

versus

STATE

..... Respondent

Through: Mr. G. M. Farooqui, APP for
State with SI Ramkishan, Crime
Branch, Shakarpur, Delhi

CORAM:

HON'BLE MR. JUSTICE C.HARI SHANKAR

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JUDGMENT

1. *Vide* the impugned judgment dated 3rd March, 2016, followed by order on sentence dated 10th March, 2016, the appellant stands convicted, by the learned Special Judge, NDPS, under Section 20 of the Narcotics Drugs and Psychiatric Substances Act, 1985 (hereinafter referred to as “the Act”), and sentenced to rigorous imprisonment for 12 years and fine of ₹ 1,00,000/-, with default simple imprisonment of six months.

2. The relevant facts, as set out in the Special Report, submitted by SI Virender Singh (PW-15) under Section 57 of the Act, read thus:

“It is submitted that on 29/7/2012, secret information was received vide DD No.4 at 10:30 AM and after compliance of

sec. 42 NDPS Act, a trap was laid near Monkey Bridge behind Red Fort, ring road, Kotwali, Delhi. At about 12 Noon one person namely Binod Kumar @ Bindu s/o Sumer Prasad r/o N-9 B/274, Jhuggi Lal Bagh, Azadpur, Delhi was apprehended along with a hired vehicle tempo No. DL 1 LL 9760, Notice U/S 50 NDPS act was served upon him and his legal rights were explained. After his refusal, search of the hired vehicle was conducted as per law. During search 5 plastic bags were recovered from his hired vehicle. All bags were given mark 1 to 5. All bags were opened and checked. In the plastic bags sl no. 1 & 2 was having 25-25 packets, sl.no.30 was having 30 packets, Sl. No.4 was having 36 packets and Sl.No. 25 was having 23 packets. Weight of each packet was 1 Kg each. Some small quantity was taken out from each parcel and two sample of 250/250 gms each were prepared. marked A & B. Rest of the Ganja recovered was kept as it was recovered and all were kept in 5 pulandas and marked as sl. No.1 to 5, FSL form filled up. All the pulandas and FSL forms were sealed with the seal of SP. After use, the saal was handed over to HC Suresh Kumar No. 1221/Cr. SI Samar Pal took all the 7 pulandas and vehicle into police possession through seizure memo and prepared rukka u/s 20/25 NDPS Act against the accused person and handed over to Ct. Anil No. 1701/Cr. Along with the case property, FSL form and carbon copy of the case property seizure memo for registration of the case and depositing the case property by SHO/Crime Branch, Delhi. The further investigation of the case is being carried over by under signed. I reached on the spot i.e. Monkey Bridge, behind Red Fort, Ring Road, Kotwali. Delhi and prepared the site plan, interrogated the accused persons, arrested the accused person namely Binod Kumar @ Bindu s/o Sumer Prasad r/o N-9 B/274, Jhuggi Lal Bagh, Azadpur, Delhi at 7 p.m. dated 29/7/2012 after his sufficient evidence and recorded his disclosure statement. Then I went to PS-Crime Branch and recorded the statement of SHO/Crime Branch and MHCM/Crime Branch, later that I again came back to the office of SOS and recorded the statement of witnesses. Information of his arrest has been given to his wife Savita personally. The investigation of the case is in progress.”

Witnesses cited by the prosecution

3. The witnesses cited by the prosecution may be divided into three categories, viz.

- (i) witnesses to the seizure and recovery of the *ganja*, i.e. PW-9, PW-10, PW-11, PW-12, PW-14 and PW-15,
- (ii) witnesses to the sampling and testing of the seized *ganja*, i.e. PW-3, PW-5, PW-6, PW-7 and PW-13 and
- (iii) other witnesses, i.e. PW-1, PW-2, PW-4, PW-9.

4. Of the various officers who constituted the raiding party, evidence was led, by the prosecution, of HC Suresh, Constable Anil Kumar and SI Samarpal Singh, who deposed as PW-10, PW-12 and PW-14 respectively. To a large extent, the evidence of these three officers was identical; so much so that the examination-in-chief of PW-12 Const. Anil Kumar is a near unsettlingly verbatim reproduction of the examination-in-chief of PW-10 HC Suresh. These three witnesses deposed, in one voice, that (i) the raid team was constituted by SI Samar Pal Singh (PW-14), (ii) the team left the police station at 10:45 am and reached the area behind the Monkey Bridge, Red Fort (iii) passers-by were requested to join the investigation but they did not cooperate, (iv) the raiding team, thereupon, constituted a *nakabandi*, (v) on the prompting of the secret informer, a green Vikram tempo, bearing No. DL-1L-L9760, was stopped by them, (vi) the driver of the tempo disclosed his identity to be Om Prakash (PW-9), (vii) the person sitting beside the driver was pointed out, by the secret informer, to be Bindu @ Binod Kumar who,

according to the secret informer used to carry *ganja* for Vinod Jha, (viii) on being queried, the said co-passenger admitted that he was Binod Kumar @ Bindu, (ix) a written notice, under Section 60 of the Act (Ex.PW-10/A) was given to Binod Kumar, but he refused, (x) the tempo was found to be carrying five *kattas* which, on being searched, was found to contain *ganja*, (xi) the IO interrogated Binod Kumar, whose disclosure statement was exhibited as Ex.PW-10/C, (xii) Binod Kumar was arrested *vide* Arrest Memo Ex.PW-10/D and (xiii) personal search of Binod Kumar was also conducted *vide* Personal Search Memo Ex.PW-10/E.

