

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

RESERVED ON : 28th February, 2013

DECIDED ON : 8th April, 2013

+ CRL.A. 108/2012 & CRL.M.B.175/2012

VIJENDER SINGH Appellant

Through : Ms.Puja Srivastava, Advocate.

versus

DIRECTORATE OF REVENUE INTELLIGENCE

....Respondent

Through : Mr.Sushil Kaushik, Advocate.

AND

+ CRL.A. 1561/2011 & CRL.M.B.Nos.2249/2011 & 1503/2012

ROZY VIJENDER @ ELIZABETH SAMUEL Appellant

Through : Ms.Puja Srivastava, Advocate.

versus

DIRECTORATE OF REVENUE INTELLIGENCE

....Respondent

Through : Mr.Sushil Kaushik, Advocate.

CORAM:

HON'BLE MR. JUSTICE S.P.GARG

S.P.GARG, J.

1. The appellants- Vijender Singh (A-1) and Rozy Vijender @ Elizabeth Samuel (A-2) impugn judgment dated 15.10.2011 in Sessions Case No. 28A/2006 arising out of Complaint ID No.02403R0183302006

(Ex.PW-2/A) by which they were held guilty for committing offence under Section 21(c) NDPS Act and acquitted of the charges under Section 29 read with Section 21(c) of the Act. Vide order dated 17.10.2011, they were sentenced to undergo RI for ten years with fine ₹ 1 lac, each.

2. Allegations against the appellants were that on 23.11.2005 at around 07.30 P.M., at Bus stop, outside New Delhi Railway Station, they were found in possession of 5.022 kg. of Heroin meant to be delivered to an individual. The prosecution examined ten witnesses to substantiate the charges. In their 313 Cr.P.C. statements, the appellants pleaded false implication and came up with the plea that they were lifted from their rented house on 22.11.2005 at about 02.00 P.M. by DRI officials. DW-1 (Rajbir Singh) stepped in their defence. On appreciating the evidence and considering the rival submissions of the parties, the Trial Court, by the impugned judgment, held both the appellants guilty for the offence mentioned above. Being aggrieved, they have preferred the appeals.

3. Learned counsel for the appellants urged that the Trial Court did not appreciate the evidence in its true and proper perspective and fell into grave error to base conviction on the testimonies of official witnesses without seeking independent corroboration. Mandatory provisions of Section 50 were not complied with. No reasonable explanation was

offered for withholding independent panch witnesses. No such independent witnesses were associated at the time of alleged recovery. It was the duty of the complainant to ascertain the address of panch witnesses to examine them in the Court. Counsel for the appellants further pointed out that material discrepancies and improvements emerging in the statements of the prosecution witnesses were ignored without any valid reasons. The prosecution was unable to prove that the accused travelled in Malwa Express. No attempt was made to ascertain the time when Malwa Express was to arrive at its destination. Statement under Section 67 was recorded under duress. Their signatures were taken on blank papers. The confessional statements were retracted by the appellants at the earliest opportunity. The proceedings were conducted at DRI office. Log book was not maintained and proved. The prosecution was unable to establish A-2's identity beyond reasonable doubt.

4. Learned Spl.P.P urged that there are no good reasons to disbelieve the cogent and reliable testimonies of the official witnesses. Two panch witnesses were associated at the time of recovery of the contraband from the conscious possession of the accused. Bona fide attempts were made to produce them in the Court. However, they could not be served at the address given by them. Section 50 is not applicable as

recovery was effected from the 'baggage'. The confessional statements were never retracted by the appellants.

5. I have considered the submissions of the parties and have perused all the relevant materials. The counsel for the appellants could not demonstrate what provisions of law were violated while effecting recovery from their possession. The contraband was recovered from the 'baggage' of the accused persons and not from their person. Under such circumstances, no notice was required to be served or given to the accused persons. In '*Jarnail Singh vs. State of Punjab*', AIR 2011 SC 964, the Supreme Court held :

*"13. This apart, it is accepted that the narcotic/opium, i.e., 1 kg. and 750 grams was recovered from the bag (thaili) which was being carried by the Appellant. In such circumstances, Section 50 would not be applicable. The aforesaid Section can be invoked only in cases where the drug/narcotic/NDPS substance is recovered as a consequence of the body search of the accused. In case, the recovery of the narcotic is made from a container being carried by the individual, the provisions of Section 50 would not be attracted. This Court in the case of **Kalema Tumba v. State of Maharastra** : (1999) 8 SCC 257 discussed the provisions pertaining to 'personal search' under Section 50 of the NDPS Act and held as follows;*

...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.

Similarly, in the case of Megh Singh v. State of Punjab : (2003) 8 SCC 666, this Court observed that;

A bare reading of Section 50 shows that it applies in case of personal search of a person. It does not extend to a search of a vehicle or container or a bag or premises.”

6. The prosecution associated Deep Chand and Kuldeep Sharma, independent public witnesses at the time of recovery. Their signatures were taken on the panchnama (Ex.PW-2/K) and annexures (Ex.PW-2/B to Ex.PW-2/F). They were cited witnesses in the case. Efforts were made to serve the summons for their appearance before the Court. However, the addresses given by them were found fake. Their presence could not be secured during trial. No adverse inference can be drawn against the prosecution for their failure to examine independent panch witnesses. The secret information (Ex.PW-1/A) was received on 23.11.2005 around 06.30 P.M. A raiding party was organised at about 07.30 P.M., the accused were arrested at a Bus stop, outside New Delhi Railway Station at a distance of 3 or 4 km. from the office of the complainant. Apparently, the officials had no sufficient time to arrange independent public witness before proceeding to the spot. Their anxiety was to intercept the culprits at the earliest. Even then before apprehending the accused, they joined Deep Chand and Kuldeep Sharma who were

available at the Railway Station. They were not acquainted with the officials. There was no time for them to verify and ascertain their identity. The name and address disclosed by them were believed. No fault can be found on this account with the members of the raiding team. The non-examination of the witnesses, who joined in the investigation per se is not fatal. It is no rule of law but of prudence that public witnesses should be joined. This is insisted so as to lend authenticity and credibility to the search and the recovery that are effected, it is of course not an absolute rule. Though it is desirable to examine an independent witness, in the absence of any such witness, if the statements of the official witnesses are reliable and when there is no animosity established against them by the accused, their version cannot be doubted or discredited.

