

**(2012) 04 DEL CK 0339**

**Delhi High Court**

**Case No:** Criminal A. 424 of 2000

Hazoor Singh

APPELLANT

Vs

State

RESPONDENT

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**Date of Decision:** April 23, 2012

**Acts Referred:**

- Criminal Procedure Code, 1973 (CrPC) - Section 313
- Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) - Section 15, 50

**Hon'ble Judges:** Mukta Gupta, J

**Bench:** Single Bench

**Advocate:** Anita Abraham, Amicus Curiae, for the Appellant; Manoj Ohri, APP for the State, for the Respondent

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**Judgement**

Hon"ble Ms. Justice Mukta Gupta

1. The present appeal is directed against the judgment passed by the learned Additional Sessions Judge convicting the Appellant for offence punishable u/s 15 of the NDPS Act and order on sentence dated 24th April, 2000 whereby the Appellant was sentenced to undergo Rigorous Imprisonment for 10 years and a fine of Rs.1,00,000/-, in default of payment of fine to further undergo Simple Imprisonment for 1 year. Briefly the prosecution case is that on 18th September, 1996, DD No. 20 was received at PS Lahori Gate and in pursuance thereof, a raiding party consisting of ASI Ranbir Singh along with SI Amit Issar, HC Ashok Kumar and Const. Krishan Kumar was formed, which reached at SPM Marg, Old Punjab Bus Stand. The Investigating Officer asked 4/5 public persons to join the investigation to which one Harjeet Singh agreed and was joined as a public witness. At about 9:20 a.m. on the pointing out of the informer, the Appellant was apprehended with the help of Cont. Krishan Kumar. Offer was given to the Appellant to be searched in the presence of a Magistrate or a Gazetted Officer, which was declined by him. Search of the Bag/Katta on which the Appellant was sitting was taken. The bag was found

containing poppy straw powder. The bag/katta contained 12 packets of one kg each out of which one packet was kept as a sample. The remaining 11 packets were kept back in the same katta, which was sealed with the seal of RS. The CFSL form was filled up and the seal of RS was also affixed on it. By that time, the SHO, PS Lahori Gate also came to the spot and he also affixed his seal on both the parcels/pulandas and CFSL forms. The sample was deposited in the CFSL for testing. As per the report of CFSL, the sample gave positive test for the poppy straw powder. On completion of investigation, charge sheet was filed. After recording the testimony of the prosecution witnesses and the statement of Appellant u/s 313 Cr.P.C., the learned Special Judge convicted the Appellant for offence punishable u/s 15 of the NDPS Act and sentenced him as mentioned above.

2. Learned counsel for the Appellant contends that the impugned judgment is bad in law. Learned Special Judge ignored the factual matrix of the case and passed the impugned judgment based upon conjectures and surmises. Learned Special Judge ignored the fact that there were contradictions in the testimonies of the investigating officer, the SHO and the public witness. Also there was overwriting on the CFSL report and PW8 Dr. S.K. Shukla, Asstt. Chemical Examiner, CFSL had stated that the correction on the report had not been made by him. Learned counsel has further stated that there was delay in sending the sample for testing to CFSL and no explanation in this regard had been rendered by the prosecution. The sample was not produced in the Court for identification and the remaining poppy straw recovered in the katta/bag when brought in the Court was found unsealed. Thus, the case property was not properly sealed, preserved and was tampered. Further the Appellant is entitled to get the benefit of the Amendment Act passed in 2001 wherein the sentencing structure under the Act underwent a drastic change. The said amendment Act provided graded sentences linked to the quantity of narcotic drug or psychotropic substance in relation to which the offence was committed. It is stated that the Appellant was found in possession of 12 kg of poppy straw powder, which is less than commercial quantity under the amended Section 15 of the NDPS Act. Thus, the benefit of the same has to be extended to the Appellant. The Appellant has already served 3 years, 10 months and 23 days and has also paid/deposited the fine.