5. All the aforementioned three witnesses, i.e., PW-10 HC Suresh, PW-12 Const Anil Kumar and PW-14 SI Samar Pal Singh, correctly identified the appellant, in court, as the co-passenger seated on the front seat of the tempo beside Om Prakash (PW-9). The fact of conducting of raid by SI Samar Pal Singh (PW-14) was also confirmed by PW-8 Insp. Suhail Ahmed.

6. PW-9 Om Prakash was the key witness of the prosecution. He deposed that, on 20th July, 2012, he was approached by one Binod Kumar, who requested him to load five plastic bags, belonging to him, on his vehicle and to transport the bags to Azadpur Delhi, for which he offered to pay ₹800. He identified the appellant, in court, as the person who had approached him. He confirmed that, while they were *en route* to Azadpur, with the aforementioned consignment of Binod Kumar, his vehicle was stopped by Police officials near Red Fort and that, on the five bags being checked, *ganja* was found contained therein. The

police officials thereupon, took samples from the bags and seized the vehicle vide Seizure Memo Ex.PW-9/A. His testimony withstood cross examination.

7. HC Suresh, deposing as PW-10, testified that, on 29th July, 2012, a secret informer had informed him that “Binod Jha”, who used to deal in *ganja*, would be proceeding, with a consignment, towards Azadpur, via Ring Road. He conveyed the said information to SI Samar Pal Singh (PW-14), and a raid team was constituted, consisting of SI Samar Pal Singh, himself, HC Yogender, HC Harvinder, HC Vikram, Const. Lal Bahadur, Const. Harindra, Const. Pankaj, Const. Ravinder and Const. Anil. He deposed that the raiding team proceeded to the area behind the Red Fort, where attempts were made to secure the assistance of passersby, but in vain. At about 12:15 pm, one green Vikram Tempo, belonging to Om Prakash (PW-9) approached, in which “Bindu @ Binod Jha”, was sitting besides the driver. The secret informer, on seeing them, stated that the appellant used to carry *ganja* for “Vinod Jha”. The raiding team stopped the vehicle, and enquired of the identity of the persons seated therein, whereupon the appellant disclosed himself to be Binod Kumar @ Bindu. The driver was found to be Om Prakash (PW-9).

8. PW-10 further deposed that notice, under Section 50 of the Act (Ex. PW-10/A) had been given to the appellant – though, it may be noted, as the seizure was effected from the tempo, and not from the person of the appellant, the said provision was not applicable. Thereafter, the tempo was searched. Five plastic *kattas* were found in

the tempo, with *katta* Nos. 1 and 2 having 20 packets each, *katta* No. 3 having 30 packets, *katta* No. 4 having 30 packets and *katta* No. 5 having 25 packets. In other words, there were a total of 139 semi-transparent polythene packets, contained in the 5 *kattas*. On opening the packets, they were found to contain a substance which smelt like *ganja*. Each polythene was found to be weighing 1 kg thereby making a total of 139 kg *ganja*.

9. It was further deposed by PW-10 HC Suresh that the “IO had taken out sample from each and every packets and two samples of 250 gms each were drawn and these two samples were kept in two separate polythene, tied with the rubber band and then the same were kept in two separate cloth parcels and marks A & B were given to the parcels”.

10. The sealed parcels, FSL Form and the tempo were taken into possession by the IO (PW-14), *vide* Seizure Memo (Ex. PW-9/A). *Tehrir* was prepared by Const. Anil Kumar (PW-12). Sometime later, SI Virender arrived at the spot and prepared the site plan. The IO interrogated the appellant and recorded his disclosure statement as Ex. PW-10/C. Thereafter, the appellant was arrested *vide* Arrest Memo Ex. PW-10/D, and subjected to personal search *vide* Personal Search Memo Ex PW-10/E.

11. PW-10 correctly identified the appellant, who was present in Court. He also identified the seized *ganja*. It was seen, however, that, in the *kattas* serial no. 1 and 3, only 24 polythenes and 29 polythenes

were found as against the original quantity of 25 polythenes and 30 polythenes, which fact was also noted by PW-10, HC Suresh in his statement.

12. PW-10 further acknowledged that he did not know whether the IO had made any inquiry to ascertain if the contraband found in the vehicle belonged to Om Prakash. He also stated that no public person was invited to join the investigation. He also deposed that no family member of the accused put his/her signature on the Arrest Memo of the accused, in his presence.

13. The deposition of Anil Kumar (PW-12), also a member of the raiding team, was to a large extent, a verbatim reproduction of the deposition of HC Suresh (PW-10). Const. Anil Kumar, too correctly identified the plastic *kattas* and the *ganja* contained therein, and other case property, when shown to him in court.

14. In cross-examination, PW-12 deposed that the accused was referred to, by the secret informer, as “Binod Kumar @ Bindu”, and that he was so referred to, by any other name, in his presence. He further stated that, though public persons were invited to join the investigation, they did not cooperate. He also confirmed that no person from the nearby temple, was called to join the investigation. He also deposed that “family members of the accused were also not called at the spot”. He further stated that he had been informed by the IO that “Bindu” used to work for Vinod Jha; however no attempt was made either to arrest Vinod Jha or investigate his role.

15. PW-11 ACP Krishan Kumar Sharma merely confirmed, in his deposition, during trial, dated 2nd May, 2015, that he had directed Inspector Suhaib Ahmed Farooqui (PW-10) to constitute a raiding party. He confirmed having received his Special Report under Section 57 of the Act, dated 30th July, 2012 (Ex.Pw-11/A).

