

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

RESERVED ON : 21st APRIL, 2016

DECIDED ON : 6th MAY, 2016

+ CRL.A.1332/2013

ANITA @ RUBY

..... Appellant

**Through : Mr.Vimal Puggal, Advocate
with Ms.Rekha Dey &
Mr.Siddharta, Advocates.**

versus

STATE NCT OF DELHI

..... Respondent

Through : Mr.Amit Gupta, APP.

CORAM:

HON'BLE MR. JUSTICE S.P.GARG

S.P.GARG, J.

1. Challenge in this appeal is a judgment dated 24.07.2013 of learned Special Judge (NDPS) / Addl. Sessions Judge (North-East) in Sessions Case No. 03/12 arising out of FIR No.232/11 PS Crime Branch whereby the appellant – Anita @ Ruby was held guilty for committing offence punishable under Section 21 (c) of the Narcotic Drugs & Psychotropic Substances Act, 1985 (in short 'NDPS Act'). By an order dated 27.07.2013, she was sentenced to undergo RI for ten years with fine ₹1 lac.

2. Briefly stated, the prosecution case as unfolded in the charge-sheet was that on 13.09.2011 at about 03.20 p.m. at footpath, ISBT road Shastri Park near IT Park, the appellant was found in possession of 1 k.g. of heroin without licence or permit.

3. On 13.09.2011 at around 01.30 p.m. PW-2 (HC Kanwar Pal) received a secret information that the appellant would come at ISBT road near IT Park, Shashtri Park to supply heroin to 'someone'. HC Kanwar Pal produced the secret informer before PW-9 (SI Sunil Kumar) who in turn produced him before PW-5 (Insp.Rajesh Sharma). After recording satisfaction about the secret information, Insp.Rajesh Sharma intimated about this to Addl. DCP/ SIT Joy Tirky. Direction was given to conduct the raid. SI Sunil Kumar recorded DD No.9 (Ex.PW-4/B). A raiding team was constituted and they all reached the spot at about 03.20 p.m. On the pointing out of the secret informer, the appellant was apprehended. She was informed of her legal rights. Notice under Section 50 NDPS Act was served upon her. On search of a bag of violet / golden colour on her left shoulder, it was found containing a transparent polythene bag containing 1 k.g. heroin. SI Sunil Kumar took out two samples of 5 grams each. He also prepared FSL form and seizure memos. Investigation was subsequently taken over by PW-10 (ASI Harcharan Singh). Statements of the witnesses conversant with the facts were recorded. Exhibits collected during investigation were sent to Forensic Science Laboratory for examination. Upon completion of investigation, a charge-sheet was filed for commission of offence under Section 21 (c) of NDPS Act. In order to establish its case, the prosecution examined ten witnesses. In 313 Cr.P.C. statement, the appellant denied her involvement in the crime and pleaded false implication. The trial resulted in her conviction as aforesaid. Being aggrieved and dissatisfied, the instant appeal has been filed.

4. Appellant's counsel urged that the Trial Court did not appreciate the evidence in its true and proper perspective. It overlooked the

fact that no independent public witness including the driver of the private vehicle Innova used in the raid was associated. He pointed out that the quantity of sample reached at FSL was 5.009 grams which is inconsistent to the quantity of 5 grams taken as sample. Five days delay in sending the samples has not been explained. It is unclear as to whom the seal was handed over. No telephone call record was collected. Delay in lodging the FIR has remained unexplained. The appellant was not involved in any other case. The handbag recovered from her possession was not produced. Learned Addl. Public Prosecutor urged that all the mandatory provisions were complied with. Since the recovery was effected from the handbag even compliance of Section 50 of NDPS Act was not mandatory. Minor contradictions highlighted by the appellant's counsel are of no consequence.

5. PW-2 (Kanwar Pal) was posted in the office of SIT, Crime Branch, Rohini on 13.09.2011. He was the individual to whom the secret informer conveyed the secret information at around 01.30 p.m. He deposed that he took the secret informer to SI Sunil Kumar who made enquiries from him. Thereafter, SI Sunil Kumar produced him before Insp. Rajesh Sharma who also made enquiries and after satisfying himself about the correctness of the secret information informed Joy Tirky, Addl. DCP/ SIT, Crime Branch. SI Sunil Kumar lodged the secret information vide DD No.9 (Ex.PW-4/B) at about 02.00 p.m. Insp. Rajesh Sharma authorized SI Sunil Kumar to constitute a raiding party. Accordingly, the raiding party consisting of he himself, SI Sunil Kumar, SI Shiv Darshan, ASI Azmer Singh, Const. Niraj and WHC Kamla was constituted and they all along with IO bag, field testing kit and electronic weighing machine, etc. left the office along with the secret informer at about 02.15 p.m. in a private Innova car

