

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

+ CRL.A. 1110/2010

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Reserved on: 1st April, 2013
Decided on: 5th August, 2013

AMBROSE IHECHEROBI OKEKE

..... Appellant

Through Mr. Jitendra Sarin, Adv.

versus

D.P.SAXENA INTELLIGENCE OFFICER & ANR

..... Respondent

Through Mr. Satish Aggarwala, Mr. Sushil
Kaushik, Advs.

Coram:

HON'BLE MS. JUSTICE MUKTA GUPTA

1. By the present appeal the Appellant impugns the judgment dated 26th August, 2010 convicting him for offence punishable under Section 21(c) of the NDPS Act and the order on sentence dated 30th August, 2010 directing him to undergo rigorous imprisonment for a period of 10 years and a fine of Rs. 1 lakh and in default of payment of fine to undergo further simple imprisonment for three months.

2. Learned counsel for the Appellant contends that as per the secret information received at 6.45 AM on 22nd December, 2005 a person of African origin around 6 feet tall with the red and black bag containing some narcotic substance would cross the Roop Nagar roundabout, near Delhi University at about 10.30 AM. Thus, a raid was conducted and at 9.40 AM

the Appellant was allegedly apprehended at Roop Nagar roundabout. Since the place was not found to be conducive for search, the Appellant was taken to the office of the Respondent at ITO where a notice under Section 50, NDPS Act was given to him vide Ex.PW1/B. As per the notice under Section 50, NDPS Act it was stated that there was a specific information and there were reasons to believe that the Appellant was carrying narcotic drugs i.e. heroine on his person or in his shoulder bag. Thus, the so-called secret information was a total farce and before giving notice under Section 50 NDPS Act and conducting the search, the investigating agency was aware that the narcotic drug was heroine. The introduction of the word 'heroine' in the notice under Section 50 NDPS Act belies the version of the prosecution totally. Allegedly two public witnesses were called, however no member of the raiding party knew who called them and from where they were called. As per the prosecution case, the panchnama Ex.PW1/C was prepared at 1.30 PM, summons were served on the Appellant at 2.00 PM and a statement under Section 67 NDPS Act was recorded. He was formally arrested at 5.30 PM. On the same day between 4.00 PM to 6.00 PM, Room No. 9 of Virat Tourist Lodge at Pahar Ganj was searched where the Appellant was staying. From the search some US \$, Nigerian currency and air tickets were seized. This version of the prosecution is belied by the entry Ex.9/DX. Entry in the Foreign Guest Register of the hotel Ex.PW9/DX shows the time and date of departure of the Appellant as 22nd December, 2005 arrested by DRI Department, ITO Second Floor at 8.30 AM. Despite the fact that Government officials were available at and near the DRI office, the two panch witnesses allegedly joined with the investigation were those who did

not give their complete address and thus they could not be served and examined during the trial.

3. The defence of the Appellant is that he was arrested while leaving the Tourist Lodge in the morning and the handbag was planted on him. The time of seizure, arrest, place of apprehension are all shrouded in mystery. PW1 the seizing officer D.P. Saxena stated that he was accompanied by PW2, however PW2 stated that the apprehension of the Appellant did not take place in his presence. Though it is alleged that the Appellant was apprehended at Roop Nagar and thereafter taken to the DRI office where heroine was recovered from him, however the relevant entries in the valuable godown register Ex.PW4/A and B indicate that the place of seizure of heroine was Room No.9, Virat Tourist Lodge and place of seizure of currency was DRI. The version that the area of apprehension was not conducive to search is wholly incorrect as near the roundabout where the alleged apprehension took place, Roop Nagar Police Station is situated and the same cannot be said to be a place not conducive for search. As per the prosecution, DRI seal No. 10 was used in both the proceedings by different officials i.e. PW1 and PW3 on the same day. As per the evidence the seal was returned by PW1 after seizure proceedings which concluded at 1.30 PM. There is no entry in the seal movement register Ex.PW1/T of handing over the seal to PW2 for search proceedings at the Lodge between 4.00 to 6.00 PM. Admittedly the seizure proceedings were over by 1.30 PM on 22nd December, 2005, however the case property, sample and test memo were not deposited in the valuable godown on the same day but were deposited on the next day i.e. 23rd December, 2005. As per the noting, the sample and the test

memo were not even deposited in the godown. The entry made in the register Ex.PW4/A shows the place of seizure of heroine as Room No. 9, Virat Tourist Lodge. The alleged statement under Section 67 of the NDPS Act cannot be said to be voluntary as the same was recorded by the seizing officer PW1 himself. The Appellant sent his retraction vide letter dated 3rd January, 2006 from the jail at the earliest available opportunity. In view of the serious infirmities in the prosecution case the Appellant is entitled to be acquitted.

