

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

% Judgment reserved on: 01.09.2009
Judgment delivered on: 23.12.2009

Crl. Appeal No. 111/2000

PARO @ RAJ @ SHAKUNTALA Appellant

Vs

STATE OF DELHI Respondent

Advocates who appeared in this case:

For the Appellant : Ms Ritu Gauba, Advocate
For the Respondent : Mr Amit Sharma, Additional Public Prosecutor

**CORAM :-
HON'BLE MR JUSTICE RAJIV SHAKDHER**

1. Whether the Reporters of local papers may be allowed to see the judgment ? No
2. To be referred to Reporters or not ? Yes
3. Whether the judgment should be reported in the Digest ? Yes

RAJIV SHAKDHER, J

1. This appeal is directed against judgment and sentence of even dated 06.1.2000 passed by the Additional Sessions Judge, Shahdara, Delhi.

1.1 By virtue of the impugned judgment the appellant has been convicted under Section 21 of the Narcotics Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the 'NDPS Act'). Consequently, the appellant has been sentenced to 10 years' rigorous imprisonment and a fine in the sum of Rs 1 lakh. In the event of default in payment of fine the appellant would be required to undergo rigorous imprisonment for a further period of six months.

2. The prosecution version of the events which transpired is briefly as follows:-

2.1 On 16.9.1996, ASI Arun Singh (PW10) received secret information that three persons, which included the appellant (i.e., Paro), Aslam and Irfan would reach the 'T'

Junction of the D Block, Railway crossing in Nand Nagri; at about 3 pm for the purpose of supplying smack. ASI Arun Singh (PW10) immediately conveyed this information to the Station House Officer (in short 'SHO') who in turn informed ACP, B.C.Kalra. ACP B.C. Kalra (PW14) constituted a team of police officials comprising of Inspector S.P. Kaushik (PW12), H.C.Rajinder Singh (PW2), Constable Rudra Mani (PW1), SI Premchand, ASI Arun Singh (PW10) and lady Constable Maya Devi (PW8). To be noted that, ACP B.C. Kalra in his deposition, however, has referred to three other persons, who according to him, were part of the raiding team i.e., Inspector Parvesh Chobbey, H.C. Nar Singh and Lady constable Manju Sharma.

2.2 The information received was diarized under DD No.21. Sure enough the appellant, Aslam and Irfan reached the designated spot. On the informer identifying them, ACP, B.C.Kalra confronted them. The appellant and her associates were told that it was suspected that they were carrying contraband and as such they would have to be searched. Before the search commenced all three were informed that they had a right to have themselves searched before a Gazetted Officer or a Magistrate. All three were served notices under Section 50 of the NDPS Act. Since, the appellant did not wish to exercise the option of being searched before a Gazetted Officer or Magistrate her refusal was recorded. ACP B.C.Kalra then proceeded to offer the search of the appellant by the lady Constable Maya Devi (PW8). The appellant declined the offer. Consequently, the appellant was physically searched by Constable Maya Devi (PW8) in the confines of a van having regard to the fact that she was a woman. The appellant's search revealed that she was carrying a polythene pack containing a granular brown coloured substance, in her braziere. On a close scrutiny and after smelling it - it was found that the substance was smack. The seized contraband was weighed. It weighed 40 grams. A sample weighing 5 grams, was drawn. The sample was put in a separate polythene packet. The remaining contraband weighing 35 grams and the sample weighing 5 grams, which had been put in two separate polythene packets, were wrapped in cloth and sealed with the seals of ASI Arun Singh and SHO S.P. Kaushik i.e. 'AS' and 'SPK' respectively. In the meanwhile,

the CFSL form and seizure forms were drawn up. The sealed cloth packet alongwith CFSL form was deposited with the Malkhana in charge (PW7) at the police station by SHO S.P.Kaushik. A rukka (Ex. PW10/A) was sent by ASI Arun Singh (PW10) with H.C. Rajinder Singh (PW2), based on which FIR No. 9/1996 (Ex PW9/A) was registered. The appellant was arrested vide memo dated 16.09.1996. Raids were carried out in the house of the appellant and her two associates. However, nothing was recovered from their houses.

