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

Reserved on 29th September, 2018
Date of decision: 16th October, 2018

+ CRL. A. 627/2017

VED PRAKASH alias KALU Appellant
Through: Ms. Rakhi Dubey, Advocate

versus

STATE Respondent
Through Mr.G.M. Farooqi, Adv.
alongwith SI Narinder
Sehrawat, ISC Crime Branch,
Chankya Puri

CORAM:
HON'BLE MR. JUSTICE NAVIN CHAWLA

1. This appeal has been filed challenging the Judgment dated 27.02.2017 passed by the learned Additional Sessions Judge-02 (East)/Special Judge (NDPS), Karkardooma Courts, Delhi in Sessions Case No. 555/16 convicting the appellant under Section 20(b)(ii)(C) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as 'Act'). The appeal further challenges the order dated 06.03.2017 passed by the Special Judge (NDPS) sentencing the appellant to undergo Rigorous Imprisonment (RI) for a period of ten years with a fine of Rs. 1 lakh; in default of payment of fine, to undergo RI of one year.
2. It is the case of the prosecution that on 21.06.2011, HC Suresh (PW-5) was posted at Anti Robbery Cell, Nehru Place. At around 10

AM, a secret informer came to him and informed that around 12 noon one Mahesh alias Meshi and his companion, the appellant herein, who were residents of Jhuggis at Nehru Camp, Near Mother Dairy, Patparganj would come for supply of ganja in TSR bearing Registration No. DL 1RL 3268. He conveyed this information to ASI Surender Singh (PW-8). ASI Surender Singh (PW-8) made enquiries from the secret informer and further conveyed the information to Inspector J.S. Joon. Inspector J.S. Joon also made enquiries from the secret informer and thereafter conveyed this information to ACP Bir Singh Yadav, who directed further action to be taken as per law.

3. ASI Surender Singh (PW-8) thereafter constituted a raiding party consisting *inter alia* of himself, HC Suresh (PW-5) and Constable Anil Kumar (PW-3). Daily Diary Entry No.4 was also prepared by him. The raiding party left for the site and on the way requested public witnesses to join the investigation, to which all of them refused. Even at the spot public persons were asked to join the investigation, however, they left the spot without disclosing their identities.

4. At around 11:50 AM, the secret informer pointed out towards the TSR coming to the spot. The TSR was being driven by accused Mahesh alias Meshi and the appellant was sitting with him. On being confronted, both the accused were given notice under Section 50 of the Act explaining that they can have themselves searched in the presence of a Magistrate or a Gazetted Officer. As the accused persons refused to avail of their right, a search was carried out and

nine plastic bags were recovered. On opening the bags, green leaves and seed like things which were smelling like ganja were recovered. Bag Nos. 1 to 4 were marked as Mark 'A' and the other five bags were marked as Mark 'B'. The total weight of the bags was 285 Kg.

5. Some ganja was taken from each bag of Mark 'A' and two samples were prepared consisting of one kilogram of ganja. The same were marked as S-A-1 and S-A-2. Similarly, ganja was taken out from each of the bags from Mark 'B' and two samples were prepared and marked as SB-1 and SB-2. Rest of the case property was kept in respective bags after sewing the same and sealing with the seal of SSD.

6. Thereafter, ASI Surender Singh (PW-8) prepared the *rukka* of the same along with case property, samples, Form FSL and carbon copy of the seizure memo, which were handed over to HC Suresh (PW-5) for producing them before the Duty Officer for registration of the FIR.

7. Based on the *rukka*, FIR No. 171/2011 was registered at Police Station Crime Branch, Nehru Place under Sections 20, 25 and 29 of the Act.

8. Inspector C.R. Meena (PW-7) who was posted as SHO, Crime Branch, was given the case property bearing the seal of SSD. He affixed the seal of CRM on each *pullanda* and the FSL Form and also put the FIR No. with his signature on all of the above. He called HC Jag Narain (PW-2) who was working as MHCM at Police Station Crime Branch to his office and handed over all the material to him.

