

IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 28.09.2020

+ **CRL. A. 915/2016 & CRL. M. (BAIL)316/2020**

SAMUEL OKEKE

.....Appellant

Versus

STATE

..... Respondent

Advocates who appeared in this case:

For the Appellant :Mr.Ajay Verma, Advocate.

For the Respondent :Ms. Kusum Dhalla, APP for State.

CORAM

HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. The appellant has filed the present appeal impugning the judgment dated 04.07.2016 passed by Special Judge, NDPS-02 (Central), Tis Hazari Courts, Delhi, whereby the appellant was convicted of committing an offence punishable under Section 22(c) of the Narcotics and Psychotropic Substances Act, 1985 (hereafter referred to as the 'NDPS Act'). The appellant was held guilty for being in possession of four hundred grams of Methamphetamine. In addition, the appellant was also convicted of committing an offence punishable under Section 21(b) of the NDPS Act on account of being found in possession of ten grams of cocaine.

2. The appellant also impugns the order on sentence dated 05.07.2016, whereby the Trial Court sentenced the appellant to undergo rigorous imprisonment for ten years with a fine of ₹1,00,000/- and in default of payment of fine, to undergo simple imprisonment for a further period of six months for committing an offence punishable under section 22(c) of the NDPS Act. The appellant was sentenced to undergo rigorous imprisonment for a period of six months with a fine of ₹10,000/- and in default of payment of fine to undergo simple imprisonment for a further period of one month for committing an offence punishable under Section 21(b) of the NDPS Act. Both the sentences were to run concurrently.

3. The case of the prosecution is that secret information was received on 19.11.2013 that the appellant – a Nigerian national engaged in dealing in drugs – would come near ISBT to deliver the drugs. The information was recorded and after authorisation from a competent officer, a raiding team was constituted. The raiding team along with the informer took positions near the ISBT terminal. The appellant was observed walking from the direction of ISBT; the secret informer identified him; and he was apprehended at 07:55 pm on 19.11.2013. The appellant was served a notice under Section 50 of the NDPS Act and was, thereafter, searched. Four hundred grams of Methamphetamine was found concealed in a metallic box recovered from a bag carried by the appellant and ten grams of cocaine was recovered from the rear pocket of his lower (trousers). The appellant was also alleged to have violated the conditions of the visa for entry

and stay in India. An FIR being FIR No. 195/2013 was registered with the PS Crime Branch. The appellant was arrested at 4.30 a.m on 20.11.2013 and was prosecuted pursuant to the said FIR. The appellant was charged for committing offences punishable under Sections 21 and 22 of the NDPS Act and Section 14 of the Foreigners Act 1946. He pleaded not guilty and, accordingly, the matter was set down for trial.

4. The Trial Court evaluated the evidence led and on the basis of testimonies of the police officials, (PW-8, PW-10 and PW-12) and held that the appellant was guilty of offences published under Section 21(b) and 22 (c) of the NDPS Act. The Trial Court found that the appellant had already been convicted and sentenced for committing an offence punishable under Section 14 of the Foreigners Act, 1946 by a judgment 23.05.2012 rendered in a case emanating from FIR No. 505/11 registered with PS Uttam Nagar. Accordingly, the Trial Court acquitted the appellant of the charge for committing the offence under Section 14 of the Foreigners Act, 1946.

5. The appellant contends that the case of the prosecution is fabricated and is based solely on the testimonies of certain police officials. According to the appellant, he was arrested from his house. The appellant further contends that the prosecution has failed to establish that four hundred grams of methamphetamine was recovered from him. He also contends that the Trial Court had erred in not taking into account that the evidence such as the delay in preparing the arrest

memo, the FSL forms and absence of including independent witnesses raised considerable doubts regarding the case set up by the prosecution.

Evidence

6. Before proceeding further, it is necessary to analyse the relevant testimonies.

7. SI Rajni Kant was examined as PW12. He testified that on 19.11.2013, at about 6:30 pm, a secret informer came to meet him in his office and informed him that one Nigerian namely Samuel Okeke would come between 7:45 pm and 8:15 pm, beneath the flyover of ISBT, Wazirabad Ring Road to supply Methamphetamine and Cocaine to some other Nigerian for sending the same to Malaysia. He deposed that he produced the secret informer before Inspector Akash Rawat at 6:45 pm. After satisfying himself regarding the information, Inspector Rawat informed ACP Zile Singh about the secret information. ACP directed Inspector Rawat to take the necessary steps. He in turn directed PW 12 to do so. PW12 deposed that he lodged DD No. 17 with respect to the secret information at 6:55 pm (Ex.PW 2/C). Copy of the same was given to Inspector Rawat for onward transmission to ACP. Thereafter, he called HC Bharat, HC Sunil Dutt and Ct Sunny Kumar and informed them regarding the facts of the secret information. He constituted a raiding party and made departure entry No. 18 (Ex. PW12/A). He stated that all the

police officials along with the secret informer left their office at around 7:05 pm in a private vehicle – a blue coloured Wagon R bearing the registration no. DL-8CP-3419. He deposed that he had also collected the IO Kit bag, field testing kit and an electronic weighing machine. He stated that they reached the spot near ISBT flyover at about 7:35 pm via Pushta Road, Shanti Van, Jamuna Bazar, ISBT.

8. PW 12 deposed that he requested four-five public persons after coming out from the office, at Jamuna Bazaar and at ISBT, but no one was ready to join the investigation and left without disclosing their names and addresses. At about 7:45 pm, one Nigerian national was seen walking from the direction of ISBT and was identified by the secret informer. The said Nigerian (identified as the accused) was carrying a green coloured cloth bag in his right hand. He was wearing a white grey printed half sleeve shirt and a black coloured lower. It seemed that he was waiting for someone. After five-seven minutes, at about 7:55 pm, they apprehended the accused.

