

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

% *Judgment Reserved on: 14th October, 2009*
Judgment Delivered on: 26th October, 2009

+ CRL.A. 866/2008

FAZAL HAQ Appellant
Through: Ms. Nitya Ramakrishanan &
Ms. Yamini Jai Shanker,
Advocates.

versus

STATE Respondent
Through: Mr. Manoj Ohri, APP

WITH

+ CRL.A. 867/2008

MOHD.RAHIM Appellant
Through: Ms. Nitya Ramakrishanan &
Ms. Yamini Jai Shanker,
Advocates.

versus

STATE Respondent
Through: Mr. Manoj Ohri, APP

WITH

+ CRL.A. 292/2009

MOHD. NASIR Appellant
Through: Mr. A.J.Bhambhani, Advocate.

versus

THE STATE (GOVT.OF NCT) DELHI Respondent
Through: Mr. Manoj Ohri, APP

CORAM:
HON'BLE MS. JUSTICE INDERMEET KAUR

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not? Yes

3. Whether the judgment should be reported in the Digest? Yes

INDERMEET KAUR, J.

1. On 2.6.2007 at about 2.20 PM a secret information was received by Inspector Joginder Singh PW-4 of Police Station Nabi Karim that two Afghan nationals namely Mohd.Nasir and Fazal Haq through another Afghan national Mohd.Rahim, would be supplying heroin near the Airlines Hotel. This information was reduced into writing vide DD No.23-A Ex.PW-4/A. Ex.PW-4/A was forwarded to the senior officer Inspector Randhir Singh PW-6 who in turn apprised the ACP B.L.Meena PW-11.

2. Thereafter on the same day at 5 PM a raiding party was constituted headed by PW-4 comprising of PW-6, ASI Ashwani Kumar, Const.Pradeep, Const.Karam Singh, Const.Jahari and Const. Homender Singh. At the spot i.e. near the corner of Qutub Road/Arakansa Road near the Airline Hotel two persons whose names later on were revealed as Fazal Haq and Mohd.Nasir were seen coming towards the Airline Hotel. They started talking to a third person whose identity was revealed as Mohd.Rahim. At the pointing out of the secret informer the aforestated persons were apprehended. Since they were Afghan nationals and could not understand the Indian language an interpreter who was conversant with the Persian language namely Raghunath PW-1

was summoned. Independent witness Durga Dayal PW-2 had also joined the raid.

3. Notice under Section 50 of the NDPS Act was served upon each of the accused persons informing them of their right to have their search conducted either before a gazetted officer or a magistrate. Notice served upon Fazal Haq is Ex.PW-4/B; that upon Mohd. Nasir is Ex.PW-4/C; the notice served upon Mohd.Rahim is Ex.PW-4/D. Each of the said notices are penned in the hindi language and bear endorsements at point A to the effect that the subject matter of the notice has been translated to the respective accused persons. These endorsements have been signed by PW-1, the interpreter. The replies given by the accused persons also written in the hand of PW-1 are Ex.PW-4/E to Ex.PW-4/G respectively.

4. In the course of the investigation Mohd.Nasir was searched first. He had a cloth belt tied around his waist from where four packets were found. These packets contained a whitish powder which when tested with the field testing kit, tested positive for heroin. The quantity of the said powder was 4 Kg. and 400 grams. Two samples of 100 grams each were extracted and the sample pulandas were seized and sealed with the seal of JS followed by the seal of the SHO i.e. RS. The contraband was seized vide memo Ex.PW-4/H; it was deposited in the malkhana on the same day. CFSL Form was filled in at the spot. Search of Fazal Haq and

Mohd.Rahim was conducted vide memos Ex.PW-4/K and Ex.PW-4/L respectively.

5. At 9.15 PM, the rukka was dispatched, pursuant to which the FIR was registered by HC Ombir Singh PW-7 Ex.PW-7/A. Investigation was marked to SI Kishan Chand PW-10. Site plan Ex.PW-4/J was prepared. The accused persons were arrested at 1.35 AM vide arrest memos Ex.PW-10/A to Ex.PW10/C and their personal search was conducted vide memos Ex.PW-10/D to Ex.PW-10/F. The disclosure statements of the accused Ex.PW-10/G1 to Ex.PW-10/G3 were recorded; they were translated and the contents thereof were explained to the accused persons through translator PW-1. Provisions of Section 57 of the NDPS Act were complied; intimation of the offence was duly transmitted to the senior officers on 3.6.2007 vide document Ex.PW-3/A.

6. In the further course of the investigation statement of the Branch Manager of Shiv Dev hotel Varun Mandal PW-9 was recorded. He had revealed that Mohd. Rahim had checked in at his hotel at Pahar Ganj on 31.5.2007 at about 7.15 PM and had been allotted room no.205. Const.Tara Chand PW-8 had taken the sample pulandas to the CFSL Rohini on 28.6.2007 and the CFSL vide its report Ex.PX dated 16.8.1997 had confirmed the said samples to be diacetylmorphine i.e. a prohibitive contraband in terms of the provisions of the NDPS Act.

