

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

+ **Crl.A.No. 433/2009**

% Reserved on: November 30, 2009
Date of Decision: December 3, 2009

FRANCIS O AKAHIE Appellant
Through:Mr. K.B. Andley, Sr. Advocate with
Mr. M.L. Mehta, Advocate

versus

N.C.B. Respondent
Through:Mr. Narendra Singh, SPP for NCB.

* **CORAM:**
HON'BLE MR. JUSTICE V.K. JAIN

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

: **V.K. JAIN, J.**

1. This is an appeal against the judgment dated 30.4.2009 and Order on Sentence dated 14.5.2009 whereby the appellant was convicted under Section 21(c) of NDPS Act and was sentenced to

undergo rigorous imprisonment for ten years and to pay a fine of Rs.1 lakh or to undergo simple imprisonment for four months in default.

2. The case of the prosecution, in brief, is that on 14.5.2001, that Shri N.S.Ahlawat, Asstt. Director, Narcotic Control Bureau received secret information that the appellant, after procuring drugs from Albert's house at Vasant Vihar would come at T-Junction of Sangam Vihar at Rao Tula Ram marg near a Marble Plaque, to deliver the drug to an unknown person. After the information had been reduced in writing and submitted to superior officers, a team led by Shri N.S. Ahlawat, reached at the spot after joining two persons namely Ved Prakash and Pradeep Kumar in their team. The appellant was intercepted while having a green bag on his shoulder. After serving a notice under Section 50 of NDPS Act on him in reply to which the appellant Francis told them that any officer could search him, the bag being carried by the appellant was searched and was found to contain two polythene bags. White powder was found in the polythene bags which on testing with the help of Field Test Kit gave positive result of narcotics substance. After drawing

sample, and sealing them and filling up CRCL form. The samples as well as the contraband were seized. The team of NCB also went to the house in Vasant Vihar where Albert was staying and recovered narcotics. The appellant also made a statement under Section 67 of NDPS Act admitting the recovery and his connection with Albert.

3. The prosecution examined 16 witnesses in support of its case. No witness was examined in defence. PW-11 Shri N.S. Ahlawat stated that on 14.5.2001, he received a secret information that two Nigerians namely Francis and Albert were drug smugglers and one Francis would come at T-Junction of Sangam Vihar at Rou Marg to deliver heroin to some unknown persons after procuring the same from Albert' house who was the resident of Vasant Vihar. The information was reduced into writing Ex.PW-11/A. He submitted the same to Zonal Director, who directed him to raid and take necessary actions. The said information bears signatures of the Zonal Director at point 'B' on it. The witness has further stated that he organized a team and gave Search Authorization to Jyothimon, I.O. along with seal of NCB DZU3. They reached the T- junction and took position on

the spot. The appellant was intercepted by the team in presence of two independent witnesses who were called by the IO before hand and two kilogram of heroin was recovered from the green bag which the appellant was carrying on his shoulder. Thereafter, the team searched House No.B-9, Vasant Vihar where a Nigerian who was inside the house threw something in the toilet on seeing them and flushed it. By the time, the team reached upstairs at first floor, he jumped from the window and went up to the roof from where he fled away.

4. PW-2 Jyothiman has stated that on 14.5.2001, Shri N.S. Ahlawat called him and informed him about the secret information received by him. He thereafter joined the team headed by Mr.Ahlawat and reached the junction of Rout Nagar and Sangam Marg. Two punch witnesses Pradeep Kumar and Ved Prakash, were joined in the team. The appellant came to the spot at about 12:30 p.m. He told the appellant that they had information that he might be carrying some narcotic drugs with him and had authorization for his search. He has further stated that he asked the appellant whether he required the presence of any Government Officer or Magistrate during the search. Vide

