

IN THE HIGH COURT OF DELHI AT NEW DELHI

CRL.A. No. 757 of 2000 & CRL M (B) A. No. 799/2007

Reserved on: 5th March, 2008

Date of decision: 1st May, 2008

RISHI DEV @ ONKAR SINGH Appellant
Through Mr. Anish Dhingra, Advocate.

versus

STATE (DELHI ADMN.) Respondent
Through Mr. Pawan Behl, APP.

CORAM:
HON'BLE DR. JUSTICE S. MURALIDHAR

JUDGMENT

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| 1. Whether Reporters of local papers may be allowed to see the order? | Yes |
| 2. To be referred to the reporter or not? | Yes |
| 3. Whether the order should be reported in the Digest? | Yes |

Dr. S. Muralidhar, J.

1. This appeal is directed against the judgment and order dated 25th November, 2000 passed by the learned Additional Sessions Judge (ASJ), Delhi in S.C. 10 of 2000 convicting the appellant in FIR No. 290/90 for the offence under Section 21 of the Narcotics Drugs and Psychotropic Substances Act, 1985 ('NDPS Act') for possessing 300 gm smack. It is also directed against the order dated 27th November, 2000 passed by the learned ASJ sentencing the Appellant to ten years' rigorous imprisonment (RI) and a fine of Rs. 1,00,000 under Section 21 NDPS Act and in default of payment of fine to undergo six months' RI.

2. The case of the prosecution is that on 19th December, 1999 Head Constable

(HC) Rajinder Singh, Constables Sarvjeet, Ashok Kumar and Ajit Singh were searching the passersby near Tejab Mill, Bhola Nath Nagar, Shahdara. At about 3.35 p.m. one person (the appellant) came from the side of the Railway Bridge, Subji Mandi, Shahdara and on seeing the police, the appellant stated to have turned around and started walking briskly. Upon being asked to stop, the appellant started running. His apprehension and search led to the recovery of one black coloured packet from the right side pocket of the kurta worn by him. Inside the said packet was a smaller white coloured packet which contained a brown coloured powder which was suspected to be smack. It is stated that the HC Rajinder Singh then sent an intimation to the Police Station Farash Bazar about the recovery. Sub Inspector (SI) B.D. Sharma reached the spot and HC Rajinder Singh handed over to SI the accused as well as the recovered substance. In the meantime, the SHO Farash Bazar also reached there and the SI produced before him the recovered smack. According to the prosecution, the smack was weighed at the spot and was found to be 300 gm out of which a sample of 50 gms was separated. The Central Forensic Sciences Laboratory (CFSL) Form was filled up and both the pulandas and CFSL Form were sealed by the IO and SHO with their respective seals. A sample packet was then sent to the CFSL for testing. A report was received from the CFSL which stated that the sample tested positive for smack.

3. Nine witnesses were examined for the prosecution and none was examined for the accused.

4. The learned ASJ thereafter delivered the impugned judgment and order in the manner referred to hereinabove.

5. The submissions of Mr. Anish Dhingra, the learned counsel, appearing for the Appellant are as under:

(a) The mandatory notice under Section 50 NDPS Act was not given to the Appellant. The appellant was not given an alternative choice to be searched before the Magistrate; he was only asked if he wished to be searched by a Gazetted Officer.

(b) There was no evidence to show that the police had with it any field kit or weighing machine to actually weigh the exact quantity that the Appellant is alleged to have been in possession of.

(c) The seal of the SHO was apparently given to the Constable who then made the arrest. This was impermissible in law.

(d) The arrest of the Appellant took place from the Tejab Mill which was a crowded area. In the circumstances, it is unbelievable that no independent witness was available at the time of the arrest or search of the accused.

(e) The documents concerning arrest and seizure were prepared at a time when the FIR was not even registered and yet these documents contain the FIR number. This is fatal to the case of the prosecution since this proves that these documents were prepared subsequently.

(f) The arrest memo bears the signature of one Mr. Sannaber Beg who happens to be the neighbor of the Appellant.

However, the Appellant was not arrested near his place of residence but at Shahjahanpur.

(g) There is a delay of over two months in sending the seized sample to the CFSL. Although the sample was collected on 18th December 1999, it was dispatched to CFSL, Chandigarh only on 1st March, 2000. There is no entry as to when it was received back from the CFSL Chandigarh. The entry only shows that the sample was again deposited in the Malkhana on 3rd March, 2000. The alleged refusal by the Laboratory at Chandigarh to undertake the testing of the sample is not mentioned in any document but stated for the first time during deposition.

