

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

RESERVED ON: 23rd January, 2013

DECIDED ON : 13th March, 2013

+ CRL.L.P.98/2007, CRL.M.A.Nos.6277/2007 & 10173/2007

**SH.AKHILESH KUMAR MISHRA, INTELLIGENCE OFFICER,
NARCOTICS CONTROL BUREAU**

....Petitioner

**Through : Mr.Rajesh Manchanda, Spl.PP with
Mr.Rajat Manchanda, Advocate.**

VERSUS

BENJAMIN DAVID BILLINGTON & ANR. Respondents

**Through : Mr.S.S.Das, Advocate with Mr.Sumit
Sharma, Advocate for R-2.**

CORAM:

HON'BLE MR. JUSTICE S.P.GARG

S.P.GARG, J.

1. Criminal Leave Petition No.98/2007 has been preferred by Akhilesh Kumar Mishra, Intelligence Officer, NCB, Delhi Zonal Unit, New Delhi (hereinafter referred to as 'petitioner') against judgment dated 12.05.2007 of learned Special Judge, NDPS by which the respondents were acquitted of the charges. Notice of Petition was issued to the respondents. Respondent No.1 could not be served as he went abroad after acquittal. Mr.S.S.Das, Advocate put appearance on behalf of the respondent No.2.

2. I have heard the learned Spl.P.P. for the petitioner and Mr.S.S.Das, learned counsel for the respondent No.2. Counsel for the petitioner urged that the impugned judgment of acquittal cannot be sustained on facts and law. 9.540 kgs and 75 grams Hashish was recovered from respondent No.1 and respondent No.2 respectively. The petitioner examined material witnesses to prove recovery from both the respondents. PW-Sarabjeet Singh independent witness supported the official witnesses in entirety. Trivial contradictions in the testimony of the prosecution witnesses were not fatal to throw away the whole case of the prosecution. The Trial Court gave undue weightage to the fact that, the bag containing 9.540 kgs Hashish, was not retrieved after seeking permission from the airlines officials. The bag in question was retrieved by the respondent No.1 in the presence of officer of NCB who had given his identity. The officials of NCB were not acquainted with the respondents to falsely implicate them. They had no animosity with them. Confessional statements of the respondents under Section 67 NDPS Act were ignored by the Trial Court without valid reasons. The cogent and reliable testimony of the witnesses examined before the Trial Court was not appreciated in its proper perspective. Non-examination of landlord of the respondent No.2 was immaterial as he did not deny in 313 Cr.P.C.

statement his residence in the said house. Counsel also urged to consider grounds (A) to (Z) in the petition to reverse acquittal of the respondents. Learned counsel for the respondent No.2 argued that the petitioner miserably failed to prove recovery of contraband from the respondents. There were vital discrepancies and contradictions. The independent witnesses were either not examined or they did not support the prosecution case. Confessional statements recorded under duress were retracted by the respondents at the earliest opportunity. There was no irregularity or illegality in the findings of the Trial Court.

3. I have considered the submissions of the parties and have marshalled the evidence. The prosecution was required to establish beyond reasonable doubt recovery of Hashish, 9.540 kgs from the conscious possession of respondent No.1. The prosecution examined official witnesses as well as independent panch witness. They testified that the suit case containing the contraband was retrieved from the conveyer belt and Hashish was recovered in it. However, Trial Court highlighted major discrepancies and contradictions in the statements of the witnesses to doubt recovery in the manner alleged by the prosecution. Admittedly, the prosecution witnesses did not know respondent No.1 before and did not have his photograph. Many foreigners were present at

IGI Airport. Respondent No.1 was not apprehended at the pointing out of the secret informer. His presence was not ascertained by making enquiries from the concerned airline officials. It was highly difficult to identify and recognise respondent No.1 on the basis of alleged description with the Enforcement officials. It has come on record that after secret information was received, the raiding team reached IGI Airport at 11.00 P.M. Respondent No.1 was apprehended at around 01.00 A.M. It is unclear at what time respondent No.1 reached the airport; when he got his baggage checked and x-rayed; when baggage tag was affixed and stub was affixed on the air ticket. Respondent No.1 was allegedly apprehended when his baggage had already been cleared after security checks and was put on conveyer belt. The witnesses did not explain why respondent No.1 was not arrested soon after he arrived with the suitcase in question and why he was allowed to put the bag on the conveyer belt. It is not clear as to why the officials waited for two hours to apprehend respondent No.1 when they had specific secret information about him.

