

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

+ **CRL.A. 245/2021 & CRL.M.(B) 1071/2021 & CRL.M.A. 2349/2022**

Reserved on: 07.02.2022

Date of Decision: 23.02.2022

IN THE MATTER OF:

MOHAMED ANAS

..... Appellant

Through: Mr. A. Raj Narayanan, Advocate

Versus

NARCOTICS CONTROL BUREAU

.....Respondent

Through: Mr. Rajesh Manchanda, SPP for
NCB/Respondent

CORAM:

HON'BLE MR. JUSTICE MANOJ KUMAR OHRI

(VIA VIDEO CONFERENCING)

J U D G M E N T

MANOJ KUMAR OHRI, J.

1. The present appeal has been preferred under Section 374 Cr.P.C. on behalf of the appellant assailing the judgment on conviction dated 11.06.2021 and the order on sentence dated 16.06.2021 passed by the learned Special Judge (NDPS), Patiala House Courts, New Delhi in SC No. 64/2019.

2. Vide the impugned judgment, the appellant was convicted for the offence punishable under Section 20(b)(ii)(B) read with Section 23(b) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter,

referred to as the 'NDPS Act'). By way of the impugned order, the appellant was sentenced to undergo Rigorous Imprisonment for a period of 04 years, alongwith payment of fine of Rs.50,000/-, in default whereof, to further undergo Simple Imprisonment for a period of 06 months. The benefit of Section 428 Cr.P.C. was extended to the appellant.

3. Brief facts of the case, as noted by the Trial Court, are as under:-

"1. Prosecution case in brief is that IO Virender Kumar on 04.12.2018 at around 2230 hours received an information that accused Mohd. Anas, Sri Lankan national travelling to Muskat by Jet Airways was detained by officials of CISF and suspected to carry narcotic drugs/psychotropic substances, thereafter the said information was given to zonal director who endorsed the said information to IO Rajesh Yadav to constitute the team and take action as per law. Then, raiding team was prepared headed by IO Rajesh Yadav left the office at around 2300 hours and reached airport at around 2350 hours where shared the information with SHA incharge who pointed towards the accused detained by CISF officials. IO requested 2-3 persons to join raiding team. SI Sanjeev Kumar Sharma and SI Robin Lakra of CISF agreed to be the independent witnesses. Accused was explained the secret information then accused disclosed that he is a resident of Sri Lanka. and declined to take search of raiding team members. Notice u/s50 was given to the accused apprising him his legal right to search before gazette officer or magistrate but accused wrote that he does not require presence of gazette officer or magistrate for personal search, however nothing recovered from his personal search. On opening the blue colour pithu bag, nothing incriminating was found in the clothes however the base bottom part looked abnormal and on touching feel like a solid substance then on cut open of the bottom part of the said bag, it was noticed that wrapped/brown adhesive tape was concealed. On taking out the whole brown tape and on cutting open, a brown colour solid substance was found which accused told that it was charas. On testing it gave positive result for charas, total weight of charas is found 200 gm, thereafter two samples of 25 gm each were drawn, panchnama was prepared. All recovered material alongwith samples, passport of accused, e-ticket, cancelled boarding pass, ticket information and visa confirmation

documents were taken in possession. Seizure and sealing proceedings were completed.

2. *On 05.12.2018 statement of accused Mohd Anas u/s 67 was recorded in which he disclosed that he came to India at Chennai Airport from 01.12.2018 from Colombo thereafter came to Delhi and went Bhuntar where stayed at Hotel HHH in Kasol then purchased charas in Kasol from one Raji of Malana village having mobile no. 9805612904 thereafter came back to Delhi on 04.12.2018 and stayed in Shyama Palace Hotel in Pahargunj however during security check at airport some suspicious thing is noted in X-ray machine thereafter he was detained. He further stated that he has purchased the said charas for Rs. 22,000/-, thereafter, statement of independent witnesses u/s 67 NDPS Act were also recorded. The samples were duly deposited in malkhana. Entries in seal movement register were made. After recording of voluntary statement u/s 67, accused was arrested. Proceedings u/s 57 was conducted. CDR and CAF of mobile recovered from accused collected. As per CRCL report, the contra band was found positive for charas having THC contents. The mobile data extraction report was obtained and on completion of investigation, complaint was filed.”*