(h) The FSL report showed that the sample tested positive for Diacetylmorphine and that the sample was received in the office of the FSL on 15th March, 2000.

(i) There are two road certificates. First one is dated 1st March, 2000 for the despatch to Chandigarh and the second is dated 4th March, 2000 for the despatch to the FSL at Delhi. It is stated that a sample seal from the SHO was not sent with the sample for comparison by the FSL. Although the FSL report was ready on 24th March, 2000 it was despatched only on 28th March, 2000. The evidence of the prosecution in this aspect is trustworthy and the accused should be given the benefit of doubt.

6. The learned APP appearing for the State submitted as under:

(a) The requirement of the compliance of Section 50 was not mandatory as has been explained in several judgments of the Supreme Court.

(b) No questions were asked in the cross-examination of the I.O. about the absence of any weighing machine or field kit.

(c) The mere mentioning of the FIR number in the documents, cannot be fatal to the case of the prosecution as has been explained by the Supreme Court in ***Radhey Sham v. State of Haryana JT 2001 (3) SC 535***.

(d) The mere delay in sending the sample to the FSL, cannot be fatal to the case of the prosecution. He relies on ***State of Gujarat v. Ismail U Haji Patel (2003) 12 SCC 29***, ***Valsala v. State of Kerala 1993 Supp (3) SCC 665***, ***State of Orissa v. Kanduri Sahu 2004 (1) SCC 337*** and ***Rameshwar v. State 98 (2002) DLT 364***.

(e) The non-joining of public witnesses is again not fatal to the case of prosecution. Reliance is placed upon the judgment in ***M. Prabhulal v. Asst. Director, Customs 2003 (8) SCC 499*** and ***Ravinder v. Superintendent of Customs 2007 (6) SCC 410***.

7. This Court proposes to first deal with the aspect of the delay in sending the samples to the CFSL. Admittedly in the present case the delay in sending the samples for testing is nearly three months.

8. In a significant judgment in ***Parminder Singh v. State of Haryana 2007 (2) JCC (Narcotics) 71***, the Punjab and Haryana High Court found that there was no explanation for the delay of 25 days in sending the samples for analysis. In para 13 of the judgment it was held as under: (***JCC @ p. 76***)

“13. No explanation has come forward from the side of the prosecution as to why the samples were sent after a gap of 25

days for analysis. S.K. Nagpal, Retired Senior Scientific Officer, FSL, Madhuban PW-2 has stated that on 7.8.2001 five sealed parcels were received in the Laboratory, but the same were returned back due to the reason that the FIR in that case was registered on 12.7.2001, with the objection regarding the delayed deposit of sample parcels. As per this witness, according to the Narcotic Control Bureau Instructions, **the sealed parcels should be deposited within 72 hours with the Chemical Examiner.** He has further stated that two samples were to be taken of the seized contraband as per instructions. The explanation given by DSP Chander Singh PW-6 to this witness was that samples could not be sent earlier due to VVIP duties. Ram Kumar MHC PW-3 brought Rapat Roznamcha from 12.7.2001 to 16.7.2001. During this period, it has been shown that the Police Force was not sent for VVIP duty at anytime. The cross-examination of Ram Kumar MHC PW-3 was deferred by the trial court to enable the witness to produce the Roznamcha from 16.7.2001 to 13.8.2001. This witness was not brought into the witness box by the prosecution. We can safely infer that Ram Kumar PW-3 was not brought again into the witness-box, as the period from 16.7.2001 to 13.8.2001 did not show any VVIP duty. It is clear that the Investigation Officer Chander Singh DSP PW-6 has only made an excuse, which is not convincing, that the samples could not be sent because of VVIP duty.” (emphasis supplied)

The above passage shows that there is a time limit of 72 hours stipulated by the Narcotics Control Bureau for a seized sample to be deposited with the Chemical Examiner for testing. This rule is salutary because any attempt at tampering with the sample recovered from the accused can have fatal consequences to the case of the prosecution. Strict compliance has to be

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insisted upon in such an event.