7. In their respective statements recorded under Section 313 Cr.P.C. accused Fazal Haq and accused Mohd.Nasir have admitted their presence in the two photographs Ex.P-19 and Ex.P-20. Their respective passports and air tickets seized from their personal search were also admitted documents. Mohd.Nasir in his statement under Section 313 Cr.P.C. had set up a defence that he was not the third person depicted in the said two photographs Ex.P-19 and Ex.P-20; he does not know either Fazal Haq or Mohd.Rahim.

8. Abdul Qayyum DW-1, father of Fazal Haq had come into the witness box and testified that third person in the photograph is Hamidulla a resident of Mahallakhana, District Ghuriyan, State of Hirat. To the same effect is the deposition of Bismillah DW-2.

9. Vide the impugned judgment dated 8.10.2008 all the accused persons had been convicted. Accused Nasir stood convicted for the offence under Section 21 and 29 of the NDPS Act whereas accused Fazal Haq and Mohd.Rahim stood convicted under Section 29 of the NDPS Act. All the accused persons had been sentenced to undergo RI for 10 years and to pay a fine of Rs.1 lakh each, in default of payment of fine to undergo SI for three months.

10. Common arguments have been addressed on behalf of the accused Fazal Haque and Mohd.Nasir. Six broad submissions have been made on their behalf:

i. There is no evidence of conspiracy under Section 29 of NDPS Act; admittedly from Fazal Haq and Mohd.Rahim no recovery had been effected and even presuming that three persons were found standing in the same vicinity of the Qutub Road near Airline Hotel would not by itself be sufficient to hold that all the aforestated persons are guilty of a conspiracy. To establish the ingredients of conspiracy, it is necessary to show that there was an agreement to do an illegal and/or an agreement to do a legal act by illegal means, a physical manifestation of the act must follow the common meeting of the minds. Reliance has been placed upon, (2000) 10 SCC 257 Ismail Khan Aubkhan Pathan vs. State of Gujrat and (2004) 5 SCC 151 Narcotics Control Bureau, Jodhpur vs. Murlidhar Soni to substantiate the submission that a mere presence at a particular place would not by itself be sufficient to draw a presumption that the person present there shall be presumed to be in possession of a narcotic or a psychotropic substance. Presumption of Section 114 of the Evidence Act is not attracted. A conscious possession has to be established which is not so in the instant case. It is submitted that to the same effect would be the proposition as enunciated by the Supreme Court in (2004) 3 SCC 582 State of Punjab vs. Balkar Singh. It is argued that in 1987 3 SCC 609 Kehar Singh vs. State it

has been held that the offence of conspiracy requires some kind of a physical manifestation of an agreement and a mere knowledge or discussion of the plan is not per se enough. The said ingredients are absent in the instant case. Attention has also drawn to the contradictory versions given by PW-2, PW-4 and PW-6 qua the presence of the accused persons present at the spot as to which two out of the three accused persons had come together and who was the third person standing at the spot. It is argued that the photographs and the Airline tickets relied upon by the prosecution to establish the ingredients of a conspiracy are insufficient to hold the accused guilty for the aforesaid offence. Reliance has been placed upon the judgment reported as 1974 SCC CrL. 647 State Vs. Nalini to advance the submission that there has to be cogent and convincing evidence against each of the accused charged with the offence of conspiracy and merely because there had been frequent and unexplained meetings of some of the accused with the others who had been charged with conspiracy it cannot be assumed that they were all members of the conspiracy; by applying the same analogy the mere presence of the accused persons at the spot even presuming it to be correct would not by itself be sufficient to establish the ingredients of Section 29 of the NDPS Act.

ii. The second submission relates to the mandate of the provision of Section 50 of the NDPS Act. In the instant case, admittedly the accused persons were Afghan nationals. The so-called interpreter PW-1 in his cross-examination has admitted that he had not been taken to the corner of Qutub Road i.e. to the spot; further he had explained the notices under Section 50 of the NDPS Act i.e. the notices Mark A to C on 3.6.2007 when he was called at the police station; it is submitted that these admissions of PW-1 throw out the case of the prosecution in toto as this version clearly establishes that the interpreter had not gone to the spot and the search of the accused persons had already been conducted; the provisions of Section 50 of the NDPS Act had been explained to them only later on in the police station. This salutary provision not having been complied with, it is clear that the accused persons are entitled to an acquittal on this ground alone. Attention has also been drawn to the version of PW-10 and PW-2 in this regard. It is submitted that PW-10 has admitted that the public person Dr.Ragunath had been summoned in the early morning in the police station which substantiates and corroborates the version of PW-1. PW-2 in his cross-examination has stated that he had left the spot for the police station at about 8 or 9 PM which again throws doubt on the veracity of this version as the arrest memos

show that the accused persons had been arrested at the spot at 1.35 AM.

