

REPORTED

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

% DATE OF RESERVE: March 19, 2009

DATE OF DECISION: July 03, 2009

+ **CRL.A. 80/2009**

STATE Appellant
Through: Mr.Manoj Ohri, APP for State.

versus

BALBIR SINGH Respondent
Through: Mr.Jaswant Persoya, Advocate.

CORAM:

HON'BLE MS. JUSTICE REVA KHETRAPAL

1. Whether reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not?
3. Whether judgment should be reported in Digest?

: REVA KHETRAPAL, J.

1. The present appeal filed by the State seeks to challenge the judgment of the learned Additional Sessions Judge dated 08.01.2004 in Sessions Case No.24/02 acquitting the accused of the charge framed against him under Section 15 of the Narcotic Drugs and Psychotropic Substances Act, 1985.

2. The facts succinctly stated are that pursuant to secret information received by ASI Rajdhari Singh of P.S. Paharganj, naqabandi was carried out in the area of Police Station Paharganj whereupon the appellant was nabbed by ASI Rajdhari Singh (PW8) assisted by Head Constable Anil Dutt (PW2) and

Constable Guljar (PW7) while he was coming from the Connaught Place side. Thereupon, the Station House Officer, Inspector Prem Singh Huda (PW4) was informed, who also reached the spot. After the necessary compliance with the provisions of Section 50 NDPS Act, the search of the appellant/accused was conducted and 14 kgs. of poppy straw powder was recovered from the bag which he was carrying on his right shoulder, out of which a sample of 250 grams of power was separated. Two separate pulandas were prepared and sealed with the seals of 'RDS' and 'PSH'. CFSL form was also filled up at the spot and the case property taken into possession. Rukka was sent to the Police Station, pursuant to which the formal FIR was registered. The investigation of the case was handed over to Sub-Inspector Jai Raj Singh (PW5), who prepared the site plan, sent the report under Section 52 of the NDPS Act as also the report under Section 57 NDPS Act. The sample was sent to the FSL, Malviya Nagar for chemical analysis, which tested positive for morphine. Charge for the offence punishable under Section 15 NDPS Act was framed by the learned Additional Sessions Judge on 14th May, 2002 and the testimony of the prosecution witnesses recorded as also the statement of the accused under Section 313 Cr.P.C.

3. On 08.01.2004, the learned Additional Sessions Judge after hearing the parties acquitted the accused, on the ground of lack of evidence on record to

show that no tampering had taken place between the time when the sample had been handled and sent for chemical analysis and the receipt of the FSL report after chemical analysis of the said sample. The relevant portion of the judgment of the learned Additional Sessions Judge reads as follows:-

“7. To this extent the testimony of these three witnesses is corroborative. However, PW5 S.I. Jai Raj Singh has destroyed the version of the prosecution completely when he came to the witness box and in his examination-in-chief, he states that he had sent the sample parcel to CFSL and obtained the result Ex PW5/D. This version of PW5 totally shatters the case of the prosecution and is contrary to the version of PW3 and the version of PW1 who has stated that the sample parcel and the CFSL form had been handed over by PW1 to PW3 to take it to the CFSL. There is only one sample parcel which has to be sent for analysis to the CFSL; it is either PW3 or PW5 who can take the sample parcel; both cannot take the sample parcel. The contrary version of PW3 and PW5 on this score in my view destroys the link evidence and the prosecution has failed to establish as to when the sample parcel was sent for analysis and whether it was same sample parcel which was the sample drawn from the so called recovery effected from the accused; the possibility of the non tampering of the sample has not been established by the prosecution and because of these conflicting version of PW3 and PW5, in my view the benefit of doubt is given to the accused and the accused is entitled to acquittal on this ground alone.”

4. Mr. Manoj Ohri, the learned Additional Public Prosecutor for the State submitted that the learned Additional Sessions Judge had wholly erred in coming to the conclusion that the contrary versions of PW3 and PW5 destroyed the link evidence, and, as such the prosecution had failed to establish

that the sample parcel recovered from the accused had not been tampered with. According to him, a bare reading of the testimonies of PW3 and PW5 clearly establishes that the sample parcel was sent by PW5, S.I. Jai Raj Singh (I.O.) through PW3, Constable Rakesh Kumar to the FSL for chemical analysis. The learned counsel for the respondent Mr. Jaswant Persoya, Advocate, on the other hand, urged that the judgment of the learned Additional Sessions Judge was not liable to be interfered with as the versions of PW3, Constable Rakesh Kumar and PW5, S.I. Jai Raj Singh were completely contrary to each other and the version of PW1, Head Constable Jitender Kumar, who had stated that the sample parcel and the CFSL form had been handed over by him (PW1 Head Constable Jitender Kumar) to PW3 Rakesh Kumar to take it to the CFSL.

