

\$~19 & 20

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **CRL. A. 154/2014**

Judgment reserved on 6th April, 2018
Judgment pronounced on 17th April, 2018.

PAPPU KUMAR & KALLU Appellant
Through: Ms. Rajni Singh, Adv.
Versus
STATE Respondent
Through: Ms. Meenakshi Dahiya, APP for
State.
AND
CRL. A. 558/2016
DEEPAK SHARMA Appellant
Through: Ms. Rajni Singh, Adv.
Versus
STATE Respondent
Through: Ms. Meenakshi Dahiya, APP for
State.

CORAM:
HON'BLE MR. JUSTICE A.K. PATHAK

A.K. PATHAK, J.

1. Vide judgment dated 5th September, 2013 of the trial court appellant-Pappu Kumar @ Kallu has been convicted under Section 20(b)(ii)(C) of Narcotic Drugs and Psychotropic Substances Act, 1985 ('the Act', for short); whereas appellant-Deepak Sharma has been convicted under Section 20(b)(ii)(B) of the Act. By the order on sentence dated 3rd October, 2013,

Pappu Kumar @ Kallu has been sentenced to rigorous imprisonment of 12 years with fine of ₹1.50 lacs and in default of payment of fine to undergo simple imprisonment of 2 years; while Deepak Sharma has been sentenced to rigorous imprisonment of 4 years with fine of ₹50,000/- and in default of payment of fine to undergo simple imprisonment of 6 months. Aggrieved by their conviction as also the sentences handed down to them, appellants have preferred abovenoted appeals.

2. Prosecution story, as unfolded from the perusal of charge-sheet, is that a secret informer came in the SIT Office on 24th April, 2011 at about 12:30 pm and informed Const. Sandeep that at about 2/3 pm appellants would come to Budh Vihar, Kanjhawla Road, near Brahm Shakti Hospital to supply large quantity of ganja to someone. Const. Sandeep produced the secret informer before SI Sharat Kohli who, in turn, produced him before the Additional DCP/SIT. After hearing the secret informer, Additional DCP ordered for appropriate action to apprehend the culprits. Accordingly, DD No. 5 dated 24th April, 2011 was recorded and forwarded to senior officers in compliance of Section 42 of the Act. SI Sharat Kohli constituted a raiding party comprising of HC Bahadur Sharma, HC Shyam Lal, HC

Rajender Kumar, HC Amit Tomar, Const. Dabbu Kanwar, Const. Narender Kumar, Const. Vikas Rana, Const. Sandeep and Const. Sunny Sangwan.

3. At about 01:15 pm, raiding party along with secret informer proceeded towards Khanjhwala Road, Brahm Shakti Hospital. On reaching there, eight to ten passersby were requested to join the raiding party but they declined on one or the other pretext. At about 02:30 pm two young boys (appellants) were seen coming from a street near telephone exchange towards the Brahm Shakti Hospital. They were carrying bags with them. They stopped at about 10 steps away from Brahm Shakti Hospital and kept their bags on the ground. On pointing of the secret informer, appellants were apprehended. Notice under Section 50 of the Act was served on them. However, they refused, in writing, to go to the nearest Gazetted Officer of any of the departments mentioned in Section 42 of the Act or to the nearest Magistrate to get their search conducted before either of them. From red coloured bag, which Pappu Kumar @ Kallu was carrying, 10 polythene packets were recovered. On opening the same ganja weighing 10 kgs was recovered. Out of which, 250 gms ganja taken as sample. Thereafter, blue coloured bag, which Deepak Sharma was carrying, was opened in which also 10 polythene packets were recovered. On opening the same 10 kgs

ganja was recovered. Out of which, 250 gms ganja was taken as a sample. Case property was then sealed with the seal of SK. Katta as well as pulandas containing the samples were seized.

4. Pappu Kumar @ Kallu disclosed that he and Deepak Sharma were living as tenants in the house no. O-1/46, Budh Vihar, Phase I, Delhi for last five to six years. They used to bring ganja from Orissa and store the same in their house and thereafter distribute the same to customers. They further disclosed that large quantity of ganja was lying in the tenanted premises as well. Accordingly, SI Sharat Kohli along with raiding party and appellants reached the aforesaid house where they met one Rajesh, son of owner, namely, Bhim Singh, who confirmed that appellants had been living at the first floor as tenants. Rajesh was joined in the investigation. Appellants took the raiding party to first floor. Appellant Pappu Kumar @ Kallu opened the room by taking out keys from his pocket and got recovered 5 bags. On opening these bags, 15 kgs ganja was recovered from each bag. 250 gms of ganja as sample was taken out from each bag and sealed in separate pulandas; whereas remnant contraband was kept in a separate Katta. All the pulandas were sealed with the seal of SK. Total recovered ganja weighed 95 kgs. FSL Form was filled and seal of SK was affixed, thereafter,