9. Significantly, on the aspect of the CFSL samples having to be preserved and sent without delay, this Court has also relied upon the High Court Rules in *Matloob v. State (Delhi Admn.) 67 (1997) DLT 372*. In para 11 it was observed as under:

“My attention was drawn to Delhi High Court Rules and Orders Part-III Chapter 18-B, which *inter-alia*, provides that articles for the opinion of the chemical examination should be forwarded without the least possible delay. In considering all this, delay if any, can be explained by the prosecution. Samples to CFSL in this case were despatched about one month after the substance was seized and no explanation for so much time taken in despatching the samples is forthcoming on record. Thus the prescribed promptitude appears to be lacking in this case.”

10. Turning to the facts of the present case, the sample was collected on 19th December 1999. PW 1 Constable Sarbjeet Singh states as to what happened at that time which reads as under:

“2. HC Rajinder Singh gave information to the police station Farash Bazar by telephone and after sometime SI B.D. Sharma came at the spot. SHO PS Farash Bazar Aushotosh Chatterjee also arrived at the spot. Smack was weighed by SI B.D. Sharma with the help of HC Rajinder Singh and it was found to be 300 grms. 50 grms. smack was separated as sample and it was kept in a separate polythene. Remaining smack was kept in the same polythene. Form CFSL was filled at the spot. SI B.D. Shama affixed his seal on both the pulandas and form CFSL Form. I.O

affixed the seal BDS on both the pulandas and CFSL Form. I.O gave his seal, after use, to me while SHO kept his seal with him. Case property was kept by the SHO in his possession. Some papers were prepared. I was standing with the accused. Recovery memo Ex.PW1/A bears my signatures at point A.”

11. The above examination took place on 14th July, 2000. On 23rd November, 2000 this witness was recalled and further examined in chief. The entire deposition on this date is important, and therefore is set out *in toto* as under:

“PW1 Constable Sarbjeet Singh No.1254E, PS Farash Bazar,
Recalled for further examination in chief.

on SA

1. On 1.3.2000 also I had taken one sealed parcel and CFSL Form sealed with the seals of the SHO and the I.O i.e. of BDS and AC from Moharrar Malkhana, vide road certificate (the number of which I do not remember) for depositing the same at CFSL, Chandigarh. But the officials of Laboratory at Chandigarh declined to accept the signatures because the forwarding letter did not have the signatures of the DCP thereon.

2. Then I returned to Delhi and told the I.O that the sealed packet was not accepted at CFSL because of said reason. Then I redeposited the said parcel on 4.3.2000.

(At this stage Addl.PP requests that he be allowed to cross examine the witness. Heard. Request allowed).

XXXXXX by Ld.All.PP Sh.R.K. Pandey.

3. It is correct that on seeing the copy of register No. 19, I now correct myself by saying that said pulanda and CFSL Form was re-deposited by me on 3.3.2000 and not on 4.3.2000. Nobody tampered with case property till it remained in my custody when I took it on 1.3.2000 or when I took it

later on for the second time.

XXXXXX by Sh.M.P.Singh Adv.

4. The same items were taken by me to Chandigarh which I later on taken to Malviya nagar. On both the occasions I carried a road certificate. I had tallied the items with the R/C. I received a message from Duty Officer that I have to appear in this court today but I did not know for what purpose I was called. It is wrong to suggest that today I have given statement at the suggestion of APP or that actually I did not know remember anything. I have seen Ex.PW8/B. It is the photocopy of CFSL Form which I had taken alongwith the sample. Ex.PW8/B was taken by me to FSL, Malviya Nagar. I do not recollect if the CFSL Form taken by me to Chandigarh was the same which was taken by me to Malviya Nagar. It is correct that Chandigarh was written on the said Form at the place where Malviya Nagar is printed at point A on Ex. PW8/B. My signatures were not obtained in register No19.”

12. PW 3 B.D. Sharma who was handed over the parcels which was allegedly recovered from the accused states in his cross-examination as under:

“12. I had put FIR No. on parcels and recovery memo in the police station. However, **no entry was made in this regard in respect of taking of case property from Mal Khana for writing the FIR No. on parcels**, but I do not remember the time when I did the same. I do not remember what was recovered in the personal search of the accused. But it was conducted in the presence of HC Rajender, Cons. Ajit Singh, and Cost. Sarbjeet, Notice U/s. 50 NDPS Act was given to accused in presence of SHO however it was not signed by him. I had not obtained the signature on the recovery memo at the spot, and thereafter I had not obtained the signature of SHO on

recovery memo. (Confronted with recovery memo Ex. PW1/A where signature of the SHO appears at point X 'C'). After smelling the substances recovered from the accused I came to know that it was smack. Accused was wearing cream colour kurta and white colour pyjama at that time. Perhaps I had given a memo in respect of ground of arrest to the accused, and it was prepared in duplicate.” (emphasis supplied)

