

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

% *Judgment reserved on :31.08.2015*
Judgment delivered on : 03.09.2015.

+ CRL.A.643/2013
SUPAPORN PATSAK

..... Appellant
Through Mr. M.L. Yadav, Adv.

versus

STATE

..... Respondent
Through Mr. Satish Aggarwal, Adv

CORAM:

HON'BLE MS. JUSTICE INDERMEET KAUR

INDERMEET KAUR, J.

1 This appeal is directed against the impugned judgment and order on sentence dated 08.11.2012 and 19.11.2012 wherein the appellant Supaporn Patsak (a Thai national) has been convicted under Section 21-C and 23-C read with Section 28 of the Narcotic Drugs and Psychotropic Substances Act (in short 'NDPS Act'). She has been sentenced to undergo RI for a period of 10 years for each of the offence and a fine of Rs.1 lac and in default of payment of fine, to undergo SI for one month each. Benefit of Section 428 of the Cr.PC has been granted to the appellant.

2 The version of the prosecution is that on 24.12.2006, it was learnt that one lady by the name of Supaporn Patsak holding a Thai passport was to travel to Beijing by flight No. CA-948 from the IGI Airport and her checked-in baggage would contain 1.250 kgs of heroin. This information was reduced into writing. The above lady on identification was off-loaded from the plane; she was carrying a black coloured strolley bag; her checked-in baggage was also off-loaded. In the presence of two public witnesses, a notice under Section 50 of the NDPS Act was served upon her. She was informed that she had a right to get her search conducted either before a Magistrate or a Gazetted Officer. She refused. On the search of the checked-in baggage, some old and used clothes were found. The bottom of the strolley bag appeared to be hard; there were screws fixed upon it. After removal of the screws, a packet secured with brown adhesive tape and covered with carbon papers of Korex was found concealed and on opening, it was found to contain an off-white coloured granule powder which gave a pungent smell. A pinch of the said powder on testing with the testing kit tested positive for heroin. Three representative samples of 5 gms each were drawn from this contraband. The remaining contraband and samples

were sealed and seized with the paper slips bearing the signatures of the witnesses. A facsimile of the seal was also affixed on the test memo. From the search of the person of the appellant, 40 Thai Bhats were recovered besides 700 US Dollors, 2,500/- Thai Bhats, a visiting card, her photograph, air ticket, boarding pass and checked-in baggage tag number was also recovered. A detailed panchnama (Ex.PW-7/C) was prepared. The statement of the appellant under Section 67 of the NDPS Act was recorded. She disclosed that she had visited India twice earlier with a friend but was not aware of the drug which was found in her bag as her bag had got damaged and she had given it to one Mr. Chinedo for repair; it was delivered back to her but she did not know about the concealment of this contraband. Statements of witnesses were recorded. The contraband was sent to CRCL for analysis which confirmed the same to be heroin.

3 On behalf of the prosecution, 17 witnesses were examined. The statement of the appellant under Section 313 of the Cr.PC was recorded. She pleaded innocence stating that she was not aware of the contraband lying in her checked-in baggage. No evidence was led in defence.

4 On the basis of the aforementioned evidence, both oral and

documentary, the appellant was convicted and sentenced as aforementioned.

5 Learned counsel for the appellant submits that the appellant has undergone incarceration of 9 years and she being a foreign national, a sympathetic consideration may be awarded to her in the sentence. In the alternate, on merits, it has been argued that there is sufficient evidence to show that there is tampering of the samples. It is pointed out that as per the version of the prosecution, a 5 gms sample was taken but the report of the CRCL discloses that what was received in the CRCL was contraband weighing 6.6 gms; this discrepancy in the sample is unexplained. To support this argument, reliance has been placed upon (2005) 9 SCC 773 Rajesh Jagdamba Avasthi Vs. State of Goa; submission being that in similar factual matrix where the Apex Court had noted the discrepancy in the weighment, the benefit had accrued in favour of the appellant and he was granted acquittal. The second line of argument adopted by the learned counsel for the appellant is on the testimony of the so called public witnesses; submission being that Satender (PW-14) has not supported the version of the prosecution. He has turned; the second public witness Prashant Rajani (PW-16) was a stock witness and this information has been elicited in his cross-Crl. Appeal No.643/2013

examination wherein he has admitted that he has deposed in the other proceedings of the DRI as well. The third argument propounded by the learned counsel for the appellant is that the conscious possession of the contraband (which is a mandate required to be proved by the prosecution) has not been established; there were three versions given by the appellant in her statement recorded under Section 67 of the NDPS Act; a wholesome reading of these statements would show that the appellant did not have the knowledge that the so called contraband which was recovered from her checked-in baggage was a drug. On all counts, the benefit must accrue in favour of the appellant and she be acquitted.