4. After investigation, the charge sheet in the case was filed and charge was framed against the appellant under Section 20(b)(ii)(B) read with Section 23(b) of the NDPS Act vide order dated 09.07.2019, to which he pleaded not guilty and claimed trial.

5. Learned counsel for the appellant submitted that the recovery from the appellant is stated to be of 200 grams of *charas*, which constitutes an intermediate quantity. He further submitted that the appellant has been in judicial custody since 04.12.2018 and has undergone more than 03 years of the sentence. It was also submitted that the fine amount of Rs.50,000/- has already been deposited on behalf of the appellant, which fact is corroborated by the receipt issued in the regard, a copy of which has been placed on record.

6. It was also stated that the appellant was taken into custody on

04.12.2018, at which time his wife was pregnant. In due course, the couple was blessed with a baby boy who as on date is about 03 years old. It was further stated that in the year 2021, the appellant's father expired, as a result whereof, it has become incumbent upon the appellant to provide for his minor son and wife. Reference was made in this regard to the copies placed on record of the birth certificate of the appellant's child and the death certificate of the appellant's father.

7. On the basis of the aforesaid, it was prayed that the appellant is not pressing the appeal on merits, however, considering the period of his incarceration and the fact that he is the sole bread-winner of his family, which includes a minor child, his sentence may be modified to the period already undergone.

8. Learned counsel for the respondent/NCB, on the other hand, supported the impugned judgment and order on sentence. It was submitted that the appellant is a foreign national, who was apprehended while he was in process of taking the seized contraband substance out of India, and thus no leniency may be shown in respect of his sentence.

9. Even though the appellant does not wish to press the appeal on merits, I have heard the learned counsels for the parties on merits as well, and gone through the material placed on record, considering the decision of the Supreme Court in Jeetu alias Jitendra and Others v. State of Chhattisgarh reported as **(2013) 11 SCC 489**, which was recently cited by this Court in Liyakat Ali v. State reported as **2019 SCC OnLine Del 11186** in the following terms:-

“5. In the case of Jeetu v. State of Chhattisgarh reported as (2013) 11 SCC 489, while placing reliance on the case of State of Uttar Pradesh v. Chandrika reported as (1998) 8 SCC 638, it was held as under:

“8.....It is settled law that on the basis of plea bargaining the court cannot dispose of the criminal cases. The Court has to

decide it on merits. If the accused confesses his guilt, an appropriate sentence is required to be imposed. Further, the approach of the court in appeal or revisions should be to find out whether the accused is guilty or not on the basis of the evidence on record. If he is guilty, an appropriate sentence is required to be imposed or maintained. If the appellant or his counsel submits that he is not challenging the order of conviction, as there is sufficient evidence to connect the accused with the crime, then also the court's conscience must be satisfied before passing the final order that the said concession is based on the evidence on record. In such cases, sentence commensurating with the crime committed by the accused is required to be imposed. Mere acceptance or admission of the guilt should not be a ground for reduction of sentence. Nor can the accused bargain with the court that as he is pleading guilty the sentence be reduced.”

[Emphasis Supplied]

6. Further, in the case of Jeetu (supra) it was held as under—

“20. In Padam Singh v. State of U.P (2000) 1 SCC 621, it has been held that in an appeal against conviction, the appellate court is under duty and obligation to look into the evidence adduced in the case and arrive at an independent conclusion.

