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

+ **CRL. A. No. 708/2010**

Date of Decision: 11th October, 2013

MOHD DAWOOD Appellant
Through: Mr. Arpit Batra and Mr. Udit Jain,
Advocates.

versus

DEPARTMENT OF CUSTOMS Respondent
Through: Mr. Pramod Bahuguna and
Ms.Kavita, Advocates.

CORAM:
HON'BLE MS. JUSTICE SUNITA GUPTA

J U D G M E N T

: SUNITA GUPTA, J.

1. The challenge in this appeal is to the judgment and order of sentence dated 20th February, 2010 and 26th February, 2010 passed by learned Additional Sessions Judge-cum-Special Judge, NDPS cases, Dwarka Courts, New Delhi in Sessions Case No. 37/3/2008 under Sections 21(c) and 23 (c) of Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred as 'NDPS Act') arising out of complaint filed by the customs titled as Sh. U.R. Gupta, Air

Customs Officer, Indira Gandhi International Airport ('IGI Airport'), New Delhi v. Mohd. Dawood convicting the appellant and sentencing him to undergo rigorous imprisonment for ten years along with fine of Rs.1,00,000/- and in default of payment of fine, to further undergo simple imprisonment for six months.

2. A complaint was filed by Sh. U.R. Gupta, Air Customs Officer, against the appellant on 29th October, 2004 on the allegations that on 6th May, 2004 appellant, holder of Afghan Passport No. TR 025317 issued at Kandhar on 13th April, 2003, had arrived by Ariana Afghan Airlines, flight No. FG 322 at the arrival hall of IGI Airport, New Delhi. After clearing immigration and after collecting his checked in baggage he walked through green channel and came to the exit gate and was about to leave the customs area, when the complainant became suspicious about his movement and asked him to go to the examination table in the arrival hall. After completing the formalities the officers of customs examined two checked in bags of the appellant and found 2.680 Kgs of heroine. Charge for offence under Sections 21(c) and 23 (c) of NDPS Act was framed against the appellant, to which he pleaded not guilty and claimed trial.

3. Prosecution examined 11 witnesses in order to substantiate its case. Statement of accused was recorded under Section 313 Code of Criminal Procedure, 1973 ('Cr.P.C.') whereby all the incriminating evidence which was against him was put to him. He denied the same and claimed to be innocent. He denied that he was explained the contents of notice Ex.PW1/B under Section 50 of NDPS Act in Persian language. According to him, his signatures were obtained on various written as well as blank documents. No contraband was recovered from him or his baggage. He further stated that he retracted from his statement immediately from prison. It was a false, fabricated and manipulated case against him. He did not prefer to lead any defence evidence. After meticulously examining the entire material available on record, the learned Special Judge by impugned order convicted the appellant and sentenced as stated above, which has been assailed by the appellant by filing the present appeal.

4. I have heard Mr. Arpit Batra, learned counsel for the appellant and Mr. Pramod Bahuguna, learned counsel for the respondent and have perused the record.

5. Learned counsel for the appellant has basically challenged the impugned order on the following grounds:-

- (i) The appellant was convicted without considering the fact that he was unaware of any other language than Persian. According to the prosecution, one Sayed Mohd. Ashraf Hofiyani joined as interpreter and he was present during the proceedings. He was the person who had interpreted the contents of the documents to the appellant. However, despite the fact that he was the star witness of the prosecution, he was not examined for the reasons best known to them. Non examination of the said witness has caused prejudice to the appellant. Reliance was placed on *Hasan Imam Inamdar v. The State of Maharashtra* 2003 (4) MHLJ 682 and *Ramaswamy v. State of M.P.* 2005 CRLJ 1603.
- (ii) One of the panch witness was not examined by the prosecution which also caused a serious dent to the prosecution case.
- (iii) PW10 Deepak, who is stated to be one of the panch witnesses, has been examined but his deposition is totally shaky and unreliable.