iii. Attention has been drawn to para 60 of the impugned judgment. It is submitted that the Trial Court has set up its own case and it appears as if the judge himself had entered the witness box. His finding that after the initial apprehension of the accused persons, the entire investigation including the search and the seizure of the accused persons was done at the police station is contradictory to the version as set up by the prosecution. The version of the prosecution is that the search and seizure of the accused persons had been completed at the spot. It is submitted that the judge cannot himself set up a new case which is contrary to the substratum of the main case. Reliance has been placed AIR 1965 SC 277 Ugar Ahir vs. State of Bihar to substantiate the proposition that where the court chooses to disable the substratum of the prosecution case on the material parts of the evidence and reconstructs a story of its own out of the rest, it would amount to the court having removed the grain and accepted the chaff and convicted the appellant on the basis of the chaff which is per se not admissible; it is submitted that applying the ratio of the aforesaid judgment accused persons are entitled to an acquittal.

iv. The next submission made by the learned counsel for the appellants relates to the contradiction of the witnesses of the prosecution. Attention has been drawn to the testimony of PW-4 who had stated that PW-1 had been summoned to the spot in a car whereas PW-6 had stated that PW-1 had been brought to the spot on foot; on the same count PW-10 had stated that PW-1 had been summoned to the police station in the early morning hours. PW-4 had further stated that he had not seen PW-2 at the police station although he had remained there throughout the night whereas PW-6 had stated that PW-2 had accompanied the raiding party back to the police station; on the same count PW-10 had stated that PW-2 had not come to the police station at all. It is submitted that these contradictions on the first blush, may appear to be trivial yet keeping in view their cumulative effect they would go to the root of the matter and derail the case of the prosecution.

v. It is submitted that the secret information in this case which had been recorded vide DD No.23-A dated 02.6.2007 cannot be relied upon as admittedly the secret informer has not been examined. Reliance has been placed upon a judgment of this Court dated 13.4.2005 titled as Manu/De/0819/2005 Kassu Ram vs. State to support this submission. Reliance has also been placed upon another

judgment titled as AIR 1983 SC 906 Bhugdomal Gangaram & Ors. vs. State of Gujarat.

vi. It has lastly been submitted that an incriminating circumstance which has not been put to the accused in his statement under Section 313 Cr.P.C. cannot be read against him; in this case it had not been put to either of the two appellants Fazal Haq and Mohd. Rahim that they were depicted in the photograph Ex.P-19 and Ex.P-20 which is a resort at Kabul; in the absence of this, such a circumstance cannot be read against them. Reliance has been placed AIR 1953 SC 468 Sharad Birdhichand Sarda vs. State of Maharashtra to support this argument.

11. On behalf of Mohd.Nasir, arguments propounded by Fazal Haq and Mohd. Rahim have been adopted. In addition, it has been submitted that the recovery of the contraband from Mohd.Nasir has not been proved beyond reasonable doubt as different witnesses have given different versions and for this proposition; attention has been drawn to the versions of PW-2, PW-4, PW-6 and PW-11. It is stated that each of them have given different statements about which accused was standing at the spot and which of the two had joined him; how the translator PW-1 was brought to the spot; whether on foot or whether by car are not explained. These contradictions as pointed out are the same which have been highlighted by the counsel for the co-accused and

noted in the submissions supra. Additional support has also been drawn from a judgment reported in (2000) 1 SCC 300 T. Hamza vs. State of Kerala to support the arguments that the provisions of Section 50 of NDPS Act have not been complied with qua Mohd. Nasir as well.

12. Record has been perused and the submissions and counter submission have been noted.

13. Notice under Section 50 of the NDPS Act:-

The notice under Section 50 of the NDPS Act is a mandatory requirement; this Section mandates that before an accused is searched he has to be informed of his valuable right of having his search conducted either before a gazetted officer or a magistrate and this has to be duly informed and brought to the knowledge of the said accused, non-compliance of this salutary provision of law would render the entire trial futile.

14. Notice under Section 50 of the NDPS Act served upon Fazal Haq is Ex.PW-4/B. It is in the hindi language and has been prepared by Investigating Officer Inspector Joginder Singh PW-4. The endorsement of Raghunath PW-1, the translator, appears at point A which recites,

“ I Raghunath translated above said notice to Fazal Haq.”

