

IN THE HIGH COURT OF DELHI AT NEW DELHI

CRL.A. 1367 of 2010

Reserved on: December 19, 2014

Decision on: December 24, 2014

MOHD. AFZAL

..... Appellant

Through: Mr. Anurag Jain, Advocate.

versus

STATE (NCT OF DELHI)

..... Respondent

Through: Ms. Isha Khanna and
Mr. Rajat Katyal, APPs with SI G.D. Joshi,
Special Cell.

CORAM: JUSTICE S. MURALIDHAR

J U D G E M E N T

24.12.2014

1. This appeal is directed against the impugned judgment dated 22nd September 2010 passed by the learned Special Judge, NDPS in SC No. 38 of 2008 convicting the Appellant for the offence under Section 21(c) of the Narcotic Drugs and Psychotropic Substances Act, 1985 ('NDPS') and the order on sentence dated 23rd September 2010 sentencing him to rigorous imprisonment ('RI') for ten years with fine of Rs.1 lakh and in default to undergo simple imprisonment ('SI') for six months.

2. The case of the prosecution is that on 23rd December 2006, Sub-Inspector ('SI') A.K. Singh of Special Cell (PW-5) received a secret information that the Appellant, a Pakistani national who was in Delhi, would come to deliver heroin to his Punjabi contacts near PVR Plaza, Connaught Place at 9.30 pm. PW-5 then took the secret informer to

Inspector Devender Singh (PW-4) who verified the information and produced him before the Assistant Commissioner of Police ('ACP') Rishipal who directed them to conduct raid. A Daily Diary ('DD') No. 17 was recorded in the *roznamcha* and a copy was sent to the ACP, Special Cell.

3. A raiding party comprising PW-5, PW-4, Sub-Inspector Satender Sangwan, Head Constable ('HC') Balraj, HC Baljender Singh and Constable Naresh (PW-7) proceeded to the spot in two private vehicles with the informer. They reached the PVR Plaza, Connaught Place and requested 4-5 passersby to join the proceedings but none agreed.

4. Around 9.30 pm, a person came from the side of outer circle on foot with a white polythene bag in his right hand. He stood near 'no parking sign board' waiting for someone. He was pointed out by the secret informer. After waiting for about 10 minutes when he starting going towards the outer circle, he was apprehended. The raiding officer introduced himself to the Appellant and told him about the information received and gave him a notice under Section 50 NDPS Act apprising him of his right to be searched before a Gazetted officer or a Magistrate which he declined. Prior to his search some passersby were again requested to join the proceedings as witnesses but they refused.

5. The polythene bag carried by the Appellant was searched. Inside it was a black polythene bag which was found to contain 2 kg heroin. Two samples of 50 grams each were taken out and given marks S1 and S2. The remaining case property was given mark E. The bags and the samples were sealed with seal of AKS and counter sealed by PW-4 with the seal of

DS. Form FSL was filled on the spot on which same seal impression was affixed. The seal was returned to PW-4 and a seizure memo was prepared. A *rukka* was sent from the spot along with the FSL form, case property, the samples and the copy of the seizure memo through HC Bijender (PW-8) to the Police Station ('PS').

6. After registration of the FIR, PW-8 produced the case property before the Station House Officer ('SHO') Inspector Parasnath (PW-3) who put a seal of PNC on it and deposited it in the *malkhana*. Further investigation was conducted by Sub-Inspector (SI) Binay Singh (PW-6). He prepared the site plan, arrested the Appellant and recorded his disclosure statement under Section 67 NDPS Act. The sample was sent to Forensic Science Laboratory ('FSL') through PW-7. When analysed the sample tested positive for the presence of diacetylmorphine ('DAM') with purity of 19.6%.

