

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

Date of Reserve: 27th January, 2011

Date of Order: 23rd February, 2011

+ Crl. Appeal 863 of 2005

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23.02.2011

SALIM @ KALLU

..... Appellant

Through: Mr. M.D. Farman, Advocate

versus

THE STATE NCT OF DELHI

..... Respondent

Through Mr. O.P. Saxena, Addl. PP

JUSTICE SHIV NARAYAN DHINGRA

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?

JUDGMENT

1. This appeal has been preferred by the Appellant against the judgment of learned Special Judge (NDPS Act) dated 1st July, 2005 convicting the appellant under Section 21(c) of NDPS Act for possessing 400 grams of smack and sentencing him to RI for 12 years and to pay a fine of ₹ 1,20,000/- and in default of payment of fine of ₹ 1.20 lakh, SI for 14 months.

2. The Appellant was apprehended on 3rd September, 2001 at about 3.45 pm opposite Shyam Lal College after information was received that he would be carrying contraband. He was holding a black-colour polythene in his right hand. IO disclosed to him his identity and told him that he had to be searched because of the information and told him that he had a right to be searched

before a Gazetted Officer or a Magistrate. A notice under Section 50 of NDPS Act was given to him. In reply to the notice the appellant wrote in his own hand that he was not willing to be searched before a Gazetted Officer or a Magistrate. Thereafter his search was conducted by the IO. From his search, one black colour polythene was recovered which further contained one transparent polythene containing dark brown colour powder. The powder was tested on field testing kit and it was found to be smack. The powder was weighted and it was found to be 400 grams including the weight of transparent polythene bag. Two samples of 10 grams each were taken out and were separately packed and sealed and the remaining smack was kept back in the same transparent and black colour polythene bags and sealed. The accused was arrested. Information of his arrest was sent to Police Station and an FIR was got registered. Samples were sent to FSL. FSL report showed that the seized substance was smack. Charge-sheet was filed against the accused and he was put to trial. After recording of evidence the learned Special Judge (NDPS Act) came to conclusion that the mandatory requirement of serving a notice under Section 50 of NDPS Act was complied with. Though, independent public witness was not associated at the time of recovery, however, an effort was made to associate independent public witness but none had agreed and non-association of independent public witness was not such an infirmity that prosecution should fail. The other discrepancies in the evidence of witnesses pointed out by the appellant at the time of trial were dealt with by the Trial Court and the Trial Court came to conclusion that discrepancies in the evidence of the witnesses were minor and trivial in nature

and cannot be given such importance as to defeat the case of prosecution. The Trial Court held petitioner guilty of possessing narcotic substance and sentenced as above.

3. During pendency of trial the appellant made an application before this court for sending sample of the drug recovered from him again to FSL so as to determine the percentage of narcotic substance in the sample. It was submitted that initially when the sample was sent to FSL, the FSL did not determine the percentage of the diacetylmorphine in the substance and therefore justice was not done to the appellant. Vide order dated 24th August, 2007, this Court declined to order further investigation in the case and or again sending the sample to FSL for determination of percentage of narcotic substance in exercise of its inherent powers. However, by concealing this order from the subsequent Bench, the petitioner moved another application and obtained an order dated 20th April, 2009 for sending the sample to FSL for determination of percentage of diacetylmorphine in the sample. Accordingly the sample was sent and a report dated 18th June, 2009 was received from FSL about the percentage of narcotic substance. The percentage of diacetylmorphine was found to be 0.22 per cent in the sample.

4. On the basis of this report, the counsel for the petitioner argued that the quantity recovered from the accused fell in small quantity being only 0.88 grams $[(400 \text{ grams} \times 0.22)/100]$. He, therefore, stated that the sentence awarded to the Appellant should have been in view of small quantity of the diacetylmorphine in the substance.