4. Learned counsel for the Respondent contends that the conviction of the Appellant can be based solely on his voluntary statement tendered under Section 67 of the NDPS Act Ex.PW1/F wherein he admitted the recovery, seizure and other incriminating facts. The voluntariness of the statement is evident from the fact that he was medically examined and no injury was found on him. Further when he was produced before the Court on 23rd December, 2005 he neither made any grievance nor filed any retraction application nor alleged false implication. The retraction application DW1/B forwarded along with letter Ex.DW1/A is meaningless, as the Appellant has not entered the witness box to prove this retraction application. Further the retraction, if at all, is highly belated, received by the Superintendent Jail on 12th January, 2006 or 13th January, 2006. There was no reason why the officers of the Respondent should falsely implicate the Appellant, as there is no enmity between them and the Appellant. The public witnesses were not deliberately withheld and the reports qua these witnesses were filed on 4th March, 2010. Further statements of these public witnesses were recorded under Section 67 of the NDPS Act and proved as Ex.PW1/A. Conviction

can be awarded on the sole testimony of the official witnesses and there is no reason to disbelieve the sole testimony of the official witness i.e. the seizing officer. The mentioning of words “narcotic drugs” i.e. heroine in the notice under Section 50 NDPS Act is not material. Further the witnesses have not been cross-examined on this point. The variation in the timing is also not material. Reliance is placed on *Somappa Vamanappa Madar Shankarappa Ravanappa Kaddi Vs. The State of Mysore AIR 1979 SC 1831*. There is no requirement in law of handing over the seals to the independent witnesses. The case property when produced before the Court and the samples when they reached the CFSL were found to be intact and in sealed condition. Reliance is placed on *Siddiqua Vs. NCB 2007 (1) JCC (Narcotics) 22*; *State of Punjab Vs. Lakhwinder and Anr. (2010) 4 SCC 402* and *Nirmal Singh Pehlwan Vs. Inspector, Customs (2011) 12 SCC 298*. The statement of PW 2 Shri R Roy that the Appellant was not apprehended in his presence is of no consequence as PW1 has not stated that the Appellant was apprehended in the presence of Shri R. Roy. The samples were drawn after homogenizing the mixture as stated by PW1 in his testimony. The difference in the weights received by the CRCL is insignificant. Reliance is placed on *Kulwant Singh Vs. NCB Crl.A. 248/1997 decided by this Court on 18th January, 2008*. The reliance on Ex.PW4/A and 4/B i.e. the entries in the register of Virat Tourist Lodge are inconsequential as PW4 A.C. Wadhwa in his cross-examination has clarified that the details were taken from him as per the inventory memo submitted by the I.O. The inventory memo Ex.PW1/L in column No. 1 states that the place and date of seizure is DRI, I.P. Estate. The non-entry in the seal movement register of handing over the seal to PW2 is an omission and is inconsequential.

5. Heard learned counsel for the parties. The prosecution case in nutshell as per the statement of PW1 Shri D.P. Saxena, Intelligence Officer DRI Headquarter, the complainant in the case is that an information was received in the morning of 22nd December, 2005 that at about 9.30 AM a person of African Origin would be crossing the roundabout at Roop Nagar, near Delhi University and would be carrying a red and black colour shoulder bag containing some narcotic drug. A team was constituted and the raid was conducted. At about 9.45 AM a person matching the description as available in the information was seen at the spot apparently waiting for conveyance. After introducing themselves, the raiding party stopped the Appellant and asked whether he was carrying any narcotic drug, to which he replied in the negative. He was informed about the specific information with regard to narcotic drug and since the place was not conducive for conducting search being a public place, the Appellant was asked to accompany the DRI officers to the office at I.P. Estate. At the DRI office again the Appellant was asked whether he was carrying narcotic drug to which he replied in the negative. A notice under Section 50 NDPS Act was prepared and the contents of the notice were read over and explained to the Appellant and in the notice he was also informed about his legal right of getting his bag and person searched before a gazetted officer or a Magistrate. The Appellant stated that the DRI officers could take the search of his person and of his red and black colour shoulder bag. On search of the shoulder bag 4 polythene packets were found which contained off-white colour granular powder from which a sharp smell was emanating. On testing with the field kit the same answered positive for heroine. The net weight of the recovered off-white coloured granular powder was 3.955 Kgs. All the 4 polythene packets were marked

X1 to X4. Two representative samples of approximately 5 grams taken from each packet were marked as X1A, X2A, X3A, X4A and X1B, X2B, X3B and X4B. The samples were then sealed in a paper envelope with DRI seal No. 10 and were duly signed by PW1, the Appellant and the panchas. The remaining case property along with the shoulder bag was kept in a trunk, wrapped and stitched with a white colour cloth, sealed with the DRI seal and a paper slip containing the signatures of the persons was affixed thereon. The test memos were prepared in triplicate which had the signatures of PW1 and the Appellant. The DRI seal was affixed on all the test memos.