9. PW12 deposed that he introduced himself to the accused and informed him about the secret information. He informed the accused about his legal right to ask to be searched in the presence of a Gazetted Office or a Magistrate, if he so desires. Accused was also told that he could search the police officials before they took his search, but he refused. PW12 stated that he served a notice under Section 50 of the NDPS Act (Ex. PW8/A) to the accused (appellant). The accused went

through the same and responded by writing his reply (Ex, PW8/B) on the notice. Some public persons had collected but they refused to join the proceedings.

10. PW12 stated that he searched the light green colour bag, which was in the right hand of the accused, and it was found to contain one green and black colour carton box on which 'Executive Golf Set' was written. He opened the carton box and it was found containing one silver coloured metallic box. He opened the box with the help of a hook and it was found containing two balls, three section golf club and one putting hole along with a case inside the metallic box. There was black coloured foam pasted inside the metallic box. He removed the foam and it was found containing two transparent polythenes, one on each side of the metallic box, containing white crystals. He stated that the two transparent polythene were tied with a brown tape. He opened both the polythene and kept the contents of both the pouches in one transparent polythene. Thereafter, he checked the white crystals on the field testing kit and turned out to be methamphetamine. The substance was weighed on an electronic weighing machine and it weighed four hundred grams. He stated that he took out two samples of five grams each and kept the same in two transparent polythenes. He marked these samples as A and B. The remaining methamphetamine was kept in a separate cloth parcel and was marked as C. The other parts of the original box were kept in the same green colour cloth bag and the same was sealed in a cloth parcel and marked as Mark D.

11. PW12 deposed that thereafter he conducted a cursory search of the accused and from the rear right cross pocket of his lower garment, one white coloured transparent polythene containing some powder was recovered. On checking the powder on the field testing kit, it was found to be cocaine. It weighed ten grams. He stated that he took out two samples of two grams each and kept the samples in two separate cloth parcels, which were labeled as Mark E and F. The remaining six grams of cocaine was kept in the same transparent polythene and was put in a cloth parcel, which was marked as Mark G. He testified that he affixed his seal of 5APS NB Delhi on all the *pullandas* (cloth parcels) and prepared the FSL forms on the spot and put his seal on the FSL form as well. Thereafter, he handed the seal to HC Sunil Dutt. He stated that the case property was taken into possession vide seizure memo (Ex. PW1/B). Thereafter, he prepared the *tehrir* (Ex. PW1/B) and gave the same to HC Bharat for the registration of the FIR. He also handed over the sealed parcels, FSL form and a copy of the seizure memo to him. HC Bharat left the spot at about 11:10 pm.

12. PW12 deposed that at about 2:30 am, SI Sumit Malik came to the spot. He handed over the documents prepared by him and the accused to him. SI Sumit Malik prepared the site plan at his instance (Ex. PW 6/A). SI Sumit Malik recorded the statement of HC Sunil Dutt and interrogated the accused. The accused was formally arrested and the arrest memo (Ex. PW 6/C) was prepared. Personal search of the accused was conducted and memo (PW 6/D) was prepared. ₹250/- in cash and a copy of the notice under Section 50 of the NDPS Act

were recovered. The disclosure statement of the accused (Ex. PW 6/B) was also recorded. Thereafter, they left the spot at about 4:45 am along with the accused and went to PS Crime Branch. The Second IO, Sumit Malik, deposited the personal search articles of the accused with MHC(M) and also recorded the statement of the SHO PS Crime Branch and MHC(M). Thereafter, they came back to the Narcotics Cell, Shakarpur at about 7:30 am. The accused was produced before Inspector Akash Rawat. The arrival entry was made by the second IO in the Narcotics Cell.

13. PW 12 deposed that on 20.11.2013, he prepared a report under Section 57 of the NDPS Act regarding seizure of Methamphetamine and Cocaine (Ex. PW 2/A) and forwarded the same to ACP through Inspector Narcotics Cell.

14. In his cross examination, PW12 stated that at the time of the raid, he was not carrying his mobile. He also stated that no other raiding party member was carrying a mobile phone. They were also not carrying any wireless set. PW12 also agreed with the suggestion that buses leaving the ISBT have to give a receipt to the officials present at the out gate. He stated that he did not call any such official to join the raiding team or investigation of this case.

15. HC Bharat Singh was examined as PW8 and he stated that he had taken the *tehrir* for the registration of the FIR. He was part of the raiding party and his narration of the events leading to the

apprehension of the accused and proceedings thereafter is consistent with the testimony of PW12. He testified that he had left the spot at around 11:10 pm and reached the PS Crime Branch at 12:05 am. He had handed over the original *tehrir* to the duty officer and handed over the sealed parcels, FSL form and carbon copy of the seizure memo to the SHO. He testified that SHO Inspector Virender Singh called MHC (M) inside his office with instructions to bring Register no. 19. He also affixed his seal of 'VSS' on the *pullandas* and put his signatures against the relevant entries. PW8 stated that, thereafter, he collected the computerized copy of the FIR and gave the FIR to SI Sumit Malik. SI Sumit Malik, then proceeded to the spot in the same vehicle leaving PW8 behind. He deposed that about 9:15 am, on the next day, SI Sumit Malik recorded his statement at the Narcotics Cell Office.