21. At this stage, we may refer with profit to a two-Judge Bench decision in Dilip S. Dahanukar v. Kotak Mahindra Co. Ltd. (2007) 6 SCC 528 wherein this Court, after referring to the pronouncements in Babu Rajirao Shinde v. State of Maharashtra (1971) 3 SCC 337 and Siddanna Apparao Patil v. State of Maharashtra (1970) 1 SCC 547, opined thus (Dilip S. Dhanukar case, SCC pp538 & 552, paras 12 & 66):—

“12. An appeal is indisputably a statutory right and an offender who has been convicted is entitled to avail the right of appeal which is provided for under Section 374 of the Code. Right of appeal from a judgment of conviction affecting the liberty of a person keeping in view the expansive definition of Article 21 is also a fundamental right. Right of appeal, thus, can neither be interfered with or impaired, nor can it be subjected to any condition.

** * **

66. The right to appeal from a judgment of conviction vis-à-vis the provisions of Section 357 of the Code of Criminal Procedure and other provisions thereof, as mentioned hereinbefore, must be considered having regard to the

fundamental right of an accused enshrined under Article 21 of the Constitution of India as also the international covenants operating in the field.”

22. Tested on the touchstone of the aforesaid legal principles, it is luminescent that the High Court has not made any effort to satisfy its conscience and accepted the concession given by the counsel in a routine manner.

23. At this juncture, we are obliged to state that when a convicted person prefers an appeal, he has the legitimate expectation to be dealt with by the Courts in accordance with law. He has intrinsic faith in the criminal justice dispensation system and it is the sacred duty of the adjudicatory system to remain alive to the said faith. That apart, he has embedded trust in his counsel that he shall put forth his case to the best of his ability assailing the conviction and to do full justice to the case. That apart, a counsel is expected to assist the Courts in reaching a correct conclusion. Therefore, it is the obligation of the Court to decide the appeal on merits and not accept the concession and proceed to deal with the sentence, for the said mode and method defeats the fundamental purpose of the justice delivery system. We are compelled to note here that we have come across many cases where the High Courts, after recording the non-challenge to the conviction, have proceeded to dwell upon the proportionality of the quantum of sentence. We may clearly state that the same being impermissible in law should not be taken resort to. It should be borne in mind that a convict who has been imposed substantive sentence is deprived of his liberty, the stem of life that should not ordinarily be stenosed, and hence, it is the duty of the Court to see that the cause of justice is subserved with serenity in accordance with the established principles of law.

24. Ex consequenti, the appeal is allowed and the judgment and order passed by the High Court are set aside and the appeal is remitted to the High Court to be decided on merits in accordance with law. As the Appellants were on bail during the pendency of the appeal before the High Court and are presently in custody, they shall be released on bail on the said terms subject to the final decision in the appeal.”

10. Adverting to the present case, it is noted that in support of its case, the prosecution had examined a total of 13 witnesses during the trial.

11. *Sh. Rajesh Kumar Yadav*, Investigating Officer, NCB, Dehradun was examined as PW-5. He deposed that on 04.12.2018, on receipt of instructions from the Zonal Director, he constituted a raiding team and reached the I.G.I. Airport, where he met in-charge SHA departure. He further deposed that though nothing incriminating was recovered from the body search of the appellant, on checking the appellant's baggage, abnormality was noticed in the bottom part. When the same was cut, something wrapped in brown colour adhesive tape was seen, which tested positive for *charas*. The witness also deposed that after the search proceedings, the *panchnama* was prepared. On returning to the NCB office, the seal was handed over to the Zonal Director and an arrest report under Section 57 NDPS Act was also given to the Superior Officer.

12. *Sh. Virender Kumar*, Intelligence Officer, NCB, DZU, R.K. Puram, New Delhi was examined as PW-2. He deposed that he, alongwith *Sh. Rajesh Kumar Yadav* (PW-5) had reached the I.G.I. Airport on 04.12.2018 at 23:40 hours. His testimony is cumulative to the testimony of *Sh. Rajesh Kumar Yadav*, Investigating Officer.

