

IN THE HIGH COURT OF DELHI AT NEW DELHI

CRL.A. 1416 of 2010

Reserved on: August 6, 2014

Decision on: September 4, 2014

NNADI K. IHEANYI Appellant

Through: Mr. Rahul Tyagi and
Mr. V.V.P.Singh, Advocates.

versus

NARCOTICS CONTROL BUREAU ... Respondent

Through: Mr. Rajesh Manchanda and Mr. Rajat
Manchanda, Advocates.

CORAM: JUSTICE S. MURALIDHAR

JUDGMENT

04.09.2014

1. The Appellant challenges the judgment dated 29th September 2010 passed by the Special Judge - NDPS in SC No. N-58/08 convicting the Appellant for the offence under Section 21(c) of the Narcotic Drugs and Psychotropic Substances Act, 1985 ('NDPS Act') for being found in possession of 292 gms. of heroin as well as the judgment on sentence dated 6th October 2010 whereby he was sentenced to rigorous imprisonment (RI) for ten years along with a fine of Rs. 1,00,000 and in default, to undergo simple imprisonment (SI) for six months.

The case of the prosecution

2. The case of the Respondent, Narcotics Control Bureau ('NCB') is that a secret information was received by them that the Appellant would come from Chandigarh by bus on 5th December 2007 at around 5 am at the Inter State Bus Terminal ('ISBT'), Kashmere Gate, Delhi with a huge quantity of heroin in order to deliver it to some Indian at the Exit gate of ISBT. On 5th December 2007, at 3:05 am, the Intelligence Officer ('IO'), Manoj Kumar (PW-8) collected the seal of NCB, DZU-1 from the Superintendent and proceeded to the spot with his team comprising four more officers. At the spot, an independent witness, Rajiv Chauhan joined them. The informer was also present. The team took position near the Exit gate, Ring Road.

3. At around 5:15 am, the Appellant came out from the Exit gate and started waiting for someone. After 15-20 minutes, when the Appellant moved, the raiding party encircled him. The IO disclosed his identity and briefed the Appellant regarding his right to be searched before a Gazetted Officer or Magistrate. He proceeded to serve upon the Appellant a notice under Section 50 of the NDPS Act. The Appellant is stated to have declined to be searched before a gazetted officer. When the Appellant was searched, he was found to be carrying a rucksack bag in which there were two polythenes containing off-white powder which tested positive for heroin. The consignment weighed 4 kg. Two samples of 5 gm each were taken out from each polythene and marked as A and B and given mark A-1 to A-2 and B-1 to B-2. The samples were then sealed with the seal of NCB, DZU-1 using

paper slips. The test memo in triplicate was prepared on which the seal impression was appended. A seizure memo was prepared by the IO on which the *panch* witness and the appellant also signed.

4. The Appellant was issued summons under Section 67 of the NDPS Act. He is stated to have tendered his statement inculcating himself in the alleged recovery and trafficking of the contraband. The seized contraband was deposited with the *malkhana* and the seal was returned to the Superintendent. The Appellant was arrested. The samples A1 and B1 were sent to Central Revenue Control Laboratory ('CRCL') through Hawaldar Shiv Ratan (PW-2) along with the forwarding letter and the test memo. The CRCL found that the samples contained diacetylmorphine ('DAM') with the purity percentages of 57.1% and 61.4% respectively. The statement of the *panch* witness was recorded. After investigation, the complaint was filed against the Appellant. He was charged under Section 21(c) of the NDPS Act. Nine witnesses were examined by the prosecution.

5. In his statement under Section 313 Cr PC, the Appellant claimed that he had been falsely implicated; he had been picked up from his house and nothing was recovered from him.

The trial Court judgment

6. The learned trial Court in its impugned judgment concluded that there was substantive compliance with Section 42 of the NDPS Act. A perusal of the information noted down (PW-8/1) showed that a

substantive part of it had been recorded which led to the recovery. On the question of tampering with the case property, although there was overwriting on the seal movement register, PW-9 had stated that the overwriting was made in the presence of PW-8. A perusal of the record showed that there was nothing to infer that the entry was tampered with. The time of issue of seal and return of seal was mentioned in the register (Ex. PW-7/1) and this was duly corroborated by PW-8.