16. In his cross examination, PW8 stated that he was not carrying a mobile phone with him during the raid. He also did not notice if any raiding party member was carrying a mobile phone or not. He stated that he had no idea if any government phone had been issued in favour of SI Rajnikant (PW12). He also deposed that at the time of leaving for the raid, he had left his mobile in the narcotic cell in a switched off condition.

17. HC Sunil Dutt, who was also a member of the raiding party, was examined as PW10. His testimony is also consistent with the testimony of PW12 and PW8 except that he did not testify that the white crystals (Methamphetamine) recovered from the two polythene

pouches concealed in metallic box were tested after the contents were taken out and kept together.

18. HC Daya Nand was examined as PW1 and he testified that he had registered the FIR in question. He testified that on 19.11.2013, he was working as Duty Officer from 8pm to 8am. He deposed that about 12.05am, he received a *rukka* sent by SI Rajnikant through HC Bharat Singh. On the basis of the *rukka*, he got the present FIR (Ex. PW-1/A) registered and handed over a copy of the FIR and the *rukka* to HC Bharat Singh to hand over the same to SI Sumit Malik since further investigations were marked to SI Sumit Malik.

19. SI Sumit Malik, the second IO, testified as PW6. He deposed that on 20.11.2013, at about 2 pm, HC Bharat Singh gave him the original *tehrir* and the computerized copy of the FIR at Narcotics Cell, Shakarpur. He made his entry vide DD No. 2 in his office and he alone went to the spot driving a blue coloured Wagon R bearing registration no. DL 8CP-3419 Wagon R Blue Colour. He reached at the spot. i.e. beneath ISBT flyover where he met SI Rajni Kant and the raiding party. He deposed that he prepared the site plan and recorded the statement of HC Sunil Dutt. He interrogated the accused; recorded his disclosure statement; arrested him; and prepared arrest memo (Ex. PW 6/C). He conducted a personal search of the accused (Ex. PW6/D). Thereafter, he along with the other officials went to the Narcotics Cell, Shakarpur. He deposed that he produced the accused before Inspector Aakash Rawat. PW6 stated that he recorded the statement of Aakash

Rawat, SI Rajni Kant, HC Sunil Dutt and HC Bharat Singh. He deposed that he prepared a report under Section 57 of the NDPS Act (Ex. PW 6/E) and produced the report before Inspector Aakash Rawat. He stated that the accused was medically examined. Thereafter, he was produced before the concerned court and was sent to judicial custody.

20. Inspector Aakash Rawat deposed as PW7. He stated that about 6.45 p.m, SI Rajnikant informed him that he had received secret information regarding a Nigerian dealing in party drugs. After having satisfied himself regarding the information and making inquiries from the secret informer, he informed the ACP, N & CP, Sh. Zile Singh in his office. He also forwarded DD No. 17 as prepared by SI Rajnikant to ACP Zile Singh. He deposed that on 20.11.2013, at about 7:30 am, SI Sumit Kumar produced the accused before him and thereafter, his statement was recorded by SI Sumit Kumar. He deposed that on 20.11.2013, SI Rajnikant placed before him the report under Section 57 regarding seizure of the contraband (Ex. PW 2/A) and SI Sumit Kumar furnished his report under Section 57 regarding the arrest of the accused Samuel (Ex. PW 2/B). He deposed that he forwarded both the reports to the ACP. He deposed that he had enquired about the source and the destination of the contraband from the accused in both English and Hindi.

21. HC Maan Singh was examined as PW2. He deposed that on 19.11.2013, he received two reports under Section 57 of the NDPS

Act, duly signed by SI Rajnikant Sharma, regarding the seizure of four hundred grams of methamphetamine and ten grams of cocaine vide Diary No. 3059. He stated that he had received another report regarding the arrest of the appellant made by SI Sumit Malik (PW6) vide Diary No. 3060. The reports had been duly forwarded by Inspector Akash Rawat of N & CP Crime. He stated that he put up both the reports before ACP Sh. Zile Singh. He proved both the reports (Ex. PW 2/A and Ex. PW 2/B) in Court. He also brought the copy of DD No. 17 dated 19.11.2013, which was forwarded by Insp Akash Rawat and received in their office vide Diary No. 3058 dated 19.11.2013 (Ex PW 2/C).

22. On cross examination, PW2 stated that he did not know the exact time when the aforesaid DD and reports under Section 57 of the NDPS Act, were received. He volunteered that DD entry was received in their office during evening time and reports under Section 57 of the NDPS Act were received in the morning. He stated that he placed the DD entry and reports under Section 57 of the NDPS Act before the ACP, immediately after the receipt of the same. He denied the suggestion that the entries were manipulated.

23. Inspector Virender Singh, who was the SHO, Crime branch, at the material time was examined as PW4. He testified that on 20.11.2013, at about 12:10 am, HC Bharat Singh had arrived at the office and handed over seven *pullandas*, all bearing one seal of 5APS NB Delhi, along with the FSL form. He stated that he put his seal of

VSS and at about 12:40 am, he called MHC(M) HC Jag Narain and deposited all the abovesaid seven *pullandas* and the documents in the *malkhana*. He deposed that HC Jag Narain made the entries in Register No. 19 and he put his signatures in the relevant column. He testified that at about 12:50 am he recorded DD No. 3 (Ex. PW/A). Thereafter at about 05:50 a.m, SI Sumit Malik arrived in his office and recorded his statement. On 22.11.2013, he instructed the MHC (M) to deposit the *pullandas* containing the samples along with FSL form, at FSL, Rohini.