5. At this juncture, adverting to the prosecution evidence is deemed necessary to decide whether there are any inherent contradictions in the statements of the prosecution witnesses and, in particular, the statements of PW1, PW3 and PW5.

6. PW1, Head Constable Jitender Kumar, the Malkhana Moharrar, Police Station Paharganj deposed that on 04.02.2002, while he was working as such, the Additional SHO, Police Station Paharganj Inspector Prem Singh deposited two sealed parcels pertaining to the present case along with the CFSL form in the malkhana, in respect of which he made an entry in the Malkhana Register

at Serial No.2289. He further deposed that on 14.03.2002, he had sent the sample parcel along with the CFSL form **through Constable Rakesh Kumar to the FSL Malviya Nagar vide RC No.249/21 for expert opinion.** He proved on record the photostat copies of the aforesaid entries in the Malkhana Register as Exhibit PW1/A and in the RC book as Exhibit PW1/B, and testified that so long as the parcels remained in his custody the seals were intact. In cross-examination, the testimony of this witness remained unshaken.

7. PW3, Constable Rakesh Kumar, No.7336/DAP 6th Bn. Delhi testified that on 14.03.2002, he was posted at Police Station Paharganj and that on that date, **he had taken one sealed parcel with the FSL form from the Malkhana Moharrar vide RC No.249/21 to deposit the same in the office of the FSL, Malviya Nagar, which was deposited by him in the FSL, Malviya Nagar on the same very day.** He further testified that so long as the parcel and the Form remained in his custody, the seals on them were intact. Not even a suggestion was put to this witness with regard to the tampering of the sample parcel or the FSL form.

8. Next, adverting to the testimony of the PW4, Inspector Prem Singh Huda, Additional SHO, Police Station Paharganj, in this regard the said witness testified that he had taken into possession the sealed parcels, the FSL form and the copy of the seizure form at the spot and after reaching the Police

Station, he had deposited the case property in the malkhana and later on, the investigation of the case was marked by him to PW5, S.I. Jai Raj Singh.

9. PW5, S.I. Jai Raj Singh (the Investigation Officer) with regard to the case property, inter alia, deposed that he had **sent** the sample parcel to FSL and obtained the result Exhibit PW5/D. Not a single suggestion was given to this witness that he had not sent the sample parcel to the FSL or that there had been any tampering with the sample parcel.

10. The remaining witnesses, i.e., PW2, Head Constable Anil Dutt, PW7, Constable Guljar and PW8, S.I. Rajdhari Singh (apart from PW4, Inspector Prem Singh Huda), were examined as witnesses of recovery of the 14 kgs. of poppy straw recovered from the appellant, while PW6, Head Constable Balbir Singh testified about the receipt of the secret information through telephone and the recording of the same in DD No.19-A of Police Station Paharganj. Their testimonies thus throw no light on the controversy as to who had taken the sample parcel to the FSL for chemical analysis.

11. Having heard Mr. Manoj Ohri, the learned Additional Public Prosecutor on behalf of the State and Mr. Jaswant Persoya, the learned counsel for the respondent and having gone through the records, I am unable to concur with the findings of the learned Additional Sessions Judge which have resulted in the acquittal of the accused. The finding of the learned Additional Sessions

Judge that there was only one sample parcel which had to be sent for analysis to the CFSL; it was either PW3, Constable Rakesh Kumar or PW5, Sub-Inspector Jai Raj Singh who could have taken the sample parcel; both could not have taken the sample parcel, in my view, is clearly erroneous, as is the further finding that the versions of PW3, Constable Rakesh Kumar and PW5, Sub-Inspector Jai Raj Singh on this score (the sending of the sample parcel) destroyed the link evidence. I find nothing contrary in the versions of the two witnesses, viz., PW3, Constable Rakesh Kumar and PW5, Sub-Inspector Jai Raj Singh (I.O.). It is settled law that the testimonies of the witnesses have to be read in tandem and not in isolation. But, in the instant case, even if the same are read in isolation, there is nothing contradictory in their testimonies and as a matter of fact, the testimonies of both these witnesses complement each other, and the testimony of PW1, Head Constable Jitender Kumar further corroborates the testimonies of PW3, Constable Rakesh Kumar and PW5, Sub-Inspector Jai Raj Singh.

