

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

+ **CRL.A. 80/2001**

% Reserved on: 8th November, 2010

Decided on: 13th January, 2011

BILAL AHMED

..... Appellant

Through: Mr. Sanjiv Kumar and Mr. F.A.Wani,
Advocates

versus

STATE

..... Respondent

Through: Mr. Manoj Ohri, APP

Coram:

HON'BLE MS. JUSTICE MUKTA GUPTA

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

MUKTA GUPTA, J.

1. By this appeal, the Appellant challenges his conviction under Section 20 of the NDPS Act (in short the 'Act') and the order of sentence whereby he has been directed to undergo Rigorous Imprisonment for a period of 10 years

and a fine of ₹1 lakh and in default thereof to undergo further two years imprisonment.

2. The prosecution case in brief is that on 2nd May, 1999 an information was received that some militants were coming to Delhi and may commit an offence. A checking party was constituted which stationed itself near Sarai Peepal Thala. At about 7.30 P.M. during checking, two persons coming from the Apple Mandi, G.T.K. Road having bags on their shoulders were spotted. On seeing the police party, they tried to slip away between the trucks parked. They were overpowered and one of them named Bilal Ahmed the Appellant herein, was having the rexine bag on his shoulder. On checking it was found containing charas wrapped in a sky blue colour polythene and six idols wrapped in another polythene bag. From the second boy whose name came to be known as Mohd. Maqbool, a black and orange colour bag was found. On checking the bag it was found containing smack wrapped in a polythene bag. The SHO was informed on the wireless, who reached the spot and on verification asked whether the accused wanted to be searched before a Gazetted Officer, so that the Gazetted Officer can be called. However, the two boys refused. Three or four passerby were requested to join the proceedings but none agreed. The charas recovered from Bilal Ahmed on weighing was found to be 5 Kg out of which two samples of 100 grams each

were taken out and converted into separate pulanda and sealed with a seal of R.K. The FSL form was also filled up. Six idols were also separately converted into pulandas. The investigation of the two cases was handed over separately to two different officers and as against the Appellant, FIR No. 262/99 under Section 20 NDPS Act and Section 30 of Antiques Monuments Act was registered. On completion of the investigation, a charge sheet was filed. The Appellant was charged for an offence under Section 20 of NDPS Act to which he pleaded not guilty and claimed trial. After recording of the prosecution evidence and the statement of the Appellant under Section 313 Cr.P.C., the impugned judgment was passed.

3. Learned counsel for the Appellant contends that the prosecution has not been able to prove the case beyond reasonable doubt against the Appellant. The FSL form allegedly filled was not deposited with the Moharar Malkhana nor was the same sent to CFSL Chandigarh along with the pulandas. There is no mention of deposit of the FSL form in the Malkhana by the SHO and there is an overwriting on the date under his signature in the Register No. 19. The date when the pulandas were deposited with the CFSL is different as given by the witness PW2. Thus, the prosecution has not proved the link evidence. In the absence of link evidence having been proved, the delay of 59 days in sending the samples to CFSL, Chandigarh assumes importance. The report of

the CFSL per se is not admissible under Section 293 Cr.P.C. and the same has been tendered by the learned APP. Even the tendering and exhibiting of the report is not mentioned in the order sheet of the learned Trial Court dated 17th November, 2000. The Appellant did not get the opportunity to cross-examine the CFSL expert thus causing prejudice to him. Reliance is placed on *Keshav Dutt vs. State of Haryana, JT 2010(9) SC 25*.

4. It is further contended that the case of the prosecution is also falsified because the FIR Number is mentioned on the documents which were prepared when the FIR was not registered. The prosecution has not proved the departure and arrival entries regarding the sending and receiving of the samples to FSL Malviya Nagar and the CFSL, Chandigarh nor have they proved the road certificate by which the same was sent. The statement of PW 6 SI Banwari Lal that at the first instance, the samples were sent but were not accepted by FSL Malviya Nagar is without any basis as there is no entry in the Register No. 19 qua sending the samples to FSL Malviya Nagar. It is further contended that the mandatory requirement of Sections 52,55 and 57 of the Act have not been complied with as there is no mention of sending the information about the arrest of the accused to senior officers. Despite the fact that public witnesses were available, they were not joined in the investigation. After the arrest, the Appellant was tortured and thus, he was got medically examined on

the directions of the Court. Learned counsel contends that the Appellant has been falsely implicated in the present case and prays that the appeal be allowed and the Appellant be acquitted of the charges framed against him.