24. HC Jag Narain deposed as PW5 and stated that on 20.11.2013, Inspector Virender Singh, SHO called him in his office along with Register No. 19. He handed over seven *pullandas* and FSL form duly sealed with the seal of 5APS NB Delhi and VSS and the carbon copy of the seizure memo. He proved the photocopy of the entry in Register 19 at serial no. 2011 (Ex. PW 5/A). He testified that on 20.11.2013, SI Sumit Kumar produced the personal search items of the accused, carbon copy of notice under Section 50 of the NDPS and ₹ 256/-, for which he made an entry in register No. 19 at Serial No. 2012 (Ex. PW 5/B). He deposed that on 22.11.2013, two sealed parcels of this case were sent to FSL Rohini through Ct Sunny (apparently a typographical mistake should be Ct Shani Kumar) vide RC no. 374/21/13.

25. In his cross examination, PW5 stated that it was correct that no time was mentioned in the Register no. 19 in entry 2011 and 2012. He affirmed that it is correct that if parcels are deposited before 12

midnight, the entries of the previous date are made and after 12 midnight, the entries are to be mentioned in the next dates in the Register No. 19.

26. Ct Shani Kumar was examined as PW3 and had deposited the samples in FSL Rohini. He testified that on 22.11.2013, he had deposited Samples A and E, which were sealed with seal of 5APS NB Delhi and VSS, along with FSL form bearing the same seal impression and RC bearing no. 374/21/13 dated 22.11.2013, with the FSL Rohini. In his cross examination, he denied the suggestion that he had tampered with the case property when the same was in his possession.

27. Sh. Sanjeet Kumar, JJA, deposed as PW9. He brought and proved the judicial file of the accused in FIR No. 505/11, under Sections 323/325/341 of the IPC and Section 14 of the Foreigners Act, 1946, registered with PS Uttam Nagar. He testified that the accused was acquitted of the offences under IPC but had been convicted for offence punishable under Section 14 of the Foreigners Act, 1946. The accused was sentenced to undergo simple imprisonment for a period of four months and to pay a fine of ₹1,500/-. In default of payment of fine, the accused would undergo simple imprisonment for a further period of seven days.

28. The accused in his statement under Section 313 of the CrPC stated that he had been falsely implicated in the present case and no contraband was recovered from him and the case property was planted

on him. He stated that the police officials obtained his signatures on some blank papers and on some printed forms. He stated that he was lifted from his house at Uttam Nagar and the police officials took his electricity bills, rent agreement, and tore them and took his mobile phone as well.

29. To prove his innocence, the accused examined three witnesses in his defence.

30. DW3 – Ct Sandeep proved the copy of the RTI application (Ex. DW 3/A) and the reply to the application given by PIO North (Ex. DW/3). By his application dated 21.03.2016, the accused sought information regarding the names and ranks of police officials deputed at the outer area of ISBT Gate near the flyover leading to ISBT from Wazirabad Ring Road on 19.11.2013 from 6 pm in the evening to 6 am on 20.11.2013, as maintained in the duty roster. He also sought information whether any foreign national was arrested near ISBT on 19th- 20th November, 2013. The reply dated 19.04.2013 (Ex. DW3/B) stated that no foreigner had been found arrested on 19th and 20th November, 2013 in the area of ISBT, Delhi.

31. SI Sanjay Kumar deposed as DW1. He stated that he was posted as Incharge PP ISBT under the jurisdiction of Kashmere Gate. He deposed that there was always night patrolling on the road from ISBT to Tis Hazari. In his cross examination he stated that it is correct that the night patrolling staff used to patrol the area but since the area was

quite large, the night area patrolling staff could not be available at a given time in the entire area. SI Ravi Kumar deposed as DW2 and he deposed that on 19.11.2013, he was posted at PS Kashmere Gate and was on emergency duty.

Submissions

32. Mr Verma, learned counsel for the appellant contended that the case regarding the raid proceedings put forth by the prosecution is completely fabricated and the appellant was lifted from his house in Uttam Nagar. He contended that the fabrication of false evidence was substantiated by the fact that the appellant was allegedly apprehended at 7:55 pm, whereas the arrest memo states that he was arrested at 04:30 am. He submitted that it could not be believed that the officials were conducting the raid proceedings till 4:30 am. PW12 had stated in his cross examination that the entire proceedings were conducted on the bonnet of the car and they had not taken any break for dinner, food, or otherwise. He submitted that the same was not necessary and could not be believed. Further the reply dated 19.04.2016 of the Public Information Officer to the RTI application dated 21.03.2016 filed by the appellant also confirmed that no foreigner was found arrested during 19.11.2013 & 20.11.2013 in the area of ISBT, Delhi.

33. It is further contended that the claim of the Investigating officer and the recovery witness that they had left the police station along with the field testing kit and the electronic weighing machine is also

unsubstantiated. The appellant contends that the *malkhana* register recording the withdrawal of such articles prior to the departure of the raiding team was not produced. Further, the field testing kit or electronic weighing machine was also not produced in Court to prove that any such test was conducted on the spot.

34. He further contends that contents of both the packets allegedly containing the Methamphetamine were mixed without drawing samples from both the packets and therefore the prosecution has failed to establish that four hundred grams of methamphetamine was recovered from the appellant.

35. The appellant also challenges the veracity of the FSL receipt. The samples, which were marked as A and Mark E were sent for testing to the FSL and PW5-HC Jag Narain testified that the FSL receipt was given to him by PW3, Const. Shani. Mr Verma contended that neither the FSL Form nor the covering letter indicating the sample seals was produced and therefore there is no evidence that the sample as sealed was received by the FSL.