2.3 A challan was filed with the trial court. By an order dated 17.03.1997, while the appellant was charged under Section 21 of the NDPS Act, her two associates were discharged. Since, the appellant pleaded that she was not guilty and demanded trial- a trial was conducted. The trial culminated in the appellant's conviction as mentioned hereinabove.

3. The prosecution cited 14 witnesses in support of its case while the appellant did not lead any evidence in her defence. The appellant in her statement under Section 313 of the Cr.P.C. denied monotonously every incriminating evidence put to her by the trial court with the answer 'it is incorrect'; save and except towards the end of her statement when, the appellant said that she had been picked up from her house and falsely implicated.

4. Ms Ritu Gauba, learned counsel for the appellant assailed the judgment of the trial court on the following grounds:-

(i) The appellant has been falsely implicated in the case while her two associates have been discharged, which is evident, if regard were to be had to the following:-

(a) the mandatory requirement of serving the appellant with a notice under Section 50 of the NDPS Act was not complied with. The prosecution case before the trial court is that a notice was served on the appellant and if that is assumed to be correct, then how is it that in the seizure memo (Ex PW8/B) there is no mention of a recovery of a carbon copy of the said notice. In these circumstances, it is quite clear that there was no occasion for the appellant to exercise her option to have herself searched in the presence of a Gazetted Officer or a Magistrate. The presence of ACP B.C. Kalra (PW14), who is a Gazetted

Officer, would not fulfill the lacunae as the letter and spirit of Section 50 of the NDPS Act obliged the police to search the person suspected, in the presence of a Gazetted Officer or Magistrate, who was not part of the team which apprehended the suspect;

(ii) even though the place where the appellant and her associates were searched was a busy public thoroughfare — no member of the public was associated by the police team. The appellant has been consequently convicted, based on unsubstantiated secret information and suspect testimony of police witnesses;

(iii) the provisions of Section 57 of the NDPS Act were infringed in as much a superior officer was not informed about the alleged incident within the requisite time frame of 72 hours. For this purpose reliance was placed on Section 42(2) of the NDPS Act;

(iv) the sample was tampered: for this purpose attention was drawn to the Malkhana register and the trial court's observations that it appeared that the entry with respect to deposit of CFSL form was made after the words "Fard Jamatalashi" had already been written. Stress was laid on the observations of the trial court at the time of recording of cross-examination;

(v) the road certificate - which was a link evidence was not produced to demonstrate that CFSL form accompanied the sample.

5. As against this, Mr Amit Sharma, learned APP supported the impugned judgment and in rebuttal submitted as follows:-

(i) the fact that the appellant was served with a notice under Section 50 of the NDPS Act is borne out from the testimony of lady Constable Maya Devi (PW8), ASI Arun Singh (PW10) and H.C. Rajinder Singh (PW2);

(ii) the refusal of the appellant to exercise her option of having herself searched before a Gazetted Officer or a Magistrate is recorded on the notice (Ex PW8/A) which bears her thumb impression at point 'X';

(iii) the fact that a carbon copy of the notice under Section 50 of the NDPS Act is not mentioned in the seizure memo (Ex PW8/B) is of no consequence since there is no requirement in law that the notice under Section 50 of the NDPS Act has to be in writing.

In this regard he relied upon judgment of the Supreme Court in the case of ***Prabha Shankar Dubey vs State of M.P. (2004) 2 SCC 56***;

(iv) the testimony of ASI Arun Singh (PW10), lady Constable Maya Devi (PW8) and H.C. Bhagwat Dayal (PW7) would show that a CFSL form was filled, and deposited safely with the Malkhana-in-charge (PW7) by the SHO S.P. Kaushik (PW12). The entries in Malkhana register were proved by PW7;

(v) PW7 had adverted to the fact that the sample alongwith CFSL form was deposited in the Malkhana on 16.09.1996. He further stated that it was sent to CFSL, Chandigarh on 27.09.1996 vide R/C No.10/21, whereupon it was received back on 06.01.1997. The fact that in the Malkhana register the reference to the CFSL form was after the word 'Fard Jamatalashi' had been written would not necessarily lead to the conclusion that there was an interpolation as it is quite possible that having forgotten to mention it in the first instance it was written immediately thereafter;