13. The above evidence throws considerable doubt on what exactly happened after the sample was recovered on 19th December 1999 and how it was kept at the police malkhana. This attains immense significance because admittedly for more than two months thereafter no attempt was made to send the sample for chemical examination. The first time that the sample was ever taken out was on 1st March, 2000 when it is supposed to have been sent to Chandigarh. The document Ex.PW 7/A which is got marked through Constable Mukesh Kumar shows that an entry is made in the Column 3 that the case property was deposited by Inspector Ashutosh Chatterjee and there is an entry dated 1st March, 2000 that the sample was sent to CFSL Chandigarh through Constable Survjeet. There is again an entry dated 3rd March, 2000 that Survjeet deposited the pulanda in the malkhana as the same could not be deposited in the CFSL, Chandigarh. Then there is an entry dated 15th March, 2000 that the sample was sent to the FSL Malviya Nagar and received back on 20th March, 2000.

14. The law as explained by the Supreme Court in *Valsala v. State of Kerala* is that as long as it is shown that the seized article has been kept in proper

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custody and proper form during the period it was so kept in the malkhana, the delay in sending the sample for testing would not be fatal. However, there must be evidence to show as to what happened in the interregnum. This was stated to be an important link. In paras 3 and 4 of the order it was held as under : (*Supp SCC @ p. 666*)

“3. One of the main contentions before both the courts below was that there was inordinate delay in sending the seized article to the Magistrate and that there is no evidence worth mentioning whether the article seized was sealed and if so when. Therefore, according to the learned Counsel for the appellant, it is highly doubtful whether the very article seized was sent to the Chemical Examiner.

4. We have seen the report of the Chemical Examiner and there no doubt it is mentioned that one sealed parcel was received containing a powder and it was analysed to be brown sugar. But from the records it is clear and it is also noted by both the courts below that the seized article was produced in the court only on January 14, 1988 i.e. after a period of more than three months **and there is no evidence whatsoever at all to show with whom the seized article was lying and even assuming that it was in the custody of PW 6, the Officer in charge of the police station who seized it, there is again nothing to show whether it was sealed and kept there.** The learned counsel for the State no doubt argued that the provisions of Section 55 of the Act are not mandatory but only directory. We need not go into this legal question in this case. **Suffice it to say that the article seized appears to have been not kept in proper custody and proper form so that the court can be sure that what was seized only was sent to the Chemical Examiner.**

There is a big gap and an important missing link. In the

mahazar Ex.P.2 which is immediately said to have been prepared, there is nothing mentioned as to under whose custody it was kept after seizure. Unfortunately for the prosecution even PW 6 does not say that he continued to keep it in his custody under seal till it was produced in the court on January 14, 1988. The evidence given by PW 6 Police Sub-Inspector, who seized the article is absolutely silent as to what he did with the seized article till it was produced in the court. As a matter of fact he did not produce it in the court. PW 3, A.S.I. is supposed to have produced the same in the court. But PW 3 does not say anything about this. It is only PW 7 the Circle Inspector who comes into the picture at a later date, who admitted in the cross-examination that the seized article was sent by PW 3 (A.S.I.) to the court and PW 7 in his cross-examination further admitted that he did not even see if the recovered material object was sealed but still he claims that he made the necessary application for sending the material object for chemical examination and it is only through PW 7 that the Chemical Examiner's report is marked. PW 7 further admitted that he did not even know when it reached the court. We are constrained to say that the investigation in this case has been perfunctory and on important aspects the evidence of the concerned officers is highly discrepant and unconvincing and does not throw much light. **Therefore the evidence adduced is wholly insufficient to conclude that what was seized from the appellant alone was sent to the Chemical Examiner.** Though this is purely a question of fact but this is an important link. Both the courts below have not examined this aspect in a proper perspective. No doubt the trafficking in narcotic drugs is a menace to the society but in the absence of satisfactory proof, the courts cannot convict.” (emphasis supplied)

15. The aforementioned judgment was later followed in *State of Gujarat v. Ismail U Haji Patel*. Dismissing the State's appeal it was held by the Supreme Court in para 5 as under: (SCC @ p. 292)