7. The learned trial Court next dealt with the differences in purity percentages of DAM in the two samples. During the trial, since there was a discrepancy in colour and texture, fresh samples were drawn and sent to CRCL for re-analysis. The second report disclosed the DAM percentages as 7.2% and 7.4% respectively. The second samples were drawn three years after the incident. The learned trial Court observed “due to change in atmospheric condition and other changes, the purity percentage could go down.” It was further observed “If re-sampling is done after a gap of considerable duration, then great variation in percentage of active content can occur due to the reason that (i) natural products are prone to get infected with bacterial and fungal micro organism, which causes a change in chemical composition of organic material by decomposition partly or fully; fast deterioration of a material will occur due to effect of light, high temperature and humidity. It is not the case that the illicit heroin was manufactured in the laboratory. Even on re-examination the sample was found to contain diacetylmorphine. No tampering with the

sample/case property at any stage is seen. In the absence of any evidence to the contrary, it cannot be doubted that the recovery was not made in the manner it is alleged to have been made.”

8. The trial Court concluded that even if the purity percentage was taken as per the second report then the actual quantity of heroin worked out to 292 gm, which was a commercial quantity. The scale which the NCB used for weighing the samples on the spot was different from the scale used in CRCL and, therefore, the variation in the weight of the sample could be explained. It was noted that nothing could be inferred from the testimonies of PWs 1 and 8 that the sealed envelope containing the samples received in the CRCL had been tampered with.

9. On the failure to examine the *panch* witness, Rajiv Chauhan, the learned trial Court noted that the summons were issued to this witnesses on 15th December 2007 for his appearance on 4th January 2008, but it was not the case that the summons were delivered at his address or sent by post. The fact of the said public witness joining the raiding party was spoken to by PWs 4 and 5. Nothing could be inferred from their testimonies that the independent witness was only "named on papers". As regards not joining the officials from the ISBT, it was noticed by the trial Court that when the accused was arrested, it was around 6 am and therefore still dark. One independent witness was already with the NCB officers at that time.

10. The trial Court held that the mere fact that the prosecution witnesses were the NCB officers was not enough to discard their evidence. They had no motive to falsely implicate the accused. The learned trial Court accepted the testimonies of PWs 4, 5 and 8 as being reliable and trustworthy. The personal details given by the Appellant in his statement under Section 67 of the NDPS Act appeared to be truthful. The fact that some part of the statement was not written by the Appellant did not mean that it was involuntary.

11. Accordingly, the Appellant was convicted under Section 21(c) of the NDPS Act and sentenced as mentioned hereinbefore.

The failure to examine the panch witness

12. There were three grounds urged by Mr. Rahul Tyagi, learned counsel for the Appellant, the first of which concerned the non-examination of the *panch* witness, Rajiv Chauhan. According to the prosecution, Rajiv Chauhan was present with them at the time of the arrest of the Appellant, on 5th December 2007. His left thumb impression was found on the seizure memo (Ex.PW-8/3).

13. Ten days after the arrest of the Appellant, summons dated 15th December 2007 were issued to Rajiv Chauhan (Ex.PW-8/8), with the address in the summons written as “Rajiv Chauhan, s/o Harpal Chauhan, resident of E-15/12, G.T.K. Road, Delhi.” He was asked to appear before the NCB at 10:30 am on 4th January 2008. It is not clear whether Ex. PW-8/8 was in fact dispatched to Rajiv Chauhan at his

postal address and delivered there. In his testimony PW-8 stated that pursuant to the summons issued to Rajiv Chauhan “he appeared on 04.01.08 and his statement written by me as requested before Shri Ajay Kumar, IO.” In his statement, Rajiv Chauhan gave his address as "E-15/2, G.T. Karnal Road, Delhi.” Rajiv Chauhan is shown to have appended his left thumb impression on the said statement.