3. Per contra, learned APP for the State contends that the impugned judgment suffers from no illegality. The minor discrepancies as pointed out by learned counsel for the Appellant do not go to the root of the prosecution case. The witnesses have fully supported the prosecution case and have deposed that the Appellant at the time of raid was sitting on the katta/bag at the old Punjab bus stand, Fatehpuri which bag was found containing poppy straw powder. The rules and procedure as prescribed in the NDPS Act have been duly complied with in the present case. The non-production of sample in the Court does not belie the otherwise clear evidence produced against the Appellant. Learned Trial Court, keeping in view the cogent testimony of the witnesses, has correctly convicted the Appellant. Hence the present

appeal has no merit and is liable to be dismissed.

4. I have heard learned counsels for the parties and perused the record.

5. After serving the notice u/s 50 NDPS Act, when the search of the katta was taken, the contraband was recovered. The alleged recovery of the contraband (poppy straw powder) is from a katta on which the Appellant was found sitting. The recovery of the contraband not being from personal search, Section 50 of the NDPS Act has no application to the facts of the present case.

6. PW4 Const. Kishan Kumar has stated that on the day of incident at about 9:25 p.m. at the pointing out of the secret informer opposite Hari Travels, the Appellant, who was sitting under a banyan tree on a katta, was caught hold by him and A.S.I. Ranbir Singh. ASI Ranbir Singh informed the Appellant that they have the information that he is in possession of poppy straw powder and his search in this regard has to be taken. If he wants, his search can be taken in presence of a Gazetted Officer or a Magistrate. A notice u/s 50 NDPS Act was served on them. The Appellant declined the offer to get the search conducted in presence of a Gazetted Officer or a Magistrate. This witness has further stated that on opening the katta, on which the Appellant was sitting, 12 polythene packets/bags were recovered. On opening the same, it was found that the polythene packets contained poppy straw powder. Out of them, one packet was taken as sample, which was sealed in a cloth pulanda with the seal of RS. Remaining 11 polythene packets were kept in the katta and were also sealed with the seal of RS. CFSL forms were also filled and seal of RS was affixed on it. SHO Inspector R.S. Jhakad also reached the spot and he affixed his seal RSJ on the sample, the katta and the CFSL forms. Recovery memo and other documents were prepared at the spot.

7. PW5 Harjeet Singh, the public witness has deposed that on the day of incident he was present near his car at main road near MCD office. One Inspector met him along with two three Constables and asked him to join the investigation of some case. He agreed and went along with the police party and stood near Hari Travels. Appellant Hazoor Singh was sitting on a katta/bag and the Inspector asked him that what he was having in the katta has to be seen. On opening the said katta, 10-12 packets containing a white coloured powder were found. The Inspector weighed the packets and the weight of one packet was found to be one kg. The investigating officer put back the packets in the same katta and sealed it. SHO also reached the spot and also sealed the katta. Around 11:30 -12:00 p.m. he went back from the spot. He has stated that he could identify the said katta and the packets. When the katta was produced by the prosecution in Court, the learned Special Judge observed that there was no seal visible on the katta and the katta had been opened with proper cutting. The katta Ex.P1 and the plastic bag in the katta(Ex.P2) were identified to be the same, which were recovered by the police party. This witness had been declared hostile by the learned APP and on his examination he stated that the police officer had informed the Appellant of his right to be searched in the presence of a

Magistrate or a Gazetted Officer. He has further stated that the Appellant declined the same and he does not know that whether the I.O. had filled any form and affixed his seal on the same. He accepted the suggestion that the investigating officer and the SHO had handed over their seals to him. He further accepted the suggestion that the investigating officer had sealed the one kg sample separately in the cloth pulanda, which was duly sealed. This witness when cross examined by the learned counsel for the Appellant has stated that he had returned the seals next day as one Constable had come to take the same.