5. Per contra learned APP for the State submits that the link evidence has been proved by the prosecution beyond reasonable doubt. Form FSL was filled on the spot and deposited with the Moharar Malkhana on 2nd May, 1999 itself which is evident from the Ruqqa Ex. PW3/DA, FIR No. 262/1999 Ex. PW1/A, seizure Memo Ex.PW3/A and the Register No. 19 Ex.PW9/A. Moreover PW3, Inspector Jeevan Singh, PW5 HC Baljeet Singh, PW6 SI Banwari Lal, PW7 SI Rakesh Kumar, have also deposed about the filling up of the form FSL at the spot. The fact that the form FSL was sent to CFSL, Chandigarh is proved by the statement of PW9 and corroborated by the CFSL report Exhibit PX which states that “seals were intact and tallied with the specimen seals impression”. It is stated that without the form FSL which has the specimen seal impressions, the seals on the sample cannot be tallied, and thus, even if in the CFSL report, it is not specified that form FSL was deposited, yet when there is an endorsement that the seals were intact and tallied with specimen seals, the only inference that can be drawn is that form FSL was sent to the CFSL. Reliance is placed on *Hardip Singh vs. State of Punjab*, 2008 (8) SCC 557, *Rameshwar Vs. State*, 1998 (2002) DLT 364,

Shamim vs. State of Delhi-MANU/DE/9510/2006 and Gurminder vs. State-MANU/DE/9708/2006. Relying on Paramjit Singh @ Pammi vs. State, 154 (2008) DLT 524 it is contended that mere omission on the part of PW2 to state that he carried the FSL form with the sample parcel is not fatal to the prosecution case in proving the link evidence.

6. Learned APP further contends that as per the statement of PW3 and PW9, the samples were deposited in the malkhana on the 2nd May, 1999 itself at around 10.00 P.M. and an entry was made in the Roznamcha register in this regard. Moreover, the samples and the pulandas were sealed with the seal of RK and JS and the seal of RK was given to PW5 HC Baljeet Singh, after use who returned the same at about 3-4.00 A.M., that is, after the deposit of the sample with the Moharar Malkhana. Moreover, there was no reason why the SHO and other police officers would conspire to temper with the parcels and implicate the Appellant falsely in this case. The samples were handed over by PW9 to PW2 on 28th June, 1999 for being taken to CFSL Chandigarh and as per PW2, he left the police station at about 4/5 A.M. in the morning and went to Chandigarh by bus. He deposited the samples on 28th June, 1999 itself. He denied the suggestion that the samples remained with him on 29th June or 30th June, 1999. No such suggestion of tampering with the parcels or not going to Chandigarh has been given to the PW2. Relying on *State of Gujarat vs.*

Ismail U Haji, 2003 (12) SCC 291, *State of Orissa vs. Kanduri Sahoo*, 2004 (1) SCC 337, *State of Punjab vs. Lakhwinder Singh and Anr.*, 2010 (4) SCC 402, , it is contended that the delay in sending parcels to the CFSL is not fatal. The CFSL report was not put to PW2 for confronting him about the date of deposit and in the absence of any explanation sought from that witness the same cannot be assumed to be adverse. The non-joining of the public witness was because the time was extremely short and despite that efforts were made, but nobody came forward to join the proceedings. Relying on *Sunil Kumar vs. State*, 1990 CrLJ 414, *Appabhai and Anr. Vs. State of Gujrat*, 1998 (supp.), SCC 24; *P.P. Beeran vs. State of Kerala*, 2001 (9) SCC 571; *M. Prabhulal vs. The Assistant Director, DRI*, 2003 (8) SCC 44; *State of Harayana vs. Mai Ram*, 2008 (8) SCC 292 and *Jawahar vs. State*, 2007 (IV) AD (Del.) 210, it is contended that the public is reluctant to join in such cases and in the absence of public witness, the police witness can be relied upon.