14. During the trial, court summons was issued to Rajiv Chauhan to appear and depose as a Prosecution Witness. The proceedings of the learned Special Judge- NDPS dated 15th July 2009 noted “summons of PW Rajiv Chauhan received with the report that the address given is incomplete. Director, NCB is directed to verify himself about the address and depute an IO for service upon this public witness.” The next date was fixed for 14th and 15th September 2009. The noting on the side of the order sheet showed that Rajiv Chauhan was summoned for 15th September 2009.

15. However, the date for 15th September 2009 was cancelled and the date for his examination was changed to 12th January 2010. On that date, the order passed by the learned Judge noted “PW Rajiv Chauhan is not present as his summon received back unserved due to incomplete address.” On 13th January 2010, the learned trial Court noted that the Court had received a report dated 12th January 2010 stating that the address of the witness was false. The order passed on 13th January 2010 reads: “PW Rajiv Chauhan be served through IO

Manoj Kumar at the address mentioned on the summon given under Section 67 NDPS Act.”

16. The order of the next date, 31st March 2010, reads “summon of Rajiv Chauhan not served since IO Manoj Kumar is on medical rest.” On 1st April 2010, again Rajiv Chauhan was not present. The order reads “PW/IO Manoj Kumar and Rajiv Chauhan be summoned for prosecution evidence for 21.5.2010.” On 21st May 2010, PW Rajiv Chauhan was not produced. Only PW-8 was present and his examination-in-chief was concluded. The case was then adjourned to 24th May 2010.

17. On 24th May 2010, the order of the trial Court read: “Summons for Rajiv Chauhan received back with the report that the address given in the summons is incomplete. Summons of this witness be given dasti to IO, Manoj Kumar. He is directed to get it served personally. Director, NCB is directed to monitor the service and submit action taken report on separate letter addressed to the Court.” On 26th July 2010, the order noted “summons on PW Rajiv Chauhan received back with the report that address is incomplete.” It was then noticed “no other PW remains to be examined.”

18. It is thus seen that despite the repeated directions given to the IO to personally serve the summons himself on Rajiv Chauhan and to the Director, NCB to monitor the effecting of service and file a report, the directions were not complied with by the NCB.

19. Copies of the summons prepared for Rajiv Chauhan on different dates are on the judicial record. The first of the summons issued to Rajiv Chauhan from the learned trial Court was dated 17th April 2009. The address was the same as that in the summons issued to him under Section 67 NDPS Act, i.e., E-15/12, G.T.K. Road, Delhi. On the reverse of the said summons was an endorsement of Rajesh Kumar, Driver Grade-II, NCB that the summons could not be served since the address was incomplete. A similar report was given for the next date, i.e., 15th July 2009, for which date summons was again issued to the very same address, knowing fully well that the address was incomplete. The endorsement on the reverse of the summon dated 15th July 2009 said that on "G.T.K. Road, there is an address E-15, but there is one Naresh Jain living there and in the E-Block, E-15/12 is not there".

20. By this time, it was clear that there was no such address as E-15/12, G.T.K. Road, Delhi and yet again on the next date, i.e., 12th January 2010, when the summons dated 14th September 2009 was issued, it was again sent to the same address. Naturally, the endorsement on the reverse of this summon also said that the address was false. The endorsement in English read that "family of Mr. Jain is living in E-15 and no E-15/12 in the E Block of G.T.K."

21. For the hearing on 31st March 2010, summons were addressed to Rajiv Chauhan, this time at E-15/2, G.T.K. Road with an endorsement "through IO, Shri Manoj Kumar." However, as noted in the order

dated 31st March 2010, this summons could not be served since the IO was on medical rest. Summons were again issued on 7th May 2010 to Rajiv Chauhan to appear on 21st May 2010. However, the address was the same that was already noted as being incomplete i.e., E-15/12, G.T.K. Road. On the reverse of the summons the report of the process server was that the address was incomplete.