(vi) on the issue of absence of the road certificate, the learned APP submitted that its non-production would not be fatal in this case — as Dr.S.K.Kulshresta (PW13) has clearly deposed that the sample (Ex PW8/B) was received by him on 27.09.1996 along with the CFSL form, and that the seal on the sample tallied with the seal on the CFSL form. PW13, as per his submission had also proved the CFSL form cum forwarding letter (Ex PW13/B);

(vii) lastly, as regards whether a superior officer was informed within the requisite 72 hours in accordance with the provisions of Section 57 of the NDPS Act; reliance was placed on the testimony of H.C. Nar Singh (PW11). The testimony of PW11, according to the learned APP, proved that information was received in the office of DCP the very next day i.e., 17.09.1996 and hence, there was no infraction of the provisions of Section 57 of the NDPS Act.

6. I have heard the learned counsel for the appellant as well as the learned APP and also considered the evidence on record. In my view the conviction of the appellant cannot be sustained. My reasons are as follows:-

6.1 The case set up by the prosecution is that on 16.09.1996 on receiving secret information a police team was formed under the supervision of ACP B.C. Kalra (PW14). The team convened at the designated spot, that is, the 'T' junction of the D-block, railway crossing in Nand Nagri. At 3 p.m., the appellant alongwith her two associates Aslam and Irfan reached the site. They were confronted with the information that they were suspected of carrying contraband, and to ascertain its veracity they were required to be searched. Upto this stage, there is perhaps no occasion to find fault with the prosecution case. However, it is at this point that the prosecution's case becomes suspect. It is the prosecution's case hereafter that ACP B.C. Kalra (PW14) informed the appellant and her two associates about the right of search before a Gazetted Officer or a Magistrate. It is the prosecution's case that a written notice under Section 50 of the NDPS Act was served on the appellant, and since the appellant refused to exercise her option — which is evidenced, according to the prosecution, by the thumb impression on the said notice where refusal is recorded; it would establish the correctness of the prosecution version. In my view the position is to the contrary. If the events had occurred in the normal and ordinary course, on being confronted and, being issued a written notice under Section 50 of the NDPS Act, a copy would have been found on the appellant's person and therefore, so included in the seizure memo drawn up. The prosecution does not deny that both the seizure memo (Ex PW8/B) and recovery memo (Ex. PW8/C) do not make a mention of the copy of the notice evidently issued under Section 50 of the NDPS Act. This is sought to be explained by the learned APP by taking a stand that it would be of no consequence — since there is no mandatory requirement in law that the notice under Section 50 of the NDPS Act should be in writing. This submission is untenable. Once the prosecution sets up a case that a written notice was issued, it cannot, in order to explain away the absence of a copy of the notice on the person of the appellant, resort to a submission which is not in consonance with its own case.

6.2 It is no longer *res integra* that the compliance with the provisions of Section 50 of the NDPS Act is mandatory. The non-compliance with the provisions of Section 50 of the

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NDPS Act would vitiate the trial. The reason for that is not far to see. To rely upon the recoveries made during a search, it is important for the court to have an assurance based on the evidence on record, that the statutory procedure set out for search is untainted. It is well-settled that no presumption can be drawn that a person was informed of his right under Section 50 of the NDPS Act to be searched in the presence of a Gazette Officer or a Magistrate. Non-compliance of a mandatory provision will result in the conviction of the accused being set aside. (See *Saiyad Mohd. Saiyad Umar Saiyad and Ors. vs State of Gujarat 1995 (3) SCC 610*, *C. Ali vs State of Kerala 1999 (7) SCC 88*, *State of Punjab vs Baldev Singh 1999 (6) SCC 172* & *Beckodan Abdul Rahinan vs State of Kerala 2002 (4) SCC 229*)

6.3 Let us examine the testimonies of the witnesses on this aspect of the case. PW8, who searched the appellant, and evidently recovered the plastic packet containing the contraband from the brassiere of the appellant, said in her cross-examination that she was not sure as to whether a copy of the notice under Section 50 of the NDPS Act was given to the appellant or not. The said witness went on to say that the contents of the notice were, however, read to the appellant and her signatures were obtained on the said notice.