“5. We find that there was really no material brought on record to show as to where the seized articles were kept. The High Court after analyzing the evidence on record came to hold that the identity of the articles sent for analysis was not established and **it was not established that the articles seized were in fact sent for chemical examination.** In view of the judgment of this Court in *Valsala v. State of Kerala* the view of the High Court is in order. **It is not the delay in sending the samples which is material. What has to be established is that the seized articles were in proper custody, in proper form and the samples sent to the Chemical Analyst related to the seized articles.**” (emphasis supplied)

16. In *State of Orissa v. Kanduri Sahu*, emphasis was again placed on the safe custody of the articles in the malkhana.

17. If the facts of the present case are examined in the light of the above law the evidence led by the prosecution only gives the date on which the samples were deposited with the malkhana and removed therefrom. It does not explain the delay of three months in sending the samples, and also what happened with the sample during those three months. Significantly, PW 7 in his cross-examination was unable to deny the suggestion that B.D. Sharma took out the property from the malkhana after it had been deposited and wrote FIR number therein without making any entry in that regard. This

Court is not satisfied that in the interregnum of three months between the seizure of the sample and its testing at the FSL, it was kept in a proper and safe custody and that it was the same sample that was sent for testing.

18. The trial court in para 39 of the impugned judgment has lightly treated the aspect of delay in sending the sample in the following manner:

“39. I may mention here that in the present case the sample has been sent twice. Firstly, it was sent on 1.3.2000 but it could not be accepted as forwarding letter did not bear the signatures of the concerned DCP. Moreover, my experience in dealing with the NDPS Act cases has revealed that from the last few years the Laboratories are so overcrowded that several times **the Laboratory Officials generally refuse to accept the samples as they are already overloaded. So, in my opinion, the court should have a practical approach and should not try to find fault** with the prosecution where due to the prevailing circumstances the prosecution should not be blamed.”(emphasis supplied)

19. This Court is unable to agree with the approach adopted by the trial court, especially its observations highlighted above. The record of the case should contain entry in writing about the sample being sent for testing within the time specified by the Narcotic Control Bureau. A strict compliance of this requirement has to be insisted upon. The reason is this. The sample that is kept in a police malkhana, under the seals of the police officers themselves, is still definitely under the control of those police officers. There is every possibility that the samples could be tampered and again re-sealed by the

very same officers by again affixing their seals. It is to prevent this from happening that earlier the sample is sent for testing to the CFSL the better.

20. The delay in sending samples to the CFSL has to be properly explained by the prosecution and further, such explanation can be accepted only where the prosecution shows that it made a genuine attempt to send the sample to the CFSL forthwith and that because of the excessive workload of the CFSL, the sample was returned and was unable to be tested. The record must show that such an attempt was made and the sample was returned for reasons not of the making of the prosecution. The lacuna in this regard cannot be permitted to be made up by oral evidence.

21. In the instant case till 1st March, 2000 there was absolutely no attempt made by the prosecution to even send the sample for testing. Even when it was sent on 1st March 2000, it was brought back on 3rd March, 2000. There is no explanation forthcoming on the record as to why it was not sent till then and what happened in the two day gap between 1st March, 2000 and 3rd March, 2000 when the sample was outside the malkhana. The evidence of PW1 Sarbjeet Singh is testimony to the lackadaisical manner in which the entire exercise has been undertaken. This Court is not satisfied that the requirement of safe keeping of the sample as explained by the Supreme Court in *Valsala* was actually complied with.

22. The reliability of the test report would depend on whether in fact the

sample sent for testing was the one recovered from the accused. If there is doubt as to the safe custody of the sample that is recovered from the accused, then the benefit of such doubt, must obviously enure to the accused.

23. This Court finds that the prosecution has in this case failed miserably in satisfying the requirement of the law. The delay of three months in sending the sample for testing the instant case must be held to be fatal to the case of the prosecution since on the facts of this case, this Court is not satisfied that the seized sample was properly preserved during the period of the delay and that the sample sent for testing was the one that was seized. Since the accused is entitled to succeed on this ground, this Court is not examining other grounds urged by the accused.

24. For the aforementioned reasons, the impugned judgment dated 25th November, 2000 and the order dated 27th November, 2000 passed by the learned ASJ are set aside. The accused is acquitted of the offence under Section 21 NDPS Act.

25. The appeal is accordingly allowed with no orders as to costs. Application stands disposed of accordingly. The accused will be set at liberty forthwith unless required in any other case. A certified copy of this judgment be sent by the Registry to Superintendent, Central Jail, Tihar forthwith.

1st May, 2008

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(S. Muralidhar)
Judge

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