

**(2007) 11 DEL CK 0007**

**In the Delhi High Court**

**Case No : Criminal Appeal No. 391 of 2003**

Mohd. Altaf

APPELLANT

Vs

State of NCT of Delhi

RESPONDENT

**Date of Decision : 30-11-2007**

**Acts Referred:**

Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 20, 42, 43, 50, 57

**Citation :** (2007) ILR Delhi 106 Supp

**Hon'ble Judges :** S.N. Dhingra, J

**Bench :** Single Bench

**Advocate :** Padam Singh and Prem Pratap Singh, for the Appellant; Amit Sharma, for the Respondent

## **Judgement**

Shiv Narayan Dhingra, J.—This appeal has been preferred by the appellant against the judgment dated 9th May, 2003 and the order on sentence dated 12th May, 2003 whereby the appellant was convicted u/s 20 of Narcotic Drugs and Psychotropic Substances Act ( for short the "NDPS Act") for possession of 3 kg of "charas" and was sentenced to undergo rigorous imprisonment for a term of ten years and fine of Rs.1 lac, in default of payment of fine, to further undergo rigorous imprisonment for one year.

2. The facts relevant for deciding this appeal are that on 28.03.1998, Sub Inspector Rakesh Dahia along with one constable were on patrolling duty near Old Lajpat Rai Market when a secret information was received that a young "Kashmiri" boy possessing "charas" would come at Angoori Bagh, a place nearby, to sell it off. The information was put by the Sub Inspector in writing. Since he was on patrolling duty, he sent a wireless message of the information so recorded to the Additional SHO Police Station Kotwali and also requested him to reach Angoori Bagh. The Sub Inspector along with other police officials proceeded to Angoori Bagh. The appellant was pointed out by the informer and he was apprehended with a plastic bag(katta) in his hand. The information about

his possessing "charas" was disclosed to him and he was offered to be searched in presence of a Magistrate or a Gazetted Officer. The appellant, in writing, refused to be searched in presence of a magistrate or a gazetted officer. The plastic bag in the hands of the appellant was searched and it was found to contain "charas". Same was weighed and found to be 3 kg. A sample of 200 gms was separated and sealed. Rest of the quantity of charas was sealed separately. The Sub Inspector affixed his seal of "RK" on the samples and the remaining quantity. The Additional SHO, who had also reached the spot before taking search, affixed his seal of "RSG" on the sample as well as on the remaining quantity. Form CFSL was also filled in and affixed with the same seals. The sample was sent to CFSL Laboratory. It gave positive result for "charas". The appellant, who was apprehended at the time of recovery, was sent to face the trial u/s 20 of the NDPS Act. The trial court, after considering the entire evidence led in this case, convicted the appellant and sentenced him as stated above.

3. The appellant has challenged his conviction on the ground that there were contradictions in the testimony of witnesses regarding use of the balance for weighing the substance(charas) recovered from him, no public witness was joined by the police despite plenty of them being available, the substance recovered from him, as stated by the witnesses, was black in colour while in the testimony of Chemical examiner, the substance was found to be green black/greenish brown, there was non-compliance of Sections 42, 50 and 57 of the NDPS Act. It is submitted that because of these reasons, the conviction and consequent sentence of the appellant was bad in law. It is also stated that there was delay of 18 days in sending the sample to CFSL and sample were tampered.

4. A perusal of entire evidence would show that the appellant has not denied his presence at the spot. The stand taken by the appellant is that he was working on one of the nearby traveling agency office as an employee and since the owner of the traveling agency had not paid regular monthly (Hafta) to the police, police falsely implicated him. The cross examination of the witnesses also showed that the stand taken is that the "charas" was recovered from some other women on the spot, who was let off by the police after taking Rs.19000/- and the appellant was falsely implicated in recovery of the "charas". The two facts stand uncontroversial and are also proved by testimony of witnesses regarding apprehension of the appellant from the spot and recovery of "charas". The appellant has only disputed that this recovery was not made from him but was made from someone else and he was falsely implicated.

5. There is no doubt that the place from where the appellant was apprehended was a busy place. However, it is not necessary that if there are persons around on a busy place, they would be ready and willing to join the investigation on the request of the police. It has come in the testimony of police officials that request was made to public persons to join the investigation but they refused to join. I consider that on the ground that no public witness was ready to associate, the case of the prosecution cannot be doubted. In P.P. Beeran Vs. State of Kerala, ,

the Supreme Court observed that the testimony of police official cannot be rejected on the ground that police official was the sole witness of recovery of opium and the public witness, who was examined, turned hostile. The Supreme Court observed that the conviction can be based on the sole testimony of a Sub Inspector if the other circumstances existed, shall corroborate the testimony.