Ex.PW-2B, the appellant give his reply in writing and stated that any officer present could take a search. The officers of NCB offered their search to the appellant but he denied. The appellant was carrying, on his shoulder a samsonite bag of green colour out of which two polythene bags were taken out. White powder was found in those polythene bags which on testing gave positive test for heroin/cokain/methaquolain. He then weighed the polythene bags and drew four samples, two from each of them. The samples as well as the remaining substance were seized after they had been duly sealed with the seal of NCB DZU3. He has further stated that he also went to the house of Albert in Vasant Vihar along with other officials and panch witnesses. Two persons who met them in the house told them that Albert had ran away from the other door. One packet of white powder was recovered from the godown, which, on testing gave positive result for kokains/methaquolain.

5. PW-5 Shri A.S.Budhwar, Directorate of Enforcement, Lok Nayak Bhawan, has stated that on 16.5.2001, he took samples in four envelopes along with test memos and deposited the same in CRCL in intact condition through Mr.R.P.Singh, who issued

receipt Ex.PW-5/B. PW-6 Shri Ved Prakash has also supported the deposition of PW-2 and PW-11 regarding recovery of payment from House No.F-9, Vasant Vihar. PW-10 Shri N.K.Dhaka, Enforcement Officer Enforcement Directorate, has stated on 14.5.2001, he recorded the statement of Ex.PW-10/A.

6. In his statement under Section 313 of Cr.P.C., the appellant denied the allegations against him and stated that his signatures were taken on many blank papers which were subsequently used against him. He has claimed that he has forcibly picked up from his house in Malviya Nagar and was brutally tortured. He has denied having made any voluntary statement to anyone.

7. The conviction of the appellant has been assailed by the learned counsel for the appellant only on the following two grounds:

1. There was breach of section 50 of NDPS Act as the appellant was not informed that he has a right to be searched in the presence of a Magistrate or a Gazetted Officer.

2. The quantity of the samples found in C.R.C.L. was less than the quantity alleged to have been taken at the time of seizure of the contraband.

8. The case of the prosecution is that the contraband was recovered from a bag which the appellant was carrying on his shoulder. No contraband is alleged to have been recovered from the personal search of the appellant.

In *State of Punjab vs. Balbir Singh* AIR 1999 SC 2378 the constitutional Bench of the Hon'ble Supreme Court, inter alia, observed as under:

“On its plain reading section 50 would come into play only in the case of a search of a person as distinguished from search of any premises etc.”

After considering a number of earlier decisions, the Hon'ble Supreme Court held that when an empowered officer or a duly authorised officer acting on prior information is about to “search a person” it is imperative for him to inform the person concerned of his right under sub-section (1) of section 50 of being taken to

the nearest Gazetted Officer or the nearest Magistrate for making the search.

9. In *Kalema Tumba vs. State of Maharashtra and another* AIR 2000 SC 402 the appellant was found to carry heroine in a bag which he opened in the presence of NCB officers from the key which he took out from his pocket. It was contended before the Hon'ble Supreme Court that the mandatory requirement of section 50 NDPS Act having not been complied, the evidence regarding recovery and seizure of heroine was illegal. Rejecting the contention the Hon'ble Supreme Court noted that the search of a baggage of the person as not the same thing as search of a person himself and that if a person is carrying a bag or some other article with him and narcotic drug or psychotropic substance is found from it, it cannot be said that it was found from his 'person'.

10. In *Gurbax Singh vs. State of Haryana* AIR 2001 SC 1002, the appellant was carrying a gunny bag on his left shoulder. On search, 7 kg of poppy straw were found in that bag. He having been convicted, it was contended by his counsel for the

provisions of section 50 of NDPS Act having not been complied with, the conviction was not sustainable. The contention was rejected by the Hon'ble Supreme Court.