- (iv) The appellant has retracted the alleged statement made by him.
On the basis of retracted statement conviction cannot be based.
- (v) Detention receipts were filled by the complainant who sought assistance of his colleague for which no permission was taken from the superior nor was he examined.
- (vi) There was total non-compliance of Section 50 of the NDPS Act. Reliance was placed on *State of Delhi v. Ram Avtar* (2011) 12 SCC 207 and *Saiyaed Mohd. Saiyad Umar Saiyad & Ors. v. State of Gujarat* 1995 (3) SCC 610.
- (vii) Although, Nokia mobile phone is alleged to have been recovered from the accused, no further investigation was done with regard to that mobile.

6. As such, it was submitted that prosecution has failed to bring home guilt of the accused beyond the shadow of doubt, as such, he is entitled to be acquitted.

7. Per contra, it was submitted by learned counsel for the respondent that it is a case of international smuggling. A huge recovery of 2.680 Kgs was made from the possession of appellant and there is no challenge to the recovery from his possession. As regards

non-compliance of provision under Section 50 of the NDPS Act, reliance was placed on *Ram Swaroop v. State (Govt. N.C.T.) of Delhi* AIR 2013 SC 2068 and *Gita Lama Tamang v. State of (G.N.C.T.) of Delhi* 2006 (3) JCC [Narcotics] 197 for contending that in case of seizure from the bags there is no requirement for observance of safeguards provided by Section 50 of the Act. In any case, in the instant case, all the safeguards were observed. Since the appellant was an Afghani national, as such, one Sh. S.M. Ashraf Hofiyani was joined as interpreter to interpret the contents of the documents to the appellant and the same were thereafter translated in English by PW11 Rajesh Kumar. Under the circumstances, no prejudice is caused to the appellant by preparing the documents in English, once contents were duly translated to the appellant. PW11 Rajesh Kumar has been examined by the prosecution. Sh. S.M. Ashraf Hofiyani could not be examined as he had been transferred to Kabul, as such, it was not possible to examine him. Furthermore, the entire recovery was from the baggage of the appellant which is substantiated by the testimony of the complainant and other material witnesses. Photographs were also taken which corroborates the ocular testimony of the witnesses.

As regards statement of the accused recorded under Section 67 of NDPS Act it was submitted that there was no retraction for a considerable length of time. Moreover, there are no allegations of torture to the accused, as such, the same is devoid of merits. Reliance was placed on *Union of India v. Satrohan* (2008) 8 SCC 313; 2008 (3) JCC (Narcotics) 182. As regards minor variations in the testimony of witnesses, it was submitted that same does not affect the credit worthiness of the witnesses. Reliance was placed on *Ram Kumar v. C.B. of Narcotics* 2008 (3) JCC (Narcotics) 107. As regards non-examination of the colleague who filled the detention receipts, it was submitted that the same is not fatal to the case of the prosecution. The complainant or other witnesses were having no ill-will or grudge against the appellant for which reason such a heavy recovery would be planted upon him. As such, it was submitted that there is no infirmity in the impugned order which calls for interference.

8. I have given my considerable thoughts to the respective submissions of learned counsel for the parties and have perused the record.

9. The case of prosecution as unfolded by PW1 Sh. U.R. Gupta, ACO is that the accused was intercepted in the arrival hall at IGI Airport on his arrival from Kabul by Ariana Afghan Airlines, flight No. FG 322 at 1330 hours. Since accused was an Afghani national, as such, two interpreters, namely, Mr. Ashraf Hofiyani and Mr. Rajesh Kumar, who were the staff of Ariana Airlines were arranged. The interpreter informed him about the legal rights that he had and that his baggage could be searched in the presence of a Gazetted Officer or a Magistrate. Thereafter, notice under Section 50 of the NDPS Act Ex.PW 1/B was served upon the accused in the presence of two panch witnesses, namely, Deepak Singh and Sambhu Jeet. Recovery of contraband was effected from the hand baggage of the accused as well as from his checked-in baggage. The total weight being 2.680 Kgs., a pinch of which was tested in Field Drug Test Kit and was found positive of Herion. Both the lots recovered from the hand baggage and checked-in baggage were homogeneously mixed and three representative samples of 5 gram each were drawn therefrom marked as S-1, S-2 and S-3 and were sealed with the custom seal. The samples were kept in transparent pouches and were sealed.

