

IN THE HIGH COURT OF DELHI AT NEW DELHI

CRL.A. 9 of 2014 & CRL. (B) 11 of 2014

AMBROSE

..... Appellant

Through: Mr. Ajit Sharma, Amicus Curiae
(DHCLSC) with Appellant produced from
Judicial custody.

versus

DIRECTORATE OF REVENUE INTELLIGENCE

..... Respondent

Through: Mr. Satish Aggarwala, Advocate.

CORAM: JUSTICE S. MURALIDHAR

ORDER
03.12.2014

Introduction

1. This appeal is directed against the impugned judgment dated 9th July 2013 passed by the learned Additional Sessions Judge/Special Judge-NDPS/ South District, Saket Courts Complex, New Delhi in Sessions Case No. 46A/00 convicting the Appellant, Ambrose, for the offence under Section 21 (c) of the Narcotics Drugs and Psychotropic Substances Act, 1985 ('NDPS Act') for having been found in possession of 19 kg of heroin and the order on sentence dated 20th July 2013 whereby for the aforesaid offence he was sentenced to undergo rigorous imprisonment ('RI') for a period of 10 years and a fine of Rs 1 lakh and in default, to under simple imprisonment ('SI') for a period of six months.

2. At the outset, it requires to be noticed that there were two accused in the case. The Appellant herein was Accused No. 1 ('A-1') and Ajmer Singh was Accused No. 2 (A-2). Criminal Appeal No. 1171 of 2013 of A-2 was dismissed by this Court on 28th August 2014 on account of his

failure to appear before the Court after being on bail.

The case of the DRI

3. The case of the Directorate of Revenue Intelligence ('DRI') is that on 7th February 2009 Madan Singh, Intelligence Officer ('IO') [PW-1] had received a secret information "that a person of Indian origin, around 30 years of age, 5 feet 7 inches tall, sporting trimmed beard, wheatish complexioned with medium built, wearing sky blue coloured striped T-shirt would be handing over some narcotic substance to a medium built African person in the evening hours between 7.30 pm to 8 pm on that day in the parking area outside the Majnu Ka Tila Gurudwara, Delhi." The secret information (Ex.PW-1/A) was recorded on 5.30 pm on that very day and was placed before Mr. K.K. Sood, (PW-7), Assistant Director, DRI Headquarters. Mr. Sood then called IO, Mr. D.P. Saxena, [PW-9] and directed him to take appropriate action.

The raid proceedings

4. On the above basis, PW-9 along with a team of DRI officers consisting of himself, Mr. Ashok Kumar, Senior Tax Assistant, [PW-5], Mr. Yogesh Kumar Choudhary, the then IO and two or three sepoy. They left the DRI office at about 6.30 pm on 7th February 2009 in a government vehicle and reached at the spot at about 7 pm and kept vigilance for the next 45 minutes. It has come in the evidence of PW-5 and PW-9 that at around 7.45 pm/7.50 pm they noticed a person matching the description contained in the secret information, who was carrying two shoulder bags was apparently waiting for someone at the spot. At about 8 pm they also noticed a person of African origin who came there and met the above mentioned person. The person who was already standing with two bags handed over the two bags to the

African origin person. At that time the raiding team apprehended them and introduced themselves by showing their identity cards. PW-9 stated that he specifically asked both the persons as to whether they were carrying any narcotic substances on their person or in the two bags, to which both of them replied in the negative.

5. PW-9 stated in his evidence that when he told both the accused persons to introduce themselves, they disclosed that they were Ajmer Singh, a resident of Taran Taaran of Punjab and Ambrose Aligbogu a resident of Zimbabwe. The two accused, including the Appellant, along with their bags were escorted to the DRI office at I.P. Estate, New Delhi. After reaching the DRI office, PW-9 called two *panch* witnesses “from the nearby area through a Sepoy of DRI who was present in the office at the point of time.” The two *panch* witnesses were Arun Kumar Sahni and Arjun Dev Bhatt. In the presence of the said two *panch* witnesses, notices under Section 50 of NDPS Act were served upon both the accused individually by PW-9 who explained to each of them that it was their right that they may get their person/bags searched before a Magistrate or a Gazetted Officer. Both the accused are stated to have given in writing that their search and the search of their bags could be conducted by any officer of the DRI under their signatures. The notices (Ex.PW-9/A and Ex.PW-9/B) under Section 50 of NDPS Act were also signed by both the *panch* witnesses.