and reached near the spot at about 03.15 p.m. SI Sunil Kumar requested four passersby after crossing Burari Red Light to join the investigation but they all declined. At the spot, the appellant who was standing on the patri of the footpath was apprehended at about 03.20 p.m. by WHC Kamla. SI Sunil Kumar disclosed her his identity. She was apprised of the secret information and was told about her legal rights to search etc. She was explained that she could get her search conducted in the presence of Gazetted Officer or a Magistrate to which she declined. SI Sunil Kumar prepared a notice under Section 50 of NDPS Act (Ex.PW-2/A). Her refusal was recorded vide memo (Ex.PW-2/B). He further deposed that the accused had a violet and golden colour lady bag on her left shoulder. WHC Kamla took the bag from her shoulder and it was searched. One transparent polythene bag containing 'matiala' colour powder was found inside it. After it was handed over by WHC Kamla to SI Sunil Kumar, he opened it and 'matiala' colour powder was tested with the help of field testing kit and found to be heroin. On weighing, it was found to be 1 k.g. Two samples of 5 grams each were taken from the recovered heroin and kept in two transparent interlock polythenes. Necessary proceedings were conducted at the spot. He took rukka and the case property to the police station and handed over to the duty officer. Ex.P5 was the lady purse and Ex.P4 was the heroin recovered from the accused.

6. In the cross-examination, the witness elaborated that the secret informer had met him in the canteen of first floor of the SIT, Crime Branch. The secret informer was not acquainted with him before that. He fairly admitted that the Investigating Officer did not call any public person from Shastri Park near IT Park in his presence. He denied the suggestion that the

appellant was falsely implicated and no such recovery was affected from her possession.

7. On scanning the testimony of this witness, it reveals that material facts deposed by him in the examination-in-chief have remained unchallenged and uncontroverted in the cross-examination. Mere suggestions were put in the cross-examination denying the apprehension of the appellant and recovery of the heroin from her possession. However, no ulterior motive was assigned to the police officials for falsely implicating the appellant with whom they had no prior acquaintance. The appellant did not deny her presence at the spot. She did not claim if she was lifted from any other specific place. She did not furnish any explanation as to why she was present at a far away place from her residence. The office of the raiding team was at Rohini at a distance of 20 k.m. from the spot. In the absence of any prior animosity, the police officials are not expected to suddenly apprehend and implicate a lady standing at a distance of 20 k.m. at Shastri Park near IT Park. No material infirmities have been extracted in the cross-examination of this witness.

8. PW-5 (Insp.Rajesh Sharma), PW-7 (HC Kamla) and PW-9 (SI Sunil Kumar) all have deposed on similar lines and have corroborated the version given by each of them. Despite searching cross-examination, no infirmities could be elicited in their cross-examination to disbelieve their version. Nothing has been suggested to any of the prosecution witness if the mandatory provisions under Sections 42, 50 or 57 of NDPS Act were not complied with. The appellant did not deny her signatures on various documents prepared at the spot. She was taken to hospital for her medical examination which lends corroboration to the fact that she was apprehended

at the spot. The appellant did not examine any witness in defence to show if on the relevant date she was not available at the spot. She did not examine even her family members to establish her presence somewhere else.

9. It is true that no independent public witness was associated at any stage of the investigation. However, for that lapse the statements of the police officials who have stood the test of cross-examination cannot be thrown away. It has come on record that 4 /5 individuals were requested at two stages to join the investigation, however, for the reasons known to them they declined. The Trial Court has dealt with this aspect in the impugned judgment. Many times the public persons exhibit reluctance to join police investigation for various reasons. PW-7 (HC Kamla) disclosed that Innova vehicle was being driven by SI Sunil Kumar himself and this statement has remained unchallenged. In that eventuality, there was no question of driver of private Innova to be associated in the investigation.

10. Of course, there is five days' delay in sending the samples to FSL. The Investigating Officer was not questioned as to why there was delay in sending the samples. The appellant has failed to show if any prejudice was caused to her because of delay in sending the samples. FSL report (Ex.PW-10/A) reveals that when the samples were received on 19.09.2011, they were in intact condition and were duly sealed. None of the witnesses was asked if the case property was ever tampered with. Nothing was suggested to the prosecution witnesses if during the intervening period, the samples were tampered with in any manner. The appellant's counsel could not produce on record any worthwhile document to show that 72 hours period in sending the sample to the FSL was mandatory and its non-compliance was fatal.

11. In '*Bilal Ahmed vs. State*', 2011 I AD (Delhi) 613, this Court categorically held that the delay in sending parcel to CFSL was not fatal when as per CFSL report its seals were intact and tallied with specimen seals. The delay of 59 days in sending the same was not considered fatal. Reliance was placed on '*Hardip Singh vs. State of Punjab*', 2008 (8) SCC 557, wherein it was held :

"16. So far as the question of delay in sending the samples of opium to the Forensic Science Laboratory (FSL) is concerned, the same in our opinion has no consequence for the fact that the recovery of the said sample from the possession of the appellant stands proved and established by cogent and reliable evidence led in the trial. PW 5 has categorically stated and asserted about the recovery of opium from the possession of the appellant, which fact is also corroborated by a higher officer, namely, SS Mann, DSP who was also examined at length during the trial. The said recovery was effected in the presence of the said SS Mann, DSP, as senior police officer, who also put his seal on the said parcels of opium.