22. It appears that despite knowing fully well, on more than four dates, that the aforementioned address - E-15/12, G.T.K. Road - was incorrect or incomplete, summons were repeatedly sent to the same address and with the same result. Thus, a totally futile exercise was indulged in. On one occasion, when the address was changed to E-15/2, G.T.K. Road, the summons were not served since the IO was unwell.

23. For the last time, on 13th July 2010, summons were again prepared for Rajiv Chauhan and sent to E-15/12, G.T.K. Road for the hearing on 26th July 2010. Not surprisingly, the summons were not served. It was noted in the order dated 26th July 2010, that a report was received mentioning that the address was incomplete.

24. It was submitted by Mr. Rajesh Manchanda, learned counsel for the Respondent NCB, that the summons ought to have been sent to E-15/2, G.T.K. Road and that the failure to do so could not be attributed to the NCB. He went on to urge that if the Appellant was so keen to

have Rajiv Chauhan examined as a witness then he should have got him summoned by have summons issued to the above address.

25. The above submission conveniently ignores the position that it is the duty of the prosecution to ensure the presence of its witnesses. It was the responsibility of the NCB to provide the correct address of the witness and ensure that the process was served at the said address. Once it was known from the report on the reverse of the summons for the hearing on 15th July 2009 that the address furnished by the NCB was incomplete, there was no justification in getting summons prepared for the two subsequent dates for the address at E-15/12 G.T.K Road. The process server had noted that one Mr. Jain was residing in E-15, G.T.K. Road, Delhi and that there was no E-15/12. In the circumstances, it was incumbent on the NCB to ascertain the correct address of Rajiv Chauhan. Further, on two occasions, the trial Court directed the service of summons to the said witness through the IO, since he was the only public witness. On the first occasion, when such an order was passed on 13th January 2010, the trial Court was informed that the direction could not be complied with since the IO was unwell. On the second occasion, when such an order was passed, on 24th May 2010, the Director, NCB was called upon “to monitor the service and submit action taken report on separate letter addressed to the Court.” The said order was not complied with. If only NCB had taken effort of finding out what was written on the reverse of the summons, it would have been obvious that the summons was being sent repeatedly to an address, which was incomplete and not correct.

This points to an abject failure on the part of NCB to produce the *panch* witness for examination in the Court. The responsibility for producing the said witness cannot be shifted to the accused. The prosecution was given at least six opportunities and deliberately failed to take steps to find out the correct address and serve the summons on such correct address.

26. The lapse of the NCB points to another difficulty. The summons issued to the *panch* witness in the very first instance by the NCB during investigation, gave the address as E-15/12, G.T.K. Road, Delhi. The summons was dated 15th December 2007. Rajiv Chauhan was asked to appear before the NCB on 4th January 2008. He is stated to have appeared pursuant to the said summons. The NCB failed to explain how it managed to get the summons in the first instance served on Rajiv Chauhan at an address that was either incomplete or false.

27. The doubt regarding the correct address of Rajiv Chauhan raises the further doubt whether Rajiv Chauhan actually existed or not. In his cross-examination PW-8 maintained:

“The public witness Rajiv Chauhan was stout built, wheatish complexion and about 5’8”feet height. I do not remember whether Rajiv Chauhan has moustache or not. It is incorrect to suggest that no person named Rajiv Chauhan exists or that the proceedings were joined by any public witness named Rajiv Chauhan. It is incorrect to suggest that the thumb impressions obtained on various documents relating to this case are fake.”

28. Nevertheless, the inescapable conclusion is that the NCB having failed to produce the named *panch* witness who was shown as being present at the time of arrest and seizure, there remains a serious unexplained doubt whether such a witness in fact existed. The trial Court appears to have overlooked the above features of the prosecution case and easily accepted the explanation that the witness was perhaps not served with the summons in the first instance by post. That was a surmise which was not warranted. In the process, the trial Court overlooked its own orders requiring service of summons upon Rajiv Chauhan through the IO and calling for a report from the Director, NCB.