The panchnama proceedings

6. Nothing incriminating was found in the personal search of the accused. Their bags were then searched. One green colour bag was found containing 9 heat sealed transparent polythene packets. On opening, there was another white colour cloth packing having some

rubber stamp markings. These 9 packets were then marked A-1 to A-9. The red and blue coloured bag was found to contain 10 heat sealed transparent polythene packets which again contained white colour cloth bags having rubber stamp markings. These were marked as X1 to X7, Y1, Y2 and Z1. Thereafter, the aforesaid packets were opened and found to contain granular substance, small quantities of which were taken and tested with the help of Drug Detection Kit which gave positive result for the presence of heroin. The total weight of the recovered 19 packets and was found to be 19.046 kg. Samples of 5 gm each were taken from each packet and were marked, sealed and labelled. The test memos in triplicate were prepared and sent to the Central Revenues Control Laboratory ('CRCL'), New Delhi for examination.

7. According to PW-9, the *panchnama* proceedings started at 9 pm on 7th February 2009 and concluded at 2 am on 8th February 2009. The *panchnama* proceedings were explained in vernacular to the accused persons and got signed by them. Notices were issued to both the accused under Section 67 of the NDPS Act. The Appellant is stated to have made his voluntary statement pursuant thereto. The said statement was a typed one, and in purported explanation for this, at the end of the statement, the Appellant is shown to have written in his own hand that he can speak, read, write English but "my speed in writing the English is very very poor. Therefore, on my request the above statement has been typed on the computer by an officer of DRI." The Appellant further wrote that he had read the above statement and found that the same has been correctly typed and that he was signing it after accepting the same to be his true and voluntary statement. The statement was signed by him on 8th February 2009.

The Appellant's statement under Section 67 NDPD Act

8. The gist of the Appellant's aforementioned statement (Ex.PW-5/A) was that he did not have any passport and crossed the borders of Zimbabwe, Nigeria and South Africa. In the month of November 2008 he left South Africa for India in a cargo ship again without any passport. One of his friends Mr. John arranged for his journey to India. He did not know the address of Mr. John, nor did he know the name of ship/agent. The said ship anchored Mumbai in the night of December 2008. On reaching Mumbai he met an Indian man, about whom he did not know. He got introduced to a Nigerian girl named Ms. Abela at Mumbai. In January 2009 Abela gave him an address in Patiala, Punjab and asked him to meet one Nigerian, Mr Chika and one South African, Mr Tony who were studying there. He did not remember the dates when he left Zimbabwe, Nigeria, South Africa and when he reached Mumbai nor the date of his arrival in Nigeria and South Africa. He also did not remember the date when he left Mumbai and reached Patiala (Punjab). He did not remember the address in Patiala where he was living. Mr. Chika came to his house in the month of January 2009 and told him that a person named Ajmer Singh @ Kala (A-2) who was his friend would come to his house and would give a bag containing ten packets of heroin and asked him to hand over the said bag to Mr. Chika at a bus stand near his house. After that job was finished on 7th February 2009 Mr. Chika came to his house in the morning and told him to get ready in the afternoon as they were required to visit Delhi and that he would drop him at a place in Delhi near the Gurdwara where Ajmer Singh @ Kala would hand over 19 packets of heroin and that he was to hand over the said packets to Mr. Chika when he came back at the same place later. That is how the Appellant reached the Gurudwara in Delhi at around 8 pm on 7th February 2009.

9. On 8th February 2009 summons under Section 67 NDPS Act was issued both the *panch* witnesses, i.e., Arun Kumar Sahni and Arjun Dev Bhatt (Ex.PW-9/O and Ex.PW-9/Q respectively) and they were asked to appear before the DRI office on 11th February 2009 at 4.30 pm to make their statement. Both the *panch* witnesses made their respective statements (Ex PW-9/P and Ex. PW-9/R) which are at pages 541-555 of the trial Court record.