Panchnama Ex. PW1/C were prepared. Photographs of the concealment of the drug in the stroller bag as Ex.PW1/E, E-1 and E-2 were taken. Whole of the proceedings were explained to the accused by the interpreters in the language known to the accused. Summon under Section 67 of the NDPS Act Ex.PW1/F was served upon the accused and his voluntary statement Ex. PW1/G was recorded which was signed by him at point B and by the interpreters at point C and D, respectively and by PW1 himself at point A. Statement of panch witnesses and interpreters were also recorded.

10. The thrust of argument of learned counsel for the appellant was on the fact that the appellant being an Afghani national was not aware of any language other than Persian. Documents were prepared in English, as such, he was not aware about the contents and serious prejudice has been caused to him by non-preparation of the documents in Persian language. As stated above, reliance was placed by him on *Hasan Imam Inamdar* (supra) and *Ramaswamy* (supra). In *Hasan Imam Inamdar* (supra) the accused was knowing Marathi and Hindi. Panchnama was drawn in English language. It was held that since the panchnama was drawn in English which language was not known to

the appellant, as such, serious prejudice was caused to the accused. Similarly, in *Ramaswamy* (supra) appellant was South Indian, resident of Chennai. The documents were prepared in Hindi. There was nothing to show that procedure adopted by Investigating Officer was explained to the accused in English or any other language. Both these authorities does not help the appellant, inasmuch as, prosecution has examined PW11 Mr. Rajesh Kumar, one of the interpreters, who categorically deposed that he was translated the contents of notice under Section 50 of NDPS Act Ex.PW1/B in Persian language by Mohd. Ashraf Hofiyani. Thereafter, notice was signed by him. He further deposed that panchnama Ex.PW1/C was also translated to the accused with the help of Mohd. Ashraf Hofiyani. He denied the suggestion that reply of the accused on the notice Ex.PW1/B was written by him at the instance of Customs Officer and that no such notice was served upon the accused or that he had not given any such reply. In fact, the testimony of the witness that panchnama was duly translated to the accused goes unchallenged and unrebutted as the witness was not cross-examined on this aspect nor any suggestion was given to him that the same was not translated to the accused.

11. Although it is true that Mohd. Ashraf Hofiyani was not examined by the prosecution, but no adverse inference can be drawn against the prosecution for his non-examination, inasmuch as, it had come on record that he was working in Ariana Airlines and was transferred to Kabul. That being so, the department was not in a position to produce him before the Court. In *Dalbir Kaur and Ors v. State of Punjab* 1977 Cr.L.J. 273 (SC) omission to examine material witnesses, who were not deliberately withheld or unfairly kept back, in the circumstances held, was not sufficient to throw doubt on prosecution case.

12. Besides the complainant, PW3 Sh. K.S. Garia who was working as Superintendent Prevention at IGI Airport at arrival hall also testified that Mr. U.R. Gupta, ACO brought one passenger, namely, Mohd. Dawood on suspicion of carrying Narcotic drugs, etc. He called two independent witnesses. Since the passenger appears to be speaking very little Hindi, two interpreters were called who could communicate with the passengers in Persian and in turn could communicate his version. All the proceedings were explained to the accused by interpreting the same in the language known to the

accused. He also testified that notice under Section 50 of the Act was served upon him. Thereafter, recovery was affected.