29. The evidence of PWs 4 and 5, both NCB officers, stating that Rajiv Chauhan was associated in the arrest and search of the Appellant was at best self-serving and not re-assuring when summons were repeatedly received back unserved stating that the address given for Rajiv Chauhan was either incomplete or false. The first line of Rajiv Chauhan's statement under Section 67 NDPS Act recorded that he appeared pursuant to the summons issued to him. If the address given on the summons was false or incomplete, then the onus of proving how Rajiv Chauhan appeared on his own before the NCB on 4th January 2008 was squarely on the prosecution and that burden was not discharged by it.

30. In a large number of cases involving the NCB, there is a failure to produce the *panch* witness named. There are cases where *panch*

witnesses are not associated at all and it is sought to be explained by the prosecution that despite its request no person from the public came forward to join in the raid. The latter explanation has been accepted by some Courts by taking judicial notice of the fact that the members of the public are generally reluctant to be involved in criminal cases as witnesses. However, in a case where the NCB specifically names a public witness as being associated in the arrest and seizure, its failure to produce such person for cross-examination must be specifically explained by it.

31. In the present case the failure to produce the public witness was attributable to a false address given for the witness. This raises serious doubts as to whether such a witness existed at all. It will amount to falsification of the trial Court record if the thumb impression on the arrest and seizure memo is attributed to a witness who is not able to be produced and it is shown that the address given for him, even in the first instance in the summons issued by NCB, was false. This casts serious doubts on the trustworthiness of the prosecution version and in that circumstance the benefit of doubt should certainly go to the accused.

Retracted statement of the Appellant under Section 67 NDPS Act

32. The other conclusion, on an analysis of the above evidence concerning the *panch* witness, is that there is no independent corroboration of the arrest of the Appellant, the seizure from him of

the contraband and the recording of his statement under Section 67 of the NDPS Act.

33. This assumes importance since admittedly the Appellant had retracted his statement under Section 67 of the NDPS Act. Learned counsel for the Appellant referred to a document dated 19th December 2007 addressed by the Appellant to the Court of the learned Magistrate, which is at page 349 of the trial Court record, retracting his confession. This was at the earliest possible point in time. The trial Court record however contains only the order sheets from 2nd June 2008 onwards. Therefore, it is not possible to ascertain whether the said retraction was taken on record. In any event, it is seen that while making the statement, the Appellant was in custody. This is clear from the answers given by PW-8 in his cross-examination, when he speaks of the Appellant being apprehended even before his statement was being recorded.

34. Another feature to be noted is that the Appellant did not write the statement himself. Although he appears to have written the first paragraph and the last line, in the one paragraph written by him he stated “I am not in a position to write my statement. So, I request Ajay Kumar to write my statement on my dictation.” The MLC of the Appellant also showed that he had received an abrasion behind the right ear. He also mentioned his being tortured in the retraction statement at page 349 of the trial Court record.

35. In *Union of India v. Bal Mukund (2009) 2 JCC (Narcotics) 76*, it was observed that if accused persons are “interrogated while they are in custody, it cannot be said that they have made a voluntary statement which satisfy the conditions precedent laid down in Section 67 of the Act.” Even in that case, the Supreme Court found it difficult to accept that the confessional statement was voluntary “although they had not been put under arrest. As the authorities under the Act can always show that they had not been formally arrested before the said statements were recorded, a holistic approach for the aforementioned purpose is necessary to be taken.” Therefore, the second ground on which the Court is inclined to give benefit of doubt to the Respondent is that the confessional statement made by him is not shown to be voluntary.

Purity of the samples

36. As regards the purity of the samples taken by the NCB from the seized contraband, it was noticed earlier in the trial Court proceedings itself that a second set of samples had been sent for testing and that there was a considerable difference in the purity percentage. While in the first set of samples the purity of DAM was 51.7% and 61.4%, the purity of DAM in the second testing of the samples was 7.2% and 7.4%. The learned trial Court held that this was due to change in atmospheric conditions “and other conditions.”