FIR was registered. Appellants were arrested. Seized ganja and pulandas of samples along with FSL Form were handed over to HC Bahadur Sharma who handed over the same to SHO, who, in turn, deposited the same in Malkhana. Samples with FSL Form were sent to FSL and its report was obtained, which conformed the samples to be 'Ganja'. Statements of witnesses were recorded. After investigation charge-sheet was filed.

5. I have heard learned counsel for the appellants, learned APP and perused trial court record carefully. I am of the view that prosecution story suffers from inherent discrepancies and inconsistencies thereby making the recovery of ganja from the possession of appellants suspicious, inasmuch as, tempering of samples is also not ruled out in absence of FSL Form having been placed and proved on record. In *Bijay vs. The State* (G.N.CT. of Delhi) MANU/DE/3047/2011, a learned Single Judge of this Court has held that by not sending FSL Form along with samples made the samples doubtful. In *Radha Kishan vs. State* MANU/DE/1329/2000, this Court has held as under :-

“Contemporaneously with seizure and sealing of such articles, impression of seal used on the seal is put on a form, commonly called, the CFSL Form. This is so done because at the time of analysis of sealed packets in the laboratory, the analyst concerned is able to tally seal impressions on sealed packets with those appearing on the CFSL form in order to rule out any

possibility of tampering of seals on sealed packets after seizure anywhere or in transit till receipt in laboratory. The importance of the CFSL form thus cannot be overemphasized because this document provides a valuable safeguard to an accused to ensure that no tempering has been done during intervening period. The CFSL form is a document of forwarding note accompanying a sample sent by the police to the Forensic Science Laboratory. Such a form contains the nature of the crime, list of samples being sent for examination, nature of examination required and specimen of the seal/seals affixed on the exhibit besides particulars of the case/police station.”

6. In Balban Singh vs. State MANU/DE/2534/2008, it has been held as under :-

“In Radha Kishan, after referring to the Delhi High Court Rules, Part III Chapter 18 B, regarding proper proof of custody of articles, it was held by this Court that the evidence of preparation and dispatch of the FSL form was critical for ensuring that the sealed sample was kept intact in the police malkhana. An adverse inference would be drawn against the prosecution in the event the FSL form was not proved to have been prepared and dispatched. To the same effect are the judgments in Moolchand and Phool Kumar. Further, it has been held in Satinder Singh v. State (NCT of Delhi) MANU/DE/1211/1997 : 69 (1997) DLT 577, that oral evidence which is contrary to the documentary evidence ought not to be relied upon. In the instant case, despite the prosecution witnesses asserting that the FSL form was prepared, not only is the FSL form unavailable on the record but the photocopies of the store room register and road certificate throw considerable doubts whether the FSL form was in fact prepared and dispatched. These documents are unreliable. For the above reasons, it is held that in the instant case the non-compliance with the mandatory requirement of preparation and dispatch of the FSL form with the sample sent for testing is fatal to the case of the prosecution.” (emphasis laid)

7. In the present case, recoveries effected from the appellants are also doubtful and suspicious in view of the discrepancies in the statements of recovery witnesses. PW1 HC Sham Lal, PW2 Sharat Kohli and PW14 Insp. Aarti Sharma besides public witness PW7 Rajesh are the recovery witnesses. As per the prosecution story, raiding party took position at Kanjhawla Road near Brahma Shakti Hospital at different locations. At about 02:30 pm appellants were seen coming from a street of Budh Vihar towards the Brahm Shakti Hospital. They were carrying bags with them. On the pointing of secret informer, appellants were apprehended. Ganja was recovered from the bags of appellants which they were carrying. From the bag of appellant-Pappu Kumar @ Kallu 10 kgs ganja was recovered wrapped in 10 polythene bags. Similarly, 10 kgs ganja was recovered from the bag of appellant-Deepak Sharma which were kept in 10 polythene bags. Samples weighing 250 gms each were taken out from each bag. Case property as well as samples were sealed with the seal of SK and seized. Appellant-Pappu Kumar @ Kallu disclosed that he and appellant-Deepak Sharma were living as tenants in house No. O-1/46, Budh Vihar, Phase I, Delhi. They further disclosed that they used to bring ganja from Orissa and store the same in the said tenanted premises. They disclosed that large