9. Entry regarding the deposit was made in Register No. 19

(Exhibit PW-2/A) and the DD No. 17 (Exhibit PW-7/A) was also recorded in this regard. The SHO (PW-7) signed the Register in Column 3.

10. The case was handed over to SI Sumer Singh (PW-9) for investigation, who raided the spot, prepared site plan (Exhibit PW-8/C), recorded the statement of ASI Surender Singh (PW-8) and arrested both the accused. He also carried out personal search of the accused, interrogated them and recorded their disclosure statements. He deposited the TSR and personal search items in *malkhana* of the police station, for which an entry was made at Sr. No. 1112 in Register no. 19 (Exhibit PW-2/B). He produced the subject report under Section 57 of the Act to Inspector J.S. Joon.

11. On 06.07.2011, the samples were sent to FSL Rohini through Constable Gajender (PW-6) and the report from FSL office (Exhibit PW-9/B) dated 21.07.2011 reported that the material in Exhibit SA-1 and SB-1 was found to be ganja (cannabis).

12. The prosecution examined nine witnesses in support of its case including PW-3, PW-5 and PW-8, the members of the raiding party.

13. The Trial Court, on examination of the evidence, has convicted the appellant under Section 20 of the Act while acquitting him of charges under Sections 25 and 29 of the Act.

14. During the trial the accused Mahesh @ Meshi died and therefore, the proceedings against him stood abated.

15. Learned counsel for the Appellant relying upon the judgment dated 27.04.2018 passed by the Supreme Court in Criminal Appeal No.273/2007, ***Arif Khan @ Agha Khan v. State of Uttarakhand***,

2018 SCC Online SC 459, submits that in the present case the alleged search and recovery made on the Appellant does not satisfy the mandatory requirement of Section 50 of the Act and is therefore fatal to the case of the prosecution. Section 50 of the Act is reproduced herein below:

“50. Conditions under which search of persons shall be conducted.-

(1) When any officer duly authorised under section 42 is about to search any person under the provisions of section 41, section 42 or section 43, he shall, if such person so requires, take such person without unnecessary delay to the nearest Gazetted Officer of any of the departments mentioned in Section 42 or to the nearest Magistrate.

(2) If such requisition is made, the officer may detain the person until he can bring him before the Gazetted Officer or the Magistrate referred to in sub- section (1).

(3) The Gazetted Officer or the Magistrate before whom any such person is brought shall, if he sees no reasonable ground for search, forthwith discharge the person but otherwise shall direct that search be made.

(4) No female shall be searched by anyone excepting a female.

[(5) When an officer duly authorised under Section 42 has reason to believe that it is not possible to take the person to be searched to the nearest Gazetted Officer or Magistrate without the possibility of the person to be searched parting with possession of any narcotic drug or psychotropic substance, or controlled substance or article or document, he may, instead of taking such person to the nearest Gazetted Officer or Magistrate, proceed to search the person as provided under section 100 of the Code of Criminal Procedure, 1973 (2 of 1974)

(6) After a search is conducted under sub-section (5), the officer shall record the reasons for such belief which

necessitated such search and within seventy-two hours send a copy thereof to his immediate official superior].”

16. In ***Vijaysinh Chandubha Jadeja v. State of Gujarat***, (2011) 1 SCC 609 the Supreme Court, while approving the earlier judgment of the Constitution Bench of the Supreme Court in ***State of Punjab v. Baldev Singh***, (1999) 6 SCC 172, held as under:

“29. In view of the foregoing discussion, we are of the firm opinion that the object with which the right under Section 50(1) of the NDPS Act, by way of a safeguard, has been conferred on the suspect viz. to check the misuse of power, to avoid harm to innocent persons and to minimise the allegations of planting or foisting of false cases by the law enforcement agencies, it would be imperative on the part of the empowered officer to apprise the person intended to be searched of his right to be searched before a gazetted officer or a Magistrate. We have no hesitation in holding that insofar as the obligation of the authorised officer under sub-section (1) of Section 50 of the NDPS Act is concerned, it is mandatory and requires strict compliance. Failure to comply with the provision would render the recovery of the illicit article suspect and vitiate the conviction if the same is recorded only on the basis of the recovery of the illicit article from the person of the accused during such search. Thereafter, the suspect may or may not choose to exercise the right provided to him under the said provision.

