

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

+ **CRL.A. 1122/2012**

Judgment reserved on : 02nd April, 2014

% Judgment pronounced on : 29th April, 2014

ASHIF KHAN @ KALLU Appellant

Through: Ms.Rakhi Dubey, Advocate.

versus

STATE Respondent

Through: Mr.O.P.Saxena, APP for the State
Along with SI Karamveer, Narcotics
Cell, P.S. Shakarpur, Delhi.

CORAM:
HON'BLE MS. JUSTICE DEEPA SHARMA

JUDGMENT:

1. The present appeal has been filed against the order of conviction of the appellant dated 11th July, 2012 for the offence under Section 21 (b) of the Narcotics Drugs and Psychotropic Substances Act (hereinafter referred to as 'the NDPS Act') and order on sentence dated 17th July, 2012 in Sessions Case no.97/2007 in FIR No.87/2006, PS Narcotics Branch.
2. The brief facts are that SI Sunil Jain (PW9), the Investigating Officer on receiving a secret information at about 1.30 p.m. recorded the same as

D.D.No.10A (Ex.PW8/A) and produced the secret informer before the SHO of Narcotics Branch Inspector Kharak Singh (PW8). He conveyed the said information to ACP Mehar Singh on telephone in compliance of the provisions under Section 42 of the NDPS Act. On being directed by Inspector Kharak Singh (PW8), IO/SI Sunil Jain (PW9), Constable Om Prakash, HC Satbir (PW6) HC Vijay Pal (PW10) and secret informer along with his investigating kit reached at the spot in vehicle no.DL 1CF 3426 driven by Ct.Parveen at about 2.00 p.m. after making departure entry as DD No.11A (Ex.PW9/A). On refusal by the public persons to join investigation, the raiding party took their respective positions and saw the appellant coming from the side of Seelampur Red Light on foot and he was identified by the secret informer who thereafter left the spot. When after waiting for about 3-4 minutes, the appellant tried to move away, the raiding party apprehended him. The legal rights of the appellant were apprised to him. He was also informed about the secret information which the police party was having and he was also informed about his rights to get his search conducted in the presence of a gazetted officer or a magistrate and was offered the search of the raiding party and that of official vehicle prior to his search and on refusal of the appellant (Ex.PW6/2) to the offers, a notice under Section 50 of the NDPS Act (Ex.PW6/1) was given to him. At that

stage efforts were also made to include the public persons into the search and on their refusal, search of the appellant was conducted and from his right side pocket of wearing pant smack was recovered. Its weight was found to be 320 gms. Thereafter two samples of 5 gms. each were taken out and were sealed into a parcel and FSL form was filled and the remaining smack was also sealed into a separate parcel and all the three parcels were given the marking of 'A', 'B' and 'C'. Seal of "5BPSNBDELHI" was affixed on all the four articles and these were seized vide memo Ex.PW6/3. Seal after use was handed over to HC Satbir. Rukka Ex.PW9/B was prepared and HC Vijay Pal (PW10) was sent to the Police Station along with three FSL Forms and carbon copy of the seizure memo and the rukka and he on reaching at police station handed over the rukka to Duty Officer ASI Ghasi Ram (PW3) and handed over the articles along with parcels to SHO Kharak Singh (PW8) who had fixed his seal "1SHONBRDELHI" on three parcels and FLS Form and put FIR No. and his signatures on all these articles and thereafter handed over the same to MHCM HC Jagdish Prasad (PW7) who made relevant entries in the Register No.19 and deposited these articles along with FSL form into the Malkhana vide entry Ex.PW7/A. On the basis of DD no.14A (Ex.PW3/3), FIR No.87/2006 (copy of which is Ex.PW3/2) was registered and

endorsement (Ex.PW3/1) on the rukka was made. Entry of closure of the FIR was also made vide DD No.16A (Ex.PW3/4). Subsequent investigation was handed over to ASI Anoop Singh (PW5) who on reaching at the spot took over the investigation from SI Sunil Jain (PW9). He prepared the site plan (Ex.PW5/1) on the pointing out and arrested the accused-appellant vide arrest memo Ex.PW5/3 and conducted his personal search vide memo Ex.PW5/4. The articles recovered on the personal search of the accused-appellant includes carbon copy of notice under Section 50 of NDPS Act (Ex.PW6/4) and cash amount of Rs.170/-, one wrist watch, one golden chain, one black colour purse containing some visiting cards and documents etc. He remained at the spot till 10 p.m. and reached at the police station at 10.45 p.m. and produced the accused-appellant before SHO Inspector Kharak Singh (PW8) and articles of personal search of appellant were deposited with MHCM. Report (Ex.PW2/3) under Section 57 of the NDPS Act was prepared and forwarded to senior officers by Insp.Kharak Singh (PW8) which was received in the DCP office vide diary No.4419 and 4420 (copy of which is Ex.PW2/1). The original report under Section 57 of NDPS Act received in the office of DCP is Ex.PW2/2. The samples were sent to FSL on 18.10.2006 by MHCM HC Ishwar Singh (PW4) vide RC No.126/21 (Ex.PW4/C) and acknowledgement receipt (Ex.PW4/B) was

