

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

**RESERVED ON : 17<sup>th</sup> APRIL, 2014**

**DECIDED ON : 7<sup>th</sup> JULY , 2014**

**+ CRL.A.No.496/2012**

**DEEPENDER KUMAR @ CHHOTU ..... Appellant**

**Through : Mr.Chetan Lokur, Advocate.**

**versus**

**THE STATE OF NCT OF DELHI ..... Respondent**

**Through : Mr.M.N.Dudeja, APP.**

**CORAM:  
HON'BLE MR. JUSTICE S.P.GARG**

**S.P.GARG, J.**

1. Challenge in this appeal is to a judgment dated 08.02.2012 of learned Special Judge (NDPS) / Addl. Sessions Judge in Sessions Case No. 07/10 arising out of FIR No. 10/10 PS Narcotics Branch by which the appellant – Deepender Kumar @ Chhotu was convicted under Section 21 (c) of the NDPS Act. By an order dated 15.02.2012, he was sentenced to undergo RI for ten years with fine ₹ 1 lac.

2. Briefly stated, the prosecution case as unfolded in the charge-sheet was that on 04.02.2010 at about 05.05 P.M. near Bus Stop, Metro Station – Seelampur, Delhi, the appellant was found in possession of 500 gms. of Heroin having 0.73% diacetylmorphine, a contraband, without licence or permit. During investigation, statements of the witnesses conversant with the facts were recorded. The exhibits were sent to Forensic Science Laboratory for examination. After completion of investigation, a charge-sheet was placed before the Court concerned against the appellant; he was duly charged and brought to trial. The prosecution produced ten witnesses to further its case. In 313 statement, denying his complicity in the crime, the appellant claimed his arrest at Muzzafarnagar while going to meet his aunt (Bua) without producing defence. The trial resulted in his conviction as aforesaid. Being aggrieved and dissatisfied, he has preferred the appeal.

3. Learned counsel for the appellant urged that the Trial Court did not appreciate the evidence in its true and proper perspective and erred in relying upon the testimonies of police officials alone. Despite availability of independent public witnesses, no sincere efforts were made to associate them at any stage of the investigation. Counsel emphasized that inordinate delay of fifteen days in sending the sample to FSL was

fatal. Relying upon the judgment of this Court, '*Rishi Dev @ Onkar Singh vs. State (Delhi Admn.)*', CrI.A.No.757/2000 dated 01.05.2008, he contended that the delay beyond 72 hours was not permissible and there was every possibility of tempering with the sample and contraband. Learned Addl. Public Prosecutor urged that the delay per se was inconsequential as the prosecution was able to confirm that the sample remained intact throughout. Despite various requests by Investigating Officer to many individuals to join, none of them agreed to be a witness for one or the other reason. In the absence of cogent reasons, testimonies of police officials cannot be suspected.

4. Secret information received by PW-8 (SI Bhagwan Singh) at his office at 03.45 P.M. about the arrival of Deepender Kumar @ Chhotu, R/o Neem Ka Thana, Distt. Seekar, Rajasthan, to supply smack in retail and wholesale in Delhi at Bus Stand, Metro Station Seelampur, Delhi in between 05.00 P.M. to 05.30 P.M. led to recording of Daily Diary (DD) No.23 (Ex.PW-8/A) at 04.15 P.M. SI Bhgwan Singh testified that this DD was produced before Insp.M.L.Sharma who put his signatures at point 'B' and on his directions, he constituted a raiding party comprising of he himself, HC Mahesh Kumar and Const.Satpal. Insp.M.L.Sharma apprised about the secret information to ACP S.R.Yadav on telephone in his office

who directed to conduct a raid and to proceed in accordance with law. PW-10 (Insp.M.L.Sharma) corroborated the version given by PW-8 (SI Bhagwan Singh) in its entirety. The raiding team left for the spot in official vehicle No.DL-1CJ-3481 vide DD No.24 (Ex.PW-8/B) at 04.30 P.M. Compliance of provisions of Section 42 of the NDPS Act are not under challenge.