16. The next witnesses, to the seizure, PW-14 Inspector S. P. Singh, the IO, tendered his evidence on 28th August, 2015. He confirmed that the raiding team had made a *nakabandi* near the Monkey Bridge, Ring Road and had started checking all vehicles. He confirmed having intercepted the green Vikram tempo, in which the appellant was found sitting besides the driver of the tempo. He also confirmed that the secret informer, on seeing the tempo, stated that the appellant (whose name was ascertained, on enquiry, to be Bindu @ Binod Kumar) used to carry *ganja* for Vinod Jha. On enquiry, he deposed that the driver of the tempo was Om Prakash. He confirmed having served a notice under Section 50 of the Act, on the appellant. As regards the contents of the tempo, his deposition was, again, identical to that of Inspector Suhaib Ahmed Farooqui (PW-8), and HC Suresh (PW-10). In court, he identified the three plastic *kattas*, which were found contained 24, 25 and 29 plastic polythenes, and also confirmed that the *kattas* originally contained were 25, 25 and 30 plastic polythenes. He identified the *ganja* which was contained in the said plastic polythenes.

17. The above versions of PW-8, PW-10, PW-12 and PW-14 were confirmed by SI Virender Singh (PW-15), also a member of the

raiding party. Significantly, however, PW-15 also acknowledged having obtained the signatures of Sunita Devi, wife of the appellant, on the Arrest Memo at a later date.

18. Apart from the above, PW-8 Inspector Suhaib Ahmed Farooqui deposed that, on 29th July, 2012, he was informed by the secret informer, that “Vinod Jha” would reach near Lal Qila with a huge consignment of *ganja*, and that he informed the ACP Krishan Kumar Sharma (PW-11) accordingly. ACP Krishan Kumar Sharma, as already noticed hereinabove, confirmed this fact and stated that, on receipt of information from Inspector Suhaib Ahmed (PW-8), he directed Inspector Suhaib Ahmed to constitute a raiding party, which was, ultimately, constituted by SI Samar Pal Singh (PW-14).

19. From the above depositions, it is obvious that there was some ambivalence regarding the identity of the person who, according to the secret informer, would be carrying *ganja*, and learned counsel for the appellant understandably seeks to capitalize thereon. PW-8 Inspector Suhaib Ahmed Farooqui deposed that the information, provided by the secret informer was that “Vinod Jha supplier of ganja” would be reaching Lal Qila with the consignment. In cross examination, he confirmed that the secret information received was about “Vinod Jha” and there was no reference to “Binod Kumar @ Bindu”. As against this, PW-10 HC Suresh, whom the secret informer had actually met, deposed that the information given by the secret informer was that “one person, namely, Vinod Jha, a resident of Azadpur, Lal Bagh

Jhuggi, used to deal in ganja and he would proceed towards Azadpur via Ring Road to supply ganja...”.

20. ACP Krishan Kumar Sharma, deposing as PW-11, on the other hand, testified that Inspector Suhaib Ahmed Farooqui had informed him that HC Suresh had received information from the secret informer to the effect that one person, namely, “Vinod Jha” who used to deal in *ganja*, would be proceeding towards Lal Quila. Const. Anil Kumar (PW-12), who was also informed by the secret informer, deposed that, on 29th July, 2012, the secret informer informed him that “one person, namely, Binod Jha” would be proceeding towards Azadpur, carrying a consignment of *ganja*. In cross-examination, however, he admitted that the information given by the secret informer was to HC Suresh, and not to him. Again, Inspector SI Samar Pal Singh, deposing as PW-14, referred to the persons, regarding whom secret information had been received, as “Binod Jha”.

21. While, therefore, there was marked ambivalence amongst the various witnesses *inter se*, regarding the first name of the person who, according to the secret informer, would be carrying *ganja*, spanning the distance between “Binod” and “Vinod”, none of the witnesses testified to have received any information regarding “Binod Kumar”.

22. As regards “Vinod Jha”, while HC Suresh (PW-10) and Const. Anil Kumar (PW-12) deposed that no investigation was carried out, by the IO, regarding the said person, and no attempt was made to arrest him, the second IO, SI Virender Pal Singh, deposing as PW-15, testified that he, along with HC Suresh, Const. Anil Kumar, HC

Ravinder, and Binod Kumar, went to Patna in search of the supplier Vinod Jha, but could not trace him. On this issue, too, therefore, the actual position is unclear, with the IO SI Virender Pal Singh asserting that efforts had, in fact, been made to trace Vinod Jha, for which purpose the team had proceeded to Patna, and HC Suresh and Const. Anil Kumar, who was stated by him, to have been members of the team deposing otherwise, stating that no efforts were made to investigate Vinod Jha, or to arrest him.

23. The manner in which the 5 *kattas*, found in the Vikram tempo of Om Prakash, were examined and searched, is described thus, in the statements of PW-10 HC Suresh:

“... Thereafter, IO conducted the search of aforesaid tempo. There were five plastic kattas inside the tempo. IO had given serial no.1 to 5 to these five plastic kattas. IO checked all the five plastic kattas. Plastic katta bearing serial no.1 and 2 were having 25 packets each. Katta bearing serial no.3 was having 30 pkts. Katta bearing serial no.4 was having 36 packets and plastic katta bearing serial no.5 was having 23 packets. There were total 139 packets in semi transparent polythenes. All the packets were having khaki colour tape. IO opened the plastic kattas and these were found containing flowering tops and seeds. From the physical appearance and from the smell these found to be ganja. Thereafter, IO weighed each semi transparent polythene containing ganja and it came to be 1 kg each. IO had taken out sample from each and every packet and 2 samples of 250 gm each were drawn and these two samples were kept in two separate polythene, tied with the rubber band and then the same were kept in two separate cloth parcels and mark A and B were given to the parcels. The remaining ganja was kept in the respective packets and then in the respective plastic kattas and the mark 1 to 5 had already been given to these kattas. IO prepared form FSL at the spot. IO affixed his seal, i.e. SP on all the five parcels bearing no.1 to 5, A and B, the seal after use was given to me. Thereafter, IO had taken into his possession all the sealed parcels, the

FSL Form and also the aforesaid tempo into his possession through seizure memo vide Ex. PW9/A, which bears my signatures at point B. Thereafter, IO prepared tehrir and gave the same to Ct. Anil Kumar with the direction to hand over the same to the duty officer. IO had also given all the seven sealed parcels, FSL Form and carbon copy of seizure memo to Ct. Anil with the direction to hand over the same to SHO, PS Crime Branch.”

