

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

% Decided on: 10th July, 2018

+ **CRL.A. 553/2016**

SARWAN KUMAR Appellant

Represented by: Mr.Akshay Bhandari,
Advocate.

versus

STATE Respondent

Represented by: Mr. Ashok K. Garg, APP for
State with SI Bacha Singh, PS
Kotwali.

CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA

MUKTA GUPTA, J. (ORAL)

1. The present appeal is directed against the judgment dated 19th March, 2016 passed by the learned Special Judge, NDPS whereby appellant was convicted for the offence punishable under Section 20(c) of Narcotics Drugs and Psychotropic Substances Act, 1985 (in short 'NDPS Act'). Vide order on sentence dated 29th March, 2016, he was sentenced to undergo rigorous imprisonment for a period of fifteen years and to pay a fine of ₹1,00,000/- and in default of payment of fine, to further undergo simple imprisonment for one year for the offence punishable under Section 20(c) of NDPS Act.

2. Assailing the conviction, learned counsel for the appellant submits that there is non-compliance of Section 42 NDPS Act and its proviso and no information in writing giving the grounds of belief that a search warrant cannot be taken was complied with. Reliance is placed upon the decisions of Supreme Court reported as (2002) 9 SCC 363 Chhunna alias Mehtab v. State of M.P. and MANU/SC/1008/2014 State of Rajasthan v. Chhagan Lal.

It was further urged that there was contradiction with regard to deposit of case property. There was difference in the weight of samples. On 18th December, 2013, attempt was made to send the pullandas to FSL by Ct. Vijay, however, it could not be deposited. Thus, there was possibility of tampering and Ct. Vijay has not been examined as a witness. Prosecution having failed to prove its case beyond reasonable doubt, appellant is entitled to be acquitted.

3. Per contra, learned APP for the State submits that the impugned judgment and the order on sentence suffer from no illegality.

4. Process of law was set into motion on 24th November, 2013 at 10:16 P.M. when information was received that one person namely Sarwan was dealing in opium at H.No. 1239, Maliwara Chandni Chowk. Aforesaid information was recorded vide DD No. 21A (Ex. PW-1/A) and was assigned to HC Prakash (PW-8) and SI Gajender (PW-9). They went to spot and met Sarwan Kumar. SI Gajender (PW-9) informed Sarwan Kumar that information had been received that he was dealing in contrabands and there was a possibility of recovery of contraband from him. SI Gajender (PW-9) informed Sarwan Kumar of his legal right that his search can be conducted in the presence of a magistrate or a gazetted officer but he refused to it. He was issued notice under Section 50 NDPS Act (Ex.PW-8/A). Sarwan Kumar replied to the notice vide Ex.PW-8/B. On search of the room, three bags were found lying. The bags were checked and it contained green and black colour round and batinuma substance and from the physical appearance and smell it appeared to be charas. HC Prakash (PW-8) went to PS Kotwali to bring packing material and manual balance and its weight. Thereafter, the bags were marked as A, B & C. The bags were weighed, the bag with mark

A weighed 13.5 kg of charas, the bag with mark B weighed 9 kg and bag with mark C weighed 5kg. Two samples of 100 gm from each bag were taken and kept in separate polythenes tied with rubber band and all six samples were kept in 6 separate cloth parcels marked as A1, A2, B1, B2, C1 & C2. Remaining charas was kept in three different bags A, B & C and then those bags were kept in separate cloth parcels and all the cloth parcels were sealed with seal of GK. HC Prakash (PW-8) prepared the FSL form at the spot and affixed the seal of GK on it. Case property was taken into possession vide Ex.PW-8/C. Consequently, FIR No. 312/2013 (Ex.PW-3/A) was registered at PS Kotwali for offence punishable under Section 20 NDPS Act. Further investigation was handed over to SI Gopeshwar Nath Tiwari (PW-10).

5. At about 2:00-2:15 A.M., SI Gopeshwar Nath Tiwari along with HC Prakash (PW-8) came to the spot. Sarwan Kumar was produced before SI Gopeshwar Nath Tiwari. He prepared the site plan (Ex.PW-9/B). SI Gopeshwar Nath Tiwari interrogated Sarwan Kumar and arrested him vide arrest memo Ex.PW-8/D. Personal search was conducted vide memo Ex.PW-8/E and disclosure statement was recorded vide Ex.PW-8/F. SI Gopeshwar Nath Tiwari prepared the report under Section 57 NDPS Act (Ex.PW-2/B). Search for co-accused Manoj was made but he could not be traced. On 23rd December, 2013 the exhibits were sent to FSL. After completion of investigation, charge sheet was filed. Charge was framed under Section 20 NDPS Act vide order dated 26th April, 2014.

6. Dimple Jain (PW-6) stated that Sarwan Kumar was residing on the ground floor as a tenant and that she came to know that he was dealing in smack, afim and charas and many a times she had asked him not to deal in

such contraband but he did not mend his ways. She stated that on many occasions while coming down the stairs she used to notice some packets in the tenanted room and there was a smell of contrabands. On 24th November, 2013 at 10:00 P.M. she informed the police regarding the drugs and thereafter within half an hour police officials came to her house. At that time, she stated that Sarwan Kumar was inside the room and was sleeping. She further stated that the police got the door of the house opened and conducted the proceedings. During her cross examination, she stated that the officials came to the house and conducted the proceedings at the ground floor but she did not join the proceedings. She stated that she was not asked by the police to join the proceedings and no notice was issued to her.

7. Appellant in his statement recorded under Section 313 Cr.P.C. stated that he was innocent and had been falsely implicated in the present case. He was lifted from his tenanted room by the police at the behest of Dimple Jain and was taken to PS Kotwali where the police officials obtained his signatures on blank papers. He stated that he did not make any disclosure statement, no contraband was recovered from his possession, it was all planted upon him and all the proceedings had taken place at the police station.

8. Main argument of learned counsel for the appellant is non-compliance of Section 42 NDPS Act and the proviso thereto. Supreme Court in Chhunna alias Mehtab (supra) held:

2. It is not in dispute that the entry in search of the premises in question took place between sunset and sunrise at 3.00 a.m. This being the position, the proviso to Section 42 of the Narcotic Drugs and Psychotropic Substances Act was applicable and it is admitted that before the entry for effecting

search of the building neither any search warrant or authorisation was obtained nor were the grounds for possible plea that if opportunity for obtaining search warrant or authorisation is accorded the evidence will escape indicated. In other words, there has been a non-compliance with the provisions of the proviso to Section 42 and therefore, the trial stood vitiated.

9. Considering the evidence on record, there is nothing on record to prove that the compliance under Section 42 NDPS Act was made and grounds to believe have neither been recorded nor communicated to the immediate superior. Further, proviso to Section 42 NDPS Act has also not been complied with. Since there is non-compliance of Section 42 NDPS Act, the impugned judgment and the order on sentence are set aside.

10. Appeal is disposed of. Trial Court record be sent back.

11. Copy of the judgment be sent to the Superintendent, Jail, who is directed to release the appellant forthwith, if not required in any other case.

Crl. M.B. No.2001/2017 (suspension of sentence)

Since arguments have been heard in appeal itself and judgment has been rendered and the appellant has been acquitted, application seeking suspension of sentence is dismissed as infructuous.

**(MUKTA GUPTA)
JUDGE**

**JULY 10, 2018
'vn'**