13. PW11 Rajesh Kumar confirmed regarding preparation of notice under Section 50 of the Act after duly translating the contents of the same, then preparing panchnama and other documents. No suggestion was given to the witness that the documents were not explained to the accused in his own language by the interpreter. All this goes to show that since the appellant was an Afghani national and was not conversant with English language and knew very little Hindi, therefore, at the very initial juncture all the safeguards were taken by the complainant while arranging interpreters who knew Persian language. All the proceedings were explained to the accused in Persian language and thereafter, the same were translated by Mohd. Ashraf Hofiyani to Mr. Rajesh Kumar, who then recorded the proceedings in English. That being so, it cannot be said that any prejudice was caused to the appellant. In *Gita Lama Tamang* (supra) also a plea was taken that appellants were Nepali Nationals and were not conversant with English language. It was observed that “if panchnama and confessional statements made by the accused under

Section 67 of NDPS Act are read in juxtaposition, no incongruities are to be located. Nothing extra was included in panchnama. Secondly on the last page of the panchnama it is recorded that the panchnama had been read over and explained to the appellant Gita Lama Tamang and thereafter his signatures were obtained”.

14. At the cost of repetition it may be mentioned that in the instant case sufficient evidence has come on record to prove that all the proceedings were translated to the appellant in Persian language and thereafter the documents were prepared in English. The mere fact that proceedings were carried out in English language does not raise any presumption that the appellant was unaware of the contents of the proceedings so as to cause any prejudice to him.

15. As regards the submission that there was non-compliance of Section 50 of the NDPS Act, this submission is again devoid of merit, inasmuch as, in the authorities ***Ram Avtar*** (supra) and ***Saiyed Mohd.*** In ***Saiyad Umar Saiyad*** (supra) relied upon by learned counsel for the appellant, it was held that merely informing the accused that he can be searched before a gazetted officer without informing that he has a right to be searched is not compliance of Section 50 of the NDPS Act.

However, it has come in the testimony of the complainant that the accused was duly informed that he has a right to be searched in the presence of a gazetted officer. Moreover, in the instant case, recovery was not effected from the person of the accused but from his checked-in baggage. In *Gita Lama Tamang* (supra) it was held that it is now settled that Section 50 applies, whenever a person of an accused is to be searched. For searching a blue black zipper bag, Section 50 has no application. Reference was made to the following authorities:

- (i) *State of H.P. v. Pawan Kumar*, 2005 (1) JCC [Narcotics] 107 : 2005 (4) SCC 350;
- (ii) *State of Haryana v. Ranbir Singh @ Rana*, 2006 (1) JCC [Narcotics] 75 : (2006) 5 SCC 167; and
- (iii) *State of Punjab v. Balwant Rai*, 2005 (1) JCC [Narcotics] 103 : 2005 III AD (S.C.) 407

16. The matter also came up for consideration before Hon'ble Supreme Court in *Ram Swaroop* (supra). In that case 32 bags of poppy straw power weighing 64 kgs. had been seized from the bags of the accused. It was established by adducing cogent and reliable evidence that the bags belonged to the appellant. It was urged that there was non-compliance of Section 50 of the Act and therefore,

conviction is vitiated. Repelling the contention, Supreme Court referred to an earlier decision reported in *Ajmer Singh v. State of Haryana* (2010) 3 SCC 746 where the appellant was carrying a bag on his shoulder and the bag was searched and contraband articles were seized. While dealing with the applicability of Section 50 of the NDPS Act, reference was made to the decisions in *Madan Lal v. State of H.P.* 2003 CrL.L.J. 3868 and *State of H.P. v. Pawan Kumar* AIR 2005 SC 2265; (2004) 7 SCC 735, and it was held as under:

“Thus, applying the interpretation of the word “search of person” as laid down by this Court in the decision mentioned above, to facts of present case, it is clear that the compliance with Section 50 of the Act is not required. Therefore, the search conducted by the investigating officer and the evidence collected thereby, is not illegal. Consequently, we do not find any merit in the contention of the learned counsel for the appellant as regards the non-compliance with Section 50 of the Act.”

