

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

+ CRL.A. 998/2008 & CrI.M.A. 17384/2012

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Reserved on: 1st April, 2013

Decided on: 3rd May, 2013

MUHAMMAD JAVED

..... Appellant

Through: Mr. Puneet Singhal, Advocate.
Appellant in custody.

versus

THE STATE (NCT OF DELHI)

..... Respondent

Through: Mr. Satish Aggarwala, Advocate.

Coram:

HON'BLE MS. JUSTICE MUKTA GUPTA

1. By the present appeal the Appellant challenges the judgment dated 27th May, 2008 whereby the Appellant has been convicted for offence under Section 21(c) NDPS Act and the order on sentence dated 27th May, 2008 whereby he has been directed to undergo rigorous imprisonment for a period of 15 years and to pay a fine of Rs. 2 lakhs and in default of payment of fine to undergo further rigorous imprisonment for a period of two years.

2. Learned counsel for the Appellant contends that though the panchnamas and documents were signed by two independent witnesses, however they were not examined before the Trial Court. The apprehension was allegedly at the railway station, however no witness of either the railway department or railway Police has been associated. The co-traveller has neither been made an accused nor cited as a witness. Thus, the statement of the co-traveller under Section 67 NDPS Act cannot be read in evidence.

Form CFSL was not deposited in the malkhana. The case property was seized on 5th June, 1998, however the case property and the samples were deposited in the malkhana on 8th June, 1998 after a gap of 4 days. Thus, the chances of tampering cannot be ruled out. When the contraband was produced before the Trial Court it was found to be tampered with. Though it is alleged that from the personal search Rs. 792 and two railway tickets were recovered, however the railway tickets have not been made a part of the record. As per PW5 Dr. Y.K.S. Rathore, Senior Analyst, Department of Revenue Intelligence, Ministry of Finance, the samples were sealed with the seal of DRI No. 8, however as per PW1 and other witnesses the same were sealed with DRI seal No. 9. Thus, there is discrepancy in the seal. Further, there is discrepancy in the colour of the contraband recovered, as some of the witnesses stated that brown colour contraband was recovered whereas the others stated that light brown colour contraband was recovered. No proper receipt of goods were taken when the same were deposited with the malkhana. The version of prosecution is highly improbable. According to the prosecution the secret information was not noted down due to urgency, however they were in possession of the photograph. It is not known from where photograph of the Appellant was available with the investigating agency. The photograph has not been exhibited during trial. PW14 did not even know which vehicles were used to conduct the raids. She states that no notice under Section 50 was served in her presence. As per PW2 the statements and the entire writings were done at the DRI office. The Appellant had in fact been apprehended from the house of his relatives at Jama Masjid where he was staying after coming to India for medical treatment and falsely implicated in this case. Hence, the Appellant be

acquitted of the charges. In the alternative it is prayed that the Appellant had already suffered incarceration of around 11 years and 10 months, thus he be released on the period already undergone as already directed in the other case of the Appellant in CRL.A. 85/2005.

3. Learned counsel for the DRI on the other hand contends that PW5 has inadvertently stated that the samples were sealed with DRI seal No. 8, which fact is clarified as all other witnesses have stated that they were sealed with DRI seal No.9. Further all the documents on record fortify the case of the prosecution that the samples of the case property were sealed with the DRI seal No. 9. Thus, the Appellant cannot take advantage of a bonafide typographical error of number. In the testimony of PW5, the tickets from Ludhiana to Delhi which were recovered from the Appellant have been exhibited as Ex.P-1 and P-2. The co-traveller Ms. Hina was searched by PW14 and as nothing was recovered from her search, she was not made an accused. Since it was a secret operation, thus officers of the railways or the railway Police were not associated. There is no difference in the colour of the contraband recovered, as a few witnesses have stated the same to be brown and the others light brown which does not make a material difference. The learned Trial Court has clearly discussed the reason for non-examination of the panch witnesses as Inderpal had died before he could be examined before the Trial Court and witness Umesh Chander had left the given address and his present whereabouts were not known. No doubt, the seizure was effected on 5th June, 1998 and the case property and samples was deposited with the Moharar malkhana on 8th June, 1998 but this was on account of the holidays in between. The link evidence has been duly proved by the

prosecution. PW1 in his testimony before the Trial Court has clearly stated that the case property and the samples remained in his custody till they were deposited with the Moharar malkhana on the 8th June, 1998 and no one tampered the same. PW1 has not been cross-examined on this aspect and thus there is no challenge to this part of his testimony. Further, PW12 has clearly stated that when the case properties and samples were received the seal tallied with the fascimle DRI seal No. 9 and the seals were intact. There is no merit in the appeal and the same be dismissed.