10. It must be noted that on 20th February 2009 before the learned Metropolitan Magistrate ('MM') the Appellant retracted the aforementioned statement. In his retraction (Ex DW2/A), the Appellant stated that he was in a friend's house situated at 252, Patiala Housing Estate, Patiala, Punjab just opposite Punjab University. Some men in plain clothes came to his place and asked for the owner of the flat. When they could not meet the owner, they forcibly picked up the Appellant and brought him to Delhi. He further stated that on arriving at the DRI Office at about 7 pm on 7th February 2009 he was tortured and forced to copy an already written statement and also made to sign many blank papers and slips.

The Appellant's statement under Section 313 Cr PC

11. The prosecution examined nine witnesses. When the incriminating evidence was put to the Appellant under Section 313 Cr PC, he denied all the allegations levelled against him. He claimed that he did not know the co-accused before this case but he met him at the DRI office for the first time. The DRI officers had forcibly taken him from his rented accommodation at C-267, Patiala House, Phase-I, Opp. Patiala University, Punjab. He denied having received any contraband from the possession of or at the instance of A-2. He denied that any notice was given to him under Section 50 NDPS Act. He maintained that his

signatures had been forcibly taken by the DRI officials on many blank papers and slips. His writings were dictated by the DRI officers.

The defence evidence

12. During the course of the trial, the co-accused Ajmer Singh @ Kala tendered copies of *panchnamas* in several DRI cases through his counsel, Mr. S.K. Santoshi. One D.P. Singh, (DW-3) who was an official of the RTI and Vigilance Branch of Saket Court Complex was examined regarding the RTI application filed in regard to the status of services of summons/notices on the *panch* witnesses in the said DRI cases. One Jyoti Kumar Kujur was examined as DW-4 as regards the replies given to the RTI applications. The purpose of this exercise was to show, through the document EX.DW-3/D, that there were at least 55 NDPS cases in which either the *panch* witnesses could not be served because the addresses were non-existent or the *panch* witnesses was not traceable at the given address. Consequently, one or both *panch* witnesses were dropped by the DRI.

13. The Appellant examined himself as DW-2. He stated that he had been picked up from his rented house at Patiala and that the contraband was planted on him “because I am a Nigerian National”. He confirmed having filed two retractions on 20th February 2009 and 8th December 2010. In fact the proceedings before the learned trial Court on 8th December 2010 recorded this fact. In his cross-examination he was asked by learned proxy counsel for the SPP for the DRI as to whether he had come to India from South Africa in a cargo ship without any passport and that the said journey had been arranged by his friend Mr. John. He denied the said suggestion. He denied the suggestion that his statement under Section 67 NDPS Act, was truthful and voluntary and that he had given his retractions application on the basis of legal advice

given to him. He voluntarily stated as under:

“When I was produced in the Court on the first day I had pointed out my grievances to the learned Judge, but I was told by the Judge to put the things in writing and to give the same to the Court on the next date. It is further wrong to suggest that I am deposing falsely. It is further wrong to suggest that no torture/beatings was used by the officers as stated by me in my examination-in-chief.”

14. In his further cross-examination, he maintained that it was wrong to suggest that he had entered into India without a valid tourist visa or through any illegal means.

The judgment of the trial Court

15. In the impugned judgment, the trial Court, while convicting the Appellant for the offence under Section 21 (c) of NDPS Act, came to the following conclusions:

(i) the evidence of PW-5 and PW-9 showed that the proceedings including the service of notice on the accused under Section 50 NDPS Act were done in the presence of *panch* witnesses. The above evidence was corroborated by the documents which had the signatures of the *panch* witnesses;

(ii) The failure by PW-9 to collect the identity documents of the *panch* witnesses, or his failure to secure their presence during the trial, could not lead to the presumption that no such *panch* witnesses either joined the investigation or that they were the fake witnesses;

(iii) There was nothing on record to show that *panch* witnesses were stock witnesses or that they were examined in any other case of the DRI. Moreover, had they been stock witnesses, the prosecution would have certainly produced and examined them

in the Court as they would have only supported its case;