Below this there is an endorsement in the Persian language signed by Fazal Haq. After this there is yet another endorsement of the Investigating Officer that in front of the witnesses Fazal Haq

has informed that he does not wish to get his search conducted either before a gazetted officer or a magistrate. On Ex. PW-4/E which is the second page of this document there is a second endorsement by Raghunath PW-1 which states,

“The above said subject was translated by me Raghunath to Fazal Haq.”

This document has been attested by Durga Dayal PW-2, Inspector Randhir Singh PW-6 and ASI Ashwani Kumar.

15. Notice under Section 50 of the said Act issued to Mohd. Nasir is Ex.PW-4/C and the second page of the said document is Ex. PW-4/F wherein again there is endorsement at point A by Raghunath which reads,

“I Raghunath shopkeeper of Main Bazar Pahargaj (Former Afghan National) have translated the notice to Mr.Nasir.”

This notice has also been attested by the aforesaid witnesses i.e. PW-1, PW-6 and ASI Ashwani Kumar.

16. The third notice under Section 50 of the NDPS Act issued to Abdul Rahim is Ex.PW-4/D. This document is also in two pages i.e. Ex.PW-4/D and Ex. PW-4/G and has two endorsement of Raghunath PW-1 one on the first page and another on the second page. The first endorsement states,

“I Raghunath Shopkeeper of Main Bazar Paharganj have translated above said notice to Mr.Abdul Rahim verbally.”

The second endorsement recites that the above said subject was translated by Mohd. Rahim to Raghunath and is duly signed by Raghunath at point A. The said notice is also attested by PW-1, PW-6 and ASI Ashwani Kumar.

17. All the aforementioned documents are dated 02.6.2007.

18. Raghunath PW-1 was the translator who had translated the contents of the aforementioned notices to the accused. All the accused being not conversant either with the hindi or english language and knowing only the persian language a translator conversant with the said language has been called. This is the version of Inspector Joginder Singh PW-4.

19. Raghunath PW-1 has deposed that on 02.6.2007 at about 7.00-7.30 PM he was present at the shop of his brother in Main Bazar Paharganj. He was a medical practitioner educated in Pakistan that is how he knew the persian language. A police officer came to him and requested him to be present before the ACP. He i.e. PW-1 went to the ACP where a police officer of the rank of an Inspector requested him to assist him as some Afgan persons had been apprehended who knew only the persian language. PW-1 joined the interrogation of the accused. Whatever questions were put to the accused persons in hindi were interpreted to the accused persons in the persian language and similarly whatever answers were given by the accused in persian were translated and interpreted by PW-1 to the police in hindi.

PW-1 has further deposed that the police had prepared the documents on the basis of the answers given by the accused persons which had been reduced into writing. PW-1 had given certificate below the questions put to the accused that the same were correctly put and replied. He has identified his endorsements as Ex.PW-1/A, Ex.PW-1/B and Ex.PW-1/C respectively; PW-1 has further deposed that he was not taken to the corner of Qutub Road Arakasha Road by the police officials at the request of Inspector Joginder Singh as such the question of his meeting the accused persons does not arise. He was declared hostile by learned APP as this was a deviation from his version given to the Investigating Officer. In his cross-examination, he has reiterated that he had not gone to the place of incident near Qutub Road/ Arakansa Road near Airlines Hotel at the request of Inspector Jognder Singh. He has admitted that mark A to C i.e. the carbon copy of the notices bear his endorsement at point A. He has further admitted that he was called to the Police Station at about 12.00 at night on 2.6.2007 to translate the communication between the police and the accused persons; the notices mark A to C were explained to the accused persons by him on 03.6.2007 when he was called in the police Station.

20. It is this part of the cross-examination which has been highlighted by the learned defence counsel; it has vehemently been argued that it has come on record in the version of PW-1 that

he had not gone to the spot i.e. the place of incident and he having explained the substance of the notice to the accused persons on 03.6.1997 when he was called to the Police Station, clearly shows that the mandate of Section 50 of the NDPS Act has not been complied with; the accused persons had been searched prior to their having been served with the a notice informing them of their right of search before a gazetted officer or a magistrate; in the absence of the compliance of this statutory provision, non-compliance going to the root of the matter, the entire trial stands vitiated.

21. This Court has carefully perused the testimony of PW-1. There are two places in this deposition of PW-1 wherein he has stated that he had not gone to the corner Qutub Road / Arakansa Road; both these statements have been qualified by subsequent words wherein PW 1 has stated that he had not gone to Qutub Road/Arakansa Road at the request of Inspector Joginder Singh, thereby clearly implying that PW 1 had not gone to the spot i.e Qutub Road / Arakansa Road on the asking of Inspector Joginder Singh; he had gone there at the asking of the ACP; this is fortified by his opening version wherein on oath he has stated that he had been requested by some police official to be present before the ACP.

22. It is thus clear that PW-1 has not gone to the spot at the request of Inspector Joginder Singh but he had gone there at the

request and asking of the ACP; the argument of the defence counsel on this score is meritless and an incorrect appreciation of the testimony of PW-1.