7. Secret information with DRI officials was that two persons were coming from Punjab to Delhi in Malwa Express and they were carrying a bag consisting of narcotic drug concealed therein. Out of the two, one was a lady wearing purple colour salwar-suit and red sweater, aged around 30 years and other was male, aged 30 to 35 years, medium built and height. With this specific description, DRI officials arrived at New Delhi Railway Station and found that Malwa Express had already arrived. They went to the Bus stop outside New Delhi Railway Station

and identified and recognised both the appellants with the bags in their possession. They were taken to DRI office and recovery of the contraband was effected. It is true that the DRI officials did not verify the timings of arrival of Malwa Express. Since the raid was sudden and there was time constraint it was not possible to ascertain the timings of arrival of Malwa Express. The evidence was collected that the appellants had travelled from Ludhiana to Delhi. Railway ticket (Ex.PW-2/L) was recovered from A-2. It was issued in the name of fictitious persons Rajesh and Smt. Razi. The accused did not produce any cogent evidence to deny that they had not travelled from Ludhiana by Malwa Express that day. They claimed that DRI officials lifted them from their residence on 22.11.2005 at 02.00 P.M. but defence witness DW-1 (Rajbir Singh) A-1's brother contradicted them and deposed that they were lifted from the said premises on 23.11.2005 in the evening when they were going to sleep, after taking dinner. They did not examine any independent witness to establish their presence at their residence on 23.11.2005 before their apprehension. The prosecution witnesses were not acquainted with the accused. They did not have their photographs. They were not aware as to what was the relationship between the two appellants. Only after their apprehension, they came to know that A-1 and A-2 were husband and wife. The appellants did not

deny this relationship. When house No.E-397, East Vinod Nagar was searched on 25.11.2005, some documents including passport, bank passbook, driving licence and ATM card in the name of A-1 were seized vide seizure memo (Ex.PW-6/A). The accused did not explain as to what business or job was being carried out by them to earn their livelihood.

8. Confessional statement under Section 67 was made by A-2 in her own handwriting. She did not deny that Ex.PW-2/P & Q were not in her handwriting. She did not specifically allege that she was forced to write down the confessional statement. Confessional statement of A-1 was recorded by PW-2 (S.D.Sharma, Intelligence Officer, DRI HQ, New Delhi) which is Ex.PW-2/N. The Trial Court has dealt with aspect minutely and found that the confessional statements were not retracted categorically by the accused persons. In their 313 statements, they did not in clear words stated to have retracted the confessional statements. In the absence of prior animosity or ill-will, DRI officials were not expected to fabricate their confessional statements. Statement under Section 67 NDPS Act is admissible in evidence and can be relied upon by a Court against an accused provided it is found to be made by the accused voluntarily. Even retracted statement can be acted upon as per law if the retraction is found to be the product of some legal advice or after thought etc. The

confessional statements recorded under Section 67 contain many personal facts about the accused and their family which are expected to be known only to the accused and not to an outsider/ stranger. These statements were voluntary statements of the accused and can be relied upon without independent corroboration. In ‘*Raju Premji vs. Customs NER Shillong Unit & Arun Kanungo vs. D.Pakyntein*’, 2009 CrL.L.J. 3972, the Supreme Court held :

XXX

XXX

XXX

“22. We would, for this purpose, assume that such confessions are not hit with Section [25](#) of the Evidence Act, 1872 but even then they must receive strict scrutiny.

This Court in Kanhaiyalal v. Union of India : AIR2008SC1044 , upon taking into consideration number of decisions, held as under:

43. The law involved in deciding this appeal has been considered by this Court from as far back as in 1963 in Pyare Lal Bhargava case. The consistent view which has been taken with regard to confessions made under provisions of Section [67](#) of the NDPS Act and other criminal enactments, such as the Customs Act, 1962, has been that such statements may be treated as confessions for the purpose of Section [27](#) of the Evidence Act, but with the caution that the court should satisfy itself that such statements had been made voluntarily and at a time when the person making such statement had not been made an accused in connection with the alleged offence.”

9. Contradictions, discrepancies and improvements highlighted by counsel do not affect the core issue of recovery of contraband from the conscious possession of the accused. These do not go to the root of the case to throw away the otherwise unimpeachable testimony of official witnesses. Testimonies of official witnesses have to be considered at par with that of independent witnesses. Testimony of complainant was corroborated by confessional statements of the accused persons. It was further corroborated by recovery memo and other documents which had been prepared at the time of recovery and proved before the Trial Court. All the contentions raised by the appellants have been dealt with in the impugned judgment and no interference is called for.

10. In the light of above discussion, I find no merit in the appeals preferred by the appellants and the same are dismissed. Conviction and sentence of both the appellants are maintained. The Trial Court record be sent back forthwith.

11. All the pending applications are also stand disposed of as being infructuous.

(S.P.GARG)
JUDGE

APRIL 08, 2013/*tr*