

* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ **CRL.L.P. 403/2013**

Decided on 29.07.2013

IN THE MATTER OF :

DIRECTORATE OF REVENUE INTELLIGENCE Petitioner
Through: Mr. Satish Aggarwala, Advocate with
Mr. Sushil Kaushik, Advocate

versus

MOHD. ANWAR KHAN Respondent
Through: None

CORAM
HON'BLE MS.JUSTICE HIMA KOHLI

HIMA KOHLI, J. (Oral)

1. The present Criminal Leave Petition has been filed by the petitioner/Directorate of Revenue Intelligence (in short 'DRI') under Section 378(iv) of the Cr.PC against the judgment of acquittal dated 18.03.2013 passed by the Special Judge for NDPS cases, Saket, New Delhi.

2. Before referring to the grounds raised by the learned counsel for the petitioner/DRI for seeking leave to file an appeal against the aforesaid judgment, it is deemed appropriate to briefly refer to the relevant facts of the case.

3. In brief, the facts of the case are that on 08.07.2009, the Intelligence Officer of DRI, Headquarters had received a secret information that at about 8.00 PM, the respondent would reach at a bus stop near the road leading to Delhi, opposite Sanjay Gandhi Transport Nagar for taking a public transport and he would be carrying some narcotic substance on his person or in a bag. After reducing the aforementioned information into writing, the Deputy Director, DRI was approached for permission to take steps to conduct search and seize the aforesaid narcotic substance. Two public witnesses, PW3 and PW4 had also been joined for recovery of the narcotic substance.

4. The raiding team led by the IO (PW2) had reached the spot and he confronted the respondent and asked him about the contents of the 'Nike' brand bag that he was carrying, to which he had replied that the same contained his personal belongings. The respondent was then told that his search for seizure of the narcotic substance was to be conducted and the petitioner claims that the DRI officers had given a notice to the respondent under Section 50 of the NDPS Act (Ex.PW2/A), in the presence of the *panch* witnesses while explaining to him his legal rights to get his person and the aforesaid bag searched in the presence of a Gazetted Officer or Magistrate. As per the DRI, the respondent had given a written reply to the aforesaid notice in his own handwriting and he had agreed that his search be conducted before a Gazetted Officer of the DRI in its office, and not at the place of his interception.

5. The respondent was then escorted to the office of the DRI and in the course of the search of the 'Nike' bag carried by him, ten cloth packets bearing some rubber stamp marking were recovered. The said packets were found to contain transparent polythene packets, that contained some off-white coloured powdery/granular substance, emitting a strong pungent smell. A small quantity of the substance was collected from each packet and tested. The result of the test was positive for heroine. The gross weight of the ten packets was found to be 10.258 kg and the net weight of the heroine contained therein was 10.056 kg. All the above packets were seized by PW2 for violation of the provisions of the NDPS Act. Thereafter, the respondent was arrested and remanded to judicial custody.

6. After recording the statements of the two *panch* witnesses (PW3 and PW4), a complaint for the offence punishable under Sections 21 of the NDPS Act was filed against the respondent on 24.12.2009 and cognizance thereof was taken on the same day. Vide order dated 26.02.2010, charge for the aforesaid offence was framed, whereafter evidence was directed to be led by both sides. In support of its case, the prosecution had examined a total of twelve witnesses, the details whereof have been furnished in paras 12 to 24 of the impugned judgment. After conclusion of the prosecution evidence, the statement of the respondent was recorded under Section 313 Cr.PC. However, no defence evidence was led by him. After hearing the arguments of both sides and examining

the evidence placed on record, the special court concluded that the prosecution had failed to prove its charge and the guilt of the respondent for the offence punishable under Section 21(c) of the NDPS Act beyond reasonable doubt and therefore, the respondent was acquitted of the offence by giving him the benefit of doubt.