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31. We are of the opinion that the concept of “substantial compliance” with the requirement of Section 50 of the NDPS Act introduced and read into the mandate of the said section in Joseph Fernandez and Prabha Shankar Dubey is neither borne out from the language of sub-section (1) of Section 50 nor it is in consonance with the dictum laid down

in Baldev Singh case. Needless to add that the question whether or not the procedure prescribed has been followed and the requirement of Section 50 had been met, is a matter of trial. It would neither be possible nor feasible to lay down any absolute formula in that behalf.”

17. In the present case the service of notice under Section 50 of the Act on the Appellant and Appellant refusing to avail his right under Section 50 of the Act have been duly proved by the testimonies of PW-3, PW-5 and PW-8 as also through the reply given in the hand of the Appellant (Ex.PW3/D). Infact, the case of the Appellant is that he was not present at the site and had been later picked up from his house and falsely implicated in the present case. Therefore, I do not find any merit in the contention raised by the learned counsel for the Appellant relying upon Section 50 of the Act.

18. Learned counsel for the Appellant next contended that not only is there discrepancy in the material allegedly recovered from the Appellant but also there is discrepancy in the weight of the sample allegedly drawn and the weight of sample which was produced before the FSL for testing. She submits that PW-5 HC Suresh in his testimony has stated that the material recovered was green leaves and seed like things whereas the FSL report states that it was “Brownish greenish vegetative fruiting and flowering tops along with fungal growth”. She submits that seeds and leaves when not accompanied by the flowering and fruiting tops of a cannabis plant are not ganja in terms of Section 2(iii)(b) of the Act. She further submits that while the case of the PW-3, PW-5 and PW-8 was that the sample was of 1

kg each, the FSL report states that the quantity of Ex.S-A-1 was 1021 grams while the weight of Ex.S-B-1 was 1026 grams. She submits that this wide variation in the weight of the sample has not been explained by the prosecution, clearly showing that the samples had been tampered with. She further submits that when the bags were produced before the Trial Court it was recorded that they had been cut from various places due to mice bites and some bags had big cuts from which the case property could be taken out. She therefore, submits that the case property itself had not been secured by the prosecution, which itself is fatal to the case of the prosecution.

19. I have considered the submission made by the learned counsel for the Appellant, however, I find no force in the same. The custody of the samples Ex.S-A-1 and Ex.S-B-1 has been duly proved by the prosecution right from the drawing of the samples till the same were produced before the FSL by way of the testimonies of PW-5 HC Suresh, PW-7 Inspector C.R.Meena, PW-2 HC Jagnarain and PW-6 Ct.Gajender. The FSL report also states that the sealed parcel Ex.S-A-1 and Ex.S-B-1 were received by it with the seals intact and tallied with the specimen seal as per forwarding letter "FSL Form" till they reached the FSL. The variation in the weight is not that large as to cast a doubt on the case of the prosecution. Such difference can occur due to variety of reasons like the weight machine used etc.

20. Equally, merely because at the time of the trial it was found that some of the bags had been cut from various places due to mice bites, the case of the prosecution does not get affected in any manner. It is important here to note that the Trial Court has recorded that there

were other bags which were not in such condition. No further questions were put to the witnesses regarding the contents of these bags.

21. As far as the reliance on the statement of PW-5 that what was recovered was only leaves and seed like things and not flowers, I may only note that PW-3 (Ct. Anil Kumar) clearly states about the bags containing “leaves, flowers and small twigs”. In any case, the FSL report clearly shows that what was recovered was ganja. As noted above, some of the bags that were produced before the Trial Court had not been found in a position where their contents could have been replaced and it is not the case of the defence that they contained only leaves and seeds and not flowers or fruiting tops of cannabis plant. In fact, as noted above, the contents of these bags were never questioned by the defence. I therefore do not find any infirmity in the prosecution case in this regard.