7. After investigation the Appellant was sent for trial and charged with the aforementioned offence. Nine witnesses were examined by the prosecution. In his statement under Section 313 of the Code of Criminal Procedure ('Cr PC'), the Appellant denied the evidence and claimed to have been falsely implicated. He claimed to have been picked up forcibly from the place near PCO Turkman Gate, taken to the office of the Special Cell at New Friends Colony where he was tortured and his signatures were obtained on many blank papers. He denied that anything was recovered from his possession or at his instance.

8. The Appellant examined Mohd. Ashfaq as DW-1. He was the uncle of the Appellant who had come from Pakistan to meet him. On 23rd

December 2006 when he was going for *namaz* he noticed 5-6 persons taking away the Appellant. When DW-1 enquired they informed him that the Appellant would be released after half an hour. Later he came to know that the Appellant had been arrested.

9. During the course of the trial, at the instance of the Appellant, another sample was sent for testing to the FSL. By its report dated 26th November 2009 the FSL determined the sample to contain DAM with purity of 14.34%. The trial Court concluded that this reduction might be due to passage of time and change in atmospheric conditions. It noted that when the case property and the samples were produced in the Court, their seals were intact and no tampering was observed. The trial Court also dealt with the plea of the Appellant regarding the weight of the remaining consignment to be less than it should have been after accounting for the weight of the sample removed from the total consignment of 2 kg. The weight was 1.764 kg where it should have been 1.882 kg. Here again the trial Court held that since no tampering in the case property was highlighted at any stage of the proceedings and the objection was not taken at the initial stage when the case property was produced in the Court, no benefit could be given to the Appellant on this count.

10. The trial Court also came to the following conclusions:

- (i) From the evidence of the prosecution witnesses (PWs), it was apparent that there was no tampering at any stage with the samples which were sent to the FSL.
- (ii) On material aspects there was no contradiction in the testimonies of the PWs. The contradictions, if any, in their were not so glaring as to suspect the veracity of the prosecution case.

(iii) The failure to join public witnesses by itself was not fatal to the case of the prosecution.

(iv) The case of the defence that the Appellant was falsely implicated was without basis. Such a huge quantity of heroin could not have been planted on the Appellant.

(v) There was no specific complaint made by the Appellant about torture when he was taken to hospital for his MLC. The letter pad brought by DW-1 with the numbers of two telephones installed in his shop showed that there was no need for the Appellant to go to a PCO to make a call.

(vi) The presumption under Section 35 read with Section 54 NDPS Act stands attracted in the present case. The Appellant failed to rebut the presumption by any credible explanation as to how he was found in possession of commercial quantity of heroin thereby committing offence under Section 21 (c) NDPS Act.

11. During hearing of the present appeal, on the aspect of the reduction in the percentages of DAM as detected in the second sample, on 29th September 2014 the Court passed the following order:

“1. The case of the prosecution is that the Appellant was found in possession of 2 kgs. of heroin on 23rd December 2006. The first sample sent to the Forensic Science Laboratory (‘FSL’) was received by the prosecution on 24th January 2007. In the FSL report dated 21st March 2007, signed by Dr. Madhulika Sharma, it was noticed that the sample was a cream coloured powder with lumps and the percentage of diacetylmorphine (‘DAM’), as per the gas chromatography examination, was 19.6%. Further, it was opined that the parcel sent to the FSL, marked S-1, was found to contain Monoacetylmorphine (‘MAM’), Acetyl Codeine and DAM.

2. During the examination of one of the prosecution witnesses (PW-4), when the samples were opened in the Court, it was noticed that the substance was of a light brown colour. That led to the Appellant filing an application for re-testing, which was allowed by the learned trial Court by its order dated 14th September 2009. Thereafter, a sample of 18 gms. was drawn and sent again for testing to the FSL. The second report of the FSL is dated 26th November 2009. It notes inter alia that the parcel (X-1) contained 'brown coloured coarsed material' and that on subjecting it to chemical tests, chromatography and instrumental methods, it was found to contain Acetylcodeine, MAM and DAM and that the percentage of DAM was 14.34%.