13. *SI Sanjeev Kumar Sharma*, CISF, I.G.I. Airport was examined as PW-6. He deposed that on 04.12.2018, he was posted as SHA at the I.G.I. Airport and his duty was at X-ray machine No. 8. While performing his duty, he noticed a doubtful image in a baggage that came through the tunnel, and accordingly, the same was referred for physical check-up, which was to be conducted by *Sh. Robin Lakra*. When the passenger concerned (i.e., the appellant) was called near the baggage for the purpose of physical check-up, he refused. As a result, the instance was brought to the notice of the area in-charge (of the rank of Inspector) and suspecting that the baggage contained some narcotic substance, the

passenger was asked to stand on a side till further order.

Eventually, the NCB team, alongwith Inspector, arrived and introduced itself to the passenger. After taking introduction of the passenger as well, notice under Section 50 NDPS Act was served upon him. He was explained his legal right to be searched in the presence of a Gazetted Officer/Magistrate if he so desired, which was waived by the passenger and an endorsement to the effect was given by him on the notice. During the body search of the passenger, nothing incriminating was found or recovered. However, on checking of the blue colour *pithu* bag belonging to him, an artificial cavity was noticed in the bottom. On cutting open the same, some solid substance was found wrapped with brown tape, which tested positive for *charas*.

14. *Sh. Robin Lakra*, CISF, I.G.I. Airport was examined as PW-10. His testimony is cumulative to the statement of *SI Sanjeev Kumar Sharma* (PW-6).

15. *Sh. Madho Singh*, Ex-Zonal Director, NCB, DZU was examined as PW-12. He deposed that on receipt of the case information, he had directed the Investigating Officer/*Rajesh Kumar* to constitute a team and take action. He also deposed that on 05.12.2018, he had signed and made endorsement on the test memo form, which was thereafter sent to CRCL.

16. *Sh. Satya Kumar Gupta*, Assistant Chemical Examiner, CRCL, New Delhi was examined as PW-1. He deposed that the sample of this case was analysed and tested under the supervision and control of Chemical Examiner/*Dr. Purnima Mishra*. He further deposed that on analysis and testing, it was found that the sample tested positive for *charas*. The report (*Ex.PW1/2*) in that regard was prepared on 24.12.2018 and forwarded to NCB.

17. *Dr. Purnima Mishra*, Chemical Engineer, CRCL was examined as

PW-3. She deposed that the relevant sample was analysed by chromatography, instrumental and microscopic analysis and from each, the sample tested positive for *charas*. On the basis of the examination, the report of analysis of sample was prepared, which is *Ex.PW1/2*.

18. At the time of apprehension of the appellant, one mobile phone was also recovered from his possession and sent for forensic examination. In this regard, the prosecution examined *Dr. Ranjeet Kumar Singh*, Managing Director of SIFS India Forensic Science Laboratory as PW-4. The said witness proved his Report as *Exhibit PW-4/2*, which was exhibited alongwith printout of images, chat and pen drive. A perusal of the documents exhibited as *Ex.PW-4/2* would show images of *charas* as well as the prices of different types of *heroin* in Afghanistan, the prices of 1 kg. of *heroin* in other than U.S. dollars, the prices of *heroin*, *opium* and *hashish* at consumer level, and the appellant's communication with foreign nationals regarding inquiry about *hash* price.

19. The appellant, in his statement recorded under Section 313 Cr.P.C., stated that he has been falsely implicated in the present case.

20. From a perusal of the case records, it is borne out that on apprehension of the appellant, his bag was found to contain some suspicious substance. On that basis, information was given to NCB and the search proceedings conducted after due formalities. From the testimonies of *SI Rajesh Kumar Yadav* (PW-5) & *Sh. Virender Kumar* (PW-2), it is established that the appellant's bag was found to contain an artificial cavity at the bottom, from which 200 grams of *charas* wrapped in brown adhesive tape were recovered. The CRCL report (*Ex.PW1/2*) duly corroborates the factum of recovery of *charas* from the baggage of the appellant. In terms of Section 20(b)(ii) of the NDPS Act, the quantity

seized from the appellant is intermediate in nature.