This stands fully corroborated by statements of PW-12 Const. Anil Kumar and PW-14 SI Samar Pal Singh.

24. Besides the above, the only other witness to the raid was PW-9 Om Prakash, who was the “star witness” of the prosecution, and on whose statement learned counsel Mr. Farooqui emphatically relies. According to the statement of Om Prakash, he used to drive a Mahindra Champion vehicle, using which he used to deliver filter at M/s Studds Company, Faridabad, Haryana. He further deposed that on 28th July, 2012, on the way back from M/s. Studds Company, his vehicle developed a snag at the Badarpur Border, for which purpose he called the mechanic at 9 am, the next day, who repaired the vehicle. In the meanwhile, he deposed, “one person whose name later on revealed as Binod Kumar came to (him) and asked (him) to load his 5 plastics bags and take the same to Azadpur”, for which an amount of Rs. 800 was settled between them. He identified the appellant, in court, as the said Binod Kumar. He further deposed that Binod Kumar loaded the five plastic bags in his vehicle and that, while they were proceeding towards Azadpur, they were intercepted by police officials, who checked the bags and found that they contained *ganja*. He also confirmed that samples had been taken, by the police officials, from the bags, which were seized vide Seizure Memo Ex.PW-9/A.

25. In cross examination, however, PW-9 Om Prakash, on being queried, was unable to disclose the name of the mechanic who repaired his vehicle on 28th July, 2012. He also stated that he had never informed his office regarding the defect in his vehicle. He further admitted that he had no bills regarding the goods allegedly consigned to him by Binod Kumar for carriage to Azadpur, even while acknowledging that “whenever (he) was carrying any goods of any customer, it was always with the bill of that goods”.

26. It may be noted, here, that SI Virender Singh (PW-15), the second IO, in his deposition, confirmed that none of the documents recovered from PW-9 Om Prakash, or from his vehicle, contained the name of Binod Kumar @ Bindu.

27. Inasmuch as there is no serious dispute regarding the transmission of the sample to FSL for analysis, detailed reference to the process adopted therefore, may not be necessary. Suffice it to state that the MHC (M), HC Jag Narayan, deposing as PW-3, confirmed that he handed over the *pullanda* marked “A”, sealed with the seals of “SP” and “CRM” to Const. Lalit Kumar, for being deposited in the FSL, and Const. Lalit Kumar, deposing as PW-6, confirmed having deposited the same sample marked as “A”, in the FSL.

28. Santosh Tripathi, SSO (Chemistry) in the FSL, deposing as PW-7, confirmed that he received, on 22nd August, 2012, the aforementioned sealed cloth parcel, marked “A”, with seal impressions of “SP” and “CRM” and subjected it to physical,

microscopic, chemical and TLC examination, whereupon it was found to be “ganja” (Cannabis).

29. The examination report (Ex.PW-2/A), dated 20th September, 2012, of the FSL, may be reproduced thus:

“EXAMINATION REPORT

No. of pages of report 02

1. **Report No. FSL.2012/C-6113** Date : 20.09.12
2. **Ref.No.** 1277, 4PP/SHO/Crime Branch, Malviya Nagar, dated 22.08.2012, From SHO/Crime Branch Malviya Nagar.
3. **FIR No.** 203/12, PS – Crime Branch Malviya Nagar, dated 29.07.12, U/S 20/25 NDPS Act.
4. **Mode of Receipt** : through Ct. Lalit, No. 499/Crime.
5. **Date of Receipt** : 22.08.2012
6. **Articles(s) Received** : One sealed cloth parcel.
7. **One sealed parcel.** Seals were found intact and tallied as per forwarding authorities specimen seals.
8. **Details of the Parcels/Exhibit received** :

No. of Parcels/ Exhibits	No. of Seals & seal Impression	Description of Parcels/Exhibits
Parcel-A	Three seals of “SP” & one seal of “CRM”	One sealed cloth parcel found to contain exhibit ‘A’ kept in a polythene.
Exhibit-‘A’		Greenish brown colour fruiting and flowering vegetative, tops having

		characteristic cannabinoids odour, weight 258.7 gm (approx) with polythene.
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9. Purpose of reference :- For Chemical Examination & Report.

10. Dates of Examination : 05.09.2012 to 20.09.2012

11. **RESULT OF EXAMINATION REPORT**

On Physical, Microscopic, Chemical and TLC examination, exhibit 'A' was found to be 'Ganja' (cannabis).

12. After the examination, the remnants of the exhibits have been sealed with the seals impression as per specimen provided below:"

30. After recording of the statements of the various PWs were complete, the statement of the appellant, under Section 313 of the Cr.P.C., was recorded. The appellant's statement was in the form of a bald denial, totally disowning having anything to do with *ganja*, or the transport thereof, or of the interception and seizure thereof, by the raiding team. He claimed that he had, in fact, been brought from his house in the wee hours of the night and embroiled in a case, with which he had no concern.

31. The appellant cited four witnesses in his defence, namely DW-1 Suraj (his son), PW-2 Sunita Devi, (his wife), DW-3 SI Ganesh Kumar and DW-4 Vipin Kumar (his uncle).