23. PW-1 has been categorical that the translation of the contents of the said documents had been translated by him from hindi into persian language and explained to each of the accused and thereafter their replies which were given in persian were translated by him in hindi and informed to the police. The aforementioned documents i.e. the notices under Section 50 of the NDPS Act and the replies of the accused and the consequential endorsement of PW-1 at point A on Ex.PW-4/B to PW-4/D and Ex.PW-4/E to Ex. PW-4/G are all dated 02.6.2007. Submission of PW-1 that he had explained these notices on 03.6.1997 is answered by the fact that PW-1 had admittedly gone to the police station at 12.00 midnight i.e. in the intervening night of 2.6.1997-3.6.1997 to translate the communication between the accused and the police officials; this communication refers to the disclosure statements which had been given by the accused and the translation of the said documents. This is evident from the endorsements Ex.PW-1/A to Ex.PW-1/C on the three respective disclosure statements of each of the accused i.e. on Ex.PW-10/G1 to G3. This part of the version of PW-1 does not have any reference to the translation of the notices under Section 50 of the NDPS Act. This is also fortified by the version of SI Kishan Chand

PW-10 who had recorded these disclosure statements; these documents are dated 3.6.2009. PW-10 has deposed that public person Dr.Raghunath was summoned in the early morning of 03.6.2007 and he had translated the communication with the accused persons pursuant to which these disclosure statements were recorded.

24. It is, thus, clear that PW-1 had gone to the spot at the request of the ACP where he had translated the notices served upon each of the accused from Persian to hindi and their replies were translated vice-versa; he has admitted his endorsements at point A on each of said notices as also the replies of the accused. He had thereafter in the early morning hours of 3.6.2007 gone to Police Station wherein he had translated the disclosure statements made by the accused.

25. Version of PW-1 has also been corroborated by another independent witness Durga Dayal PW-2 who is the public witness who had been asked to join raiding party. He had joined the raid at about 3.30 PM pursuant to a secret information which had been received at 2.15 PM. PW-2 on oath deposed that he reached hotel Airlines, Arakansa Road at about 5.00 PM and after about half an hour two persons were spotted coming from the New Delhi Railway Station and they joined the third person who was already standing there. PW-2 had correctly identified each of the accused persons i.e. Fazal Haq and Rahim as the persons who were coming

from the Railway Station and Nasir was the person who was standing at the spot. PW-2 has further deposed that Dr. Raghunath had been called at the spot as the accused persons were speaking a foreign language. Inspector Joginder Singh informed the SHO that a person conversant with the said language has been summoned. Dr. Raghunath explained the communication between the police and the accused and vice-versa. Thereafter on the search of Nasir from a cotton belt three to four packets of a granular powder were recovered. This witness was cross-examined by the learned APP as there was a variation in his version as to which of the two persons were coming from the railway station and who was the third person standing at the spot. He has clarified that Mohd. Nasir and Fazal Haq were seen coming from the railway station and they joined Mohd. Rahim who was standing on the patri near hotel Airlines. He has further deposed that notices under Section 50 of the NDPS Act were served upon upon the accused persons in the presence of Raghunath and the contents of the same were explained by Raghunath to the accused persons. PW-2 has also identified his signatures at point 'C' on each of the three notices Ex.PW-4/B, Ex.PW-4/C and Ex.PW-4/D and their replies Ex.PW-4/E, Ex.PW-4/F and Ex.PW-4/G. He has reiterated that the accused persons had been informed through Raghunath that they have legal right to have their search effected either in the presence of a gazetted officer or a

magistrate but each of the said accused persons had refused this offer. He has stated that he does not know what a notice under Section 50 of the NDPS Act; PW-2 is a layman and obviously not conversant with the legal provisions of the special statute; he has, however, otherwise in the first part of his testimony clearly stated that the accused persons through these notices had been informed of their legal right of search either before a gazetted officer or a magistrate.

26. Inspector Joginder Singh PW-4 was the scribe of the aforementioned documents Ex.PW-4/B to Ex.PW-4/D. The replies appended by the accused persons Ex.PW-4/E to Ex.PW-4/G were as per the version of PW-4 in the handwriting of PW-1. PW-4 has on oath deposed that after the accused persons had been apprehended, Raghunath was called who reached the spot; PW-4 has prepared the notices and gave them to Raghunath who explained the contents of the same to the accused. PW-4 has admitted that Raghunath stayed at the spot for about one hour. In his cross-examination, he has stuck to his stand; he denied the suggestion that the proceedings were conducted in the Police Station.