8. PW6 ASI Ranbir deposed that on 18th September, 1996 he was posted at PS Lahori Gate at about 9.10 p.m. when an informer came to the police station and informed SI Amit Issar about a person having possession of poppy straw powder. This information was recorded vide DD No. 29. A raiding party comprising SI Amit Issar, H.C. Ashok, Const. Krishan Kumar and himself (ASI Ranbir) reached at the old Punjab bus stand where 4-5 public persons were asked to join the raiding party and one Harjeet Singh @ Pappu agreed and was joined the investigation. At about 9:25 p.m. they were standing near Hari Travels and saw the Appellant sitting on a katta opposite Hari Travels under a banyan tree. He with the help of Constable Krishan Kumar caught hold of the Appellant. This witness has further stated that he informed the Appellant about his right to get his search conducted in the presence of a Magistrate or a Gazetted Officer and served the notice u/s 50 of NDPS Act on him. He declined the offer and on opening the katta, 12 plastic packets/polythenes containing poppy straw powder were recovered. Each one of the packet was weighed and the total weight of the packets was found 12 kg. One of the packets was separated and sealed in a cloth pulanda as the sample. The remaining 11 packets were kept in the same katta and sealed with the seal of RS. The cloth pulanda was also sealed with the seal of RS. CFSL forms were filled and the seal on them was also affixed. This witness has deposed that in the meanwhile SHO R.S. Jhakar also came on the spot and he too affixed his seal of RSJ on the case property, the sample as well as the CFSL forms. Seizure memos and other documents were prepared. This witness in his cross-examination has stated that the DD entry in regard to the information received by SI Amit Issar was recorded in the DD Register. He has further stated that the DD Entry No. 29 has not been put in the present file. This witness has further stated that the seal was returned by the public witness to him on the next day.

9. PW7 Inspector R.S.Jhakar, SHO Malviya Nagar deposed that on 18th September, 1996 he was posted at PS Lahori Gate. On that day SI Amit Issar requested him telephonically at 9:15 p.m. to reach at old Punjab Bus Stand, SPM Marg and informed him about the present case. He has stated that when he reached at the spot he found the Appellant along with the police staff and one public person. He verified the facts from the investigating officer, who produced before him two sealed parcels and CFSL form having the seal of RS. He affixed his seal of RSJ on both the pulandas and CFSL form. He has further stated that the case property was

seized vide seizure memo Ex.PW4/A. He took the control of both the parcels/pulandas, CFSL form and left the spot after handing over his seal to the public witness. On reaching the police station, he deposited both the parcels, CFSL form and copy of seizure memo in the malkhana. This witness in his cross examination has stated that his seal was returned to him after one week by the public witness.

10. From a perusal of the testimony of the witnesses, the contradictions are clear. PW5 Harjeet Singh, the public witness and PW6 the Investigating Officer have stated that PW5 had returned the seal after one day whereas PW7, the SHO has given a contrary statement and has stated that the seal was returned to him after one week by the public witness. Learned Special Judge has observed that no seal was visible on the katta and the same had been opened by cutting. It is relevant to note that the case property was brought in the Court for identification for the first time when this observation was made by the learned Special Judge. In view of the fact that no seal was visible when the case property was first opened in the Court, the same does not rule out the possibility of the case property being tempered with.

11. Hon"ble Supreme Court in Jitendra & Another. vs. State of M.P., AIR 2003 SC 4836 has held that production of charas and ganja alleged to have been seized from the possession of the accused is the best evidence, which ought to have been produced during trial and marked as material objects. No explanation for this failure to produce them and mere oral evidence as to their features and production of panchnama does not discharge the heavy burden, which lies on the prosecution particularly, where offences are punishable with a stringent sentence as under the NDPS Act. In the case in hand, the sample of one kg of poppy straw powder, which was sent to CFSL, is not brought in Court for identification and no explanation has been rendered in this regard by the prosecution. Thus, the non-production of the sample, the case property being unsealed and the contradictions in the testimony of witnesses dent the prosecution case. The prosecution in the present case has not been able to prove its case beyond reasonable doubt against the Appellant. Thus, the impugned judgment and order on sentence convicting the Appellant are set aside. The Appellant is acquitted of the charges for offence punishable u/s 15 of NDPS Act. The Appellant is on bail, his bail bond and surety bond are accordingly discharged.

The appeal is disposed of.