10. In *State of Rajasthan vs. Daulat Ram* AIR 2005 SC 3186, opium was recovered from a bag carried by the accused. The Hon'ble Supreme Court rejected the contention that section 50 of NDPS Act applied to such a search. In *State of Himachal Pradesh vs. Pawan Kumar* 2005 IV SCC 350, opium was recovered from the attache being carried by the accused. The Hon'ble Supreme Court held that section 50 of the NDPS Act was not attracted to the search from the attache being carried by the accused.

Thus, section 50 of NDPS Act did not apply and hence there is no merit in the first contention.

11. Coming to the second contention, it was pointed out by the learned counsel for the appellant that though the case of the prosecution is that 5 gm each was taken out as sample, one of the sample weighed 4.05 gms whereas other one was found to be 4.98 gms, when the samples were weighed in the laboratory.

12. A perusal of Ex. PW1/A would show that both the samples had seal of Narcotics Control Bureau, DZU 3 on them when they were received in the laboratory on 16th August, 2001. That was the seal put on the samples at the time of seizure. The testimony of PW 11 Shri N.S. Ahlawat shows that the seizures were deposited by the investigating officer in the malkhana in his presence being in-charge of malkhana and necessary entries were made in the malkhana register about the seized drugs and the samples. The samples were sent to the CRCL on 16.5.2001 along with his forwarding letter for testing. The forwarding letter is Ex.PW5/A. The relevant entries in the malkhana register is Ex.PW11/C.PW 5 Shri A.S. Badhwar has stated that on 16.5.2001 he took the samples in four envelopes along with test memos in duplicate to CRCL and deposited the same in intact condition, through Shri R.P. Singh who issued the receipt Ex.PW5/B. Shri R.P. Singh has come in the witness box as PW 7 and has stated that on 16.5.2001 he received four sample packets through Shri Narender Kumar, chemical examiner Grade I issued the receipt Ex.PW5/B. The sample packets along with the forwarding note and memos were kept in strong room and

were taken out only on 19th June, 2001 in the presence of Shri Narender Kumar, chemical examiner Grade I who used to keep the keys of the strong room. Shri Narender Kumar, chemical examiner Grade I has come in the witness box as PW1 and has stated that on 16.5.2001 he had received 4 samples duly sealed from the Narcotics Control Bureau along with forwarding test memos. The prosecution has, thus, produced the entire link evidence and thereby established that there was no possibility of tempering with the seals that had been affixed on the samples, at any point of time before they were examined in CRCL.

13. The scale which the NCB officers used in weighing samples on the spot would obviously be different from the scale which was used in CRCL. Unless both are electronic scales and are hundred per cent accurate the possibility of the two scales showing some variation, on weighing, cannot be ruled out. Also, the quantity found in CRCL being less and not more than 5 gms each, the loss of weight could be attributed to loss of moisture, with the passage of time, between date of seizure and date of chemical examination in CRCL. Since there was no tempering with the seals put on the samples, it is obvious that the

discrepancy in the weight recorded by the NCB officers on the spot and the weight recorded by CRCL was on the account of different scales being used or due to loss of moisture and not on account of someone having tempered with the parcels containing the sample. Both the samples analyzed in CRCL were found to contain heroine. In one of the parcels the variation being only .02 gm is so minimal that it can come even if the two scales used for weighing the sample at different times are fully accurate.

14. Learned counsel for the appellant has referred to Mohd. Ramzan vs. State (NCT of Delhi) 2005 (2) JCC (Narcotics) 134. In that case the bail application filed by the petitioner came up for consideration before this court. In that case the case of the prosecution was that samples weighing 600 gms each were drawn whereas the FSL found that their weight was 630 gms, 560 gms and 750 gms respectively. In these circumstances, it was contended before this Court that the discrepancy in the weight could not be attributed to scales since had that been the case the discrepancy should have been either more or less in all the samples and not greater in some and less in others.

This Court, taking the aforesaid discrepancy into consideration granted bail to the petitioner. Since this is not a judgment on merits of the case after trial and in any case it does not lay down a legal proposition to the effect that even if there is minor discrepancy in the weight of the samples sent for analysis the accused would be entitled to acquittal on that ground alone.