27. Inspector Randhir Singh PW-6 another member of the raiding party, has deposed that after the accused persons had been apprehended, PW-4 had called one Raghunath at the spot as he knew the language spoken by the accused persons. Notice under

Section 50 of the NDPS Act was prepared and served on the accused Nasir, the contents of the notice had been explained by Raghunath and the reply given by the accused was reduced into writing by Raghunath.

28. It is clear from this aforementioned evidence both oral and documentary that the mandate of Section 50 of the NDPS Act has been fully complied with; there is no lacuna whatsoever. Each of the accused persons have been fully informed about the right of having their search conducted either before a gazetted officer or a magistrate; their refusal was also communicated by Raghunath to the police and these endorsements have been made by Raghunath and admitted by him in the said documents Ex.PW-4/B to Ex.PW-4/D. Replies of the accused Ex.PW-4/E to Ex.PW-4/G also establish that the said persons after having understood this option had declined the offer of search either before a gazetted officer or a magistrate.

29. Contradictions qua the witnesses:-

The contradictions as pointed out by the learned defence counsel qua the version of PW-2, PW-4 and PW-6 as to which of the two persons had come from the Railway Station and who was the third person standing at the spot are inconsequential. PW-2 had, in a clarification sought by the learned public prosecutor, deposed that Mohd. Nasir and Fazal Haq were seen coming from the New Delhi Railway Station where Mohd. Rahim was already standing; to

the same effect is the version of PW-4. Whether PW-1 had come on foot or whether he had come in a car is also of little consequence as PW-4 and PW-6 who have deposed to the said effect had come into the witness box in February 2008 whereas the offence is related to the year 1997; witnesses had deposed in the court after more than one decade. It cannot possibly be expected that they would have a photographic memory and would be able to retain all minor details which have little bearing on the facts in issue. Testimony of a witness has to be read as a whole; it is not liable to be discredited merely because he has not been able to reveal the truth in respect of a trivial matter or in respect of an inconsequential fact.

30. Criminal Conspiracy and Recovery of the Contraband from Mohd. Nasir:-

Section 29 of the NDPS Act is the penal provision for the offence of criminal conspiracy. The definition of criminal conspiracy has to be borrowed from the Indian Penal Code as has been defined in Section 120A of the said Code. It necessarily postulate that two or more persons agree to do or cause to be done an illegal act or an act which is not illegal but is done by illegal means; such an agreement is designated as a criminal conspiracy. The prosecution in order to bring home a charge under Section 29 of the Act must prove the ingredients of the section; surmises or conjectures cannot take the place of a proof.

31. In the instant case prosecution has relied upon two photographs Ex.P-19 and P-20. These photographs depict the presence of three persons of whom admittedly two persons are Fazal Haq and Mohd. Rahim. Presence of Mohd. Nasir is disputed. Mohd. Nasir in his statement under Section 313 of the Cr.P.C. has denied that he is the third person in the photographs. Fazal Haq in his statement under Section 313 of the Cr.P.C. has stated that the third person is Mohd. Hamim who is presently in Afghanistan and he is not Mohd. Nasir. Mohd. Rahim and Fazal Haq have both stated that the third person is not Nasir. DW-1 Abdul Qayyum is the father of Fazal Haq. As per his version on oath the third person in Ex.P-19 and Ex.P-20 is Hamiddulla who is resident of Mahallakhana, District Ghuriyan, State of Hirat. Bismillah DW-2 the brother of Mohd.Rahim has also deposed that the third person is Hamiddulla. DW-2 has further stated that the resort shown in the said photographs is in Kabul in Afghanistan. Ex.P-19 is a photograph of three persons which is taken on a boat and all the three persons appear to be in a relaxed and comfortable posture; Ex.P-20 is a photograph taken along side a lake, it appears to be a picnic spot or luxury resort.

32. From this evidence gathered it has been established that Fazal Haq and Mohd.Rahim are together with a third person; both Fazal Haq and Mohd.Rahim had denied that they know Mohd.Nasir yet in the same breath they have gone on to categorically state

that the third person in the photograph is not Mohd.Nasir; if Mohd.Nasir is not known to them it would have been difficult for them to make such a categorical averment. DW-1 and DW-2 have also stated that the third person is not Mohd.Nasir but is one Hamiddulla resident of Mahallakhana, District Ghuriyan, State of Hirat. DW-1 is the father of Fazal Haq and DW-2 is the brother of Mohd. Rahim; this relationship has been disclosed by DW-2; meaning thereby that both Fazal Haq and Mohd. Rahim are closely known and associated with one another that is why the close relatives of one another are known to their close relatives.

33. Personal search of each of the accused persons had been conducted vide memos Ex.PW-10/D, Ex.PW-10/E & Ex.PW-10/F. The passport, airlines ticket and immigration form of each of the accused persons had been found in their personal search. The photographs Ex.P-19 and Ex. P-20 had been recovered from the personal search of Mohd. Rahim.