21. In the trial, suspicion was raised regarding the presence of *SI Sanjeev Kumar Sharma* (PW-6) & *Sh. Robin Lakra* (PW-10) at the relevant time, their being interested witnesses. However, the Trial Court observed that the appellant had entered security check at about 09:30 p.m. Thereafter, he had kept his baggage for scanning and gone for physical check-up. When the appellant went to pick up his bag, the same could not be found and later, two officers came with his bag. In this backdrop and considering the testimonies recorded, the Trial Court opined that the aforesaid witnesses, being officials of CISF, were posted at the security check and performing their duty of checking luggage and frisking of passengers. In the opinion of this Court, the presence of the aforesaid witnesses at the spot was rightly believed by the Trial Court.

22. In respect of issuance of notice under Section 50 NDPS Act, the Trial Court, while relying on the decision of the Supreme Court in Than Kunwar v. State of Haryana reported as (2020) 5 SCC 260, observed that the recovery having taken place from the baggage of the appellant, Section 50 NDPS Act was not required to be complied with. Even otherwise, the appellant in the present case was duly served with a notice under Section 50 NDPS Act, in response to which, he denied being taken to any Gazetted Officer/Magistrate for his search. It was noted that Section 57 NDPS Act was also duly complied with in the present case, inasmuch as the arrest report was forwarded to the Senior Officer.

23. After appreciating the testimonies of the witnesses and finding the same to be unimpeachable, and in view of the decision of the Supreme Court in Mohan Lal v. State of Rajasthan reported as (2015) 6 SCC 222, this Court also concludes that the presumptions of culpable mental state and conscious possession under Sections 35 & 54 of the NDPS Act arise

against the appellant.

24. In light of the discussion undertaken hereinabove, I am of the opinion that the charge against the appellant has been established beyond reasonable doubt and concur with the conclusion arrived at by the learned Special Judge. Accordingly, the impugned judgment on conviction is upheld.

25. Be that as it may, it is noted that a prayer has been made to release the appellant on the period already undergone, as his father has expired in the year 2021, and his family, including his minor child and wife, depend on him.

26. As per the Nominal Roll of the appellant placed on record, he had undergone 02 years, 09 months & 24 days as on 28.09.2021 and the unexpired portion of his sentence was 01 year, 02 months & 06 days (IFP). The overall jail conduct of the appellant is stated to be satisfactory. Further, the fine imposed on the appellant has already been deposited, which fact is not only corroborated by the copy of Receipt No. E-0390805 placed on record, but also finds mention in the order dated 02.02.2022 passed by the learned ASJ/Special Judge.

27. Considering the aforesaid, the fact that the appellant, as on date, has undergone more than 03 years out of a total sentence of 04 years and that the recovery from him was of 200 grams of *charas*, which constitutes an intermediate quantity, it is deemed apposite to modify the sentence of the appellant to the period already undergone by him.

28. The appeal is dismissed, insofar as the impugned judgment on conviction is concerned, however, the impugned order on sentence stands modified to the aforesaid extent. Miscellaneous applications are disposed of as infructuous.

29. The FRRO shall take all necessary steps for deportation of the

appellant to his native country, i.e. Sri Lanka, within 30 days from the date of this judgment, unless he is required in any other case.

30. A copy of the judgment be communicated electronically to the concerned Trial Court as well as to the concerned Jail Superintendent for information and necessary compliance.

31. A copy of the judgment be also communicated to the appellant through the concerned Jail Superintendent.

(MANOJ KUMAR OHRI)
JUDGE

FEBRUARY 23, 2022

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