4. Heard learned counsel for the parties. Briefly the case of the prosecution is that on 4th June, 1998 a secret information was received regarding narcotic drugs being brought by the Appellant which was reduced in writing. A raid was conducted and two persons i.e. the Appellant and one Ms. Hina were intercepted on Platform No.6, New Delhi Railway Station while alighting from coach S-10, Sarvodaya Express at 23.50 hours. The Appellant was carrying a mahroon colour suitcase and Ms. Hina was carrying a black colour leather handbag. When the Appellant and Ms. Hina were confronted regarding possession of narcotic drugs, the Appellant replied in the affirmative whereas Ms. Hina denied the possession. To carry out the search both the passengers were brought to the office of Directorate of Revenue Intelligence and two independent witnesses namely Inderpal and Umesh Chander were associated for the search operation. Section 50 notice was served on the Appellant and Ms. Hina. The Appellant gave his option in writing to be searched by gazette officer whereas Ms. Hina stated that she could be searched by any lady officer of DRI. Notice under Section 50 NDPS Act to the Appellant was exhibited as Ex.PW1/B and the one to Ms.

Hina was exhibited as Ex.PW1/C. On the personal search of the Appellant two railway tickets from Ludhiana to New Delhi Ex.P-1 and P-2 were recovered besides Indian currency, wrist watch and a metallic ring. Thereafter, search of the mahroon colour suitcase was conducted, however it was found to be number locked. The Appellant stated the number to be 000. Thereafter the suitcase was opened and it was found containing 9 white cloth stitched packets from which sharp pungent smell was emanating. The packets were taken out and marked as X1 to X9. All the packets had similar markings and pattern. On cutting open the cloth packets, sealed polythene pouches were recovered. In between sealed polythene pouches double khaki paper pouches were recovered which had brown coloured powder with sharp pungent smell. Small quantity of brown powder was tested by the field detection kit which gave positive for heroine. The gross weight of the packets were found to be 9.196 Kgs and the net weight to be 9.004 Kgs. Two samples of 10 grams each were drawn from all the packets after homogeneously mixing them, which were separately kept in zip-locked polythene packet marked as XA and XB. The envelopes were signed by the Appellant, Ms. Hina, two witnesses, the gazette officer and PW1. The case property and the samples were sealed with the seal of DRI No. 9 and thereafter the suitcase was wrapped in a white cloth and stitched with the seal of DRI No. 9. After the proceedings of panchnama, the seal of DRI No. 9 was handed over to Shri Alok Tiwari, Assistant Director DRI. A report under Section 57 NDPS Act was submitted to Shri P.K. Katiyar, Assistant Director on 5th June, 1998 vide Ex. PW1/A. Statements of witnesses, Appellant and Ms. Hina were recorded under Section 67 NDPS Act. Since 6th and 7th of June 1998 were Saturday and Sunday, the samples were

retained by PW1 and deposited in the malkhana on 8th June, 1998. PW1 also produced the original seal register wherein in column No. 3 it was mentioned that he took DRI seal No. 9 on 5th June, 1998 and deposited the same back on 5th June, 1998 in column No. 7 of the register. The version of PW1 is further fortified by the statement of PW4 P.K. Katiyar, Deputy Director DRI Headquarter, who was the gazetted officer in whose presence search was taken.

5. The contention of the learned counsel for the Appellant that the case property was not secured as the same was seized on 5th June, 1998 and deposited with PW12 Shri K.B. Singhal, the incharge valuable goods godown on 8th June, 1998 and is thus tampered with, is not substantiated. PW1 A.K. Prasad has clearly stated in his examination-in-chief that he deposited the seized goods in the godown of the Customs House, New Delhi on 8th June, 1998 with PW12 as 6th and 7th June were holidays and the case property could not be deposited in the godown. During this period the property remained with PW1 and none was allowed to tamper with the case property. Further, as per the evidence on record the seal after use was handed over by PW1 on the same day and on 8th June, 1998 when the case property was received by PW12 the seals were found to be intact.