12. PW1, Head Constable Jitender Kumar has categorically deposed that on 14.03.2002, he had **sent** the sample parcel along with the FSL form **through Constable Rakesh Kumar** (PW3) to FSL, Malviya Nagar vide RC No.249/21 to deposit it there for expert opinion, and entry to this effect had been made by him in the malkhana register as Exhibit PW1/A and the road certificate in this

regard was Exhibit PW1/B. A perusal of the entry in the malkhana register (Exhibit PW1/A) clearly shows that the sample parcel was sent to the FSL, Malviya Nagar through Constable Rakesh Kumar vide RC No.249/21. A perusal of the Road Certificate bearing No.249/21 (Exhibit PW/B) further corroborates the same, wherein, it is clearly recorded that one pulanda sealed with the seal of 'RDS' and 'PSH' containing 250 grams post butts (opium) along with FSL form was being sent by Road Certificate to the FSL, Malviya Nagar through Constable Rakesh Kumar. Thus, the testimony of Head Constable Jitender Kumar, the entry in the malkhana register (Exhibit PW1/A) and the entry in the Road Certificate (Exhibit PW1/B) are at one with each other.

13. PW3, Constable Rakesh Kumar has deposed on the same lines as PW1, Head Constable Jitender Kumar by deposing that on 14.03.2002, he had taken one sealed parcel with the FSL form from the Malkhana Moharrar vide RC No.249/21 to deposit the same in the office of the FSL, Malviya Nagar, which was deposited by him on the same very day. The testimony of this witness has not been challenged in cross-examination. Likewise, the testimony of PW5, the Investigating Officer S.I. Jai Raj Singh is corroborative of the testimonies of PW1, Head Constable Jitender Kumar and PW3, Constable Rakesh Kumar, inasmuch as the said witness has stated that he had '**sent**' (as opposed to 'taken') the sample parcel to FSL and obtained the result (Exhibit PW5/D). He

has nowhere stated that he had taken the sample parcel to the FSL and the question of his doing so, even otherwise, did not arise in view of the fact that he was the Investigating Officer of the case and it was on his orders that PW3, Constable Rakesh Kumar carried the sample to the FSL, Malviya Nagar. Clearly, when he stated that he had 'sent' the sample parcel to FSL, he meant that the same had been sent through some other police personnel. Had he taken it himself, he would have stated so.

14. It also cannot be lost sight of that had there been any contradiction or ambiguity in the statement of S.I. Jai Raj Singh, the Investigating Officer, he would have been confronted with the statements of PW1, Head Constable Jitender Kumar and PW3, Constable Rakesh Kumar and asked to explain why his statement was contradictory to the statements of the prosecution witnesses examined prior to him. In the instant case, the witness has not been confronted either with the testimony of PW1, Head Constable Jitender Kumar or PW3, Constable Rakesh Kumar or with the entries in the malkhana register and the road certificate, presumably because there was no need to do so.

15. I pause here to note that it was incumbent upon the learned trial court to have sought clarification from the witness in case his testimony was, in any way, ambiguous, unclear or contrary to the case of the prosecution. Not having done so, it was not open to the learned trial court to acquit the accused

on the ground of contradiction in the testimony of PW3, Constable Rakesh Kumar and PW5, S.I. Jai Raj Singh leading to destruction of the link evidence. Then again, the finding of the learned trial court that the possibility of the non-tampering of the sample had not been established by the prosecution because of the conflicting versions of PW3, Constable Rakesh Kumar and PW5, S.I. Jai Raj Singh and on this score the benefit of doubt accrued to the accused, is again erroneous for the reasons aforesaid.

16. In view of the foregoing discussion, in my view, the impugned judgment acquitting the accused deserves to be set aside and is set aside. However, keeping in mind the fact that the impugned judgment is entirely based on the finding that the versions of the prosecution witnesses relating to the deposit of the sample parcel with the Chemical Examiner are contrary and other aspects of the case had not been gone into by the learned trial court, the case is remanded to the trial court for hearing afresh on the other facets of the case. It is also clarified that nothing herein contained shall be construed as an expression of opinion on merits on the other aspects of the case on which no findings have been rendered in the impugned judgment.

CRL.A. 80/2009 stands disposed of accordingly.

REVA KHETRAPAL, J.

JULY 03, 2009

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