32. DW-1 deposed that at about 1 - 1:30 am on 28th July, 2012, his father i.e., the appellant was called out of the house by someone with

whom he conversed for about 15 minutes, whereafter his father was taken to PS Darya Ganj. He further stated that he waited for his father till 2 - 2:30 am whereafter he went to sleep and that, on waking up at 7 am he went to his uncle Vipin Kumar (DW-4) and narrated the incident. He claims that he had thereafter, attempted to call his father on his mobile phone, which was switched off, and that DW-4 had advised him to wait as the police “might leave” his father after sometime.

33. DW-2 Sunita Devi, after returning from Haridwar on the next date, i.e., 30th July, 2012 supporting the deposition of DW-1, stated that she had returned to Delhi on 30th July, 2012 and come to know that her husband, i.e., the appellant had been taken to PS Darya Ganj and that, on her visiting the Police Station, the police officials reluctantly allowed her to meet the appellant.

34. DW-4 (Vipin Kumar), the uncle of the appellant, deposed that, on 29th July, 2012, DW-1 had informed him that his father, i.e., the appellant, had been taken away by certain persons the previous night. He further deposed that he had attempted to call the appellant, but found that his mobile phone was switched off and that, after waiting for his brother to return, the whole of that day, he, on 30th July, 2012 (as 29th July, 2012 was Sunday), sent a fax complaint (Ex. DW-3/A) to PS Darya Ganj, regarding the lifting of his brother by the Police officials.

35. DW-3 SI Ganesh Kumar confirmed the receipt of the complaint dated 30th July, 2012, made by DW-4 (Vipin Kumar).

36. Consequent on the above investigation, the appellant was charged for having committed the offence under Section 20 of the Act. He pleaded innocence and claimed trial.

37. Having assimilated the evidence in the manner aforementioned, the learned Special Judge proceeded, vide the impugned judgment, dated 3rd March 2016, to convict the appellant under Section 20 of the Act, entering, in the process, the following findings:

(i) Learned counsel for the appellant had sought to submit that the case was one of mistaken identity, in which the appellant was wrongly implicated in place of one “Vinod Jha”. It was emphasised, by learned counsel for the appellant, that the appellant was not “Binod Jha” but “Vinod Kumar”, who had nothing to do with “Vinod Jha”. This submission was rejected, by the learned Special Judge, placing reliance, for the purpose, on the testimony of HC Suresh (PW-10) (who was the person contacted by the secret informer), to the effect that the information received was in respect of “Binod” and not “Vinod”. This aspect, it was noted by the learned Special Judge, had not been clarified in his cross-examination. Similarly, PW-12 Const. Anil Kumar, had also referred to the person, regarding whom secret information was received, as “Binod” and not “Vinod”. The contention that the secret information received was with respect to “Vinod” and not “Binod”, could not, therefore, be accepted. In any event, held the learned Single Judge, the names “Vinod” and “Binod” were

interchangeably used by many persons, the difference being purely phonetic in nature.

(ii) The next contention, advanced on behalf of the appellant, regarding non- association of public witnesses in the raid, was also rejected, relying, for the purpose, on the judgment of the Supreme Court in *Karamjit Singh v. State*, AIR 2003 SC 1311.

(iii) Evidence of an independent witness, namely, PW-9 Om Prakash, driver of vehicle, in which the *kattas* containing the *ganja*, were being transported was available. No suggestion was put, to Om Prakash, to the effect that the *kattas* being carried in the vehicle did not belong to the appellant, or that they did not contain narcotics.

(iv) The version, of the appellant, that he had been lifted from his house at 1:30 am on 28th July, 2012, could not be accepted, as there was no reason for the Police, who bore no enmity with the appellant to behave in such a manner.

(v) The fact of recovery of the *ganja* had not been contraverted or challenged by the appellant.

(vi) All mandatory procedures, as required by the Act, had been followed. Certain minor inconsistencies regarding putting of barricades, etc., among the statements of the various PWs

had been sought to be urged; however, they did not dilute the total weight of the evidence otherwise available.

(vii) As regards the signatures of the appellant's wife Sunita on the Arrest Memo, it had been confirmed by PW-15 SI Virender Singh, that he informed her of the fact of the appellant's arrest by mobile, and that her signatures were obtained on the Arrest Memo only later.

(viii) The evidence of the defence witnesses was incapable of acceptance. According to DW-1, he, as well as his three sisters, of which the youngest was in 12th class, were present in the house at 1 - 1:30 am when his father was being taken away by the Police. Even so, in cross-examination, DW-1 confirmed that he did not wake up any of his sisters. It was unbelievable that he would calmly go to sleep, thereafter, and inform his uncle only the next morning, and that complaint would be lodged with the Police authorities only two days later. No complaint, regarding false implication of the appellant had been made by any of his family members.

38. Following on the analysis of the evidence, as noted hereinabove, the learned Special Judge, holding that the testimony of the prosecution witnesses, though they were police officials, inspired confidence, and had been corroborated with the available documents, held that the conscious possession, by the appellant Binod Kumar @ Bindu, of 139 kg *ganja*, at 12:15 pm on 29th July, 2012, stood

conclusively proved. The test report of the FSL also proved the consignment to be containing *ganja*. In these circumstances, the learned Special Judge held that the appellant was liable to be convicted under Section 20 the Act.

39. *Vide* subsequent order, dated 10th March, 2016, the learned Special Judge, keeping in mind the fact that the quantity of the *ganja* found in the possession of the appellant was seven times more than the stipulated commercial quantity, imposed, on him, sentence of 12 years' rigorous imprisonment with fine of ₹ 1,00,000/- and default simple imprisonment of 6 months.

40. Aggrieved thereby, the appellant is in appeal before this court.

41. I have heard Ms. Naomi Chandra learned counsel appearing for the appellant and Mr. G. M. Farooqui learned APP for the State, at considerable length.