Reasons and conclusion

36. The first question to be addressed is whether there is any doubt that the appellant was apprehended at about 07:55 pm as claimed by the prosecution. It was contended on behalf of the appellant that since the arrest memo indicates that he was arrested at 04:30 am on

20.11.2013, the case set up by the prosecution that he was apprehended about eight and a half hours earlier, cannot be believed. In addition, it was also contended that the appellant had procured information pursuant to Right to Information Act, 2005, wherein it was confirmed by the police authorities that no foreigner had been arrested during the period as claimed by the prosecution.

37. The appellant was arrested by the raiding party, which was headed by SI Rajni Kant (PW12). PW12 had deposed that he had received secret information on 19.11.2013 and he had recorded the same at about 06:55 pm vide DD No. 17 (Ex.PW2/C). The same was presented before Inspector Aakash Rawat for onward transmission to the ACP in compliance with the NDPS Act. PW12 had produced the secret informer before Inspector Aakash Rawat at about 06:45 pm. Inspector Aakash Rawat (who deposed as PW7) also confirmed in his testimony that SI Rajni Kant had produced the secret informer before him and he had made the necessary inquiries from him. He further testified that after being satisfied regarding the information, he had informed the same to ACP Sh. Zile Singh and he had instructed him to take steps for conducting a raid. Inspector Aakash Rawat, PW7, further testified that he had directed SI Rajni Kant (PW12) to constitute a raiding team and proceed with the same. PW12 had also testified that he had recorded the secret information at about 06:55 pm vide DD No. 17 (Ex.PW2/C). He had further testified that thereafter, he called HC Bharat, HC Sunil Dutt and Ct. Shani Kumar and informed them regarding the secret information. The said persons

were included in the raiding party constituted to act on the secret information. The said raiding team departed from their station at about 7.05 PM and their departure was recorded vide DD Entry No. 18 (Ex.PW12/A). He testified that the police officials (raiding team) along with the secret informer had left the station at 07:05 pm in a private vehicle (bearing No. DL 8CP 3419). He had also collected the IO kit, field testing kit and electronic weighing machine. He testified that the team had reached near ISBT Flyover at about 07:35 pm travelling via Pushta Road, Shanti Van and Jamuna Bazaar. After reaching the spot, they had parked their vehicle below the flyover and the raiding team had taken their positions. He testified that at about 07:45 pm, one Nigerian was found walking from the direction of the ISBT. The secret informer pointed towards the accused indicating him to be the person who would be carrying illicit drugs. The accused stood beneath the flyover for about five to seven minutes and thereafter, started walking away. PW12 testified that they apprehended him at that stage, at about 07:55 pm.

38. The testimony of all the official witnesses is consistent regarding the events leading to the apprehension of the appellant. PW12, PW10 and PW8, who were members of the raiding party that had apprehended the appellant were cross examined. There is nothing stated in their cross examination that raises even an iota of doubt as to their testimonies regarding the apprehension of the appellant at about 7.55 p.m on 19.11.2013.

39. In view of the above the key questions to be addressed are whether the time spent leading to the arrest of the appellant at 4.30 a.m has been explained and whether the responses received pursuant to the information sought under the Right to Information Act, 2005 raise any doubt as to the presence of the raiding party at the spot near the ISBT and the appellant's apprehension at the said spot.

40. According to the prosecution, the bag carried by the accused was checked and it was found, that it contained a green and black coloured carton box on which Executive Golf Set was written. The said carton box was opened and it was found that it contained a metallic box. The said box was opened and it was found that it contained two balls, three section gold club and one putting hole. There was black coloured foam pasted inside the metal box. On removal of the foam, it was found that it contained two polythene on each side of the metal box. The said polythene were taped with a brown tape and contained white crystals. SI Rajni Kant (PW12) had kept the said crystals in a polythene and drawn samples after testing the said substance. He had then made parcels of the case property. PW12 had also searched the accused and he testified that a white coloured transparent polythene was recovered from the rear pocket of the lower garment worn by the accused. The said white coloured powder was also tested and weighed. Two samples were also drawn from the substance and kept in a separate transparent polythene tied with a rubber band. Separate cloth parcels were made of the case properties and the samples. They were sealed. PW12 further stated

that he prepared the FSL Form at the spot and had put a seal on the FSL Form. The seal was handed over to HC Sunil Dutt who was a part of the raiding team. He had thereafter prepared the *tehrir* (Ex.PW1/B). The same was handed over to HC Bharat with the direction to hand over the same to the Duty Officer for registration of the FIR. He had also handed over the sealed parcels, FSL Form and carbon copy of the seizure memo. HC Bharat left the spot with the said articles at about 11:10 pm. HC Bharat (PW8) also testified that he left the spot at 11:10 pm and reached PS Crime Branch at about 12:05 am in the private vehicle. He further testified that he handed over the original *tehrir* to the Duty Officer and he handed over the sealed parcels, FSL Form and the carbon copy of the seizure memo to the SHO (Inspector Virender Singh). The SHO had affixed his seal on the said parcels and had produced the case property before MHC(M), who made an entry in Register No. 19. PW8 testified that he collected the computerized copy of the FIR and the original *tehrir* from the Duty Officer and proceeded to the Narcotic Cell, Shakar Pur at about 02:00 am. He handed over the same to SI Sumit Malik, who proceeded to the spot in the same vehicle.

41. PW12 had testified that SI Sumit Malik (who was examined as PW6) had arrived at the spot at about 02:30 am. At that stage, he had handed over the documents prepared by him and had produced the accused before him (SI Sumit Malik). SI Sumit Malik had prepared a site plan at his (SI Rajni Kant) instance. He, thereafter, recorded the statement of HC Sunil Dutt at the spot. He also interrogated the

accused and formally arrested him at 04:30 am vide arrest memo (Ex.PW6/C). SI Sumit Malik (PW6) confirmed that he had prepared the site plan (Ex.PW6/A) at the instance of SI Rajni Kant. He had recorded the statement of HC Sunil Dutt and he had interrogated the accused. He also testified that he had recorded the disclosure statement of the accused (Ex.PW6/B); prepared the arrest Memo (Ex.PW6/C) and; thereafter, arrested the accused. He also testified that he conducted a personal search of the accused and a carbon copy of the notice under Section 50 of the NDPS Act and an amount of ₹250/- were recovered from him.