5. I consider that the quantity of drug recovered from accused cannot be determined on the basis of percentage of diacetylmorphine in the substance given in FSL report when the sample was tested after about eight years of its collection/seizure. The percentage of diacetylmorphine is relevant only if the same is tested soon after the recovery of narcotic substance. Percentage is not relevant when the sample is tested after a long time or after eight years. Narcotic substance extracted from opium or other natural products, like any other chemical or medicines or drug is subject to degradation. Like any other chemical or drug, a narcotic substance has a shelf life. The shelf life denotes the period after which the substance becomes useless since it has none of the properties of the chemical left in it. It is for this reason that it is mandatory for all drug and medicine manufacturers, whether they are Allopathic, Homeopathic or Ayurvedic, to mention on all packaging of medicines the date of manufacture and expiry date. Expiry dates denotes by which date the medicine shall become ineffective and the quantity of chemical in the medicine, whether tablet, injection or syrup, becomes so negligible that it would not cure the disease. Every chemical substance, unless it is an inert substance, has a tendency to react with atmospheric gases and disintegrates/corrodes / lose its properties. This disintegration can take place in certain chemicals and medicines without even coming into contact with air, on mere exposure to the sunlight or heat. Even sunrays initiate process of disintegration. Some of the chemicals are required to be stored in cool atmosphere below certain degree of temperature so as to retain their properties for even shelf life period, which only implies that even if the

chemical does not come in contact with air, mere heat and a high temperature initiates disintegration process or the process of change in chemical composition. Thus, when diacetylmorphine or any other narcotic substance is recovered, if it is tested within a short period, say, within 10 days or so, it would give approximately correct purity/percentage of the chemical at the time of seizure. However, if the testing is done after lapse of time, with passage of every day, the percentage of chemical is bound to fall and after a period of approximately 90 days to three years depending on quality of diacetylmorphine, the percentage in FSL test would be negligible in the narcotic substance. This is the reason that in this case the percentage of diacetylmorphine in test has come out to be 0.22 per cent since the test was done after about 8 years. In respect of diacetylmorphine a scan through the literature on internet does not show any exact period of shelf life, however, the maximum shelf life has been shown to be 3 years in a high purity drug if stored in cool atmosphere away from sunrays.

6. The percentage of carbon in diacetylmorphine is around 68 per cent and the percentage of oxygen is around 22. Hydrogen and Nitrogen are around 6 per cent and 4 per cent respectively. Diacetylmorphine (smack) and Hashish, both are subject to degradation by oxidation as well as by exposure to heat and sunlight. Both are also degradable by hydrolysis i.e. by coming in contact with moisture. However well a sample may be preserved, after 3 years of preservation, the sample will show negligible percentage. I, therefore consider that the analysis done by FSL in 2009 of a sample seized in 2001 cannot be relied upon to determine the actual quantity of smack seized. Only

if the analysis was done by FSL, soon after the seizure of sample, that analysis could be considered a reliable test. Such analysis should have been done maximum within 30 days of the seizure so as to give a true picture of the percentage. Any analysis done thereafter would not give a true picture of the percentage since degradation process starts soon after the manufacturing process. The petitioner, therefore, cannot be acquitted of the offence on this basis.

7. The other argument taken by the petitioner is non joining of public witness by IO. IO had specifically deposed that public persons were asked to join the raiding party, but, none agreed. It was not necessary for IO to keep on asking public persons at every stage, one - at the time of constituting raiding party, then at the time of search etc. If the IO had asked public person to join the raiding party initially, that shows that the Investigating Officer's intention was to seek help of public. Even otherwise, this Court has observed time and again that mere non joining of public person cannot defeat the case of prosecution. The treatment which is given by police and courts to the witnesses deters public persons from joining any investigation and public persons are justified in refusing to join. The accused cannot be given benefit of this.

8. The counsel for the appellant has pointed out two discrepancies in the statements of witnesses, about time and about request made to public person etc. The trial court rightly rejected this argument. It is not expected of witnesses to keep everything recorded in diary or on paper and thereafter by

rote reproduce it in the court. It has been proved by scientific studies that two persons may differ in perceiving the same incident and if they are asked to give an account of the incident later they are bound to differ.

9. In view of the above discussions, I find no force in the Appeal. The trial court rightly convicted the Appellant.

10. However, the Trial Court awarded sentence of 12 years RI and a fine of ₹ 1.20 lakh to the appellant. I consider, considering the quantity of diacetylmorphine recovered from the Appellant, a sentence of 10 years RI, which is the minimum prescribed sentence, and a fine of ₹ 1.00 lakh (Rupees one Lakh only), which is the minimum prescribed fine, would meet the ends of justice. In default of payment of fine, the petitioner shall further undergo imprisonment for a period of six months. The appeal is allowed to the above extent of modification in quantum of sentence. The appeal as against the conviction of the Appellant is dismissed. A copy of this judgment be sent to Jail Superintendent concerned.

FEBRUARY 23, 2011
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SHIV NARAYAN DHINGRA, J.