7. Aggrieved by the aforesaid judgment, the petitioner/DRI has filed the present Criminal Leave Petition. Mr. Satish Aggarwala, Advocate appearing for the petitioner/DRI assails the impugned judgment by submitting that the special court had made an erroneously observation in respect of the notice issued under Section 50 of the NDPS Act. He submits that once the court had concluded that no notice under Section 50 of the NDPS Act was required to be served in the present case, it was not required to examine the genuineness of the said notice, and despite making an observation that the said notice was not mandatory in nature, the same was taken into consideration for acquitting the respondent. Secondly, it was argued that after discussing the statement tendered by the respondent under Section 67 of the NDPS Act (Ex.PW2/D), the court below had discarded the retraction application filed by the respondent after a period of two and a half months and having done so, it ought to have relied on the statement of the respondent made under Section 67 of the NDPS Act for indicting him.

8. The principles governing the scope of interference in an appeal against acquittal are well settled. The Supreme Court had summarized

these principles in the case of Chandrappa and Ors. vs. State of Karnataka, reported as **2007, Cri. L.J. 2136** when it had observed that the Code of Criminal Procedure, 1973 puts no limitation or restriction on the power of the courts to re-appreciate or review the evidence upon which the order of acquittal is founded. However, an appellate court must bear in mind that in case of an acquittal, there is a double presumption in favour of the accused. The fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law coupled with an acquittal by a trial court re-affirms the innocence of the accused. Lastly, the Supreme Court had held that when two reasonable conclusions are possible on the basis of the evidence on record, ordinarily, the appellate court should not disturb the finding of acquittal recorded by the trial court.

9. The Court shall consider the submissions made by learned counsel for the petitioner in the light of the aforesaid principles. The first contention of the learned counsel for the petitioner/DRI is with regard to the provisions of Section 50 of the NDPS Act and compliance thereof. A perusal of para 31 of the impugned judgment reveals that the court had taken notice of the fact that as per the settled law, the provisions of Section 50 of the NDPS Act are to be complied with mandatorily and the accused has a legal right to be apprised of the fact that he has an option to have his search conducted in the presence of a Gazetted Officer or a

Magistrate for recovery of any contraband substance. However, it was observed that in the present case, 'nearest recovery' of heroine had not been effected from the person of the respondent as the said substance was lying in a bag that he was carrying and in such circumstances, no notice was legally required to be served on him. The learned Judge went on to opine that merely because the notice served on the respondent had not mentioned the word "nearest", it cannot be assumed that the provisions of Section 50 of the NDPS Act had not been complied with as substantial compliance thereof had been made by the Department.

10. The grievance of the petitioner/DRI is that having held that substantial compliance of the notice under Section 50 of the NDPS Act had been made by the Department, the special court had erroneously observed in para 32 of the impugned judgment that there were various discrepancies in the prosecution evidence that would clearly suggest that the aforesaid notice (Ex.PW2/B) was actually served upon the respondent at the place where he was intercepted, and the same is a fake document which had not come into existence at the alleged time and place, but was created subsequently, thus giving a serious blow to the trustworthiness of the prosecution story.

11. No doubt, the special court has held that the mandatory provisions of Section 50 of the NDPS Act had been complied with by the petitioner in the present case, but the observations that have been made by the trial court subsequent thereto were only to highlight the fact that apart from

the service of the aforesaid notice, the prosecution ought to have made out a fairly credible case against the respondent by substantiating its story through ocular and documentary evidence, which it had failed to do.

12. The impugned judgment has noticed the fact that the respondent comes from a financially weak background and had studied only upto class 10 and he was unaware of the meaning of the acronym "DRI". Therefore, for him to allege that he was feeling insecure at the spot from where he was apprehended and instead, he had expressed a desire that he be taken to the office of the DRI for proceedings to be conducted there, seemed improbable. Referring to the testimony of the IO (PW2), the Court had observed that the said IO had not stated anywhere that he had taken any testing kit or sealing material at the spot. Instead, during his cross-examination, he had admitted that he had not made any enquiry from the respondent as to why the place of his apprehension was found to be unsafe for conducting his search. Further, the evidence brought on record had revealed that the seal of the DRI that is used for sealing the case property was got issued by PW2 on 09.07.2009, i.e., one day after the date of apprehension of the respondent from the spot at 8 PM on 08.07.2009. Noting the aforesaid glaring discrepancies in the prosecution evidence, the trial court had observed that the aforesaid notice purportedly issued under Section 50 of the NDPS Act seemed to have been created on a subsequent date.