Rival Submissions

42. Ms. Naomi Chandra, appearing for the appellant, emphatically submitted that her client was being unjustly persecuted. She submitted that he had been picked up from home, and was never travelling with PW-9 Om Prakash in his vehicle. She drew attention to the fact that, though the signature of the appellant's wife Sunita Devi figured on the Arrest Memo, she was, undisputedly, not there at the time when the Arrest Memo was drawn up. She maintained that the case was one of mistaken identity, and instead of proceeding against Vinod Jha, the

prosecution was proceeding against Binod Kumar, i.e., her client, the appellant. She highlighted the fact that no action whatsoever had been taken against Vinod Jha, against whom the information had actually been received. Neither was any effort been made to ascertain the involvement of Om Prakash. She further contended that the evidence of PW-10 categorically demonstrated that “Vinod Kumar” and “Binod Jha” were two different persons.

43. Submitting further by way of demurrer, Ms. Naomi Chandra also objected to the manner in which sampling and testing of the consignment, contained in the vehicle of Om Prakash, had been undertaken. She pointed out that, out of the total quantity of 139 kg., only ½ kg had been tested. She also relied on the fact that, when the packages were produced in court, two packages were found missing. This, too, in her submission entitled her client to acquittal, for which purpose she relies on the judgment of the Bombay High Court in *Shahaji Mattapatti v. State of Maharashtra, 2009 SCC online Bom 879*.

44. Arguing per contra, Mr. Farooqui, appearing for the respondents, places extensive reliance on the statement of the appellant, under Section 67 of the Act, which, in his submission, was a complete confession to involvement in commission of the offence. He also relies, partially, on the testimony of PW-9 Om Prakash. He seeks to dismiss the evidence of the defence witnesses, drawing attention to the inordinate delay, in the reporting, by the family members, of the appellant having been taken away by the police officials at 1:30 am.

45. All in all, Mr. Farooqui would submit, the case against the appellant was unassailable on facts and in law. He would exhort this Court, accordingly, to uphold the order of the learned Special Judge *in toto*.

Analysis

46. The first aspect to be considered is the evidentiary value of the appellant's statement, recorded under Section 67 of the Act by the IO SI Virender Singh (PW-15). The legal position regarding the admissibility of a statement recorded under Section 67 of the Act, is presently in a state of flux. Earlier decisions of the Supreme Court in ***Kanahiya Lal v. UOI, (2008) 4 SCC 668*** and ***Ram Singh v. Central Bureau of Narcotics, (2011) 11 SCC 347*** (in each case by a Bench of two Hon'ble Judges) adopted the view that an officer, conferred with the power of a Police Officer under Section 53 of the Act, did not become, merely by virtue of that fact, *ipso facto*, a police officer, for the purposes of Section 25 of the Indian Evidence Act, 1982 and that, therefore, the statement recorded by such officer was admissible in evidence, so long as it was not found to have been extracted by coercion or by adopting unlawful methods.

47. Another Bench of two Hon'ble judges of the Supreme Court, however, departed from this view in ***Noor Aga v. State of Punjab, (2008) 16 SCC 417***, holding that the statement, recorded under Section 67 of the Act, would attract Section 25 of the Evidence Act, and would not be admissible in evidence.

48. In view of this difference in view, a later bench of the Supreme Court, speaking through A.K. Sikri, J. held, in ***Tofan Singh v. State of Tamil Nadu*, (2013) 16 SCC 31**, that the matter deserved to be referred to a Larger Bench – which still remains to be constituted.

49. ***Tofan Singh (supra)*** was also noted in a very recent decision of the Supreme Court, speaking through Uday Umesh Lalit, J., in ***Surinder Kumar Khanna v. IO, Directorate of Revenue Intelligence*, 2018 SCC Online 757**.

50. Whatever be the view that the Supreme Court ultimately takes in the matter, it is clear that, in the facts of the present case, the statement of the appellant under Section 67 of the Act, having been recorded by PW-15 SI Virender Singh, who was *actually* a Police Officer, could not be safely relied upon as sole evidence to connect the appellant with the offence.

51. I may also refer in this context to the judgment of the Supreme Court in ***UOI v. Bal Mukund*, (2009) 12 SCC 161**, which holds that there was a presumption, in the case of recording of the statement under Section 67 of the Act in the office of the Narcotics Control Bureau (hereafter referred to as “NCB”) that the statement was not voluntary.

52. This principle, it may easily be surmised, would apply with even greater force where the statement is recorded, as in the present case, by the Sub-Inspector of Police.

53. Proceeding further, it is clear that, in the present case, three aspects alone required to be examined, i.e., (i) whether the fact of interception and seizure, of the vehicle, driven by Om Prakash and carrying the appellant, was conclusively proved, (ii) whether the appellant had conclusively been linked with the *ganja* found in the *kattas* being carried in the said vehicle, and (iii) whether the fact that the *kattas* actually carried 139 kgs *ganja*, stood proved beyond doubt.

54. I proceed to address each issue *seriatim*.

55. As regards the factum of interception of the vehicle driven by PW-9 Om Prakash, carrying the appellant with him in the front seat, I am of the view that the defence of the appellant is completely bereft of substance. The fact that the vehicle was actually being driven by Om Prakash, and that the appellant was seated beside him, as well as the fact that the vehicle contained 5 *kattas*, stands established by the statements of the police witnesses, namely, PW-9, Om Prakash; PW-10, HC Suresh; PW-12, Const. Anil Kumar and PW-14 Insp. S.P. Singh, who correctly identified the appellant in court.

56. The non-association of public witnesses, it is by now well settled, is not fatal to the case of the prosecution, and the reliance by the learned Special Judge on *Karamjit Singh (supra)*, is in my view well taken.