4. It is admitted that once a baggage is checked after security checks, the same cannot be retrieved without the permission of the Custom officials or the airline staff. The prosecution did not adduce cogent evidence to ascertain as to how the baggage was retrieved without

oral or written permission of the Custom/airline officials. It was not elaborated as to who and under what circumstances, had retrieved the baggage or any written proceedings were conducted by the airline officials in that regard. Admittedly, the officials did not record statement of any such official from the airline staff or Custom to corroborate that the baggage was retrieved by the accused after it was put on conveyer belt. The baggage was thoroughly checked manually as well as with the use of X-ray machines. The prosecution did not examine any such official who conducted X-ray of the baggage or who manually checked it. Before clearance false cavity in the baggage was not detected and no contraband in the baggage was noticed during X-ray.

5. The prosecution associated two panch witnesses Sanjay Sharma and Sarabjeet Singh. Only PW-Sarabjeet Singh was examined. The prosecution did not produce other panch witness Sanjay Sharma as he was untraceable. PW-Sarabjeet Singh gave inconsistent version and did not corroborate the official version in its entirety. When he was examined on 19.05.2005 before lunch, he introduced a new story that both respondent No.1 and respondent No.2 were taken by NCB Officers near the conveyer belt and they took away blue colour bag from the belt. When he was further examined on 25.05.2005, learned Spl.PP put a leading question to

prove that the recovery was made only from one accused. PW-8 changed his version and stated that the contraband was recovered from respondent No.1. He explained that other person (respondent No.2) was also sitting nearby. He did not clarify as to who else was present with respondent No.1 at the time of recovery. PW-8 could not produce his employment with the Courier Company. He also did not produce any document to establish his presence at the spot. The address given by him was of his maternal grandmother. Adverse inference is to be drawn against the prosecution for withholding another independent witness Sanjay Sharma. The Trial Court did not believe confessional statement recorded under Section 67 of the Act as it was made under duress and was retracted at the earliest opportunity. The prosecution further could not establish that both respondent No.1 and respondent No.2 hatched conspiracy to export the contraband out of India.

6. Recovery of 75 grams Hashish from the residence of respondent No.2 is also doubtful and suspicious. The prosecution did not associate the landlord despite his availability. No rent note or rent receipt was collected to prove his residence at the said place. Two panch witnesses Nathu Ram and Ram Parshad were associated at the time of recovery from the residential premises I-51, 3rd Floor, Lajpat Nagar.

However, they were not examined in the Court. Again adverse inference is to be drawn for withholding the material witnesses. No evidence was collected that the baggage in question was collected by respondent No.1 from the residence of respondent No.2. Rather in the confessional statement recorded under Section 67 of the Act, it is mentioned that respondent No.1 collected the packet containing Hashish from Hari Rama Hotel reception counter which was lying unattended. There was no evidence to prove that at any time respondent No.1 and respondent No.2 were ever seen together.

7. The evidence has been analyzed by the Trial Court minutely and recovery of the contraband from respondent No.1 and respondent No.2 and has been found discrepant. The prosecution could not establish conspiracy. In the absence of unimpeachable evidence and due to inherent and major contradictions, the Trial Court was justified to give benefit of doubt to the accused. It was obligatory on the part of the prosecution to establish by cogent and reliable evidence that the respondents were found in possession of contraband articles. It is well settled that if two views are possible, the view favourable to the accused is to be preferred.

8. Law dealing with appeals against the order of acquittal has been laid in '*Jaswant Singh vs. State of Haryana*', (2000) 4 SCC 484 as :

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“(v) An order of acquittal is to be interfered only when there are "compelling and substantial reasons" for doing so. If the order is "clearly unreasonable", it is a compelling reason for interference.

(vi) While sitting in judgment over an acquittal the Appellate Court is first required to seek an answer to the question whether finding of the Trial Court are palpably wrong, manifestly, erroneous or demonstrably unsustainable. If the Appellate Court answers the above question in the negative the order of acquittal is not to be disturbed. Conversely, if the Appellate Court holds, for reasons to be recorded, that the order of acquittal cannot at all be sustained in view of any of the above infirmities, it can reappraise the evidence to arrive at its own conclusion.

(vii) When the Trial Court has ignored the evidence or misread the material evidence or has ignored material documents like dying declaration/report of Ballistic Experts etc., the Appellate Court is competent to reverse the decision of the Trial Court depending on the materials placed.”

9. In the light of above discussion, I find no compelling and substantial reasons to interfere in the impugned judgment of acquittal. There is no merit in the Criminal Leave Petition filed by the petitioner and is dismissed. Pending applications also disposed of.

**(S.P.GARG)
JUDGE**

MARCH 13, 2013

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