37. During the pendency of the present appeal, this Court heard

extensive arguments on the above aspect and passed the following order on 6th January 2014:

“Arguments heard.

During the course of arguments, it is pointed out by the learned counsel for the appellant that the samples sent to CRCL for analysis were found to contain heroin (diacetylmorphine) having purity percentage of 57.1 per cent in one sample and 61.4 per cent in the other, whereas when the samples drawn in the Court on 9.8.2010 were analysed, the purity percentage in one sample was found to be 7.2 per cent and in the other sample it was found to be 7.4 per cent. The learned trial Judge has taken the following view on the aforesaid difference in the purity percentage:

'...The difference in purity percentage was observed in the two reports as the earlier report indicated the purity of diacetylmorphine in the recovered substance as 57.1% and 61.4% while the second report disclosed the percentage as 7.2% and 7.4%. It is relevant to mention that the second sample was drawn after about three years of incident and due to change in atmospheric condition and other changes, the purity percentage could go down. The illicit seized NDPS material of natural, semi synthetic in origin i.e. opium, charas, Ganja and heroin etc. Are non homogeneous in nature, hence if re-sampled, sample variation in contents of active substances will occur. If re-sampling is done after a gap of considerable duration, then great variation in percentage of active content can occur due to the reason that (i) natural products are prone to get infected with bacterial and fungal micro organism, which causes a change in chemical composition of organic material by decomposition partly or fully, fast deterioration of a material will occur due to effect of light, high temperature and humidity. It is not the case that the illicit heroin was manufactured in the laboratory. Even on re- examination the sample was found to contain diacetylmorphine. No tampering

with the sample/case property at any stage is seen. In the absence of any evidence to the contrary, it cannot be doubted that the recovery was not made in the manner it is alleged to have been made. The observations in the case of *Rahul Saini* supra were only on the bail application and not on the merits of the case. Even otherwise in the present scenario, the second report would be considered for calculating the purity percentage with which the actual quantity of heroin comes to 282 grams.'

The learned counsel for the appellant submitted that the view taken by the learned trial Judge was not based either on the deposition of the expert or upon any scientific study undertaken in this regard. He also submits that since the purity percentage cannot go down to the extent it has gone down in the present case, even after three (3) years between the analysis of the first sample and the analysis of the second sample, the natural inference would be that the sample which was initially sent to CRCL was not drawn from the same case property which was produced before the court, meaning thereby that there has been tampering with the case property. The request made by the learned counsel for the appellant is to remand the matter back to the trial court to summon the author of the second report, namely Ms. Meenakshi Gupta, and examine her on the question as to whether the purity percentage can vary with the passage of time and if so to what extent and under what conditions. He further submits that in case the author of the report is not available, the Director, CRCL or any other expert deputed by him can be examined on this aspect of the case. Of course, according to him, the appellant will have to be given an opportunity to examine the expert as and when he/she is examined by the trial court.

The learned Special PP seeks an adjournment to take instructions on the request made by the learned counsel for the appellant, hence, renotify on 9.1.2014.

Dasti under the signature of the Court Master to Mr.

Rajesh Manchanda, Special PP.”

38. Pursuant to the above directions, the learned trial Court summoned Dr. Mahesh Kumar for recording his statement. This witness was examined over three dates. What was significant in his cross-examination was that he clarified a few important aspects on the two test reports – the first obtained from CRCL before the trial commenced and the second during the trial. The first sample was received by CRCL on 6th December 2007. The report dated 12th March 2008 showed the DMA purity percentage as 57.1% in the parcel A-1 and 61.4% in parcel B-1. The report (exhibit CW-1/A) enclosed a computer generated Chromatogram which showed seven peaks. The witness himself pointed out the seven peaks. The sixth peak referred to DAM; the fourth to internal standard (IS). It was mentioned that these were two component names. However, this witness clarified in reply to a specific question that it was correct that the fact that seven peaks were shown meant that there were seven constituents, including IS and solvent.