6 Arguments have been refuted. It is stated that on no count, does the impugned judgment call for any interference.

7 Record has been perused.

8 The members of the raiding party were namely Anju Singh (PW-7), Arvind Kumar Sharma (PW-8) and Satender (PW-14).

9 PW-7 and PW-8 were official witnesses. PW-7 had deposed that on a secret information which was a telephonic conversation which she received, she was briefed by Sanjay Bansal (PW-11 the Joint Director of

the DRI) that one lady passenger by the name of Supaporn Patsak was going to Beijing by an Air China flight and she could be carrying contraband in her checked-in baggage. PW-7 reached the airport. The passenger was off-loaded. Notice under Section 50 was served upon her. In the presence of two public witnesses, her checked-in baggage was opened where the strolley bag was found to contain some old clothes and cosmetics; on further checking of the baggage, the bottom appeared to be heavy and when unscrewed, one packet was found which was secured with brown adhesive tapes and carbon paper. The total weight of the recovered substance was 1450 gms; it was an off-white granule powder. Its net weight was 1300 gms. Three representative samples of 5 gms each were taken. In her cross-examination, she stuck to her stand; although a lengthy cross-examination was effected of this witness. In fact nothing to discredit her version has been pointed out by the learned counsel for the appellant on this score.

10 The second member of the raiding party was Arvind Kumar Sharma (PW-8) who also joined investigation with PW-7. His version is also on the same lines as PW-7. PW-8 had also recorded the statements of various other witnesses under Section 67 of the NDPS Act. In his

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cross-examination, he had reiterated that contraband was seized from the bottom lining of the strolley bag which was the checked-in baggage of the appellant.

11 Satender (PW-14) was another member of the raiding party who was a public witness. He did not toe the line of cross-examination. He was declared hostile and was permitted to be cross-examined by the learned Public Prosecutor; this witness was of no use to the prosecution.

12 Another member of the raiding party who was also a public witness was Prashant Rajani (PW-16). He was working as an Assistant Supervisor in the Air China Sector of the Airport at the relevant date. He has supported the version of the prosecution and has deposed on the same line as PW-7 & PW-8. He has deposed that after the passenger was off loaded, the notice under Section 50 of the NDPS Act was served upon the appellant. From her checked-in baggage, recovery was made of contraband which later on revealed to be heroin. The samples from contraband were drawn out in his presence and the paper slips which were pasted on the contraband on the remaining samples was signed by him. He also identified his signatures on the panchnama (Ex.PW-7/C).

In his cross-examination, he did not deter from his testimony. Although

he has admitted in one part of his examination that in another case booked by the DRI about 1- ½ years, he has given his statement (which has no connection with the present case) but merely because he had deposed in another prosecution of the DRI would not in any manner hold him out to be a stock witness. Relevant would it be to note that PW-16 was working as an Assistant Supervisor in Air China at the International Airport at Terminal 2. Raids by the DRI are largely effected at the International Airports and this is a well known fact; it is also fairly common that persons who are easily available in this sector would be requisitioned as public witnesses and in such an eventuality, PW-16 having joined investigation in another prosecution (wholly unconnected with the present case) by the DRI would not make him a stock witness. A stock witness is a person who is engrained time and again by the same Department to toe the line of the prosecution without any independent information; a perusal of the version of PW-16 wholly negatives this position. PW-16 was definitely not a stock witness.

13 The members of the raiding party i.e. PW-7, PW-8 and PW-16 have thus established that the contraband which was in the nature of heroin was recovered from the appellant.