(iv) The documents obtained under the RTI Act, to show the failure of the DRI to examine the cited *panch* witnesses due to non-availability or non-existence of their given addresses, could be considered as evidence. However, no adverse inference could be drawn against the prosecution regarding “their fakeness or falseness” only because the *panch* witnesses were not found existing or traceable at their given addresses;

(v) The testimony of official witnesses could be safely relied upon for convicting the Appellant because the presumption of honesty was as much available to the official witnesses as it was to a public witness. The only requirement was that they should inspire confidence and should be worthy of acceptance;

(vi) The non-joining of any public witness prior to or at the time of apprehension of the Appellant was not fatal since in any event the public witnesses were associated when the search took place at the DRI office;

(vii) The evidence of PW-9 confirmed that PW-5 was present throughout the proceeding and it cannot, therefore, be said that he was not present at the relevant time;

(viii) The mere fact that the *panchnama* proceedings took place in the office of the DRI cannot by itself discredit the case of the prosecution;

(ix) There was nothing to show that there was any tampering of the samples sent to the CRCL for testing;

(x) The failure to further investigate the case to ascertain the source of drugs would not discredit the prosecution case;

(xi) Even if the statement of the Appellant under Section 67 NDPS Act was retracted, as long as it was corroborated by other independent material, it could be relied upon. Reliance was placed on the decision in *Kanhaiya Lal v. Union of India 2008 (1) AD (Crl.) (SC) 277*.

16. This Court has heard the submissions of Mr. Ajit Sharma, learned *amicus curiae* for the Appellant and Mr. Satish Aggarwala, learned Standing Counsel for the DRI.

Notices under Section 50 NDPS Act

17. At the outset it requires to be noticed that one remarkable feature of the present case is in regard to the notices purportedly issued to each of the accused, including the Appellant, under Section 50 NDPS Act. From the evidence placed on record it appears that soon after their apprehension outside the Gurudwara the accused were taken to the DRI office. There the DRI officers served notices on the accused under Section 50 NDPS Act. Both the Section 50 NDPS Act notices were typed. They were typed on a computer and printed out. On both notices, the addresses of two accused including their parentage, residential addresses have been set out. In the case of Appellant, his father's name and residential address in Zimbabwe have been typed out.

18. Mr. Aggarwala drew the attention of the Court to the *panchnama* (Ex.PW-9/C) which records that when they were apprehended each of the accused introduced themselves giving their parentage and full

residential addresses.

19. Even if the above is accepted as a credible explanation of how these typed details figured in the notices, what is a total give away is that typed notices refer to the fact that the DRI officers had “reason to believe” that two accused were carrying "heroin packets". The typed notice under Section 50 NDPS Act reads thus:

“On the basis of specific information, the officers of Directorate of Revenue Intelligence (Hqrs.), New Delhi intercepted you along with 2 baggage on 7th February 2009 at the parking area of Majnu Ka Tilla Gurdwara, Delhi and have reasons to believe that narcotics drugs i.e., Heroin packets are being carried by you in your person or in two baggage. For retrieval of the same, your person and two baggage are required to be searched. You are hereby informed that under Section 50 NDPS Act, 1985, you have a legal right to get your personal search and search of your bag conducted in the presence of a Magistrate or a Gazetted Officer for which you have to give your option in writing.”

20. It was impossible for the DRI officers to know in advance, even before the search of the bags, that the accused were in possession of heroin packets. It must be recollected that the secret information reduced to writing (Ex.PW-1/A) only referred to the information that a person of Indian origin would be handing over “some narcotic substance” to a medium built African person. The trial Court appears to have completely overlooked the above glaring lacuna. This shows that the notice under Section 50 NDPS Act could not have possibly been issued prior to commencing the search of the bags as contended by the DRI but much later.

The statement under Section 67 not truthful

21. The trial Court also failed to notice another important aspect of the

matter regarding the truthfulness of the so-called confessional statement made by the Appellant under Section 67 NDPS Act. The Appellant in both retraction statements, i.e., one dated 20th February 2009 and the subsequent dated 8th December 2010 stated that he had been picked up from his rented house at Patiala. Both the statements of retraction formed part of the record.