3. Subsequently, on the application of the Appellant, which was allowed by the learned trial Court on 1st July 2010, the total consignment was re-weighed. It was found to weigh 1.764 kgs. The learned trial Court noted in the impugned judgment that, after accounting for the weight of the samples drawn, the total consignments should have weighed 1.882 kgs.

4. One of the issues before the learned trial Court was whether both the samples sent for testing to the FSL came from the same source. It was contended on behalf of the Appellant that, with there being a difference in the colour and texture, percentage of DAM and in the overall weight, the benefit of doubt ought to be given to the Appellant.

5. One interesting feature of the case was that the scientific expert, Dr. Madhulika Sharma, who authored both the FSL reports dated 21st March 2007 and 26th November 2009, was not examined as a witness. In the impugned judgment, the learned trial Court has noted that the prosecution failed to explain the variations in the overall weight of the consignments but that "no tampering in the case property was highlighted at any stage of the proceedings." As regards the variation in the percentage of DAM, the learned trial Court simply concluded in para 22 that "This may be due to passage of time and change in atmospheric condition. When the case property and the samples were produced in the Court, their seals were intact and no tampering was observed."

6. In the considered view of the Court, the differences in the percentages of DAM, the difference in the colour and texture and the difference in the weight of the consignments were required to be explained by a scientific expert and could not have been opined on by the learned trial Judge.

7. In a similar situation, in *Nnadi Iheanyi v. Narcotics Control Bureau* (Crl. A. No. 1416 of 2010), this Court had, by an order dated 4th January 2014, sent back the case to the trial Court to summon and examine the scientific expert on the question whether the purity percentages could vary with the passage of time, and, if so, to what extent and under what condition. The permission was given to the parties to examine and cross-examine the said witness.

8. Accordingly, in the present case, the Court considers it appropriate to direct the learned trial Court to record the deposition of Dr. Madhulika Sharma, the author of both the aforementioned FSL reports. The trial Court record be sent back and the case be listed before the learned Judge Incharge, Patiala House Courts ('PH Courts') on 15th October 2014. The learned Judge Incharge will allocate the case to the concerned Court dealing with NDPS cases and list it before the said Court on 3rd November 2014. To avoid wastage of time, summons will straightway be issued to Dr. Madhulika Sharma by the Judge Incharge, PH Courts to appear with the concerned FSL records of the case before the Court concerned on 3rd November 2014. The examination and the cross-examination of the said witness will be completed not later than one month thereafter. The trial Court record be sent back to this Court with the transcript of the evidence by the next date.

9. It is clarified that all the other points are also available to be urged by learned counsel for the Appellant before this Court, when the matter is taken up for hearing on the next date.

10. List on 8th December 2014.

11. A copy of this order along with the trial Court record be sent forthwith to the learned trial Court.

12. *Dasti.*”

12. Thereafter the scientific expert, Dr. Madhulika Sharma, (PW-10) was examined once again in the trial Court and cross-examined by learned counsel for the Appellant. After receipt of the transcripts of the said evidence, when hearing was resumed, at the request of learned APP for the State, PW-10 was also present. It transpired that some of the originals of the documents which were relevant to the case had not been tendered earlier. On 11th December 2014 the Court passed the following order:

“1. Dr. Madhulika Sharma, Deputy Director, FSL, Rohini is present in Court. She has brought with her the originals of the documents pertaining to the testing of the samples on 6th March 2007 and 26th November 2009.

2. Learned APP makes an oral request, in terms of Section 391 Cr PC, for permission to tender the said document through the witness as additional evidence. The prayer is vehemently opposed by learned counsel for the Appellant who submits that there was no reason why these documents should not have been tendered before the trial Court itself when the witness was examined there as PW-10 on 3rd and 13th November 2014. He submits that entertaining the prayer of the learned APP at this stage would cause serious prejudice to the Appellant.