34. Airline ticket of Mohd. Rahim is Ex.P-17. This is a return ticket showing departure of Mohd.Rahim from Kabul to Delhi on 31.5.2007 within an expected return on 3.6.2007. His immigration from Ex.P-18 shows that he had entered India on 31.5.2007. His passport Ex.P-16 shows a valid visa for India w.e.f. 20.5.2007 to 19.8.2007.

35. The airlines ticket of Mohd.Nasir Ex.P-14 shows that he had left Kabul on 01.6.2007 with a return ticket dated 4.6.2007. His

immigration form Ex. P-15 shows his entry in Delhi on 2.6.2007. His passport Ex. P-13 shows the validity of his visa w.e.f. 17.5.2007 to 16.8.2007.

36. The air ticket of Fazal Haq is Ex.P-11. This is a return ticket from Kablul to Delhi and back as per which Fazal Haq left Kabul on 01.6.2007 and he was to return back on 04.6.2007. His immigration form Ex.P-12 shows his entry in Delhi on 02.6.2007. His passport Ex.P-10 shows the validity of his visa w.e.f. 20.5.2007 to 19.8.2007.

37. This documentary evidence collected by the prosecution has established that each of the accused persons had return tickets from Kabul to Delhi and back for a limited period only; Mohd.Rahim's ticket was between 31.5.2007 to 3.6.2007 and the return airlines ticket of Mohd. Nasir and Fazal Haq were between the period 1.6.2007 to 4.6.2007 i.e. for a limited period of three days each. This obviously implies that each of the three persons had entered India only for a limited period and for a limited purpose. What was that purpose? this is the query which the prosecution has to answer.

38. Testimony of PW-2, PW-4 and PW-6 is clear and cogent; all the said witnesses have stated that Mohd.Nasir and Fazal Haq were seen coming from the New Delhi Railway Station where they met the third person Mohd.Rahim; this was near the Airlines Hotel Arakansa Road, which was in the proximate vicinity of Hotel Shiv

Dev where Mohd. Rahim had checked in on the late evening of 31.5.2007. Varun Mandal PW-9 had deposed that on 31.5.2007 Mohd.Rahim had checked in Hotel Shiv Dev, Arakasha Raod, Paharganj at 7.15 PM and room no.205 had been allotted to him. He has proved the relevant entries in his register Ex.PW-9/A and Ex.PW-9/B. Accused Mohd.Rahim in his statement under Section 313 Cr.P.C. had also admitted that he had checked in at this hotel on 31.5.2007. His defence is that he had been picked up from outside his hotel and falsely implicated; no such suggestion had been given to any of the witnesses of the prosecution; this defence has surfaced for the first time only in his statement under Section 313 of the Cr.P.C.

39. The aforementioned documentary evidence has established that Mohd.Rahim had come from Kabul to Delhi on 01.6.2007; one day later i.e. on 2.6.2007 Mohd.Nasir and Fazal Haq had travelled together from Kabul to Delhi on the same flight i.e. RQ No.13 and they had to return back to Kabul on 04.6.2007 on the same flight i.e. RQ No.14. Mohd. Nasir and Fazal Haq were also the two persons who were found seen coming from New Delhi Railway Station towards the spot where Mohd. Rahim was standing. Both Mohd. Nasir and Fazal Haq have in their statements under Section 313 of Cr.P.C. stated that they did not know each other;

40. It would but be a strange co-incidence that two Afghan nationals travelling together on the same day by the same flight

with an expected return on the same flight on the same day being together in the company of one another wherein they are joined by a third party; coming to India for a limited period of three days and yet they have stated that they did not know one another; this is nothing short of misleading the Court. Fazal Haq for the first time in his statement under Section 313 Cr.P.C. has stated that he had been picked up by the police while he was buying mangoes. No such defence had been propogated at the time when he had cross-examined the witnesses of the prosecution. This court also had the opportunity to physically see Mohd. Nasir; he had been called in Court on a production warrant from Jail; his physical features and attributes were examined and they co-relate with the third questioned person in Ex.P-19 and Ex.P-20. Submissions made by each of the three persons under Section 313 Cr. P.C. are palpably false. The secret information Ex.PW-4/A received at 2.20 PM had also mentioned the names of all the three accused persons i.e. Mohd.Nasir and Fazal Haq who would be coming to Airlines Hotel where they would meet the third person Mohd.Rahim who would be supplying contraband to them.

41. A conspiracy is always hatched in darkness. What is going on in the mind of a person is only known to that person; his thought process and mental faculties are not overt features which can be physically seen; it is only from the attendant circumstances that the evidence of conspiracy can be gathered.

42. From the evidence brought on record, it is clear that all the three accused persons had come to India for a limited purpose and for a concerted object i.e. the supply of contraband; the conspiracy to commit the offence is clearly evident.