7. Relying on *Sorabkhan Gandhkhan Pathan and Anr. Vs. State of Gujarat*, 2004 (13) SCC 60 and *Babubhai Odhariji Patel & Ors. vs. State of Gujarat*, 2005 (8) SCC 125, it is further contended that this was a case of chance recovery and Section 42 of the Act was not applicable. Moreover, the secret information was about terrorist activity and not about an offence under NDPS Act. Since the recovery was from the baggage and was also a chance

recovery, Section 50 of the Act has no application. The non-production of road certificate is not fatal as the seals on the samples were found to be intact by the CFSL report. Reliance in this regard is placed on *Mahatam Parshad vs. State of Delhi*, 63 (1996) DLT 884. Sections 52, 55 and 57 of the Act are directory in nature and the effect thereof has to be seen from the evidence collected. Relying on *Gurbax Singh vs. State of Harayana*, 2001 (3) SCC 28; *Khet Singh vs. Union of India*, 2002 (4) SCC 380 and *Babubhai O.Patel vs. State of Gujrat*, 2005 (8) SCC 725, it is contended that when all mandatory provisions are complied with, non-compliance of these provisions are not fatal to the prosecution. PW7 has stated that FIR number was put on the seizure memo after the registration of the FIR and this fact is corroborated by the testimony of PW3 who has stated that at the time of handing over of seizure memo, FIR number was not mentioned. Even otherwise subsequently mentioning the FIR number on the document does not vitiate the proceedings. Reliance is placed on *Radhey Shayam vs. State of Haryana*, 2001 (10) SCC 206 and *Ramesh Kumar Rajput @ Khan vs. State*, MANU/DE/0786/2008. Minor variations are bound to occur in the testimony of the witness and a parrot like version shows that the statements are not natural and are tutored. As regards the allegation of torture, the Appellant was medically examined on 3rd and 6th May, 1999 and no fresh injury was found.

8. As regards admissibility of the CFSL report Ex. PX relying on *Shyamlal @ Kuldeep vs. Sanjeev Kumar and others*, 2009 (12) SCC 454 and *Shankaria @ Shankar vs. State*, 56 (1994) DLT 662, it is contended that the objection as to the admissibility of a document and mode of proof of the document has to be taken at the time of trial. No objection having been taken in this regard, the document is admitted as an evidence and can be relied upon. It is thus prayed that the appeal be dismissed.

9. I have heard learned counsel for the parties and perused the records. The law as to the admissibility of the documents is well settled. In *Phool Kumar vs. Delhi Administration*, 1975 (1) SCC 797 and *Ashfaq vs. State*, AIR 2004 SC 1253, the Hon'ble Supreme Court held that any objection as to the mode of proof of document has to be taken at the time of trial and cannot be subsequently taken in appeal. Before framing of charge, a copy of CFSL report Ex. PX was provided to the Appellant on 12th October, 1999. Under Section 293 Cr.P.C., a report of an expert is per se admissible, without examination of the expert. Under Sub-Section (2), the Court may, if it thinks fit, summon and examine any such expert as to the subject matter of his report. Thus it is not mandatory for the Court to examine the expert whose report is used as evidence in any inquiry, trial or other proceedings, nor is it obligatory for the Court to ask the accused if he wants to summon the expert.

The order sheet of the trial court dated 17th November, 2000, when the CFSL report was tendered by the learned APP and exhibited as Ex.PX, records the presence of the accused. While recording the statement of the learned APP the Court was not required to again note the presence of the Appellant. Moreover, this report was put to the Appellant in his statement recorded under Section 313 Cr.P.C. and in case any prejudice was caused to the Appellant by the non-examination of the expert and that it was tendered in his absence, the Appellant ought to have stated the same in reply to the said question. The reliance of the Appellant on *Keshav Dutt(supra)* is misconceived. In the said case, the Hon'ble Supreme Court was dealing with the report of the handwriting expert which is not per se admissible under Section 293 Cr.P.C. Thus in the present case the Appellant having not objected to the CFSL report being exhibited as Ex. PX, no objection thereto can be raised now in the appeal.