17. The then Station House Officer, Inspector Baldev Singh, who was examined as PW 1, was posted at Police Station Ajnala on the date of occurrence. He received the said samples of opium along with case material, being produced before him by PW 5. It has come on evidence that Inspector Baldev Singh kept the entire case property with him till it was deposited in the office of the Chemical Examiner, Amritsar on 30.9.1997 through ASI Surinder Singh, (PW-3). It has also come on evidence that till the date the parcels of sample were received by the Chemical Examiner, the seal put on the said parcels was intact. That itself proves and establishes that there was no tampering with the aforesaid seal in the sample at any stage and the sample received by the analyst for chemical examination contained the same opium which was

recovered from the possession of the appellant. In that view of the matter, delay of about 40 days in sending the samples did not and could not have caused any prejudice to the appellant. The aforesaid contention, therefore, also stands rejected.”

12. In ‘*Rattan @ Ratan Singh vs. State (Govt. of NCT of Delhi)*’, 2013 II AD (Delhi) 288, delay of one month in sending sample was not taken as fatal. In ‘*Jarnail Singh vs. State of Punjab*’, AIR 2011 SC 964, the Supreme Court held :

“15. Mr. Ujjal Singh then submitted that there was a delay of twelve days in sending the sample of narcotic for chemical examination. This submission, in our opinion, is without any factual basis. The trial court as well as the High Court, on examination of the entire material, concluded that there was sufficient independent evidence produced by the prosecution regarding the completion of link evidence. Therefore, the delay in sending the sample parcel to the office of Chemical Examiner pales into insignificance. We are of the considered opinion that mere delay in sending the sample of the narcotic to the office of the Chemical Examiner would not be sufficient to conclude that the sample has been tampered with. There is sufficient evidence to indicate that the delay, if any, was wholly unintentional. This Court had occasion to deal with a similar issue, in the case of Balbir Kaur v. State of Punjab : (2009) 15 SCC 795. The Court made the following observations:

*As far as delay in sending the samples is concerned, we find the said contention untenable in law. Reference in this regard may be made to the decision of this Court in *Hardip Singh* case⁶ wherein there was a gap of 40 days between seizure and sending the sample to the chemical examiner. Despite the said fact the Court held that in*

view of cogent evidence that opium was seized from the Appellant and the seals put on the sample were intact till it was handed over to the chemical examiner, delay itself is not fatal to the prosecution case.

The trial court as well as the High Court, on examination of the evidence on record, concluded that the case property was handed over by Ram Pal (PW4), Investigating Officer to the SHO Inspector Rachhpal Singh (PW3). This witness checked the case property and affixed his own seal bearing impression 'RS' on the case property as also on the sample impression of the seal. The case property was deposited with MHC Sudh Singh on the same day. Sudh Singh appeared as PW1 in court and tendered his affidavit Ex. PA to the effect that the case property including the sample parcel and the specimen impression of the seal, duly sealed and intact was deposited with him by Ram Pal, PW4, on 23rd September, 1994. He also stated that he handed over the sample parcel, duly sealed and sample impression of seal to Constable Chet Ram on 4th October, 1994 for depositing the same in the office of Chemical Examiner. It was further stated that none had tampered with the aforesaid case property and the seal which remained in his custody. He ultimately deposited the case property in the office of Chemical Examiner on the same day and tendered receipt. This apart, there is a report of the Chemical Examiner (Ex. PJ) which indicates that the seals were intact when the sample was received and tallied with the sample impression of the seal. It is note worthy that such a report of the Chemical Examiner would be admissible under Section 293 of the Code of Criminal Procedure Considering the aforesaid clear evidence, it cannot be said that there is any infirmity in the link evidence merely because there was a delay of few days in sending the sample to the office of the Chemical Examiner.”

13. The delay in the instant case for five days per se thus is not consequential to throw away the prosecution case as a whole.

14. It is true that as per FSL report the quantity of the sample received was 5.009 grams. In my view, it has no impact on the merits of the case. The sample drawn was of 5 grams each. There can be minor variation when the same quantity is weighed with different weights at two stages. Possibility of the polythene bag in which the sample material was contained to be weighed along with it cannot be ruled out. No such explanation was sought from the Investigating Officer or any other prosecution witness.

15. Other minor discrepancies or infirmities highlighted by the appellant's counsel are of no consequence as they do not affect the core of the prosecution case. The Trial Court has dealt with all these aspects in the impugned judgment and it deserves no intervention.

16. Regarding sentence order, the minimum substantive sentence prescribed for the crime has been awarded which cannot be altered or modified. The sentence order is modified to the extent that default sentence for non-payment of fine ₹ 1 lac will be SI for one month instead of three months. Other terms and conditions of the sentence order are left undisturbed.

17. The appeal stands disposed of in the above terms. Trial Court record be sent back forthwith with the copy of the order. A copy of the order be sent to the Superintendent jail for information.

MAY 06, 2016 / tr

**(S.P.GARG)
JUDGE**