15. The learned counsel has also referred to the decision of the Hon'ble Supreme court in *Rajesh Jagdamba Avasthi vs. State of Goa* 2004(9) Scale 539. In that case, narcotic substance was alleged to have been recovered from the shoes which the appellant was wearing. On weighing, the substance recovered from the right shoe was found to be 100 gms whereas that recovered from the left shoe was weighing 115 gms. The recovery was effected on 14th December, 1994. The envelopes containing the substance were sent to the Dte. Of Food and Drug Administration on January 4, 1995 through a constable who had not been examined. The quantity in one envelope was found to be 98.16 gms whereas the quantity in the other envelope was 82.54 gms. The seals which were put on the two envelopes soon after the alleged recovery of charas was different from the seal

found on them by PW 1 who conducted the analysis of the substance forwarded to him in the two envelopes. The Hon'ble Supreme Court noticed that there was discrepancy as the inscription on the seal according to panch witnesses was 'ANCPS' while according to PW 4 it was 'Anti Narcotoic Cell, Panaji at Goa'. According to the PW 1, it was 'Anti Narcotics Cell'. It was also noticed by the Hon'ble Court that according to PW 4 he had taken the seal from PSI Thorat and after seizure he carried both the packets to the police station where he handed over the packets as well as the seals to Inspector Yadav and next day he took the packet from the police station and sent them to PW 3 who forwarded it to PW 4 for chemical analysis. In these circumstances, the Hon'ble Court found justification in the argument that since the seal as well as the packets were in custody of the same person there was every possibility of the seized substance being tempered with. That was the only hypothesis on which the distinction in weight could be explained. In that case it was also found by the Hon'ble Suprme Court that PW 2, the panch witness associated with the case appeared to be stock witness and the other panch witnesses had not been

examined. In view of these features of the case the Hon'ble Supreme Court set aside the conviction of the appellant.

16. In my view the above referred judgments do not help the appellant in the facts and circumstances of the present case. In the case before this Court there is no discrepancy as regards the inscriptions on the seal used for sealing the samples as well as the remaining contraband. No stock witness has been used as panch witness and moreover the samples having not remained in the custody of the same person throughout, there was no possibility of any tempering with the samples. The most important aspect is that the discrepancy seen is less than 1 gm in one sample and only .02 gm in the other sample. Such a minimal discrepancy cannot be treated at par with the discrepancy which was noticed by the Supreme Court in the case of *Rajesh Jagdamba Avasthi (supra)*. Such minimal discrepancy in the weight of the samples is attributable either to different weighing scales having been used by the NCB officers and by CRCL or to loss of moisture due to passage of time. Another important aspect in this regard is that no opportunity was given to the IO to explain the discrepancy. His attention was not drawn to the weight recorded

by CRCL and he was not asked as to how the discrepancy had occurred.

17. In *Gita Lama Tamang vs. State of (GNCT) of Delhi* 2006 (3) JCC (Narcotics) 197, the case of the prosecution was that sample weighing 5 gm was taken from the contraband seized from the appellant whereas as per the report of CFSL, the weight was found to be 3.29 gms. It was observed by this Court that the difference in weight could be due to moisture and when the sample was found intact condition having paper slip bearing signature of the appellant, difference in the weight did not make any difference. Similar view was taken in *Gurdev Kaur vs. State of Haryana* 2002 CrL. L.J. 3016, which was relied upon by this Court in the case of *Gita Lama Tamang (supra)*.

18. No other submission having been raised on behalf of the appellant, I find no ground to interfere with the conviction of the appellant. The sentence awarded to him being the minimal prescribed sentence for the offence committed by him, there is no scope for interference with the sentence awarded to the

appellant. The appeal is devoid of any merit and is hereby dismissed.

(V.K.JAIN)
JUDGE

December 3, 2009
shitu/RS