42. The testimony of the police officials as to the manner in which the accused was apprehended at about 07:55 am on 19.11.2013 and the timelines leading up to his formal arrest at 04:30 am on 20.11.2013, are consistent in material aspects. Although, delaying the arrest of the accused for eight and a half hours after he was apprehended, cannot be countenanced; but this delay has been sufficiently explained by the witnesses for the prosecution. Thus, the delay in his arrest does not raise any doubt as to his apprehension at the spot near ISBT and the recovery of illicit substance from his possession. The testimonies of the officials comprising of the raiding team and the testimony of SI Sumit Malik (PW6) establish the time frame of the proceedings leading to the formal arrest of the appellant at 04:30 am on 20.11.2013.

43. It is the appellant's case – as discernable from his statement recorded under Section 313 Cr.PC – that he was picked up from his house in Uttam Nagar and the case property was planted on him. He had also alleged that the police officials had taken his mobile as well. The appellant had also led evidence in his defence and had examined three witnesses. However, there is no evidence to establish that the appellant had been picked up from his residence and the case property had been planted on him.

44. In the present case, the police officials did not include any witnesses from the public or any other independent witnesses. However, the testimony of police witnesses cannot be ignored or doubted on this ground. In absence of evidence of any public or independent witness, it is essential that the testimony of the official witnesses should be subjected to greater scrutiny. In the case of ***Kalpnaath Rai Vs. State: (1998) AIR SC 201***, the Supreme Court observed as under:

“There can be no legal proposition that evidence of police officers, unless supported by independent witnesses, is unworthy of acceptance. Non-examination of independent witness or even presence of such witness during police raid would cast an added duty on the court to adopt greater care while scrutinising the evidence of the police officers. If the evidence of the police officer is found acceptable it would be an erroneous proposition that the court must reject the prosecution version solely

on the ground that no independent witness was examined.”

45. Thus in absence of testimonies of any independent witness, even minor inconsistencies in the evidence of the official witnesses may be considered as material. In the present case, this Court has carefully examined the evidence led by various official witnesses and there is no material inconsistency regarding apprehension of the appellant at the spot. Thus this Court has no doubt that the appellant was apprehended at about 07.55 pm on 19.11.2013, as claimed by the prosecution.

46. The appellant was arrested by officials of PS Crime Branch and thus the response from Public Information Officer of Additional Dy. Commissioner of Police North District is not determinative of whether the appellant was arrested near ISBT. The opening paragraph of the said reply (Ex DW3/B) indicates that the same was based on the report received from ACP Civil Lines and ACP Kotwali.

47. The next aspect to be examined is whether the prosecution has established the chain of custody of the samples, beyond any reasonable doubt. The learned counsel appearing for the appellant had contended that there is no evidence to establish that the samples received by FSL were the same as allegedly drawn by SI Rajni Kant (PW12). He stated that PW12 had testified that he had drawn two samples of 5 grams each from white crystals (methamphetamine)

recovered from the accused and had kept them in separate parcels marked as Mark A & Mark B. He further testified that he had drawn two samples of 2 grams each from the 10 grams of cocaine that were recovered from the rear trouser pocket of the accused and the said samples had been marked as Mark E & Mark F. He had testified that he had affixed his seal of “5APSNB Delhi” and had prepared the FSL Form at the spot and had also put the same seal on the FSL Form. He testified that the seal was handed over to HC Sunil Dutt. The seizure memo was exhibited as Ex.PW8/C. He stated that he had given the sealed parcels, FSL Form and the carbon copy of the seizure memo to HC Bharat with the direction to hand over the same to the SHO. HC Bharat had testified that he had received the said case property from SI Rajni Kant and as per his instructions, handed it over to the Inspector Virender Singh, who was the SHO of the PS Crime Branch at the material time. He was examined as PW4. He testified that HC Bharat Singh had handed him over seven *pullandas* marked as A, B, C, D, E, F & G. The said *pullandas* were sealed and were bearing the seal of 5APS NB Delhi. He stated that he had, thereafter, put his seal of VSS on all the seven *pullandas* and had called HC Jag Narain (who was the MHCM) along with Register No.19 and had made the necessary entries. The relevant *Malkhana* Register was produced (Ex.PW4/A) and the relevant entries conform with the testimony of PW4. MHC (M) HC Jag Narain, was also examined as PW5 and his testimony is consistent with that of PW4. He had produced the original Register no. 19; the same was seen by the Court and a photocopy of it (Ex.PW5/A) was retained on the record.

48. PW5 had further testified that on 22.11.2013, two sealed parcels were sent to FSL, Rohini through Ct. Shanni vide Road Certificate – RC No. 374/21/13. The original RC Register was seen by the Court and the photocopy of the relevant entry was placed on record as Ex.PW5/C. The original exhibits were deposited with the FSL lab and Ct. Shani had returned back and handed over the receipt (Ex.PW5/D).

49. Ex.PW5/D indicates that FSL, Rohini had received two sealed cloth parcels along with the FSL Form, copy of the FIR, seizure memo and sample seal. However, the FSL Form that was received by FSL, Rohini has not been placed on record. It was contended that there is no confirmation by FSL, Rohini that the two sealed cloth parcels that were received bore the seals of 5APS NB Delhi and VSS.