57. Apart from the oral evidence, the interception of the appellant would also be proved by documentary evidence in the form of the Test

Memo at the spot of interception (Ex.PW 9/A), the Arrest Memo of the appellant (Ex.PW 10/DX), and the Personal Search Memo of the appellant, (Ex.PW 10/E). The assertion, of the appellant, that he had been picked up from home at 1:30 am on 28th July, 2012, is completely unworthy of acceptance. The evidence of the defence witnesses, DW-1, DW-2, DW-3 and DW-4, led by the appellant to prove the point, inspires little confidence. The only witness to the alleged “picking up of the appellant” was his son DW-1. As has been correctly observed by the learned Special Judge, it cannot be believed that DW-1 would not wake up any of his three sleeping sisters when he found his father being taken away by the police officials, and would, instead, calmly go to sleep himself, and inform his uncle about the fact only next morning. Equally unbelievable is the fact that his uncle waited for two days to intimate the Police authorities. It is, thankfully, not the appellant’s case that he had made a habit of being whisking away to the Police Station in the dead of the night.

58. Given all these improbabilities, on the factum of interception, by the raiding party of the Vikram Tampo carrying PW-9 Om Prakash and the appellant, I am disinclined to believe the version put forth by the defence witnesses, in preference to that which emerges from the evidence of PWs, which is credible and corroborative in all respects. It is well settled that evidence of police witnesses, if credible and corroborative, merits acceptance, even if public witnesses are not co-operated. [*Kashmiri Lal v. State of Haryana*, (2013) 6 SCC 595]

59. For the same reason, I find no reason to disbelieve the version of the police witnesses as regards recovery of *ganja* from the *kattas*

which were being transported in the vehicle being driven by Om Prakash.

60. For these reasons, I hold that the fact of interception of the appellant, in the vehicle being driven by Om Prakash, which was carrying 5 *kattas*, at the area near Lal Quila, by the raiding team on 29th July, 2012, and the fact that the *kattas* were carrying *ganja*, stand conclusively proved.

61. Coming, now, to the second aspect, i.e., whether the involvement of the appellant in the carriage of the *ganja* found in the 5 *kattas* in the vehicle, stood established, I am of the view that the appellant would be entitled to be extended the benefit of doubt. The only evidence to link the appellant to the *ganja* found in the Kattas being transported in the vehicle of Om Prakash is in the form of the statements of Om Prakash (PW-9) and the appellant's own "disclosure" statement under Section 67 of the Act. As has already been noticed hereinabove, the legal position regarding the admissibility of the appellant's statement is still uncertain and, the latest decision on the point [*Noor Aga (supra)*] answers the issue in the negative.

62. That apart, the statement of the appellant was recorded by PW-15, who was actually a Sub-Inspector of Police. While this fact, by itself, would not render the appellant's statement unworthy of acceptance, or even unworthy of being the basis for a conviction, it would, undoubtedly, merit exercise of considerable circumspection on the part of a court intending so to do. One may refer with advantage,

to the following words of caution, administered by the Supreme Court in ***Francis Stanly v. NCB, (2006) 13 SCC 210:***

“15. We are of the opinion that while it is true that a confession made before an officer of the Department of Revenue Intelligence under the NDPS Act may not be hit by Section 25 in view of the aforesaid decisions, yet *such a confession must be subject to closer scrutiny than a confession made to private citizens or officials who do not have investigating powers under the Act. Hence the alleged confession made by the same appellant must be subjected to closer scrutiny than would otherwise be required.*

16. We have carefully perused the facts of the present case, and we are of the opinion that on the evidence of this particular case it would not be safe to maintain the conviction of the appellant, and he must be given the benefit of reasonable doubt.”

(Emphasis supplied)

63. ***Bal Mukund (supra)***, which notes the above words of caution, also relies on ***Noor Aga (supra)***, referring, in connection therewith, to the observation, of Mehmood, J., in ***Queen Empress v. Babulal, ILR (1884) All. 509***, to the effect that Section 25 of the Evidence Act was enacted “to put a stop to the extortion of confession, by taking away from the police officers as the advantage of proving such extorted confession during the trial of accused persons.”. Viewed with the circumspection endorsed by these authorities, I am of the view that the statement of the appellant, recorded by PW-15 SI Virender Singh, was not worthy of immediate acceptance as evidence on the basis of which the charge of infraction of the Act could be laid at the door of the appellant.

64. There is also substance in the submission of learned counsel for the appellant that the case appears to be one of mistaken identity. The

statements of the various prosecution witnesses indicate that the secret information that was received was with respect to “Binod Jha”, whereas there is no dispute about the fact that the appellant was “Vinod Kumar”. In fact, according to the statement of PW-10 HC Suresh, the secret informer stated that the appellant was actually *working* for “Vinod Jha”. No attempt appears to have been made to contact the said “Vinod Jha”, and the statement, of PW-15, to the effect that a team, consisting of himself along with, *inter alia*, PW-10 HC Suresh and PW-12 Const. Anil Kumar, proceeded, fruitlessly, to Patna, in search of Vinod Jha does not inspire confidence, in view of the statement, to the contrary, of PW-10 HC Suresh and PW-12 Const. Anil Kumar, who deposed, in one voice, that no efforts had been made to investigate or arrest Vinod Jha. In any event, even if the observation of the learned Special Judge, to the effect that the words “Vinod” and “Binod” could interchangeably be used is to be accepted, there is definite difference between the words “Kumar” and “Jha”, and it could hardly be accepted that the person “Vinod Jha” could be mistaken for “Binod Kumar” or *vice versa*. In any event, the position is so nebulous that no positive verdict can, in my opinion, be returned, to the effect that the person seated beside Om Prakash in the vehicle was, indeed, the person regarding whom intelligence had been provided by the secret informer. Viewed thus, the interception of the appellant, by the raiding team, would be reduced to a chance occurrence, which would necessarily require a much higher standard of proof in order to connect the appellant to the crime.