22. What is also interesting is that the Appellant at the earliest point of time placed on record before the trial Court the photocopies of the pages of his passport and the page bearing the visa stamp issued by the Indian Embassy in Nigeria. It also contained the immigration stamp with the date of entry. The Appellant also produced a photocopy of the stub of the Qatar Airline boarding pass to show that he had travelled by air from Doha to Mumbai on 19th October 2009 by flight (QR 200). In para 72 of the impugned judgment, the trial Court noted as under:

“Though the accused himself has pointed out that a photocopy of his passport and one boarding pass etc. are in the judicial file to show that his arrival in India was not illegal, but due to the legal constraints, this Court cannot take note of any such documents as no steps have been taken on record on behalf of the accused to lead any evidence on this aspect. Hence, the above retraction statements of the accused cannot be given much weight and his above statement Ex.PW-5/A under Section 67 of the NDPS Act is held to be his voluntary statement.”

23. The above approach of the trial Court was unfortunate given the fact that the DRI could have easily verified the above documents to ascertain their truth.

24. During hearing of the present appeal on 4th August 2014, this Court after noting the above observation of the trial Court, passed an order requiring the DRI to verify the above documents. Several hearings

thereafter were consumed in trying to ascertain the correctness of the said documents from the Indian Embassy in Nigeria, the Nigerian Embassy in India and the Foreigners Regional Registration Office ('FRRO'). The FRRO in its report dated 26th November 2014 stated that the Appellant was not registered with the FRRO, Delhi Office but "as per the available records/computer data, Nigerian national Anigbogu Ambrose Emenike (Sex-Male & DOB: 05.04.1979) arrived in India on 20th October 2008 by flight No. QR-200 through ICP Mumbai on the strength of Passport No. A3559381A. No departure record has been found in respect of the aforementioned foreign national."

25. Unfortunately despite repeated reminders by the DRI to the Ministry of External Affairs, High Commission of Nigeria, High Commission of Nigeria, and Qatar Airways (City Office), Mumbai to confirm whether the visa stamp issued by the Indian Commission in Nigeria, no information was forthcoming. Additionally, Mr. Aggrawala placed on record a copy of letter dated 2nd December 2014 received from the Deputy Commissioner of Police, Special Branch-II, CID & FRRO, Mumbai that the name of the Appellant did not figure in the list of registered foreigners at the said office.

26. Be that as it may, the above report of the FRRO dated 26th November 2014 confirms that the computer data showed that the Appellant, a Nigerian national, having the same passport a photocopy of which had been produced by the Appellant, did arrive at Mumbai on 19th October 2009 by Qatar Airways.

27. The above documents ought to have been verified by the trial Court, by adopting the procedure followed by this Court. It shakes the

very basis of the entire prosecution case which relies on the truthfulness of the Appellant's statement under Section 67 NDPS Act. The failure of the trial Court to do so has caused severe prejudice to the Appellant who has had to face the ordeal of the trial. The entire case was built on the edifice of unverified secret information and on false assumptions. The story that the Appellant travelled without a passport from South Africa to Mumbai by a cargo ship stands disproved.

28. The above documents which expose the falsehood of the case of the DRI could have been easily verified by the DRI itself. The Court would add that when an accused offers an alternative theory and produces documents in support thereof, the DRI can itself verify their genuineness without waiting for the order of the Court. For an accused in judicial custody, it is only to be expected that it would be difficult for him to produce witnesses. This difficulty is further compounded when the accused is a foreign national. Unfortunately this difficulty was not been appreciated by the trial Court. It unfairly cast the burden on the Appellant to further lead evidence to prove the details of his passport and visas stamps. It may be further added here that according to the Appellant, his original passport was with the Nigerian Embassy in India. The Appellant has been in judicial custody throughout and it is obvious that he does not have his passport with him.