50. Ms. Kusum Dhalla, the learned APP for the State had readily conceded that this was a lapse on the part of the prosecution and the FSL Form/letter forwarding the Exhibits ought to have been exhibited. However, she pointed out that the examination report furnished by FSL clearly indicated that FSL had received two parcels and both of them were bearing the seal of PS/NB 5A Delhi and VSS. The said report also indicated that the said parcels were received through Ct. Shani on 22.11.2013. The report also specifically mentioned: *“Seals were found intact and tallied as per forwarding authority specimen seals.”*

51. Even though the forwarding letter under the cover of which the two samples were forwarded to FSL, Rohini have not been produced; this Court is unable to accept that there is any doubt as to the chain of custody. The prosecution has led evidence of the police official who had sealed the two parcels (that is, SI Rajni Kant, who was examined as PW12). Further, the evidence of the police officials that had carried the parcels to PS Crime Branch and had deposited it into the *Malkhana* and thereafter, had withdrawn the same from the *Malkhana* and carried to the FSL, have been brought on record. The Chemical Examination Report (Ex.PX) also clearly records that the seals on the parcels when received were intact and it also confirms that the parcels were bearing the seals “5APSNB Delhi” and “VSS”.

52. In view of the above, the contention that the accused is liable to be acquitted only on the ground that the chain of custody of the samples allegedly drawn has not been established, is unmerited.

53. The next question to be examined is whether the procedure adopted by the concerned police official (SI Rajni Kant) in drawing the samples of the illicit substance was faulty and whether the prosecution has established beyond reasonable doubt that four hundred grams of methamphetamine and ten grams of cocaine was recovered from the possession of the appellant.

54. PW12 had deposed that he had given notice under Section 50 of the NDPS Act (Ex.PW8/A) to the accused. The accused had gone

through the contents of the notice and had penned down the reply in his own handwriting. He did not want to be searched before a Gazetted Officer/Magistrate and therefore, PW12 had conducted his search. He testified that he had taken the light green coloured bag from the right hand of the accused and on checking the bag it was found that it contained one green and black coloured carton box on which Executive Golf Set was written. He had opened the said box and found that the same contained a silver coloured metallic box. He testified that he, thereafter, opened the box with the help of a hook and it was found containing two balls, three section golf clubs and one putting hole along with the case inside the metal box. He testified that there was black coloured foam pasted inside the box. He had removed the foam and it was found that it contained two transparent polythenes; one on each side of the metal box. The two transparent polythenes were tied with a brown tape. PW12 testified that he had taken out the contents of both the transparent polythenes and kept the same in one transparent polythene. He had, thereafter, checked the white crystals on the field testing kit and found the same to be methamphetamine. He stated that he had weighed the substance on the electronic weighing machine and the same weighed four hundred grams. He took out two samples of five grams each and kept them in two separate transparent polythenes tied with a rubber band and these polythenes were kept in two separate parcels and were marked as A and B. The relevant extract of his testimony is set out below:-

“.... There was a black colour foam pasted inside the metallic box. I removed the foam and it was found containing two transparent polythene i.e. one on each side of the metallic box having white crystals. These two transparent polythenes were tied with brown tape. I had taken out the contents of both the transparent polythenes and kept the same in one transparent polythene. *Thereafter, I checked those white crystals on the field testing kit* and it came to be methaphatamine. Then, it was weighed on electronic weighing machine and it came to be 400 gm of methaphatamine. I had taken out two samples of 5gm each, kept the same in two separate transparent polythene, tied with rubber band and then these polythenes were kept in two separate parcels and were given mark A and B.”

[italics for emphasis]

55. It is evident from above that PW12 had not tested the contents of the two transparent polythenes, which were taped with a brown coloured tape. He had removed the contents from the said polythenes and had kept the same in a transparent polythene and thereafter, tested the substance. It is clear that he had drawn the samples after he had kept the contents of both the polythene packets together.

56. The testimony of PW8 (HC Bharat Singh) is also consistent with the testimony of PW12 and establishes that the contents of the two polythenes packets found underneath the foam inside the metallic box, were removed and put into a transparent polythene and then

weighed. Thereafter, two samples of five grams each were drawn. The relevant extract of his testimony is set out below:-

“..... IO opened the box with the help of hook and it was found containing two balls, three section gold club and one putting gold inside that metallic box. There was black colour foam pasting inside the metallic box. IO removed the form and it was found containing two transparent polythene having white crystals. These two transparent polythenes were tied with brown tape. IO checked those white crystals on the field testing kit and it came to be methaphatamine. *The white crystals from both the plastic polythenes were taken out and then it was kept in a separate polythenes* and then it was weighed on electronic weighing machine and it came to be 400 gm of methaphatamine. IO had taken out two samples of 5 gm each, kept the same in two separate transparent polythene, tied with rubber band and then these polythenes were kept in two separate parcels and were given mark A and B.”

[italics for emphasis]

57. Ms Dhalla, learned APP contended that the contents of the two polythenes were mixed only after the same were tested on a field testing kit. She referred to the testimony of HC Sunil Dutt (PW10) in this regard. He had testified as under:

“There was black colour foam pasting inside the box metallic box. IO removed the form and it was found containing two transparent polythene having white crystals. These two transparent polythenes were tied

with brown tape. IO checked those white crystals on the field testing kit and it came to be methaphatamine. The white crystals from both the plastic polythenes were taken out and then it was kept in a separate polythenes and then it was weighed on electronic weighing machine and it came to be 400 gm of methaphatamine. IO had taken out two samples of 5gm each, kept the same in two separate transparent polythene, tied with rubber band and then these polythenes were kept in two separate parcels and were given mark A and B.”