5. PW-8 (SI Bhagwan Singh), PW-4 (HC Mahesh) and PW-3 (Const.Satpal), all have deposed that on the way, SI Bhagwan Singh requested passersby standing at the Bus Stands at Pushta Road and Dharampura to join the investigation but none of them agreed. They admitted that no notice was served upon the public persons declining to participate in the proceedings and their names and addresses were not noted. It is true that no independent witness was associated in the raid. The Investigating Officer, has, however, given a reasonable explanation that despite requests made to many public witnesses at various stages, none agreed to join the investigation. I am in agreement with the learned Addl. Public Prosecutor for the State that many a times public witnesses exhibit reluctance to join police investigation to avoid repeated visits to the police station and the Court. In '*Ajmer Singh vs. State of Haryana*', 2010 (2) SCR 785, the Supreme Court held that it is not always possible

to find independent witnesses at all the places at all the times. The obligation to join public witness is not absolute. If the police officer is unable to join any public witness after genuine efforts, the recovery made by the police officer would not be vitiated. The Supreme Court held that in such circumstances, the Court will have to appreciate the relevant evidence to determine whether the evidence of a police officer is believable so as to place implicit reliance thereon. In the instant case, there are no cogent and valid reasons to discard / suspect the testimony of the police officials who had no prior acquaintance with the appellant and did not nurture any grievance against him. Record reveals that the appellant was a resident of village Mahava, PS Neem Ka Thana, Distt. Seekar, Rajasthan and had no familiarity with any of the member of the raiding team. The appellant did not give reasonable and plausible explanation about his presence that day at Delhi. He did not specify the specific motive or purpose to visit Delhi from his native place. In the cross-examination, it was suggested that he (the appellant) was threatened and forced to put his signatures on various memos at the place of his apprehension. Contrary and conflicting suggestions were put that due to presence of a crowd at the spot, the appellant who was innocent was picked up as suspect. In 313 statement, inconsistent and conflicting

defence was taken about his arrest from Muzzafarnagar while going to meet his aunt (Bua) without elaborating as to where she resided or by what mode of transport, he was going there. No such defence was put to police officials in the cross-examination. In the absence of prior enmity or animosity, members of raiding team unaware about the appellant's antecedents were not expected to falsely rope him in the case in Delhi.

6. PW-3, PW-4 and PW-8, members of the raiding team have given consistent version about the apprehension of the appellant at around 05.00 P.M. at the time of his arrival at the spot from GT road side, where he stood in wait for someone for few minutes at a distance of 15 metre from Bus Stand, Metro Station – Seelampur, Delhi. In compliance of Section 50 of the NDPS Act notice (Ex.PW-3/A) was served upon him. He declined the offer and the refusal was recorded as Ex.PW-3/B. On search of the appellant, from his right side pocket of the pant, a transparent polythene containing brown colour substance weighing 500 gms. was recovered. Out of it, two samples of 5 gms. each were taken and kept in small polythene pouches in pullandas marked 'A' and marked 'B'; the remaining 490 gms. of heroin was converted into a parcel given mark 'C'. SI Bhagwan Singh filled up form FSL, put up his seal 'BS' on all the three parcels and form FSL and prepared seizure memo (Ex.PW-3/C).

Rukka was handed over to Const.Satpal along with three parcels ('A', 'B' and 'C'), form FSL and copy of the seizure memo with the direction to hand it over to SHO, PS Crime Branch. PW-9 (Insp.Kuldeep Singh), SHO PS Crime Branch, corroborated PW-3 (Cont.Satpal)'s statement in this regard. At 09.30 P.M., he called MHC(M) HC Chand Ram with register No.19 in his office and deposited the articles. He also lodged DD No.10 (Ex.PW-9/A) at 09.55 P.M. Despite in-depth cross-examination, no material discrepancies could be elicited to disbelieve their version. Their testimonies on all relevant facts remained unchallenged in the cross-examination. Bare suggestions without substance were given to the prosecution witnesses denying the facts emerging in their examination-in-chief. Nothing was suggested as to why and for what purpose the appellant had arrived in Delhi. No ulterior motive was assigned to the police officials for falsely implicating him.

7. The prosecution examined PW-7 (SI Satyawan) who took over the investigation and recorded disclosure statement (Ex.PW-4/D) after appellant's arrest. He also prepared site-plan (Ex.PW-7/A); deposited personal search articles with the MHC(M) and recorded DD No.4 (Ex.PW-7/B) at 03.30 A.M. at Narcotics Cell, Shakarpur.

