

**(2009) 05 DEL CK 0437**

**Delhi High Court**

**Case No:** Criminal Appeal No. 394 of 2007

Ram Swaroop

APPELLANT

Vs

State (GNCT) of Delhi

RESPONDENT

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**Date of Decision:** May 4, 2009

**Acts Referred:**

- Criminal Procedure Code, 1973 (CrPC) - Section 313, 374(2)
- Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) - Section 15, 16, 42, 43, 50

**Hon'ble Judges:** Mool Chand Garg, J

**Bench:** Single Bench

**Advocate:** Bharat Bhushan and R.S. Bhorla, for the Appellant; Navin Sharma, APP, for the Respondent

**Final Decision:** Dismissed

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**Judgement**

Mool Chand Garg, J.

This criminal appeal has been filed by the appellant u/s 374(2) Cr.P.C. aggrieved of the judgment dated 21.9.1996 passed by Additional Sessions Judge, Delhi in Sessions Case No. 90/2006 arising out of FIR No. 386/2005 u/s 15/61/85 of the NDPS Act, registered at Police Station Kashmiri Gate, wherein after holding the trial the Additional Sessions Judge convicted the appellant under all the aforesaid Sections and sentenced him to undergo RI for ten years with a fine of Rs. 1 lakh and in default to further undergo RI for two years vide orders passed on 28.9.1996.

2. Briefly stating the case of the prosecution is that on 22.7.2005 SI Ritesh Kumar while patrolling reached at the outer gate of ISBT where Constable Balwant Singh met him at 10.15 a.m. At that time, the accused was found sitting on two white colour kattas on the left side of foot path of outer gate of ISBT and on seeing the police party he tried to run away after leaving the kattas which raised suspicion in the mind of SI Ritesh Kumar, and accused was apprehended and on interrogation

he disclosed his name as Ram Swaroop and further on being asked as to what were the contents of those kattas, he got perplexed and disclosed that the contents of the kattas were chura post brought by him from Shahjanpur, Rajasthan for taking the same to Punjab. SI Ritesh Kumar informed the accused about his legal right to get himself searched before a Gazetted Officer or a Magistrate, who can be called at the spot or that he can be produced before them and a notice u/s 50 of the NDPS Act was served upon the accused but the accused refused to get himself search in the presence of a Gazetted Officer or a Magistrate and the reply of the accused was recorded on the notice u/s 50 of the NDPS Act. SI Ritesh Kumar conducted the search of the accused. He also asked passerby to join the proceedings but nobody agreed to join the same and accordingly, SI Ritesh Kumar asked Constable Balwan Singh to bring investigation material and balance and weights. The kattas were weighed with the help of balance brought by Constable Balwan Singh. They were found to be containing 32 packets of polythene each, containing poppy straw powder and each packet weighed 1 kg. Thus, the total quantity recovered from accused was 64 kgs. Thereafter, from the recovered poppy straw powder, sample of 1 kg each was drawn out from each of the katta. Samples and the remaining poppy straw powder were converted into pullandas and were sealed with the seal of RK. The kattas were converted into pullandas and were given Sl. No. 1 and 1A while the sample pullandas were given Sl. No. 2 and 2A. SI Ritesh Kumar then prepared the relevant documents and got the FIR registered. Constable Balwan Singh handed the sealed pullandas sealed with the seal of RK, form FSL on which also the seal of RK was affixed and carbon copy of seizure memo to Inspector Randhir Singh Khatri, Addl. SHO who was working as SHO and who also affixed his seal RSK on all the pullandas, form FSL and mentioned the number of FIR on the pullandas, form FSL and carbon copy of seizure memo and deposited the same in the malkhana. The necessary entries in this regard were also made in the malkhana register by MHCM. The further investigation of this case was handed over to ASI Jagdish Chander who reached at the spot and at the instance of SI Ritesh Kumar prepared the site plan Ex.PW7/B, arrested the accused and conducted the personal search. The accused was also got medically examined. ASI Jagdish Chander also prepared a report u/s 57 of the NDPS Act and sent a copy thereof to ACP, Sadar Bazar on 23.7.2005. After completing the investigation, the challan was filed before the Additional Sessions Judge. The appellant pleaded not guilty and accordingly the charges were framed against him. In order to prove its case, prosecution examined eight witnesses. Thereafter, the statement of the appellant was recorded u/s 313 Cr.P.C. However, no defence evidence was led by the appellant. The trial court vide impugned orders dated 21.9.1996 and 28.9.1996 convicted the appellant u/s 15/16/85 of the NDPS Act and sentenced him to undergo RI for ten years and to pay a fine of Rs. 1 lakh and in default RI for three years as aforesaid.