14 The submission of the appellant that she was not in conscious possession of the same is also an argument which is noted to be rejected. Before drawing presumption under Sections 35 & 54 of the NDPS Act (which speaks of the culpable mental status of an accused) the prosecution must establish a prima-facie case and which the appellant is permitted to rebut; but noting the fact that the appellant in this case has not rebutted this statutory presumption, this Court notes that the physical possession of the contraband which was admittedly recovered from the checked-in baggage of the appellant, the knowledge that this substance was not heroin has not been rebutted by the appellant. It is also not the case of the appellant that the said checked-in baggage did not belong to her. The baggage tax (Ex.PW-7/H) affixed on the boarding card and air-ticket also established that this luggage in fact belonged to the appellant. The Apex Court has time and again held that once a physical possession of the contraband has been established, the argument that it was not a conscious possession is an argument the onus of which is to be discharged by the accused. Thus the burden would be upon the accused to rebut the statutory recognition of this fact that the accused was not in the knowledge that this substance was a contraband.

15 In this context, the argument of the learned counsel for the appellant that there were three versions given by the victim in her statement recorded under Section 67 of the NDPS Act have also been noted. There is no doubt to the proposition that a statement under Section 67 of the NDPS is a piece of evidence; it may not be a substantive piece of evidence but it can be used for the purposes of corroboration. Her first statement under Section 67 of the NDPS Act was recorded on 25.12.2006 (Ex.PW-7/M); on the same day, her second statement under Section 67 was also recorded (Ex.PW-7/O). They are both in the English language and they have been recorded before Anju Singh (PW-7). It was in these statements that there were various personal facts disclosed by the appellant which were only in her personal knowledge; it was disclosed by her that she had come to India on two earlier occasions with another friend and that friend had a boy friend by the name of Mr.Chinedo. Although in her first statement, she had stated that Chinedo had taken the suit case for repair and she did not know what was contained in the suit case but in the second statement (which was also on the same day), the appellant disclosed that she had knowledge that the heroin was contained in the bottom portion of this

suit case. Her third statement recorded under Section 67 of the NDPS Act was recorded much later on 28.02.2007 while she was in Tihar jail. This statement may not be relevant as it was only for the purpose of verifying her address of Thailand. Her retraction (Ex.PX/1) was received in the Court on 01.07.2007 after 5- ½ months after making her first statement and the trial Judge had rightly noted that this was on legal advice from her inmates or by her lawyer as there was no reason for this delayed retraction. Moreover, in her retracted version, she stated that she was physically beaten by the DRI officials. This appears to be wholly incorrect as the appellant was medically examined on the date of her remand (Ex. 7/Q) which revealed no injury upon her person.

16 In this background, her conscious possession of the contraband stood fully established.

17 The last argument of the learned counsel for appellant that the weight of the sample recovered in the CRCL was 6.6 gms whereas the version of the prosecution was that a 5 gms sample was drawn and the discrepancy being unexplained, the appellant is entitled to a benefit is also an argument which is misconceived. The sample received in the CRCL of 6.6 gms (as is evident from the report Ex.PW-9/A) was the

weight of the sample with the polythene bag. It was the gross weight of the sample which was inclusive of the polythene pouch and not the net weight of the sample alone. The gross and the net weight of the contraband has already been detailed supra. What was drawn and sent to the CRCL was the net weight of 5 gms and what was the net weight of the sample received in the CRCL has not been mentioned in Ex.PW-9/A. Obviously the gross weight would be more considering that the polythene bag would have some weight and thus the CRCL having noted that 6.6 (gross weight) had been received in the Department is another argument which in no manner is beneficial to the appellant.

18 Reliance upon the judgment of Rajesh Jagdamba on this score is misplaced; in that case, the Supreme Court had noted that there was a substantial difference in the net weight of the sample which was received in the Department and the sample which had been drawn. In that case, the sample sent for testing was 82.5 gms as against the weight of 115 gms; the difference of the weight in the present case is too minor.

19 The appellant was found in the possession of a commercial quantity. This is also evident from the report Ex.PW-9/A which had noted that the purity percentage of diacetylmorphine as 960 gms and the

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commercial quantity cordoned off to 250 gms; the appellant was rightly convicted under Section 21-C of the NDPS Act. The attempt on the part of the accused to export this contraband out of the country also calls for no interference in her conviction under Section 23-C read with Section 28 of the NDPS Act.

20 The appellant has already been granted the minimum sentence. On no count does the impugned judgment call for any interference. Appeal is without any merit. Dismissed.

INDERMEET KAUR, J

SEPTEMBER 03, 2015

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