obtained. The sample Mark A which was sent to FSL was chemically analysed by Dr.Madhulika Sharma, Assistant Director (Chemistry), Forensic Science Laboratory, Rohini, Delhi and she submitted her report bearing no.FSL.2006/C-3524 dated 02.01.2007 which is admissible in evidence under Section 293 of the Code of Criminal Procedure, 1973.

3. The prosecution had examined ten witnesses who have duly supported the prosecution case.

4. After considering the arguments of learned counsel for the appellant and of learned APP for the State, the trial court had convicted the appellant for the offence under Section 21 (b) of the NDPS Act.

5. The main arguments which has been put forth in the appeal is that there was a delay of 25 days in depositing the samples to FSL, Rohini and that Constable Mahesh who took the sample even prior to the date 18.10.2006 and the same could not be deposited in the FSL was not examined by the prosecution and thereafter chances of tampering of the sample cannot be ruled out.

6. The same contention had been raised by learned counsel before the trial court as well. The trial court has very elaborately dealt with this argument. The relevant portion of the trial court judgment is quoted as under:

Para 21. “.... I do not find any merit in this submissions of the Ld. Defence Counsel as the prosecution witnesses have deposed in a consistent and trustworthy manner, regarding the recovery of the contraband from the possession of the accused, the seizure of the case property, preparation of the samples and deposition of the samples at the Malkhana and sending of the sample to the FSL, Rohini for chemical analysis and thereafter, receiving the remnants of the sample alongwith the FSL Report, at the Malkhana.

22. Furthermore, it has been held by the Hon'ble High Court of Delhi in the case of Bilal Ahmed Vs. State, reported as 2011(1)JCC 27, as under: “

10. I also do not find any merit in the contention that the form FSL was not deposited in the malkhana or that the same was not sent to the CFSL. PW3 Inspector Jeevan Singh has stated that the form FSL was filled and the pulanda was taken into possession vide Seizure Memo Ex. PW3/A. He took the pulanda and the FSL form in his possession along with the seizure memo and deposited the pulanda and FSL form along with a copy of the seizure memo in the malkhana on 2nd May, 1999 at around 10 p.m. The testimony of PW3 Inspector Jeevan Singh also finds support from the testimony of PW 9 Bhagmal Singh who also states that the samples and pulanda were deposited with him duly sealed with the seal of R.K. and J.S. He made the entry in the register No.19, Ex. PW9/A. The contention that the form FSL was not sent to CFSL Chandigarh, is unfounded. The CFSL report Exhibit PX states that “Seals were intact, and tallied with specimen seals impressions”. The seals on the samples cannot be tallied except with the specimen seals on the FSL form. Thus, even without

specifically stating that form FSL has been received with the samples, this endorsement clarifies that the form FSL was received. Delay in sending parcel to the CFSL is not fatal especially when as per the CFSL report, the seals are intact and tallied with the specimen seals. In State of Rajasthan v. Daul @ Daulat Giri MANU/SC/0881/2009 : 2009 (14) SCC 387 it was held:

1. The factual scenario goes to show that Jaswant Singh (PW.1), the I.O., seized the articles on 15/6/1995. The search memo is Ex. P.4 and the specimen impression of the seal Ex. P.5. PW.1 deposited the seized articles and sample with Bhanwarlal (PW.8) who was the Malkhana In Charge in the Malkhana register in Ex. P.15A. PW.8 handed the material to Surendera Singh (PW.5) for depositing the sample in FSL. PW.5 reached the Superintendent of Police office and gave the samples to Jamnalal at 10.00 a.m. and received back the samples from Jamnalal at 5.00 p.m. and also obtained forwarding letter which is Ex. P.12 and is dated 20/6/95. PW.5 submitted the samples to FSL and obtained acknowledgment receipt it is Ex. P.13. The role of Jamnalal is very limited; that is receiving sample at 10.00 a.m. and handing samples back at 5.00 p.m. It is not understandable as to how the non examination of Jamnalal in any way affected the veracity of the prosecution version. The High Court came to an attempt and unsustainable conclusion that because Jamnalal was not examined “possibility of the sample having been tampered with could not be ruled out”. The conclusion is unsustainable in view of the FSL report which

clearly stated that the seals were intact and matched with the specimen seals.