3. It is the case of the appellant that the order of conviction and order of sentence passed by the Additional Sessions Judge are unsustainable in law taking into

consideration the facts on record.

4. It is also submitted on behalf of the appellant that there are material contradictions in the deposition of witnesses who had been examined and that the trial otherwise stands vitiated because the provisions of Code of Criminal Procedure to ask the independent witnesses to join the proceedings at the time of search have not been complied with by the Police officials intentionally inasmuch they have not given notice to any of the public witness to join the proceedings. It is submitted that the SHO or the ACP was not informed about the incident nor was he called at the spot, nor the search of the appellant was taken before the ACP or the SHO.

5. It is also submitted that there is no entry in the rojnamcha register about fetching of weights and balance from the police post. There are difference of timing of reaching of spot by PW-5 and PW-7. The essential requisites of the NDPS Act have not been complied with. There is no evidence that the appellant alone was in exclusive possession of the contraband goods and therefore, he cannot be held guilty of the possession of contraband goods as allegedly recovered from him.

6. It is further submitted that the conviction of the appellant could not have been based solely upon the testimony of the police witnesses and therefore, it is prayed that the appellant be acquitted of the charge and the sentence awarded to him be accordingly set aside.

7. Arguments heard. The learned Counsel for the appellant has reiterated the submissions made in the grounds of appeal and has also taken me through the statements of witnesses recorded on behalf of the prosecution.

8. On the other hand, the learned APP has submitted that the possession of contraband has been proved beyond reasonable doubt inasmuch as the raiding party which in fact came to know about the possession of the contraband goods by the appellant just by chance has conducted itself in accordance with law. They have given adequate opportunities to the appellant to get himself searched in the presence of a Gazetted Officer but the appellant refused to do so. It is submitted that the entire proceedings and the sequence of events starting from the time when the appellant was identified along with two kattas and deposition of the exhibits in Malkhana Register as also the report of the FSL proves the case of the prosecution beyond reasonable doubt.

9. I have given my thoughtful consideration to the rival submissions and have also gone through the judgments which have come on record. I have also gone through the impugned judgment of the trial court. I find that the star witness of this case is SI Ritesh Kumar, who was examined as PW-7 before the trial court. He deposed that on 22.7.2005 at about 10.15 am he met Constable Balwain Singh and while they were on patrolling, the accused was seen sitting on two white colour bags on foot path in the left side of ISBT out gate and tried to slip away on seeing the police, which act of the accused raised suspicion in their mind and the accused was over

powered and the bag was checked and both the bags were found to contain poppy straw powder. He has also deposed that he informed the accused about his legal right to get himself searched before a Magistrate or a Gazetted Officer who can be called at the spot or that the accused can be produced before them and a notice u/s 50 NDPS Act was given to the accused. The notice has been proved as Ex.PW5/A. He also deposed that accused refused to get himself searched before a Magistrate or a Gazetted Officer and the reply of the accused point X to X on Ex.PW5/A was noted down and the accused admitted the same to be correct and put his signature on the same. He also deposed that he asked passerby to join the proceedings but none agreed and left without disclosing their names and addresses. Constable Balwan Singh was sent to fetch investigation material and the scale and on being checked the bags, each of the bag was found to contain 32 packets of poppy straw powder and each of the packet contained 1 kg poppy straw powder. He had also stated that samples were drawn from each and the sample pullandas were given mark S. No. 2 & 2A and the pullandas of remaining poppy straw were given S. No. 1 & 1A. He has also deposed that he filled form FSL and affixed seal of RK on all the four pullandas and the same were taken into possession vide seizure memo Ex.PW5/B. He has proved the tehrir as Ex.PW7/A which was prepared by him and was handed over to Constable Balwan Singh for getting the FIR registered at the police station, who left the spot along with four pullandas duly sealed and form FSL and carbon copy of seizure memo.