6. It is next contended that there is discrepancy in the seal affixed. No doubt PW5 Y.K.S Rathore, Senior Analyst has stated that the samples received were sealed with the seal of Directorate of Revenue Intelligence No. 8 and marked as XA, however this version of PW5 is not supported by PW10 S.K. Mittal, Assistant Chemical Examiner, Customs House Kolkata who stated that the sample XA was received on 8th June, 1998 with the

facsimile of DRI No. 9 which tallied with the test memo. Further even as per Ex. PW4/C the test memo seal No. 9 of Directorate of Revenue Intelligence was affixed on sample marked XA and on the same test memo vide Ex.PW5/A PW5 has reported that the sample and the reference contained Diacetyl Morphine with 55.2 percentage purity.

7. As regards the non-examination of the public witnesses, the learned Trial Court in para 23 of the impugned judgment has noted that the public witnesses could not be examined in this case as Shri Inderpal was reported to have died as recorded in order sheet dated 9th December, 2012 and Shri Umesh Chander had left the given address. Thus, no adverse inference can be drawn against the prosecution for non-examination of the public witnesses. Further in the absence of deposition of public witnesses, the testimony of official witnesses does not get washed away.

8. The version of the Appellant that the railway tickets are not exhibited is also incorrect as the same have been exhibited vide Ex.P-1 and P-2 by PW1 before the learned Trial Court. The Appellant in his statement under Section 313 Cr.P.C. has stated that he was lifted from his friend's house at Jama Masjid and nothing was recovered from him or at his instance. However, the Appellant has not even examined the friend from whose house he states that he was lifted from. Thus, I find no infirmity in the impugned judgment convicting the Appellant for offence under Section 21(c) NDPS Act.

9. As regards the sentence imposed it may be noted that prior to the apprehension of the Appellant on 5th June, 1998 with approximately 9 Kgs of heroine, the Appellant was earlier involved in a case on 6th March, 1998

wherein recovery was made from Asif Parvej and Mohd. Akram who named the Appellant as an accomplice. The Appellant could not be arrested at the spot in the said case. On a trial being conducted, the Appellant was convicted vide judgment dated 2nd November, 2004 for having committed offences under Section 29 read with Section 21 of the NDPS Act and sentenced to undergo rigorous imprisonment for a period of 15 years, to pay a fine of Rs. 2 lakhs and in default to undergo simple imprisonment for a period of one year. In appeal before this Court learned counsel for the Appellant in the said case did not press the appeal on merits and confined his submissions to the quantum of sentence and prayed for leniency. Since out of 15 years of imprisonment, the Appellant had undergone 12 years, 10 months and 23 days i.e. substantial portion of the sentence, this Court taking a lenient view reduced the imprisonment of 15 years to the period already undergone and the fine from Rs. 2 lakhs to 1 lakh and in default to undergo simple imprisonment for a period of 1 year. Since the conviction for offences under Section 29 and 21 NDPS in the other case has not been challenged, the conviction in the present case amounts to a conviction for second offence which would entail an enhanced penalty under Section 31 of the NDPS Act and has to be more than 10 years imprisonment. Section 31 NDPS Act provides that if a person has been convicted for commission of, or abetment of, or attempt of criminal conspiracy of an offence punishable under this Act and is subsequently convicted for commission of offence or abetment of criminal conspiracy to commit an offence punishable under this Act with the same amount of punishment, then he shall be punished for the second and every subsequent offence with rigorous imprisonment for a term which may extend to one half of the maximum term of imprisonment and be

also liable to fine which may extend to maximum amount of fine. Further Sub-Section 2 of Section 31 provides that if a person is liable to be punished with a minimum term of imprisonment and to a minimum fine the minimum punishment for such person shall be one half of the minimum term of the imprisonment and one half of minimum amount of fine. Thus, the minimum sentence which can be awarded to the Appellant is 15 years of rigorous imprisonment and Rs. 1.5 lakh as fine. The sentence of the Appellant for rigorous imprisonment for 15 years is thus upheld, however the fine amount is reduced to Rs. 1.5 lakh and it is directed that in default of payment of fine the Appellant would undergo further one year imprisonment. Appeal is disposed off accordingly.

Crl.M.A. 17384/2012

By this application the Respondent/ applicant seeks permission to dispose of the case property. In view of the fact that the appeal filed by the Appellant has been decided, the Respondent is directed to dispose of the case property in accordance with the procedure laid down in the manual of the Directorate of Revenue Intelligence. A compliance report of the same be filed within four months.

Application is disposed of.

(MUKTA GUPTA)

MAY 03, 2013

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