39. There are two known constituents of heroin. One is Monoacetylmorphine (MAM) which is obtained upon hydrolysis of the main constituent DAM. This was confirmed by the witness himself. He stated that after a sample containing DAM, MAM and impurities undergoes hydrolysis for more than a period of two years “the percentage DAM will go down and that of MAM will increase.” With

reference to Ex. CW-1/A he confirmed that peak No.5 could be MAM and its quantity was far less than DAM in the said sample.

40. The witness was then shown a second test report of CRCL which was dated 12th August 2010 (Ex. CW-1/B). This also enclosed the computer generated Chromatogram. The witness confirmed that it showed five peaks. Peak No.3 was IS and Peak No.5 was DAM. Here again, the witness stated that Peak 4 in this report could be MAM because, as per the literature in case of heroin, MAM comes before DAM.

41. A specific question put to the witness by learned counsel for the Appellant and the answer given by him reads as under:

“Q. There are two chromatograms shown to you of the same seized sample of street heroin – one taken today and one taken two years after that and the subsequent chromatogram show presence of decreased number of constituents (peaks) and relative decrease in MAM percentage and relative increase in DAM percentage. What would it indicate?

A. I do not wish to say anything with respect to this question as I have not come across such a possibility happening nor have I come across any literature in this regard.”

42. In other words, when he was specifically confronted with this question, the expert avoided answering it. However, the cross-examination at this stage was deferred and resumed in the afternoon of 31st January 2014, reproducing the earlier question. The learned counsel for the Appellant now asked him:

“Q. The samples in the first set of test were of off white colour, they had five constituents. The second of samples were brown in colour, they had only three constituents. The chromatograms of the first set and the second set of samples are also very different. Would I not be correct in saying that it is possible that the second sample is not of the same origin as that of the first sample? (objected to)

A. The difference in colour in two samples does not lead to the necessary inference that they are from two different sources. The difference in the minor peaks in the chromatograms may be due to the different sensitivities of the instruments used for analysis. Some major peaks may also get generated due to some chemical changes. In my opinion therefore there is no possibility that the two set of samples would have come from two different sources.

It is wrong to suggest that I have right now completely lied on oath only to help the NCB. I have neither lied now nor did I lie in my pre-lunch deposition when I deposed the portion X to X. Vol. According to me both the questions are different.

Q. On what basis, have you ruled out the possibility?

A. I have done so because the records in this case available with our laboratory show that the samples on both the occasions had come properly sealed. I therefore presumed that they would have come from the same source.

Q. If it is assumed or presumed that the second set of samples had come from a different source containing only three constituents then is it possible that the second set of chromatogram reflected a different source?

A. May be. It is possible.”

43. A careful examination of the above answers shows that this witness was presuming that there was no possibility of the second set

of samples coming from a different source only because the records in the case available with the laboratory showed that on both the occasions the samples had come 'properly sealed.' It appears to the Court that the above answer was not a scientific one but a practical one which does not explain the considerable variation in the purity percentage of DAM and also the absence of two constituents in the second set of samples. The expert failed to explain how when the first set of samples showed seven constituents, even accounting for hydrolysis, there was a complete absence of two constituents in the second set of samples. The literature produced by both the parties points to the possibility of degradation of DAM to MAM and not the heroin when it is in crystallized form.

44. According to an article published in the European Journal of Pharmacology in 2002, by Mark R. Hutchinson and Andrew A. Somogyi on the issue of degradation of DAM to MAM for *in vitro* studies, DAM degradation "is dependent on the conditions of the cell culture and not on the presence of cells." In another study, titled as "*Methods for Impurity Profiling of Heroin and Cocaine*" which is a part of the United Nations Manual for Use by Drug Testing Laboratories, 2005, it was noticed that "Post processing hydrolysis can occur readily for those samples containing non-bound water or excess acid. In those cases where both the alkaloidal content and the extent of hydrolysis are significant, the sample may become dark brown (almost black) and will finally become tar-like. In less severe cases, hydrolysis may not be obvious until the impurity profile data