quantity of ganja was lying in the said room. Accordingly, PW2 Sharat Kohli along with raiding party and appellants reached the said premises. They met PW7 Rajesh there who agreed to join the investigation. Appellant Pappu Kumar @ Kallu opened the room from the keys which he was carrying in his pocket. 5 bags were recovered from the room. On opening each bag, 15 kgs ganja was recovered. Samples were taken out and sealed in separate pulandas with the seal of SK. FSL Form was filled and seal of SK was affixed.

8. PW7 Rajesh has not supported this fact. As per the prosecution, both the appellants were living in the said premises on rent, however, PW7 has deposed that appellant-Deepak was not living in the said house and only appellant-Pappu Kumar @ Kallu was living there. He denied that ganja was recovered by the police from the room in his presence. He stated that police had obtained his signatures on some documents on the pretext that ganja was recovered. He further stated that he had handed over a rent agreement executed between his father, namely, Sh. Bhim Singh and appellant-Pappu Kumar @ Kallu. PW7 was declared hostile and was cross-examined by the learned public prosecutor at length but nothing could be elicited from him, in his cross-examination, which could go in favour of prosecution and

against the appellants. PW12 Bhim Singh, who is father of PW7 Rajesh, has also not supported the prosecution story that appellant-Deepak Sharma was living in the tenanted premises along with appellant-Pappu Kumar. He has deposed that he did not see Deepak Sharma ever in the tenanted premises. He was also cross-examined by the learned public prosecutor at length but nothing adverse to the appellant could be elicited from him. Both the public witnesses have not supported the prosecution.

9. In view of this, it would not be safe to rely on the shaky statements of the police officials. As per PW1 HC Shyam Lal, FSL Form was filled and seal of SK was affixed therein at the time of first recovery, that is, at Kanjhawla Road; as also at the time of second recovery from the tenanted premises. Per contra, PW2 SI Sharat Kohli has deposed that FSL Form was filled only after recovery was effected from the tenanted premises. As per PW4 HC Bahadur Sharma also, FSL Form was filled after ganja was recovered from the tenanted premises (second recovery). PW14 Insp. Aarti Sharma deposed that FSL Form was filled once. According to her also, FSL Form was filled after ganja was recovered from the tenanted premises. Thus, there are material discrepancies in the statements of witnesses with regard to

filling of FSL Form and seizure thereof. These statements of police witnesses otherwise became suspicious in absence of the FSL Form.

10. Recoveries were effected from two different places at different times. Case property was seized separately. First recovery was effected from Kanjhawla Road near Brahm Shakti Hospital where, as per the prosecution, all the proceedings were conducted in respect of this recovery. As per HC Shyam Lal, FSL Form was filled at the time of first recovery, that is, Kanjhawla Road as well as at the time of second recovery from the tenanted premises. Thereafter, as per prosecution, appellant-Pappu Kumar made a disclosure statement and took the police party to the tenanted premises where PW7 Rajesh joined the raiding party. Appellant-Pappu opened the room and got the recoveries effected. However, according to PW2 SI Sharat Kohli, PW4 HC Bahadur Sharma and PW14 Insp. Aarti Sharma, FSL Form was filled at the time of second recovery only. Thus, there are material discrepancies in the statements of witnesses on this point, inasmuch as, public witness has not supported the prosecution story regarding second recovery. According to PW7 Rajesh, no recovery was got effected by Pappu Kumar @ Kallu from the tenanted premises in his presence. As per the prosecution, both the appellants were living together in the same tenanted

premises, however, landlord-PW 12 Bhim Singh and his son PW 7 Rajesh have not supported this version.

11. For the foregoing discussions, I am of the view that appellants are entitled to benefit of doubt. Trial court has erred in concluding that prosecution had succeeded in proving its case beyond the shadow of reasonable doubt. Accordingly, impugned judgment is set aside and appellants are acquitted. Appellant-Pappu Kumar @ Kallu is in jail. He be released forthwith, if not required in any other case. Appellant-Deepak Sharma is stated to have already completed his sentence.

12. Both the appeals are disposed of in the above terms.

13. Copy of the judgment be sent to concerned Superintendent Jail for serving it on the appellant and for compliance.

A.K. PATHAK, J.

APRIL 17, 2018

ga