3. The documents sought to be tendered by the witness are the originals of some of the documents that were exhibited in the trial Court. For some reason, the reverse of some of the documents, which appear to be computer-generated printouts were not exhibited before the Court. The Court is unable to view this failure by the witness to tender the originals as a deliberate attempt to keep back evidence. In order to get to the truth of the matter, it is important that the complete documents are on the judicial record. At the same time the opportunity to the accused to challenge the said evidence should not be denied.

4. Accordingly, the Court allows the oral prayer of the learned APP and proceeds to record the further evidence by way of examination-in-chief of Dr. Madhulika Sharma (PW-10).

5. A copy of the complete set of documents tendered today in evidence has been provided to learned counsel for the Appellant as well as APP.

6. Mr. Anurag Jain, learned counsel for the Appellant states that he needs some time to cross-examine the witness on her deposition recorded today. Dr. Madhulika Sharma is accordingly bound down for her cross-examination on 15th December 2014 at 2.15 pm.

7. A copy of the transcript of evidence of Dr. Madhulika Sharma recorded today be given to learned counsel for the Appellant as well as APP under the signature of the Court Master.

8. List on 15th December 2014 at 2.15 pm."

13. Further examination-in-chief of PW-10 was recorded in the Court on the same date, i.e., 11th December 2014. *Inter alia* she produced the originals of the entire documents along with photocopies in relation to both first and second testing of the samples which took place on 6th March 2007 and 26th November 2009 respectively. The photocopies of the two sets of documents were marked as Ex.PW10/DB-1 to Ex.PW10/DB-4 and as Ex.PW10/DC-1 to Ex.PW10/DC-7. Copies of the said documents were handed over to learned counsel for the Appellant. PW-10 was cross-examined by Mr. Jain on 19th December 2014. Final arguments were heard on the same date.

14. The central plank of the submissions of Mr. Jain revolved around the difference in DAM percentages detected in the testing of the two samples,

the first being conducted on 6th March 2007 and the second on 26th November 2009. His submission was that a combination of three factors, viz., difference in the colour in the two samples, the unexplained reduction in the DAM percentage and the unexplained difference in the overall weight of the total consignment made it extremely doubtful that the two samples came from the same source. This meant that the samples were not tamper-proof and the doubt in this regard should go to the benefit of the Appellant.

15. Referring to the decision of this Court in *Nnadi K. Ihenyi v. Narcotics Control Bureau 2014 (4) RCR (Crl) 563* Mr. Jain submitted that no credible explanation was forthcoming from PW-10 qua marked differences in the purity percentage and in particular the failure to fully account for it in scientific terms. Mr. Jain further submitted that the answers given by PW-10 were evasive and only to help the prosecution. He submitted that PW-10 had failed to account for the difference in the overall weight of the balance consignment which instead of 1.882 kg was only 1.764 kg. He urged that even after the cross-examination of PW-10 on two occasions, one before the trial Court and thereafter before this Court, the difference in the purity percentage of DAM in the two samples remained unexplained. She also failed to explain the change in the colour of the consignment from cream coloured powder with lumps to light brown colour. This raised serious doubts as to whether both the samples came from the same source. Mr. Jain submitted that in view of the decision of the Supreme Court in *State of Himachal Pradesh v. Jai Lal AIR 1999 SC 3318*, this Court was not bound by the expert opinion and the benefit of doubt ought to be given to the Appellant, thus acquitting him of the offence under Section 21 (c) of NDPS Act.

16. On the other hand Ms. Isha Khanna, and Mr. Rajat Katyal, learned APP for the State submitted that deductions in the present case were different from those in *Nnadi K. Iheanyi* (*supra*). There, no credible explanation was given for the difference in the percentage of monoacetyl morphine (MAM). It was submitted that the observation in para 44 of the *Nnadi K. Iheanyi* that “the increase in MAM contents were observed to be corresponding to the decrease in their respective heroin (DAM) contents” did not require an exact proportional decrease in the percentage of DAM which compared to the increase in MAM. In the present case, Ex.DW-10/DB-2 and 3 and Ex.DC-4 and 5 made clear that the two samples came from the same source. The increase in the area of MAM in the second test report corresponded with the decrease in the area of DAM.