have been examined" It was further observed: "However, for high-purity illicit heroin samples the rate of degradation (hydrolysis) is so slow that it can be difficult to measure from year-to-year." In the "*Studies on the degradation of heroin*" by A.R.L. Wijesekera published in the Forensic Science International in 1994, it has been noted that under refrigerated conditions, the degradation of heroin during a five week period could result in an overall decrease in its heroin content by 17%. One sample showed decrease of average 15%. However, in all instances, the increase in MAM contents were observed to be corresponding to the decrease in their respective heroin (DAM) contents.

45. While the above literature shows that even in the same set of samples from the same source, there is possibility of differences in percentages on account of hydrolysis of DAM into MAM, they do not explain the possibility of total absence of constituents in the second set of samples. In the instant case, this raises a doubt to whether both the set of samples were from the same source.

46. The Supreme Court in *State of Himachal Pradesh v. Jai Lal AIR 1999 SC 3318*, held that it is for the Court to decide, in terms of Section 45 of the Evidence Act, whether and to what extent an expert evidence can be relied upon. It was observed in the said decision as under:

"17. Section 45 of the Evidence Act which makes opinion of experts admissible lays down that when the Court has to form an opinion upon a point of foreign law, or of science, or art, or

as to identity of handwriting or finger impressions, the opinions upon that that point of persons specially skilled in such foreign law, science or art, or in questions as to identity of handwriting, or finger impressions are relevant facts. Therefore, in order to bring the evidence of a witness as that of an expert it has to be shown that he has made a special study of the subject or acquired a special experience therein or in other words that he is skilled and has adequate knowledge of the subject.

18. An expert is not a witness of fact. His evidence is really of an advisory character. The duty of an expert witness is to furnish the Judge with the necessary scientific criteria for testing the accuracy of the conclusions so as to enable the judge to form his independent judgment by the application of this criteria to the facts proved by the evidence of the case. The scientific opinion evidence, if intelligible, convincing and tested becomes a factor and often an important factor for consideration along with the other evidence of the case. The credibility of such a witness depends on the reasons stated in support of his conclusions and the data and materials furnished which form the basis of his conclusions.

19. The report submitted by an expert does not go in evidence automatically. He is to be examined as a witness in Court and has to face cross-examination. This Court in the case of *Hazi Mohammed Ikramul Haque v. State of West Bengal* AIR 1959 SC 488 concurred with the finding of the High Court in not placing any reliance upon the evidence of an expert witness on the ground that his evidence was merely an opinion unsupported by any reasons.”

47. In *Ranjitsing Brahmajeetsing Sharma v. State of Maharashtra* AIR 2005 SC 2277, in the context of the brain mapping test, the Supreme Court discussed the principles governing acceptance of expert evidence. The Court referred to the principles highlighted by the United States Supreme Court in *Daubert v. Merryll Dow* CRLA. No. 1416 of 2010

Pharmaceuticals Inc., 113 Sct 2786 (1993). The Supreme Court emphasised the need for trial courts to assume the “gate keeper’s role” in screening such evidence to ensure that it is not only relevant but also reliable.

48. The Court, on a careful perusal of the evidence of the expert evidence in the present case is not satisfied that the prosecution has been able to explain the considerable variation in the purity percentages of DAM in the two samples sent for testing. Even on this score, the Court is inclined to grant benefit of doubt to the Appellant.

Conclusion

49. For the aforementioned reasons, the impugned order dated 29th September 2010 convicting the Appellant and the order on sentence dated 6th October 2010 are hereby set aside. The appeal is accordingly allowed. The Appellant be released forthwith, if not wanted in some other case.

50. The trial Court record be sent back to the learned trial Court forthwith along with a certified copy of this judgment. The Appellant is directed to furnish to the trial Court, bail and surety bonds in terms of Section 437A IPC for a period of three months.

S. MURALIDHAR, J.

SEPTEMBER 4, 2014

tp