

IN THE HIGH COURT OF DELHI AT NEW DELHI

CRL.L.P. 33 of 2014

STATE

..... Petitioner

Through: Ms. Isha Khanna, APP

versus

PATRICK & ORS

..... Respondents

Through: Mr. Rahul Tyagi, Mr. Sudeep
Rai Saini & Mr. V.V.P. Singh,
Advocates

CORAM: JUSTICE S. MURALIDHAR

ORDER
01.09.2014

Crl. M.A. No. 725 of 2014 (for delay)

For the reasons stated therein, the delay of 60 days in filing the petition is condoned.

The application is allowed.

Crl. L.P. No. 33 of 2014

1. The State seeks leave to appeal against the judgment dated 6th July 2013 passed by the Special Judge, NDPS in SC No. 16/09 acquitting the Respondent of the offence under Section 21 (b) read with Section 29 of the Narcotic Drugs and Psychotropic Substances Act ('NDPS Act'), 1985.

2. The Special Cell is stated to have received, a few days prior to 26th

March 2009, an information that one Afghani national and his Indian wife were indulging in drug trafficking and that the couple was trying to sell a large quantity of narcotic drugs procured from Afghanistan to prospective customers. At around 7 pm, on 26th March 2009, a secret informer informed Sub-Inspector ('SI') Girish (PW-2) that the Afghani national and his wife would be coming to a place opposite Khalsa College besides the *ganda nala* at 9:30 pm to deliver narcotics drugs to an African national. After the information was conveyed to the senior officers and as per their instructions, a raiding team comprising Inspector Badrish Dutt, Women SI Neeru Bhakuni (PW-7), SI Girish Kumar, SI Dinesh Pal (PW-12), ASI Rajender Singh and Constable Nand Kishore reached the spot at around 9pm where the informer was also present.

3. According to PW-2, he requested 5-6 passersby to join the raiding team but none agreed. Thereafter, the raiding team took position besides the *ganda nala*, near gate No.1 of the Mall Apartment, opposite Khalsa College and started waiting. At around 9:40 pm, one dark blue colour Honda Activa (two-wheeler) came from the side of Model Town and the secret informer identified both the driver and the pillion as the Afghani national and his wife. The Afghani national was carrying a black colour laptop bag on his back across his shoulder. The two-wheeler stopped and the suspects started waiting for someone.

4. At around 9:45 pm, one African came on foot from the side of

Model Town, stopped near the couple and began talking to them. Thereafter, the lady in the pillion took out one packet from the bag being carried by the Afghani national and gave it to the African. At that stage, the raiding team surrounded the three persons. PW-2 introduced himself to the suspects and informed them of their rights under Section 50 of the NDPS Act. The African national revealed his name as Patrick (A-1), the Afghani national as Abdullah (A-2) and his wife as Rupal Vaishnav (A-3). They declined to be searched before a gazetted officer. From the search of A-1, a packet was recovered which contained a plastic container inside which there was a polythene pack wrapped with brownish adhesive tape. It contained an off-white colour powder. When tested with the field testing kit, it gave positive result for heroin. The total weight was 1 kg. One sample of 50 gms. was taken out and put in a polythene bag and converted into white colour cloth *pullanda* and given the mark 'S-1'. The remaining heroin was kept in the same carton and converted into cloth *pullanda* and given the mark 'R-1'.

5. From the search of the laptop of A-2, another packet in a plastic container of an off-white substance which again tested positive for heroin was recovered. It weighed 1 kg. One sample of 50 gms. was taken out and was converted into a cloth *pullanda* and marked S-2. The remaining quantity was packed in a parcel marked 'R-2.'

6. The search of A-3 by PW-7 resulted in the recovery of one polythene pack from the right pocket trouser, the contents of which

tested positive for heroin. The total weight was 15 gms. One sample of 5 gm. was taken out and put into a parcel and marked 'S-3'. The remaining was kept in a parcel marked 'R-3'.

7. The three accused were arrested and their statements recorded under Section 67 of the NDPS Act. Charges were framed against all the three accused for the offence under Section 21(b) and 21(c) of the NDPS Act. The prosecution examined 16 witnesses.

8. In their statements under Section 313 Cr PC, each of the accused denied the allegations. According to A-2 and A-3, they were married and living in a tenanted premises at 236, DDA Flats, Vasant Apartment, New Delhi. They stated that they had been picked up from the said premises between 11-11:30 pm on 27th March 2009. They were repeatedly asked about the two mobile phones and despite A-2 and A-3 informing the police that they had nothing to do with the said mobile numbers, the police insisted that the numbers were in the name of A-3 and were being used by A-2 and A-3. They stated that they were beaten mercilessly by the police officials and forced to sign some documents. They came to have filed their retracted statements in the Court at the earliest opportunity.