10. I also do not find any merit in the contention that the form FSL was not deposited in the malkhana or that the same was not sent to the CFSL. PW3 Inspector Jeevan Singh has stated that the form FSL was filled and the pulanda was taken into possession vide Seizure Memo Ex. PW3/A. He took the pulanda and the FSL form in his possession along with the seizure memo and deposited the pulanda and FSL form along with a copy of the seizure

memo in the malkhana on 2nd May, 1999 at around 10 p.m. The testimony of PW3 Inspector Jeevan Singh also finds support from the testimony of PW 9 Bhagmal Singh who also states that the samples and pulanda were deposited with him duly sealed with the seal of R.K. and J.S. He made the entry in the register No. 19, Ex. PW9/A. The contention that the form FSL was not sent to CFSL Chandigarh, is unfounded. The CFSL report Exhibit PX states that “seals were intact, and tallied with specimen seals impressions”. The seals on the samples cannot be tallied except with the specimen seals on the FSL form. Thus, even without specifically stating that form FSL has been received with the samples, this endorsement clarifies that the form FSL was received. Delay in sending parcel to the CFSL is not fatal especially when as per the CFSL report, the seals are intact and tallied with the specimen seals. In *State of Rajasthan vs. Daul @ Daulat Giri* 2009 (14) SCC 387 it was held:

“1. The factual scenario goes to show that Jaswant Singh (PW.1), the I.O., seized the articles on 15/6/1995. The search memo is Ex. P.4 and the specimen impression of the seal Ex. P.5. PW.1 deposited the seized articles and sample with Bhanwarlal (PW.8) who was the Malkhana In-Charge in the Malkhana register in Ex. P.15A. PW.8 handed the material to Surendera Singh (PW.5) for depositing the sample in FSL. PW.5 reached the Superintendent of Police office and gave the samples to Jamnalal at 10.00 a.m. and received back the samples from Jamnalal at 5.00 p.m. and also obtained forwarding letter which is Ex. P.12 and is dated 20/6/95. PW.5 submitted the samples to FSL and obtained acknowledgment receipt it is Ex. P.13. The role of Jamnalal is very limited; that is receiving sample at 10.00 a.m. and handing samples back at 5.00

p.m. It is not understandable as to how the non-examination of Jamnalal in any way affected the veracity of the prosecution version. The High Court came to an attempt and unsustainable conclusion that because Jamnalal was not examined "possibility of the sample having been tampered with could not be ruled out". The conclusion is unsustainable in view of the FSL report which clearly stated that the seals were intact and matched with the specimen seals."

11. In *Hardip Singh vs. State of Punjab* 2008 (8) SCC 557 it was held:

"16. So far as the question of delay in sending the samples of opium to the Forensic Science Laboratory (FSL) is concerned, the same in our opinion has no consequence for the fact that the recovery of the said sample from the possession of the appellant stands proved and established by cogent and reliable evidence led in the trial. PW 5 has categorically stated and asserted about the recovery of opium from the possession of the appellant, which fact is also corroborated by a higher officer, namely, SS Mann, DSP who was also examined at length during the trial. The said recovery was effected in the presence of the said SS Mann, DSP, as senior police officer, who also put his seal on the said parcels of opium.

17. The then Station House Officer, Inspector Baldev Singh, who was examined as PW 1, was posted at Police Station Ajnala on the date of occurrence. He received the said samples of opium along with case material, being produced before him by PW 5. It has come on evidence that Inspector Baldev Singh kept the entire case property with him till it was deposited in the office of the Chemical Examiner, Amritsar on 30.9.1997 through ASI Surinder Singh, (PW-3). It has also come on evidence that till the date the parcels of sample were received by the Chemical Examiner, the seal put on the said parcels was intact. That itself proves and establishes that there was no tampering with the aforesaid seal in the sample at any stage and the sample received by the analyst for chemical examination contained the same opium which was recovered from the possession of the appellant. In that view of the matter, delay of

about 40 days in sending the samples did not and could not have caused any prejudice to the appellant. The aforesaid contention, therefore, also stands rejected”.

12. Once the original Malkhana register is produced in the Court, which is seen and returned and copy thereof exhibited as Ex. PW9/A, there is no mandatory requirement to produce the Road Certificate, especially when the seals have been found to be intact. PW9 has stated that R.C. No. 79/21 alongwith form FSL and sample pulandas duly sealed with the seal of RK and JS was handed over to PW2. An endorsement to this effect also exists in the Register No. 19, copy of which is exhibited vide Ex.PW9/A. Moreover as held in *Mahatam Parshad vs. State of Delhi 63 (1996) DLT 884*, the non production of the Road Certificate is not fatal as all the samples and seals then were found to be intact by the witnesses and the CFSL report.