58. It is clear from the above that PW10 had not testified that the contents of the two polythene pouches were tested by PW12 by suing his Field Testing Kit before consolidating the contents. There is no ambiguity in the testimony of PW12, who had tested the substance in question. He had testified that he had conducted the test after the contents were taken out and kept in a polythene.

59. This Court is of the view that the manner in which the samples were drawn is fatal to the prosecution’s case regarding recovery of four hundred grams of methamphetamine from the appellant. The sample drawn after mixing the contents of both the polythene pouches cannot be stated to be representative of the contents of the two polythene pouches. The prosecution has been unable to establish that both the polythene packets, which were recovered from the metallic box, contained methamphetamine. This is because the contents of each of the polythene pouches were not tested prior to the same being kept together. The entire object of drawing and testing the samples is to

establish the composition of the substance recovered. It is, thus, essential to ensure that the samples drawn are of the same composition as the substance recovered from the accused. It is obvious, that if a sample is drawn after the contents of two or more packets have been mixed together, then the sample of the mixture would not be a true representative of the contents of each of the packets.

60. It is relevant to note that in ***E. Micheal Raj v. Intelligence Officer, Narcotic Control Bureau: (2008) 5 SCC 161***, the Supreme Court had held that when a narcotic drug or psychotropic substance is found, mixed with other neutral substances only, the content of the narcotic drug or psychotropic substance is to be taken into consideration for the purposes of imposition of punishment and the neutral substances have to be ignored. However, the said decision has been overruled in ***Hira Singh and Anr. v. Union of India and Anr.: Crl. A. No.722/2017, decided on 22.04.2020.***

61. If the decision in ***E. Micheal Raj*** (*supra*) was to be followed, then it would not make any difference if contents of two or more packets, which were suspected to contain illicit substance, were mixed and a sample was drawn from the mixture provide the substances were missed to an even consistency resulting in a homogenous mixture. If the contents have been properly mixed to a uniform consistency, then the analysis of the sample drawn from the said mixture would reveal the proportion of the offending substance in the mixture. The said proportion would indicate the exact amount of the illicit substance in

the said mixture. Thus, it would make no difference if the proportion of the offending drug in found in separate packets was different prior to the said contents being mixed. This is so because in any event, the proportion of the neutral substance would be ignored.

62. As an illustration if two packets are recovered from an accused – one packet containing hundred grams of a mixture containing 50% cocaine and the other containing white talc powder (a neutral substance) – and are mixed; the resultant mixture would contain 25% Cocaine. If the contents were mixed to a uniform consistency, analysis of a small sample drawn from the mixture would also indicate presence of cocaine to the extent of 25%. The same would establish that the accused possessed 50 grams of Cocaine and he would be prosecuted accordingly.

63. However, once it is held that the quantity of the entire mixture including the neutral substances have to be considered for the purposes of determining whether the quantity of the illicit substance is a small quantity or a commercial quantity, then it is important that the substances found in separate packets are not mixed prior to ascertaining the nature of the substance in each packet. This is because if one of the packets does not contain any illicit substance, mixing the same with contents of another packet containing illicit substance, would increase the quantity of the offending substance (which includes neutral substance) that is required to be considered for determining the punishment liable to be imposed on the accused.

64. It is also important to note that there is no evidence on record to indicate the respective weights of the two packets that were recovered from the metallic box. The prosecution has led evidence to establish that the contents of the same were kept together and two samples of five grams each were drawn. The analysis of one of the samples indicated that it contained Methamphetamine. It is material to note that there is also no evidence to indicate that the contents of the two packets were properly mixed. The FSL Report also does not indicate the percentage of the offending drug in the sample. It merely states. “*Ex.A was found to contain methamphetamine*”. It is thus not possible to accept that the prosecution has established that both of the pouches, concealed in the metallic box contained methamphetamine. Consequently, it is also not possible to ascertain the total quantity of methamphetamine recovered from the appellant.

65. In view of the above, the appellant’s conviction for committing an offence punishable under Section 22(c) of the NDPS Act, cannot be sustained.

66. The appellant has also been convicted for committing an offence punishable under Section 21(b) of the Act on account of ten grams of cocaine recovered from the rear pocket of the lower apparel worn by the accused. The evidence led by the prosecution (testimony of PW12, PW10 and PW8) clearly established the recovery of cocaine from the appellant.

67. PW12 had drawn two samples of two grams each from the ten gram of white powder recovered from a transparent polythene kept in the rear pocket of the lower apparel worn by the appellant at the material time. The said samples were sealed in two separate *pullandas*. One of them (sample marked E) was examined by Chemical Examiner, FSL, Rohini. As observed above, there is no material to doubt that the samples drawn were tampered. The FSL Report (Ex PX) indicates that the sample marked E contained cocaine to the extent of 23.6%. Thus, it is established that the appellant is guilty of committing an offence punishable under Section 21(b) of the NDPS Act and the impugned judgment convicting the appellant for committing such an offence warrants no interference.

68. In view of the above, the impugned judgment to the extent that it convicts the appellant for committing an offence punishable under Section 22(c) of the Act on account of being found in possession of four hundred grams of methamphetamine, is unsustainable and is set aside. Consequently, the sentence awarded to the appellant for the said offence is also set aside and the impugned order on sentence is modified to the aforesaid extent.

69. The appeal is partly allowed in the aforesaid terms. The pending application is also disposed of.

VIBHU BAKHRU, J

SEPTEMBER 28, 2020/RK