43. The possession of the contraband from Mohd. Nasir has been proved by the cogent version of all the recovery witnesses i.e. PW-2, PW-4 and PW-6. The contraband had been seized vide memo Ex.PW-4/H duly attested by PW-1, PW-6 and ASI Ashwani Kumar; that this recovery was a prohibitive contraband has been established by the report of CFSL Ex.PX dated 16.8.2007; the samples sent for examination were found to contain Diacetylmorphine. Recovery of this narcotic drug from the possession of Mohd. Nasir is fully established.

44. New Case set up by the Prosecution:-

Prosecution has by clear and cogent evidence established that after the accused persons had been apprehended, due notice informing them of their right of having their search conducted either before a gazetted officer or a magistrate was served upon them through the translator PW-1 who explained thus this valuable right to them. On their declining this offer, their search has been conducted and from the possession of Mohd. Nasir 4.6 Kg. of heroin was recovered. These proceedings were conducted at the spot; they commenced at 5.30PM and were continued after 10.10PM when PW-6 left the spot. Thereafter the accused had

been taken to the Police Station where their disclosure statements were recorded by PW-10. PW-1 had also been summoned in the Police Station to translate this communication between the accused persons pursuant to which these disclosure statements were reduced into writing; this is the version of PW-10.

45. It is, thus, clear that the prosecution has in no manner deviated from its original stand. Part of the investigation i.e. the part up to the search and seizure of the contraband had been conducted at the spot; thereafter in the late hours of 02.6.2007/early morning of 03.6.2007 the investigative team with the accused persons returned back to police station where the other documents were prepared including the disclosure statement of these accused.

46. Para no.60 of the impugned judgment is a mis-appreciation of the evidence collected by the prosecution; this however does not enure for the benefit of the accused.

47. Section 42 of the NDPS Act

The secret information had been reduced into writing vide DD No.23-A Ex.PW-4/A. This information has been received by Inspector Joginder Singh PW-4 and he had forwarded the same to his senior officer ACP B.L.Meena PW-11. This has been come in the deposition of both PW-4 and PW-11. The mandate of Section 42 of the NDPS Act stands duly complied with.

48. The judgments relied upon by learned defence counsel that unless the secret informant is examined, the secret information cannot be read, is not the ratio of the said judgments. In Kassu Ram's case supra this was only a submission made by the defence counsel recorded in a bail matter; it was not a finding of the Court. Bhugdomal Gangaram's case supra was an appeal against conviction under Section 65(a),(d),(e), 66(1)(b) and Section 81 of the Bombay Prohibition Act 1949. Para no.13 of the said judgment makes a reference to an information; but this is not an information in relation to a narcotic or a psychotropic substance as is contemplated under Section 42 of the NDPS Act. The ratio of the said judgment is clearly inapplicable.

49. Incriminating circumstances under Section 313 of the Cr.P.C.:-

The accused persons have been put all the incriminating circumstances upon which the prosecution has relied upon including the photographs Ex.P-19 and Ex.P-20. The question of the circumstance that the resort depicted in Ex.P-19 and Ex.P-20 was at Kabul, has not been put to the witnesses, does not arise as this was not the version of the prosecution. This fact had been disclosed for the first time by DW-2 in his version which was at the stage of the defence evidence i.e. a stage after the statements Section 313 of the Cr.P.C. have been recorded. The submission of the learned defence counsel on this score is without merit.

50. False plea by accused:

Accused persons have taken false pleas in their statements under Section 313 of the Cr.P.C. Fazal Haq and Mohd.Rahim have stated that they did not know Mohd.Nasir and vice-versa; Mohd. Nasir has stated that he did not know that Fazal Haq was travelling to Delhi on the same flight. Evidence has established otherwise. In (1999) 9 SCC 242 Swapan Patra & Ors. Vs. State of W. B., it has been held by Supreme Court that an explanation offered by an accused if found to be untrue is an additional link in the chain of circumstances to complete the chain against him. An adverse inference for misleading the Court can well be drawn against the accused person.

51. It is clear that the prosecution has been able to prove its case against all the accused beyond all reasonable doubt. Mandatory requirements of the law i.e. the mandates of Sections 50 and 42 of the NDPS Act stand complied with. The evidence of conspiracy as discussed supra and the recovery of the contraband from the conscious possession of Mohd.Nasir having been proved, the judgment of the trial Court convicting Mohd.Nasir under Section 21 of the NDPS Act and Fazal Haq and Mohd.Rahim under Section 29 read with Section 21 of the NDPS Act calls for no interference. Each of the accused persons have been sentenced with a minimum sentence i.e. an imprisonment for ten years. The

sentences imposed also call for no interference. Appeals are without merit; they are dismissed.

(INDERMEET KAUR)
JUDGE

26th October, 2009
rb/nandan