17. Relying on this authority it was observed that the contention of the appellant that there has been non-compliance of Section 50 of the NDPS Act so assiduously raised is wholly sans substance.

18. In the instant case also no recovery was affected from the person of the accused and in fact the recovery was from the checked-

in baggage of the accused, therefore, there was no requirement for compliance of Section 50 of NDPS Act.

19. Coming to the other limb of argument that only one panch witness has been examined whereas the other panch witness, namely, Shambujeet was not examined and therefore an adverse inference is liable to be drawn against the prosecution, same again is devoid of merit. In *Ram Swaroop* (supra) a contention was raised that the seizure was affected from a crowded place yet the prosecution chose not to examine any independent witness and in the absence of their corroboration with independent witness, the evidence of police witnesses could not be given credence. Repelling the contention, it was held by the Supreme Court that it had come in evidence that no independent evidence agreed to join the proceedings. Moreover, there was no absolute rule that police officers cannot be cited as witnesses and their depositions should be treated with suspect. A passage from *State, Govt of NCT of Delhi v. Sunil* 2001 (1) SCC 652 was quoted, and the same reads as follows

“We feel that it is an archaic notion that actions of the police officer should be approached with initial distrust. We are aware that such a notion was lavishly entertained during the British period and

policemen also knew about it. Its hangover persisted during post-independent years but it is time now to start placing at least initial trust on the actions and the documents made by the police. At any rate, the court cannot start with the presumption that the police records are untrustworthy. As a proposition of law the presumption should be the other way around. That official acts of the police have been regularly performed is a wise principle of presumption and recognized even by the legislature. Hence when a police officer gives evidence in court that a certain article was recovered by him on the strength of the statement made by the accused it is open to the court to believe the version to be correct if it is not otherwise shown to be unreliable. It is for the accused, through cross-examination of witnesses or through any other materials, to show that the evidence of the police officer is either unreliable or at least unsafe to be acted upon in a particular case. If the court has any good reason to suspect the truthfulness of such records of the police the court could certainly take into account the fact that no other independent person was present at the time of recovery. But it is not a legally approvable procedure to presume the police action as unreliable to start with, nor to jettison such action merely for the reason that police did not collect signatures of independent persons in the documents made contemporaneous with such actions.”

20. The observation made in *Ramjee Rai and Others v. State of Bihar* (2006) 13 SCC 229 was also reproduced and the same reads as follows:

“It is now well settled that what is necessary for proving the prosecution case is not the quantity but quality of the evidence. The court cannot overlook the changes in the value system in the society. When an offence is committed in a village owing to land dispute, the independent witnesses may not come forward.”

21. Following these authorities it was held that non-examination of independent witnesses does not cast doubt on the prosecution case. In *Gita Lama Tamang* (supra) also, after relying upon number of judicial pronouncements it was observed that no rule of thumb can be laid down to arrive at a conclusion as to what is the effect of non-examination of panch witnesses. Each case has its own facts. In that case both the panch witnesses were Nepali. They could not be examined being untraceable. The complainant supported the case of the prosecution. It was observed that there is no inkling in the evidence on record that the abovesaid witnesses nurtured any grouse against the appellants/accused persons. The deposition of complainant was well corroborated by confessional statement made by the appellant. It was further observed that there was huge recovery of contraband, as such, there must be strong reasons to falsely implicate the accused persons who are Nepali Nationals. The police

officers have no ill will or motive to falsely implicate them in such a serious case.