9. A-1 in his statement under Section 313 Cr PC stated that he was picked up by the police officials from a market in Mukherjee Nagar at around 8:30 pm. He too stated that he was mercilessly beaten and his thumb impressions were taken forcibly on many documents when he

refused to sign the said documents. He stated that after the police officials beat him, he did sign one blank paper bearing his signature as 'Alex'. However, the said document was not placed on the judicial record. A-1 stated that he had met A-2 and A-3 for the first time after his apprehension in the case. No defence witnesses were examined.

10. The learned trial Court acquitted the Respondents by the impugned judgment dated 6th July 2013. The trial Court noted that there were variations in the test reports of the Forensic Science Laboratory (FSL) of the testing of the samples. In the first instance, when the samples were tested on 23rd June 2009, the samples recovered from A-1, A-2 and A-3, namely, the parcels S-1, S-2 and S-3 were found to contain four substances, i.e., caffeine, monoacetylmorphine (MAM), acetylcodeine and diacetylmorphine (DAM). The percentages of DAM in the three samples were found to be 76.2%, 79.5% and 86% respectively.

11. During the trial, pursuant to the applications made by the accused, the samples were drawn in Court and re-examined. The samples drawn from the contraband seized from A-2 and A-3, i.e. CS-2 and CS-3 respectively were examined by Dr. Madhulika Sharma (PW-10), Director FSL, Rohini. The samples drawn from A-1, namely, CS-1 was analysed by Mr. Shri Narain (PW-13), Assistant Director, FSL, Rohini. The report prepared by PW-10, i.e., Ex. PW-10/B dated 22nd October 2010 showed that the samples CS-2 and CS-3 contained DAM of 20.15% and 22.51% respectively. The sample CS-1 tested by

PW-13 on 19th September 2011, was found to be containing DAM to an extent of 19.09%.

12. On the issue as to why the second set of samples recovered from A-2 and A-3, CS-2 and CS-3 were found to contain only MAM and DAM and not caffeine and acetylcodeine, PW-10 was recalled by the prosecution for further examination. In her cross-examination upon being recalled, PW-10 admitted that caffeine was a stable substance and its percentage would remain the same in a sample over a passage of time. She explained that the fact that acetylcodeine was found in very small traces in CS-2 and CS-3 when compared to the first set of samples, i.e., S-2 and S-3 could be explained by the presence of dilutents. There was a possibility that the sample drawn for the second time had been diluted.

13. The learned trial Court also noted that while the first set of samples were found to be of off-white colour, the second set of samples were of brown colour. Consequently, it was concluded that the decrease in the purity percentage and difference in colour raised serious doubts whether the samples sent to FSL for the first time had been in fact recovered from the accused persons. This could not be explained away only due to passage of time.

14. The second ground on which the benefit of doubt was given to the accused was that Krishan Kumar (PW-5), the landlord of the rented premises in which A-2 and A-3 were residing, stated categorically that

both A-2 and A-3 were arrested from the tenanted premises at around 11:30 pm on 27th March 2009. No effort was made by the prosecution to recall him or to declare him hostile. There was no other witness to the arrest of the accused persons. The names of those members of the public who were asked to join the raiding team were not noted.

15. Further, from the call detail records ('CDRs') of the mobile numbers 9871942268 recovered from A-1 at the time of his arrest and the CDRs of two other mobile numbers, i.e., 9810233698 and 9810238698, allegedly contacted by A-1 and stated to belong to A-2 and A-3 respectively, it transpired that the mobile numbers allegedly used by A-2 and A-3 were active with calls being made from them even at 9:41 pm, i.e., even beyond the arrest of A-2 and A-3 at 9:40 pm. However, the seizure memo revealed that no mobile phone was seized from A-2 and A-3 upon their arrest. The CDRs revealed calls having been made to certain numbers, which, according to A-1, belonged to one 'Papa'. No details were forthcoming as to who this 'Papa' was. The mobile numbers attributed to 'Papa' were in the names of Shaukat Ali and Odinnuta Julianah. Consequently, it was unable to be proved that A-2 and A-3 were actually using the mobile phones attributed to them and in any event, did not explain how if they were used even at 9:45 pm, they were not found with A-2 and A-3 at the time of their arrest.

16. This Court has heard the submissions of Ms. Isha Khanna, learned

APP for the State and Mr. Rahul Tyagi, learned counsel for the Respondents.