Non-examination of public witnesses

29. The next serious problem in the present case is the failure to secure the presence of the *panch* witnesses at the trial. A careful perusal of the record of the trial Court shows that as regards Arun Kumar Sahni, his address was shown to be A-181, Geeta Colony, Delhi. The proceeding of 30th May 2011 before the trial Court records that “the address of public witnesses, Sh. Arun Kumar Sahni at Serial No. 4 is reported to

be not existing and the report is forwarded by the IO/PW-9 Sh. D.P. Saxena himself, who is also present in Court today.” The trial Court noted that such report was submitted by PW-9. It further s clearly stated that “the above said summons could not be served upon him i.e., Arun Kumar Sahni because given address is not existing.” No attempt appears to have been made for any notice served upon Arun Kumar Sahni thereafter.

30. As far as the other *panch* witness, Arjun Dev Bhatt, is concerned, the proceeding of 5th September 2011 recorded that the address of the public witness, Sh. Arjun Dev Bhatt cited at Serial No. 5 is reported to be not existing and the report is given by the IO/concerned officer himself.” The order further records that in view of the above report, the learned Special Public Prosecutor (‘SPP’) for the DRI dropped the said witness.

31. It is surprising that the trial Court overlooked the fact the reports of the IO himself in the case showed that addresses of the two *panch* witnesses were non-existent. This is very different from the situation where the addresses are correct but the *panch* witnesses are not available. In such a scenario, it is understandable that after repeated attempts, the DRI was unable to ascertain the whereabouts of such witnesses. However, when the address is shown to be non-existent, then questions arise as to the genuineness of the entire exercise involving the *panch* witnesses. It must be remembered that the addresses of the *panch* witnesses are recorded in the *panchnama* proceeding and notices are served upon them for recording their statements under Section 67 NDPS Act. It is possible that, as explained by Mr. Aggarwala, even during the *panchnama* proceeding, notices are

served upon the *panch* witnesses and both of them appeared later in this case on 11th February 2011 for recording their statements. It is also possible, as contended by Mr. Aggarwala, that even if the DRI officials could not have insisted at that very moment that the *panch* witnesses should produce some identity document, it should always be possible for the DRI officials to verify the correctness of the address in the next few days.

32. No serious attempt in this case was made by the DRI, despite knowing that the address was non-existent, to ascertain the correct present address of the *panch* witnesses and secure their presence at the trial.

33. The Court is unable to agree with the approach of the trial Court in not drawing adverse inference against the DRI. In a situation where the *panch* witnesses are unable to be produced, because their addresses are non-existent, it is not sufficient for the DRI to simply drop the *panch* witnesses and avoid the consequence of an adverse inference being drawn.

The evidence of the DRI officials

34. As explained by the Supreme Court in ***State of U.P v. Zakaullah*** (supra), that a conviction can be based even on the evidence of police officers but the evidence of DRI officers should inspire confidence. In the present case, the record of the trial Court speaks for itself. It exposes the untruthfulness of the evidence placed before the Court by the DRI officers. The Court cannot help observing that the evidence of PWs 5 and 9 can hardly be stated to be reliable or truthful. On the contrary, the Appellant has been able to probablise his defence that he came to India by air as a tourist with a valid India visa stamp on his

passport. These facts have been verified by the FRRO, Mumbai.

Conclusion

35. The Court accordingly, set asides the impugned judgment dated 9th July 2013 and the order on sentence dated 20th July 2013 of the trial Court. The Appellant is hereby acquitted for the offence under Section 21 (c) of NDPS Act. The Appellant will now be released to the FRRO for further steps for deporting him. His bail bond and surety bond will continue for a period of three months in terms of Section 437-A Cr PC.

36. The appeal is allowed in the above terms. Pending application is also disposed of. A certified copy of this order along with the trial Court record be sent back forthwith. A certified copy of this order be also sent to the concerned Superintendent, Tihar Jail, New Delhi for communicating it to the Appellant forthwith.

37. The Court records its appreciation of the competent assistance rendered by Mr. Ajit Sharma, the learned amicus curiae. He will be paid his fees as per the schedule of the Delhi High Court Legal Services Committee without delay.

S. MURALIDHAR, J.

DECEMBER 03, 2014

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