13. As for the second leg of argument urged by the counsel for the

petitioner/DRI that the trial court ought to have taken into consideration the statement of the respondent that was recorded under Section 67 of the NDPS Act (Ex.PW2/D) and that itself was sufficient evidence to have held him guilty of the offence alleged in the present case, it is relevant to refer the observations made from paras 45 onwards of the impugned judgment. In the aforesaid paras, the special court had taken notice of the arguments canvassed by the petitioner/DRI that the statement of the respondent being a voluntary statement, given in his own handwriting, containing his admission with regard to the contraband substance recovered from him, had remained undisputed. The court also referred to the retraction application filed by the respondent on 25.09.2009, after lapse of about two and a half months from the date of his tendering a statement (Ex.PW2/D) and it had observed that the said application did not contain the signatures or the thumb impression of the respondent and it was a typed application signed by the counsel for the respondent at the relevant time.

14. The aforesaid retraction application of the respondent was however discarded by the Special Court in the light of the decision of the Supreme Court in the case of Kanhaiya Lal vs. Union of India reported as **2008 (1) JCC (Narcotics) 23**, that such a retraction statement ought to be proved on record as per the provisions of the Evidence Act and it is for the maker of the statement to establish that the earlier statement made by him was involuntary and had been extracted by illegal means. After

discussing the credibility of the retraction statement of the respondent, the trial court was of the opinion that his statement as recorded in Ex.PW2/D did not appear to be voluntary in the light of the other evidence produced by the prosecution. Instead, the Court noticed that there was manipulation of documents in the present case. In support of the said observation, the court had noticed that the petitioner/DRI had not been able to place on record any independent material to corroborate the aforesaid statement allegedly made by the respondent.

15. The discrepancies in the evidence led by the prosecution and recorded by the court related to two public witnesses, namely, Shri Shyam Lal (PW3) and Shri Adam (PW4), who were allegedly joined by the IO, PW2 at the time of raid. In his testimony, PW4 had stated that he had not even visited the area where the raid had taken place and was unaware of the present case. He had further stated that he was an illiterate person and only knew how to sign in Hindi and that he had not visited the spot at Sanjay Gandhi Transport Nagar on the date of incident. The aforesaid witness was declared hostile. Coming to the next public witness, Shri Shyam Lal (PW3), material contradictions were found in his deposition as compared to the deposition of the IO, PW2 with regard to certain aspects pertaining to the apprehension of the respondent. The same have been duly brought out in para 36 of the impugned judgment.

16. One of such glaring discrepancy noticed by the trial court was that as per the IO (PW2), after the respondent was apprehended, upon being

asked about the presence of contraband substance on his person or in his bag, he had replied in the negative and he was introduced to the public witnesses before being questioned again regarding possession of contraband substance. However, according to the public witness (PW3), he was not introduced to the respondent at the place where he was apprehended. The trial court also noticed the fact that PW3 had tried to improve upon his case and cover up the lacunae in the prosecution case. Again, discrepancies as to the number of officers, who had participated in the raid and the number of vehicles that were used in the raiding team have also been adversely commented upon by the trial court in para 37 of the impugned judgment and the learned Special Judge concluded by observing that when the very constitution of the raiding team was under a cloud, how could it have provided corroboration to the prosecution case. Sealing of the case property by the petitioner/DRI was also found to be unsatisfactory as has been observed in para 38 of the impugned judgment. Lastly, the court had observed that there was no evidence placed on record by the prosecution to establish the presence of PW3 in the DRI office on 28.07.2009, when he had allegedly tendered his statement before the IO, PW2. Several other material discrepancies noticed in the prosecution evidence have been highlighted in paras 42 to 44 of the impugned judgment.

17. Having perused the impugned judgment and considered the submissions made by the counsel for the petitioner/DRI, this court is of

the opinion that the impugned judgment does not suffer from any manifest legal error, illegality, arbitrariness or perversity which deserves interference. Rather, this court is inclined to concur with the conclusion of the trial court that the petitioner/DRI had failed to satisfactorily discharge the onus placed on it, for convicting the respondent and therefore, benefit of doubt was rightly given to him. Accordingly, the present petition is dismissed, while upholding the impugned judgment.

JULY 29, 2013
rkb/mk

(HIMA KOHLI)
JUDGE