22. Learned counsel for the Appellant next contended that even if it is proved that the Appellant was found sitting in the TSR, it cannot lead to the conclusion that the Appellant was in possession of the narcotic drugs. She submits that the TSR did not belong to the Appellant. Infact, it was the case of the prosecution itself that the owner of the TSR was the brother of the accused Mahesh @ Meshi. She places reliance on the judgment of this Court in ***Dilbag Singh v. D.R.I.***, 2009 SCC Online Del 1424.

23. I do not find any merit in the above contention of the learned counsel for the Appellant. The defence of the Appellant was one of complete denial of presence at the site. In his statement under

Section 313 of the Code of Criminal Procedure, 1973, the Appellant stated that he had been picked up from his house and not from the scene of crime. It was therefore, not the case of the Appellant that he was merely a passenger of the TSR and was unaware of the contents of the bags. He failed to lead any evidence of his defence that he was not present at the site. On the other hand, the case of the prosecution that he was sitting in the TSR has been fully corroborated and proved. Therefore, in the facts of the present case, the judgment of this Court in *Dilbag Singh* (supra) cannot come to the rescue of the Appellant.

24. Learned counsel for the Appellant has further contended that it was practically impossible to have 285 kg of ganja in a TSR. She submits that the TSR cannot carry so much ganja in it.

25. I do not find any merit in this contention. Learned counsel for the Appellant has not shown whether this contention was ever put to any of the witnesses of the prosecution. It cannot be raised as an afterthought at the appellate stage. The testimonies of the witnesses of the prosecution being consistent on this issue, cannot be doubted in this vague manner.

26. Learned counsel for the Appellant further submitted that no public witness was involved in the alleged recovery and arrest and even the concerned Police Station of the area was not informed. She further submitted that though the witnesses stated that they had taken testing kit with them, they did not use the same at the time of making the recovery and have stated that it was only by smell that they concluded that the recovery item was ganja.

27. In my opinion, these again are minor lapses of investigation. The witnesses have stated that they tried their best to involve public witnesses in the search and recovery, however, public witnesses present there did not join in the investigation. The Supreme Court in ***Ram Swaroop v. State (Government of NCT of Delhi)***, (2013) 14 SCC 235, has held that merely because independent public witnesses did not join the investigation, the prosecution case cannot be doubted.

28. This Court also in ***Jai Yodhad v State***, 2014 SCC OnLine Del 458, while highlighting the reluctance of common men to join as public witnesses, has held as under:

“11. As regards public witnesses not being joined, it has come in the deposition of prosecution witnesses that a number of persons present on the bus stops on the way to the place where the appellant was apprehended as well as several members of the public present on the spot were requested to join the police team but no one agreed to be associated with them. It cannot be disputed that the public does not want to get dragged in police and criminal case and wants to avoid them, because of long drawn trials and unnecessarily harassment. Similar view was taken in Manish v. State (NCT of Delhi) and in Appabhai v State of Gujarat. We can't be oblivious to the reluctance of common men to join such raiding parties organised by the police, lest they are compelled to attend Police Station and Courts umpteen times at the cost of considerable inconvenience to them, without any commensurate benefit. Hence, no adverse inference on account of failure to join public witnesses in such raids despite genuine efforts should be drawn.

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Therefore, no adverse inference can be drawn against the prosecution on account of the inability of the

raiding party to join public witnesses. It is not as if no effort was made by them in this regard. They did make efforts at several places but no member of the public agreed to be associated with them.”

29. Further, merely not informing the concerned Police Station of the area and failure to test the material recovered through equipment but by only smell, cannot in any manner affect the case of the prosecution which is otherwise duly proved through the testimonies of the witnesses who could not be shaken in their cross-examination and also by the FSL report which could not be doubted.

30. In view of the above, I find no merit in the present appeal and the same is accordingly dismissed.

31. The Trial Court Record be sent back.

32. A Copy of this judgment be supplied to the Appellant through the concerned Jail Superintendant.

NAVIN CHAWLA, J

OCTOBER 16, 2018
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