11. In Hardip Singh v. State of Punjab MANU/SC/7956/2008 : 2008 (8) SCC 557 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 Chemical Examiner, Amritsar on 30.9.1997 through ASI Surinder Singh, (PW3). 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.”

23. In the present case also, IO SI Sunil Jain has categorically stated that he sealed the samples with his seal of '5BPSNBDELHI', after recovery of the contraband from the accused. HC Vijay Pal has also categorically stated that he took the sample with other case property and the documents and handed over the same to SHO, Inspector Kharak Singh at PS Narcotics Branch. Inspector Kharak Singh has also stated that he put his initials and particulars of the case on the documents and the sealed parcels and also affixed his seal of '1SHONBRDELHI' and handed over the parcels and the documents to the MHCM. The MHCM have also categorically stated in the Court that the samples were not tempered, during the time, it remained in their custody. PW1 Ct. Satpal, who took the sample parcel Mark A for deposition at FSL, Rohini on 18.10.2006 has also stated that the seals were intact and the samples were not tempered by anybody, till the time, it remained in his custody. FSL Report dated 02.01.2007 also states that the sample seals were intact and was tallied with the specimen seal impression forwarded alongwith the FSL form. In view of the depositions of these witnesses, it cannot be said that the samples were tempered. Therefore, the delay in sending the samples to the FSL, Rohini for chemical analysis is not fatal to the present case.”

7. From this it is apparent that the learned trial court has correctly reached to the conclusion after considering the evidences on record and also relying on the case law that the delay in sending the sample is well explained and there is no evidence on record to suggest that during this period there was any tampering of the sample.

8. I have also perused the trial court record.

9. The learned counsel for the appellant has failed to point out even an iota of the evidence on record to suggest that there was tampering of the samples. Argument of learned counsel, therefore, has no merit.

10. The next argument which has been raised by learned counsel for the appellant is that the entire case of the prosecution is based on the testimonies of the police witnesses and although the recovery had been made at a public place and the availability of the public persons at the spot is also not denied by the prosecution, but still the prosecution has not made any person a witness to the recovery. It is further argued that this makes the recovery doubtful.

11. There is no doubt that the recovery has been made from the accused at public place. The investigating officers have duly explained that they had asked several persons to join the investigation but all of them had

refused. There is no doubt that today in the society there is apathy in the public. Even if somebody is lying in an injured condition, people just look at the injured and walk away. It is very seldom that people stop and try to help the injured or make an effort to remove the person to a nearby hospital. This court as well as the apex court has been crying about the insensitivity of public in catena of cases. It is a hard fact that nobody wants to get involved into police cases. People are becoming on lookers. When they are asked to witness anything they just show their difficulty and try to stay away. In view of this apathy of the public, the police have to act on their own. It, thus, cannot be said that because public persons were not made a witness, the entire proceedings are vitiated. The prosecution has successfully proved the due compliance of the entire procedure laid down under the various provisions of NDPS Act and in the cross-examination of the prosecution witnesses, there is nothing to create a doubt in the testimonies of the witnesses. Merely because the prosecution witnesses are police officials, they do not cease to be a competent witness. If the police official had witnessed the offence, he is a competent witness and his testimony cannot be doubted merely because he happens to be a police officer. Non-joining of a public person specially when the reason has been well explained is not fatal to the prosecution case and the conviction can be

safely based on the testimonies of the police officials who have fully corroborated each other orally and their testimonies are corroborated by the documentary evidences on record. The omissions and commissions of minor nature in the testimonies of these police officials are not fatal especially when in discharge of their official duties, they witness many such crimes. In order to be entitled to benefit of doubt, the appellant-accused has to show on record such evidences which by preponderance suggest his false implications. The appellant-accused has failed to point out any evidence on record, showing his false implication.

12. Learned counsel for the appellant has also argued that the punishment of five years and fine of Rs.50,000/- is towards higher side and it be reduced.

13. From the record, it is apparent that accused is not a first offender. He has been convicted and punished in other case under NDPS Act in FIR No.43/2002 under Section 21/29 of NDPS Act of PS Narcotics Branch.

14. In view of the previous conviction of the accused-appellant the sentence and fine is not towards higher side.

15. The appeal has no merit. Same is dismissed.

16. Trial court record be sent back along with copy of this order.

17. The Registry is directed to send a copy of the order to the Jail Superintendent, Central Jail, Tihar for compliance and to supply the same to the appellant.

DEEPA SHARMA, J.

APRIL 29, 2014

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