6.4 As against this, the I.O, ASI Arun Singh (PW10) emphatically stated that one carbon copy of the notice under Section 50 of the NDPS Act was served on the appellant, even while admitting that no copy of the notice under Section 50 of the NDPS Act was recovered from the personal search of the appellant. PW10 has also adverted to the fact that eventhough it is not written in the notice that the contents of the notice were read over to the accused the same was read over and the thumb impression of the appellant was obtained at the time of giving notice. On the other hand, ACP B.C. Kalra (PW14) in his cross-examination has said that a carbon copy of the notice under Section 50 of the NDPS Act was given to the appellant, however, no signatures or thumb impression of the appellant were obtained at the time of giving a copy of the notice to the appellant. A conjoint reading of the testimony of PW8, who conducted the search, and that of PW10

and PW14 raises a clear doubt as to whether the appellant was given the option to have her search taken before the Gazette Officer or Magistrate as mandated under Section 50 of the NDPS Act. The testimonies of the witnesses do not enthrone confidence in me that the appellant was informed of her right prior to her search being taken.

6.5 As observed by me hereinabove, that this right being mandatory, non-adherence to the provisions of Section 50 of the NDPS Act will lead to the necessary consequences of the conviction being set aside.

7. The above coupled with other attendant circumstances propels me to give the benefit of doubt to the appellant.

(i) The interpolation in the malkhana register. The trial court while recording the cross-examination of PW7 observed with respect to the interpolation as follows:

“.....Court Observation: *The entry at Sr. No. 3 regarding CFSL form does not appear to be in different ink but appears to have been written after writing the word ‘Fard Jamatalashi’ as matra of Fard Jamatalashi overlaps the aforesaid word).*”

(i)(a) The learned APP is right in his submission that it is quite possible that there was no interpolation, and that the entry had been made immediately after the writer recorded “Fard Jamatalashi”. But if there are two distinct possibilities one that favours the accused should be accepted — more so in this case when seen in the light of other discrepancies.

(ii) The testimony of H.C. Mayadevi (PW8) who testified that she had seen the appellant append her signatures on the notice issued to her under Section 50 of the NDPS Act, whereas ASI Arun Singh (PW10) in his examination in chief stated that the appellant was illiterate and hence, her thumb impression was obtained on the notice (Ex. PW8/A). However, in the cross-examination he stated that no thumb impression of the appellant was obtained on the said notice (Ex. PW8/A). The notice (Ex. PW8/A) carries a thumb impression.

(iii) In the site plan (Ex. PW10/B) the position of the van where the appellant was evidently searched by H.C. Mayadevi (PW8) is not shown.

(iv) ASI Arun Singh (PW10) in his testimony said that the team of officers, apart from himself and ACP B.C. Kalra (PW14), which executed the operation of apprehending the appellant were as follows:

Inspector S.P. Kaushik, Inspector P. Chaubey, H.C. Rajinder Singh, S.I. Prem Chand, H.C. Nar Singh, Const. Rudramani, L/Const. Maya Devi and L/Const. Manju Sharma.

Significantly, H.C. Mayadevi (PW8) did not mention the names of Inspector P. Chaubey, H.C. Nar Singh and L/Const. Manju Sharma as forming part of the team.

(v) Lastly, the road certificate, which is a crucial link evidence, was not produced.

[See *Ravi Kumar vs State* 87 (2000) DLT 680]

7.1 Therefore, a cumulative appreciation of evidence produced by the prosecution does not inspire confidence that it is free from taint. If that be the position, the benefit of doubt will have to be given to the appellant.

8. Consequently, the appeal is allowed. The impugned judgment of the trial court is set aside. The appellant shall be set free forthwith, if in custody, provided her custody is not required in another case.

RAJIV SHAKDHER, J

DECEMBER 23, 2009
da/kk