8. Indisputably, there was delay of fifteen days in sending the samples to FSL. PW-1 (HC Chand Ram), MHC(M) PS Crime Branch, recorded entry in register No.19 at Sl.No.26 (Ex.PW-1/A) showing deposit of three parcels ( 'A', 'B' and 'C'), form FSL duly sealed with the seals of BS and KSY along with carbon copy of the seizure memo. On 09.02.2010, sample mark 'A' along with FSL form was sent to FSL Rohini vide Road Certificate No. 46/21 (Ex.PW-1/D) as recorded in entry (Ex.PW-1/C). Const.Sohanpal handed over acknowledgment (Ex.PW-1/E) to him same day. On 24.05.2010, FSL result was received and the entry (Ex.PW-1/F) was made in register No. 19. PW-5 (Const.Sohan Pal) deposed that so long as the case property remained in his possession, it was not tempered with by anyone. PW-7 (SI Satyawar) in his testimony disclosed that on 19.02.2010, on the direction of the SHO PS Crime Branch the sample was sent to FSL Rohini through Const.Sohanpal vide RC No.46/21. In the cross-examination, no explanation was sought from him as to what were the compelling reasons to delay the sending of the samples to FSL. Similarly, PW-9 (Insp.Kuldeep Singh) was not cross-examined for the delay in sending the samples. Nothing was suggested to him if during the intervening period the samples were tempered with in any manner. The prosecution produced on record FSL report (Ex.PW-7/C)

which disclosed receipt of parcel in connection with case FIR No.10/10 dated 04.02.2010 under Section 21 of NDPS Act, Crime Branch, in their office on 19.02.2010 through Const.Sohanpal with its seals intact and tallied with the specimen seals. Apparently, when the sample parcel was received in the office of Forensic Science Laboratory (FSL), its seals were intact. Nothing was suggested to any of the prosecution witnesses if any prejudice was caused to the appellant due to sending of the samples after about fifteen days. The appellant's counsel could not produce on record any worthwhile document to show that 72 hours period in sending the sample to the FSL was mandatory and its non-compliance was fatal.

9. In '*Bilal Ahmed vs. State*', 2011 I AD (Delhi) 613, this Court categorically held that the delay in sending parcel to CFSL was not fatal when as per CFSL report its seals were intact and tallied with specimen seals. The delay of 59 days in sending the same was not considered fatal. Reliance was placed on '*Hardip Singh vs. State of Punjab*', 2008 (8) SCC 557, wherein it was held :

*"16. So far as the question of delay in sending the samples of opium to the Forensic Science Laboratory (FSL) is concerned, the same in our opinion has no consequence for the fact that the recovery of the said sample from the possession of the appellant stands*

*proved and established by cogent and reliable evidence led in the trial. PW 5 has categorically stated and asserted about the recovery of opium from the possession of the appellant, which fact is also corroborated by a higher officer, namely, SS Mann, DSP who was also examined at length during the trial. The said recovery was effected in the presence of the said SS Mann, DSP, as senior police officer, who also put his seal on the said parcels of opium.*

*17. The then Station House Officer, Inspector Baldev Singh, who was examined as PW 1, was posted at Police Station Ajnala on the date of occurrence. He received the said samples of opium along with case material, being produced before him by PW 5. It has come on evidence that Inspector Baldev Singh kept the entire case property with him till it was deposited in the office of the Chemical Examiner, Amritsar on 30.9.1997 through ASI Surinder Singh, (PW-3). It has also come on evidence that till the date the parcels of sample were received by the Chemical Examiner, the seal put on the said parcels was intact. That itself proves and establishes that there was no tampering with the aforesaid seal in the sample at any stage and the sample received by the analyst for chemical examination contained the same opium which was recovered from the possession of the appellant. In that view of the matter, delay of about 40 days in sending the samples did not and could not have caused any prejudice to the appellant. The aforesaid contention, therefore, also stands rejected.”*

10. In ‘Rattan @ Ratan Singh vs. State (Govt. of NCT of Delhi)’, 2013 II AD (Delhi) 288, delay of one month in sending sample was not taken as fatal. In ‘Jarnail Singh vs. State of Punjab’, AIR 2011 SC 964, the Supreme Court held :