17. A perusal of the evidence of PW-2 shows that at 9:45 pm on 26th March 2009, he noticed the scooter with A-2 and A-3 on it at the spot opposite Khalsa College. It was thereafter that A-2 and A-3 were approached by A-1 and then the three were arrested. Although the time of arrest in the arrest memo is shown as 2:30 am on 27th March 2009, it has come in the evidence of prosecution witnesses that the three accused were in custody of the raiding party from 9:45 pm onwards. The seizure memos did not reveal that any mobile phone was recovered from A-2 and A-3. The personal search memo of A-2 (Ex.PW-7/B) shows recovery of two SIM cards of MTNL and ROSHAN COYS, but no mobile phones. As far as seizure memo of A-1 was concerned (Ex. PW 8/D), it shows the recovery of one Nokia mobile phone 9871942268.

18. The case of the prosecution is that two mobile phones bearing Nos.9810233698 and 9810238698 were being used by A-2 and A-3. The learned APP has taken the Court through the deposition of Deepak (PW-14), the Nodal Officer of Vodafone, R.K. Singh (PW-15), the Nodal Officer of Bharti Airtel and Surendra (PW-16), the Nodal Officer of Idea Cellular Ltd., including the CDRs produced by each of them. These show that the mobile phones stated to have been contacted by A-1 were in the names of Shaukat and Odinnuta and their links with the so-called 'Papa' was not able to be established

during trial. As far as two mobile phones used by A-2 and A-3 are concerned, they show the calls were made on 26th March 2009 at 9:45 pm. Even if according to the learned APP, some difference in time could be allowed, the failure by the prosecution to recover the two mobile phones from the possession of A-2 and A-3 raises serious doubts as to the actual time and place of apprehension of A-2 and A-3. It strengthens the defence version that A-2 and A-3 were picked from their residence, a fact confirmed by PW-5, the landlord of the premises, who was not declared hostile by the prosecution.

19. The learned APP drew the attention of the Court to the CA forms, the certified copies of which were produced by PW-15 to show that both the mobile phones were in the name of A-3. The deposition of PW-15 shows that the counsel for the defence objected to certified copies of CA forms being marked as exhibits, particularly since the originals of those documents were not produced before the trial Court. PW-15 stated in his cross-examination that the originals were available. Yet it is not explained why they were not produced before trial Court. The learned APP, on the instructions from the IO who was present in Court, stated that the originals were produced in another case concerning the falsification of documents filed against A-1 but not against A-2 and A-3. Be that as it may, the fact remains that in the present case the originals of the CA forms were not produced. This also has to be seen in the context of A-3 denying her signatures on the said forms in her statement under Section 313 Cr PC. In effect, therefore, the prosecution has been unable to show that

the aforementioned two mobile numbers were being used by A-2 and A-3 to contact the so-called 'Papa' who was never located, or through him, A-1. There are serious doubts about their presence at the place and the time of arrest.

20. On the other aspect of the difference in the percentage of DAM in the samples, the Court is not convinced with the explanation offered by the two experts, i.e., PWs 10 and 13. Both were asked specifically, on the basis of the UN Manual for Drug Testing, whether the hydrolysis of a sample of high purity illicit heroin would be too slow to be measured year to year. While PW-10 agreed, PW-13 stated that it would be only where the sample was more than 99.5% pure. The explanation that on account of the improper storage conditions the purity percentages would decrease, still does not explain how 80% can become 22.51% between 23rd June 2009 and 22nd October 2010 (when CS-2 and CS-3 were tested) and yet between then and 19th September 2011 when CS-1 was tested they decreased only to 19.09%. There was therefore no consistent pattern of decrease in the DAM percentage. PW-10 in her cross-examination was also unable to explain how despite the caffeine being a very stable substance, the percentage of which remained the same with passage of time, was not detected in the second testing. She also could not rule out the possibility that the two samples were lifted from different sources. As far as PW-13 was concerned he claimed that he did not test the sample for MAM or morphine. He strangely suggested that if one molecule of DAM is converted into one molecule of MAM and one molecule of

acetic acid it would again form DAM, which is contrary to the scientific literature concerning hydrolysis of heroin.

21. In the context of Section 45 of the Indian Evidence Act, the Supreme Court has, in *State of Himachal Pradesh v. Jai Lal AIR 1999 SC 3318*, explained that the evidence of the expert is of “an advisory character” and that it “does not go in evidence automatically”. The Court has to follow the evidence and form an objective opinion on its reliability. 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 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.

22. In the present case, the Court finds that the experts examined for the prosecution do not offer a convincing scientific explanation for the marked variations in the DAM percentages in the samples tested on second occasion and that the benefit of the doubt created as regards the proper preservation of the samples, and whether the samples initially tested and subsequently tested were from the same source, should go to the accused.

23. No grounds have been made out for grant of leave to appeal.

24. The petition is dismissed. The trial Court record be sent back forthwith.

S. MURALIDHAR, J.

SEPTEMBER 01, 2014

tp/akg