13. Further, the samples were handed over by PW9 HC Bhagmal Singh to PW2 Constable Raj Kumar on 28th June, 1999 and as per PW2, he deposited the samples on 28th June, 1999 at CFSL Chandigarh. The report Exhibit PX shows that the samples were deposited on 30th June, 1999. However, PW 2 was cross-examined by the counsel for the Appellant, no explanation was sought as to the fact that the CFSL report mentions the date of deposit of the samples to be 30th June, 1999. In view of the settled legal principle that if the

testimony of the witness has to be discredited, the relevant fact should be put to him so that he gets the chance to offer the explanation, this objection is unsustainable as the relevant documents i.e. the report has not been put to the witness. In *State of U.P. vs. Nahar Singh* 1998 (3) SCC 561 it was held:

“13. It may be noted here that part of the statement of PW-1 was not cross-examined by the accused. In the absence of cross-examination on the explanation of delay, the evidence PW-1 remained unchallenged and ought to have been believed by the High Court. Section 138 of the Evidence Act confers a valuable right of cross-examining the witness tendered in evidence by the opposite party. The scope of that provision is enlarged by Section 146 of the Evidence Act by allowing a witness to be questioned:

(1) to test his veracity.

(2) to discover who he is and what is his position in life, or

(3) to shake his credit, by injuring his character, although the answer to such questions might tend directly or indirectly to criminate him or might expose or tend directly or indirectly to expose him to a penalty or forfeiture.

14. The oft quoted observation of Lord Herschell, L.C. in Browne v. Dunn, (1893) 6. The Reports 67 clearly elucidates the principle underlying those provisions. It reads thus:

"I cannot help saying, that it seems to me to be absolutely essential to the proper conduct of a cause, where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact by some questions put in cross-examination showing that imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged, and then, when it is impossible for him to explain, as perhaps he might have been able to do if such questions had been put to him, the circumstances which, it is suggested, indicate that the story he tells ought not to be believed, to argue that he is a

witness unworthy of credit. My Lords, I have always understood that if you intend to impeach a witness, you are bound, whilst he is in the box, to give an opportunity of making any explanation which is open to him; and, as it seems to me, that is not only a rule of professional practice in the conduct of a case, but it is essential to fair play and fair dealing with witnesses. This aspect was unfortunately missed by the High Court when it came to the conclusion that explanation for the delay is not at all convincing. This reason is, therefore, far from convincing”.

Coupled with the fact that the CFSL report Ex. PX clearly mentioned that the seals were intact, it can be said that the prosecution has been able to prove the link evidence.

14. The doubt sought to be created in the prosecution case that the samples were first sent to Malviya Nagar and then to CFSL Chandigarh is also misconceived. No cross-examination of the Moharrar Malkhana HC Bhagmal Singh PW9, the relevant witness has been done in this regard. There is nothing on record to show that in this case the samples were first sent to FSL Malviya Nagar. This fact is sought to be elicited in the cross-examination of SI Banwari Lal PW6, who was the subsequent Investigating Officer of this case and was the officer who made recovery from the co-accused Mohd. Maqbool Bhatt in the other case, without clarifying the sample of which case was first sent to FSL Malviya Nagar.

15. The present is a case of chance recovery and thus Sections 42 and 50 of the Act are not applicable. As regards Sections 52, 55 and 57 of the Act is

concerned, in view of the discussions above it can safely be held that these provisions have been complied with.

16. As regards mentioning of the FIR number on the seizure memo is concerned, the witnesses Inspector Jeewan Singh PW3, HC Baljeet Singh PW5 have clarified in their cross-examinations that when the seizure memos were prepared, the FIR number was not mentioned. PW7, SI Rakesh Kumar has clarified that FIR number was added on the seizure memo after the FIR was registered. Subsequent adding of FIR number on the document for procedural convenience would not amount to tempering of the document. This Court in *Ramesh Kumar Rajput vs. State* MANU/DE/0786/2008 relying on *Radhey Shyam vs. State of Haryana* 2001(10) SCC 206, held that mere writing of the FIR number on the arrest and search memos cannot entirely falsify these documents.

17. In view of the findings above, the appeal is dismissed and the conviction of the Appellant under Section 20 NDPS Act is upheld. The bail bond and the surety bond are cancelled. The Appellant be taken into custody to undergo the remaining sentence.

(MUKTA GUPTA)
JUDGE

JANUARY 13, 2010
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