17. The above submissions have been considered. In the first test report dated 6th March 2007 (Ex.DW-10/DB-1) on the gas chromatography examination, the purity of DAM was found to be 19.6%. The gas chromatography result was exhibited as PW-10/DB-2. The area count of MAM and DAM are indicated in the worksheet and marked as Ex.PW-10/DB-3. The area count of MAM is 19480 and DAM is 421766. This formed the basis of calculating the DAM percentage as 19.6.

18. Turning to the next test result of the second testing that took place on 26th November 2009, the test report Ex.PW-10/DC-1 showed that the percentage of DAM was 14.34. The calculation sheet was exhibited as Ex.PW-10/DC-2. The gas chromatography sheet was marked as Ex.PW-10/DC-4 with the area of the components, i.e., acetylcodeine, MAM and DAM indicated in another sheet (Ex.PW-10/DC-5). The area count is computer-generated data which is written by hand by PW-10 below it for

greater clarity. As far as the second test report is concerned, in her examination-in-chief conducted on 11th December 2014 PW-10 clarified as under:

“4. The witness has looked at the document Ex.PW10/DC-5 and states that “looking at the area of the peaks of monoacetylmorphine (MAM) diacetylmorphine (DAM), the area of MAM has increased a number of times as compared to DAM. The area is approximately proportionate to the concentration of the substance and, therefore, it is important to see the area of the peaks.”

5. Looking to the gas chromatograph in respect of the test conducted on 6th March 2007, Ex.PW10/DB-3, it is seen that the area of DAM is approximately 4,21,766 whereas the area of MAM is 19,480. In the second test i.e., Ex.PW-10/DC-5, the area of DAM is 46,475 and the area for MAM is 76,845. There is an increase in the MAM as compared to DAM. In my view both samples have come from the same source.”

19. Mr. Jain cross-examined PW-10. When asked on what basis she concluded that both the samples came from the same source, PW-10 answered that since the components, viz., MAM, DAM and acetylcodeine were found present in both the samples, she came to the said conclusion. As regards the method followed by her in determining the area counts of MAM, PW-10 informed that “I have not calculated. It is reading of the instrument, generated by software, on the basis of which it has been stated in this report that the area as 19,480 for MAM.” She clarified that the calculation was arrived at by using the computer software.

20. PW-10 has given a credible explanation for the reduction in DAM percentage in the second test and the corresponding increase in MAM. Although the Court is not bound by scientific expert evidence, and had in fact found it to be inadequate in *Nnadi K. Iheanyi (supra)* that cannot be

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said of the present case. PW-10 had deposed at three different occasions and clarified all the possible queries that arose on reading of the two test reports. Even if there was no clear explanation for the reduction in the overall weight of the balance consignment (1.764 kg instead of 1.882 kg) that still does not help the Appellant in showing that both samples could have come from different sources.

21. Even as regards the colour of the sample, with passage of time that certainly cannot be expected to remain the same. Again these factors by themselves do not persuade the Court to hold that the samples did not come from the same source. It requires to be noted that there is no serious challenge to the link evidence which shows that samples remained untampered when sent to the FSL for re-testing.

22. On examining the evidence in the case, the Court is of the view that no error can be found in the conclusion reached by the trial Court, and the case against the Appellant for the offence under Section 21 (c) of NDPS Act has been proved beyond reasonable doubt. The sentence awarded to the Appellant by the trial Court in terms of Section 21 (c) of NDPS Act does not call for interference. The appeal is accordingly dismissed with no order as to costs.

S. MURALIDHAR, J.

DECEMBER 24, 2014

Mg/Rk