65. As regards the deposition of PW-9, who is the “star witness” of the prosecution, he could not even recollect the name of the mechanic,

who was supposed to have repaired the vehicle on 28th July, 2012. Moreover, in cross examination, while acknowledging the fact that he always used to issue bills for the goods being carried out by him, he accepted that there was no bill for the 5 *kattas* purportedly consigned to his custody by the appellant, for carriage to Azadpur.

66. These inconsistencies, too, substantially erode the acceptability of the evidence of PW-9 Om Prakash, as reliable evidence on the basis of which the charge of violation of the Act could be fastened on the appellant. The issue, I may observe here, is not so much of the *quantity* of evidence, as the *quality* thereof. Even a single statement, if inherently credible and worthy of immediate acceptance, could be sufficient to tighten the noose (euphemistically speaking, of course) around the neck of the offender. Given, however, the fact that (i) the statement of the appellant was recorded by the SI of Police, (ii) no attempt was made to investigate Vinod Jha, the alleged supplier of *ganja*, (iii) PW-9 Om Prakash would obviously be interested in the liability, for the seized *ganja*, being shouldered by the appellant, (iv) no attempt was made to investigate the complicity, if any, of PW-9 Om Prakash, in the entire affair, and (v) the infirmities in the deposition of PW-9 himself, this Court is convinced that it would be unsafe to convict the appellant solely on the basis of the statement of PW-9 and himself.

67. Though the above finding is sufficient to acquit the appellant in the present case, one may also note that the manner in which the alleged *ganja* was sampled and tested, in the present case, is also far from satisfactory. There were admittedly, 139 polythene packets

containing *ganja*, each purportedly containing one kg. The total quantity of *ganja* supposedly carried in the vehicle was, therefore, 139 kg. Out of the said quantity of 139 kg, as Ms. Naomi Chandra, learned counsel appearing for the appellant correctly points out, only ½ kg was drawn, out of which only 250 grams were tested. Again, though the witnesses deposed that a “small quantity” was drawn from each of the packets, the actual quantity drawn is not forthcoming. Neither there is any indication of the total quantity of *ganja* that was drawn, after commingling said “small quantities” drawn from the said 139 kg, from which two samples of 250 grams, each were supposedly isolated, of which one was sent for testing to the FSL.

68. Proceeding to the FSL report, one finds that it opines, baldly, that the sample “contained *ganja*”. The percentage of *ganja* finds no mention in the report. In the absence of the percentage of *ganja* present in the sample, it is impossible to state the actual quantity of *ganja*, which was being carried in the truck, even treating the sample as representative of the total quantity. It has been conclusively held, by the Supreme Court, in *E. Michael Raj v. Intelligence Officer, Narcotics Control Bureau*, (2008) 5 SCC 161. as well as by the Gujarat High Court in *State of Gujarat v. Shafdar Hussain Munirmiya Malek*, (2013) SCC Online Guj 3350 [following *E. Michael Raj (supra)*] that the percentage of narcotic contained in the sample is of fundamental importance, given the fact that different punishments are prescribed, depending on whether the quantity of narcotic is small or commercial.

69. In my view, given the highly unsatisfactory manner in which the alleged narcotic was sampled and tested, it can hardly be said, with any decree of certainty, that the quantity of narcotic being carried in Om Prakash's tempo was actually "commercial quantity".

70. In view, therefore, of the fact that (i) the quantity of powder retrieved from each polythene packet is unknown, (ii) the total quantity of powder, from which two samples of 250 g each were isolated, is also unknown and (iii) the percentage of *ganja* contained in the sample tested by the FSL is also not forthcoming, it cannot be held that "commercial quantity" of *ganja* was being transported by Om Prakash in his tempo.

71. The appellant's application for suspension of sentence was rejected by this court on 1st June, 2016. Resultantly, the appellant already stands incarcerated for 6 ½ years, out of the total punishment of 12 years' rigorous imprisonment imposed on him by the learned Special Judge. In case the quantity of *ganja* being carried in Om Prakash's tempo – assuming that the appellant were to be linked with the said carriage – were to be treated as less than commercial quantity, the maximum punishment which could have been imposed on the appellant would only be six months, rigorous imprisonment or with fine, which may extend to ten thousand rupees or with both.

72. The appellant having already suffered incarceration for over 6 years, in my view, any further incarceration of the appellant would, in any event, be completely unjustified, on the facts of the present case.

Conclusion

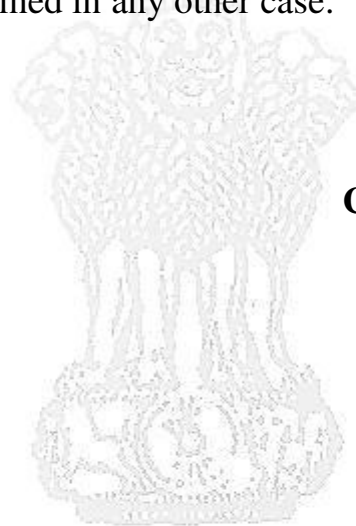
73. Consequent on above discussion, I am of the view that the appellant is entitled to be acquitted of the charge, against him, of having committed the offence contemplated by Section 20 of the Act. Accordingly, the judgment of the learned Special Judge is set aside and the appeal stands allowed accordingly.

74. The appellant would be entitled to be released forthwith, unless he is required to be detained in any other case.

AUGUST 24, 2018

bh/dsn

**C.HARI SHANKAR
(JUDGE)**



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