6. As regards the contention of the learned counsel for the Appellant that though the information was only for a narcotic drug however the notice under Section 50 mentions narcotic drug i.e. heroine and thus the officers were aware of the contents and in fact they had planted the bag would be inferring too much from the little addition. PW1 had served the notice under Section 50 of the NDPS Act. He has been cross-examined on this aspect and no explanation has been sought from him in this regard. In *State of U.P. v. Nahar Singh (dead) and Ors. (1998) 3 SCC 561* it was held:-

“13. It may be noted here that that part of the statement of PW 1 was not cross-examined by the accused. In the absence of cross-examination on the explanation of delay, the evidence of PW 1 remained unchallenged and ought to have been believed by the High Court. Section 138 of the Evidence Act confers a valuable right of cross-examining the witness tendered in evidence by the opposite party. The scope of that provision is enlarged by Section 146 of the Evidence Act by allowing a witness to be questioned:

(1) to test his veracity,

- (2) to discover who he is and what is his position in life,
or
- (3) to shake his credit by injuring his character, although the answer to such questions might tend directly or indirectly to incriminate him or might expose or tend directly or indirectly to expose him to a penalty or forfeiture.

14. The oft-quoted observation of Lord Herschell, L.C. in *Browne v. Dunn* [(1893) 6 R 67] clearly elucidates the principle underlying those provisions. It reads thus:

“I cannot help saying, that it seems to me to be absolutely essential to the proper conduct of a cause, where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact by some questions put in cross-examination showing that that imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged, and then, when it is impossible for him to explain, as perhaps he might have been able to do if such questions had been put to him, the circumstances which, it is suggested, indicate that the story he tells ought not to be believed, to argue that he is a witness unworthy of credit. My Lords, I have always understood that if you intend to impeach a witness, you are bound, whilst he is in the box, to give an opportunity of making any explanation which is open to him; and, as it seems to me, that is not only a rule of professional practice in the conduct of a case, but it is essential to fair play and fair dealing with witnesses.”

This aspect was unfortunately missed by the High Court when it came to the conclusion that explanation for the delay is not at all convincing. This reason is, therefore, far from convincing.”

8. As regards non-examination of the public witnesses, Anil Kumar was a tenant and by the time he was called for examination he had vacated the

house. His present whereabouts were not known, thus he could not be examined. Further the address of Surjeet Singh was found to be incomplete and thus he could not be traced. However, the conviction can be based solely on the testimony of official witnesses if the same is reliable and trustworthy, as held by Hon'ble Supreme Court in *Kamarjit Singh Vs. State (Delhi Administration)* (2003) 5 SCC 291. The retraction of the Appellant is highly belated and would have no bearing on the voluntariness of the statement under Section 67 NDPS Act i.e. Ex.PW1/F. The statement under Section 67 NDPS Act Ex.PW1/F has been written by the Appellant in the own handwriting wherein he admitted having taken the narcotic drug in the morning. The retraction Ex.DW1/B along with the covering letter Ex.DW1/A though dated 3rd January, 2006 is signed by the Appellant on 10th January, 2006 and has been forwarded to the Court on 13th January, 2006 by the Deputy Superintendent. Central Jail. Retraction is thus clearly an afterthought and meaningless. The testimony of PW1 is duly corroborated by the statement of the Appellant duly recorded under Section 67, NDPS Act.

9. As regards discrepancy in the timings PW9 Kulwant Singh the owner of Virat Tourist Lodge has clearly stated that the entry in column No. 14 of Ex.PW9/B which reads as "22.12.05 8.30 AM arrested by DIR Department, ITO, 7th Floor" was written by him after the DRI officers had left. Though this witness states that the DRI officers visited the lodge at 8.30 /9.00 however he states that as per the DRI officials the Appellant was arrested at Roop Nagar. PW9 stated that he was asked to search Room No. 9 where the Appellant was staying and some foreign exchange and documents were

recovered which were taken into possession by the officers concerned. The inference from the testimony of PW9 and from the noting in notice Ex.PW1/B under Section 50 NDPS Act at best arises that without giving the notice under Section 50 NDPS Act the bag was checked from which heroine was recovered. In the present case the recovery of the contraband is from a shoulder bag and not from the personal search of the Appellant. In such a situation, requirement of a notice under Section 50 NDPS Act was not essential. The contention of the learned counsel that different seal No.10 was used in both the proceedings by different officials and the seal was handed back at 1.30 PM is incorrect. PW2 in his cross-examination clarified that there was only one seal of DRI No.10 and he handed over the same after 1.30 PM but could not say whether it was at 2.30, 5.30 or 8.30 PM . Thus only one seal of DRI No.10 was used. The discrepancies pointed out by the learned counsel for the Appellant are minor in nature. The prosecution has proved beyond reasonable doubt that the case property and the samples were properly secured with the seals and they were found intact when they reached the Court and the CFSL.

8. In view of the evidence on record in my opinion the prosecution has proved the case beyond reasonable doubt against the Appellant and no interference is warranted by this Court in the impugned judgment of conviction and order on sentence. Appeal is accordingly dismissed.

(MUKTA GUPTA)

AUGUST 05, 2013
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