22. Present case stands on a much different footing, inasmuch as, at the time of recovery two panch witnesses were joined namely Deepak Kumar and Shambu Jeet. Although, Shambujeet was not examined by the prosecution, but Deepak Kumar has substantiated the case of prosecution in all material particulars regarding recovery of contraband from the checked-in baggage of the accused. On material points his testimony goes unrebutted being unchallenged. Moreover, there is no reason as to why he will falsely implicate the accused in this case. Not only that, at the time of recovery PW11 Rajesh Kumar was present. It was he who translated all the documents in English, as such, the testimony of the complainant Sh. U.R.Gupta regarding recovery, finds corroboration from ample material on record. Mere fact that one of the panch witness, namely, Shambujeet was not examined does not cast any doubt on the prosecution version in view of the voluminous evidence coming on record against the appellant.

23. Besides above, the statement of accused himself was recorded under Section 67 of NDPS Act. Learned counsel for the appellant

relied upon retraction made by the accused from the said statement, however, it was rightly observed by learned Special Judge that this retraction was on 2nd July, 2004 i.e. after 26 days of his making the statement. The same appears to be an afterthought. When the accused was produced in the Court immediately after his arrest it was not alleged by him that he was forced to make any statement. Moreover, a perusal of the statement goes to show that certain facts were disclosed by the accused which could only be within his special knowledge. In this statement he disclosed the source from where he got two bags and US \$6349 and that the same were given to him by one Afghani, namely, Faizul Haq who promised him to give Rs.1,00,000/- if he carried those bags to India. The statement also contained the details of his family. The prosecuting agency could not be expected to be aware of the particulars of the family of the accused. All this shows that the statement was made by the appellant voluntarily and the same was duly translated in English by PW Rajesh Kumar. It is well settled that confessional statement of the accused, if found voluntary and truthful and has substance, it can do without frills. It must be kept in mind that Section 67 of NDPS Act is *pari*

materia to Section 108 of Customs Act. If the confessional statement of the accused stands proved, there is no need of corroboration.

24. In *Triveni Prasad v. State of Maharashtra* AIR 1976 SC 2156, it was held :-

“The wealth of details given by the accused in his confessional statement goes to establish that his statement is voluntary.”

25. Similar view was taken in authorities reported as *Ravinder Singh @ Bittoo v. State of Maharashtra*, 2002 (2) JCC 1059 SC, *A.K. Mehboob v. IO, NCB JT* 2001 (1) SCC 614; *Pon Adithan v. Deputy Director, NCB, Madras* 1999 (2) JCC SC 335; *Kalema Tumba v. State of Maharashtra JT* 1999 (8) SC 293; *Raj Kumar Karwal v. UOI and Ors.* 1991 Cr.L.J. 97 (SC); *Emmanuel Uchenna Ezenwosu v. NCB and Ors.* 2003 (1) JCC 417 and *Francis Stanly v. Intelligence Officer, NCB 2007 (1) JCC [Narcotics] 1* AIR 2007 SC 794.

26. Since the confessional statement recorded under Section 67 of the NDPS Act was voluntarily and truthful, there was no need of further corroboration, however, in the instant case his statement finds corroboration from ample material available on record.

27. It is accordingly held that there is no merit in the contention raised on behalf of accused that the statement made by him was neither voluntary nor truthful and, therefore, could not have been relied upon for convicting him. It is pertinent to note that in his statement recorded under Section 313 Cr.P.C. the accused has not denied that checked-in baggage belonged to him. The only plea taken by him was that nothing objectionable was recovered from the same. The appellant being an Afghani National, neither the complainant nor other witnesses nurtured any ill will or grudge against him for which reason they would plant such heavy quantity of contraband upon him to falsely implicate in such serious case.

28. The fact that no further investigation was carried out by prosecuting agency regarding Nokia mobile phone having Indian sim-card does not affect the prosecution case.

29. In view of the above discussion, this Court finds no reason to differ with the finding arrived at by learned Special Judge with regard to the guilt of the accused for the offence under Sections 21(c) and 23 (c) of NDPS Act or the sentence imposed upon him.

30. The Court does not find any merit in the appeal and the same is accordingly dismissed.

**SUNITA GUPTA
(JUDGE)**

OCTOBER 11, 2013

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