6. This Court in *Jawahar v. State* Crl.Appeal No. 690/2000 decided on 23.03.2007 observed as under:

As far as non association of public witnesses at the time of recovery is concerned, I consider that this is not an infirmity sufficient to throw out the case of the prosecution. It is very hard these days to get association of public witnesses in criminal investigation. Investigation itself is a tedious process and a public witness, who is associated, has to spend hours at the spot. Normally, nobody from public is prepared to suffer any inconvenience for the sake of society. The other reason for the public witness not readily agreeing to associate with investigation is harassment of public witness that takes place in the courts. Normally a public witness should be called once to depose in the court and his testimony should be recorded and he should be discharged. But experience shows that adjournments are given even in criminal cases on all excuses and if adjournments are not given, it is considered as a breach of the right of hearing of the accused. These adjournments are specifically taken by counsels for accused persons, when witnesses are present, just to see that witnesses get harassed by calling them time and again. The excuses normally given in the courts are : the counsel having urgent personal work, left the court; death of some near relatives etc; the counsel being busy in arguing other matter in other court or cross examining other witness in some other court. This attitude of the courts of sending witness back is a major cause of harassment which discourages public from associating in the investigation of any case. Since the police is faced with this handicap, the police cannot be blamed for not associating public witness. There is no presumption that the police witnesses are not credible witnesses. The testimony of every witness, whether from public or police, has to be judged at its own merits and the court can believe or disbelieve a police witness considering the intrinsic value of his testimony. Police witnesses are equally good witnesses and equally bad witnesses as any other witness and the testimony of police witness cannot be rejected on the ground that they are official witnesses.

I, Therefore, find that non joining of public witness could not be a ground to set aside the conviction.

7. The appellant cannot draw any mileage from the discrepancy in the testimony of witness about the colour of the substance recovered. Even the Chemical examiner who had examined the sample did not give one colour of the substance. He stated that it was of greenish brown colour. The witness of recovery when asked about the colour stated that it was of black colour. However, the fact remains that the sample which was sent to CFSL for

examination was found sealed with the same seals which were affixed on it at the time of seizure of material. The seals were intact and there was no reason to believe that the sample was tampered. Once it is proved by evidence that the seals of sample were intact and sample that reached the laboratory was the one seized at the spot, the description of colour of the sample wrongly by the witness after lapse of long time of its seizure, in the court, does not prove tampering of the sample but only proves that the witness had not noted the colour properly or did not remember the colour properly.

8. The next argument advanced by counsel for the appellant that there was non compliance of Section 50 of the NDPS Act, also must fail. In the instant case, the recovery of charas was made from a polythene bag held by the appellant. The Supreme Court in *State of Haryana Vs. Ranbir @ Rana*, observed that a bag or any other article or container, under no circumstances be treated as body of human being, Therefore, it was not possible to include these articles within the ambit of "a person" occurring in Section 50 of the Act. This view was again reiterated by the Supreme Court in *State of Rajasthan Vs. Babu Ram, I*, Therefore, considers that the challenge of the judgment of trial court by the appellant on this ground must fail.

9. As far as compliance of Section 42 of NDPS Act is concerned, it has been proved on record that the Sub Inspector was on patrolling duty. The moment he received the information about possibility of a recovery of charas from the appellant, this information was recorded by him in writing. Since an immediate action was needed in this case and he was supposed to act on the information forthwith, he communicated this information on wireless to the his senior officer i.e. Additional SHO and also requested the Additional SHO to come on the spot. Section 42 of the NDPS Act does not provide that unless the information recorded in writing is not sent to senior officers, an Investigating Officer cannot act on the information. The only requirement of Section 42 of NDPS Act is that whenever an information is received, the same is to be put down in writing and if time permits and there was no danger of affording an opportunity for concealment of evidence or of escaping of the offender, the investigating officer may obtain search warrants or authorization. Section 43 of the NDPS Act further provides that any officer who received the information may search on whom he has reason to believe that he has committed the offence or if such person has a substances, may arrest him. It is not disputed that the the appellant was apprehended from a public place. The information received by the Sub Inspector was recorded by him in writing and he immediately communicated the information to his senior police officers, though on wireless. I consider that there was sufficient compliance of Section 42 in this case.

10. The other argument of learned Counsel for the appellant is about non compliance of Section 57. Testimony of PW4 shows that Section 57 was complied in letter and spirit and report of arrest and seizure, as envisaged u/s 57, was sent by the investigating officer to immediate superior officer within 48 hours.

Merely because in the register receiving report, FIR number etc. is not mentioned, does not mean that the report was not in respect of the case. In fact, only a report is supposed to contain all the details and the register showing entry of receipt of report may not contain the FIR number etc.

11. I consider that no advantage can be derived by the appellant by minor contractions here and there in the testimony of witnesses regarding weighing balance and weight. The details of these things are given by the witnesses from memory. The memory of a person starts fading soon after the incident is seen by him. It is for this reason that memos are prepared in respect of all material particulars. The contractions in respect of non material particulars appearing in the evidence do not affect the substantive evidence given by the witnesses.

12. In view of my foregoing discussion, I find no force in this appeal against the conviction of the appellant. The appeal is hereby dismissed.

13. Counsel for the appellant submitted that appellant is a poor person and he is not in a position to pay the fine imposed on him and this Court should reduce the fine. This Court cannot reduce the fine because the minimum fine provided by the statute is Rs.1 lac. However, the sentence of the appellant is modified to the extent that in case of default in payment of fine, the appellant shall undergo simple imprisonment for 3 months. The modified sentence of the appellant, Therefore, is that he has to undergo rigorous imprisonment for a term of 10 years and to pay a fine of Rs.1 lac. In default of payment of fine, he has to undergo 3 months" simple imprisonment. Let the modified sentence be communicated to Superintendent Jail.