*“15. Mr. Ujjal Singh then submitted that there was a delay of twelve days in sending the sample of narcotic for chemical examination. This submission, in our opinion, is without any factual basis. The trial court as well as the High Court, on examination of the entire material, concluded that there was sufficient independent evidence produced by the prosecution regarding the completion of link evidence. Therefore, the delay in sending the sample parcel to the office of Chemical Examiner pales into insignificance. We are of the considered opinion that mere delay in sending the sample of the narcotic to the office of the Chemical Examiner would not be sufficient to conclude that the sample has been tampered with. There is sufficient evidence to indicate that the delay, if any, was wholly unintentional. This Court had occasion to deal with a similar issue, in the case of Balbir Kaur v. State of Punjab : (2009) 15 SCC 795. The Court made the following observations:*

*As far as delay in sending the samples is concerned, we find the said contention untenable in law. Reference in this regard may be made to the decision of this Court in Hardip Singh case<sup>6</sup> wherein there was a gap of 40 days between seizure and sending the sample to the chemical examiner. Despite the said fact the Court held that in view of cogent evidence that opium was seized from the Appellant and the seals put on the sample were intact till it was handed over to the chemical examiner, delay itself is not fatal to the prosecution case.*

*The trial court as well as the High Court, on examination of the evidence on record, concluded that the case property was handed over by Ram Pal (PW4), Investigating Officer to the SHO Inspector Rachhpal Singh (PW3). This witness checked the case property and affixed his own seal bearing impression 'RS' on the case property as also on the sample impression of the*

*seal. The case property was deposited with MHC Sudh Singh on the same day. Sudh Singh appeared as PW1 in court and tendered his affidavit Ex. PA to the effect that the case property including the sample parcel and the specimen impression of the seal, duly sealed and intact was deposited with him by Ram Pal, PW4, on 23<sup>rd</sup> September, 1994. He also stated that he handed over the sample parcel, duly sealed and sample impression of seal to Constable Chet Ram on 4<sup>th</sup> October, 1994 for depositing the same in the office of Chemical Examiner. It was further stated that none had tampered with the aforesaid case property and the seal which remained in his custody. He ultimately deposited the case property in the office of Chemical Examiner on the same day and tendered receipt. This apart, there is a report of the Chemical Examiner (Ex. PJ) which indicates that the seals were intact when the sample was received and tallied with the sample impression of the seal. It is note worthy that such a report of the Chemical Examiner would be admissible under Section 293 of the Code of Criminal Procedure Considering the aforesaid clear evidence, it cannot be said that there is any infirmity in the link evidence merely because there was a delay of few days in sending the sample to the office of the Chemical Examiner.”*

11. The delay in the instant case for fifteen days per se thus is not consequential to throw away the prosecution case as a whole.

12. The prosecution examined PW-2 (HC Omprakash) who proved DD No.23 (Ex.PW-2/A & Ex.PW-2/B). Reports vide diary Nos.223 & 224 (Ex.PW-2/C & Ex.PW-2/D) were produced before

officiating ACP Rajinder Singh who put his signatures at point 'A' on Ex.PW-2/E & Ex.PW-2/F. Apparently, there was compliance of Section 57 of NDPS Act which is not in dispute.

13. No plausible explanation was offered by the appellant in 313 statement to the incriminating circumstances appearing against him. He did not examine any witness in defence to prove if he was present at some other place on that day. He even did not examine any of his family members to substantiate his plea that on that day he was on visit to his aunt (Bua)'s house. No ulterior motive was assigned to the prosecution witnesses to falsely implicate him in this case for any mala-fide reason. No material discrepancies could be extracted in the cross-examination of the PWs and their statements on material facts remained unchallenged. The Trial Court has dealt with all the contentions of the appellant minutely in the impugned judgment and the findings are based upon fair and proper appreciation of the evidence which need no intervention.

14. Regarding sentence order, the minimum substantive sentence prescribed for the crime has been awarded which cannot be altered or modified. The sentence order is modified to the extent that default sentence for non-payment of fine ₹ 1 lac will be SI for three months only.

Other terms and conditions of the sentence order are left undisturbed.

15. The appeal stands disposed of in the above terms. Trial Court record be sent back forthwith with the copy of the order. A copy of the order be sent to the Superintendent jail for information.

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

**JULY 07, 2014 / tr**