10. The deposition of this witness is fully corroborated by PW-5 Constable Balwan Singh, who was with him when the appellant was seen at the spot. He has also corroborated the testimony of PW-7 that the tehrir was handed over to Duty officer and the remaining articles were handed over to Addl. SHO Inspector Randhir Singh Khatri and came back to the spot and handed over the copy of FIR and tehrir to ASI Jagdish Chander to whom the investigation was marked, who arrested the accused vide memo Ex.PW5/C and conducted personal search of the accused vide Ex.PW5/D.

11. The testimonies of PW-5 and 7 are also corroborated by ASI Jagdish Chander, who appeared as PW-8 and prepared the report u/s 57 of the NDPS Act Ex.PW8/B, a copy whereof was sent to the office of ACP. He also proved that the goods were deposited in Malkhana. The FSL report and carbon copies of the seizure memo have also been proved.

12. As regard non-examination of public witnesses, the learned Additional Sessions Judge has rightly held that once an opportunity is granted and nobody is found agreeable to join the proceedings, no fault can be found with the investigation. Similarly, the argument that SHO and ACP were not informed or called at the spot, the Additional Sessions Judge has rightly held that it was a case of chance recovery, which is supported by the testimony of PW-5 and 7. The argument that the case particulars were not mentioned in the notice u/s 50 is of no consequence because at that stage the FIR was not recorded. As regard contradictions, it is rightly held that

they were minor in nature and does not affect the case of the prosecution. I may also observe here that merely because the case of recovery of contraband in this case is based upon the sole testimony of the police witnesses it does not make the testimony inadmissible in evidence. Reference can be made to a judgment delivered in the case of Abdul Majid Abdul Hak Ansari v. State of Gujarat : 2003 (10) SCC 198. Relevant observations are reproduced hereunder:

3. Mrs. K. Sarada Devi, learned Counsel appearing for the appellant contended before us that the prosecution has not examined any independent witness in the case, and that the prosecution case is based on the evidence of police witness only, therefore, it is not safe to rely on such evidence to hold that the said charas was seized from the appellant. She also pointed out that only one panch witness was examined and he too has not supported the prosecution case. Though it is true that the prosecution has relied on the police witness only, both the courts below after considering this evidence have placed reliance on the same and we find no error in the same. Having considered the evidence, we agree with the courts below that the prosecution has proved beyond reasonable doubt that the charas was seized from the person of the appellant and the same was properly sent to the Forensic Science Laboratory for the purpose of analysis and the same was found to be a contraband article, sale of which is prohibited under the provision of the Act and the appellant was found possessing the said quantity of charas for the purpose of sale. For the said reason we find no error in the finding of the courts below, hence this appeal has to fail.

13. At this stage, I may also observe that the search in this case was covered by the powers available to the Police as provided for u/s 43 of the NDPS Act, which reads as under:

#### Section 43 - Power of seizure and arrest in public place

Any officer of any of the departments mentioned in Section 42 may:

(a) seize in any public place or in transit, any narcotic drug or psychotropic substance or controlled substance in respect of which he has reason to believe an offence punishable under this Act has been committed, and, along with such drug or substance, any animal or conveyance or article liable to confiscation under this Act, any document or other article which he has reason to believe may furnish evidence of the commission of an offence punishable under this Act or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act;

(b) detain and search any person whom he has reason to believe to have committed an offence punishable under this Act, and if such person has any narcotic drug or psychotropic substance or controlled substance in his possession and such possession appears to him to be unlawful, arrest him and any other person in his

company.

Explanation.--For the purposes of this section, the expression "public place" includes any public conveyance, hotel, shop, or other place intended for use by, or accessible to, the public.]

14. Since it was also a case of chance recovery, the aforesaid observations are fully applicable in this case also. Accordingly the appeal is dismissed as no concession can be granted to the appellant even in respect of the sentence awarded to him. Trial court record be sent back with a copy of this order. Another copy be sent to the appellant through Jail Superintendent.