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

Date of Decision: 28th April, 2015

+ **Crl.A. 590/2012 & Crl.M.B.950/2012 & Crl.M.A.16993/2012**

MS. MANKHANCHING TOMBING Appellant

Through: Ms.Sunita Arora with Mr.Krishan
Kumar, Advocates

Versus

DIRECTORATE OF REVENUE INTELLIGENCE Respondent

Through: Mr.Satish Aggarwala with Mr.Amish
Aggarwala, Advocates for DRI.

CORAM:

HON'BLE MS. JUSTICE SUNITA GUPTA

J U D G M E N T

: SUNITA GUPTA, J.

1. The appellant Mankhanching Tombing impugns the judgment and order on sentence dated 07.04.2012 passed by learned Special Judge (NDPS), South & South East District, Saket Courts in Sessions Case No. 21A/2006 whereby the appellant was convicted for offence under Section 21(c) of NDPS Act, 1985 and sentenced to undergo rigorous imprisonment for 10 years and fine of Rs.1 lac, in default of payment of fine to undergo simple imprisonment for six months.

2. On 27.09.2005, the appellant was intercepted at Domestic Airport of IGI by Sh. Madan Kumar, Intelligence Officer, DRI when she was leaving

for Chennai by Jet Airways Flight No. 9W-0832. The search of her personal luggage resulted in recovery of 1.459 kgs of heroine. After completing the procedural formalities, the representative samples of the contraband were sent for chemical analysis, which on analysis, were found to be heroine. Prosecution relied upon the evidence of PW-1 Madan Kumar, Intelligence Officer who received the information and reduced the same into writing as Ex.PW1/A, PW-2 Sh.B.K.Banerjee, Appraiser in DRI who issued the seal of DRI to the Investigating Officer on 27.09.2005 and received the seal back on the same day. He also received the report under Section 57 of NDPS Act Ex.PW2/A from the complainant. He also sent the sample parcels to CRCL vide forwarding letter Ex.PW2/D and subsequently one report Ex.PW3/Q regarding execution of search warrant Ex.PW3/N. PW-3 Sh.M.C.Maheshwari, the main Investigating Officer of the case who deposed on the lines of the prosecution story regarding apprehension of the accused from the airport, recovery of contraband substance from her baggage and various aspects connected with the investigation of the case. PW-4 Sh.R.P.Meena, Assistant Chemical Examiner, CRCL who analysed the samples and proved the test report as Ex.PW4/B. PW-5 Sh.R.S.Kashyap with whom the case property was deposited by the Investigating Officer. PW-6 Ms.Kanwaljit Bakshi, Intelligence Officer of DRI who remained

present at the time of recording of statements Ex.PW3/F and Ex.PW3/G under Section 67 of the NDPS Act of the accused. She also conducted personal search of the accused subsequent to her arrest. PW-7 Sh.Trilok Chand and PW-8 Sh Ashwini Kumar Gaind, independent witnesses who joined the proceedings. PW-10 Ms.Baneeta Khurana was the female member of the raiding team of the DRI and deposed regarding the apprehension of the accused, search and seizure proceedings. PW-11 Sh.Vinod Kumar, Deputy Director, DRI to whom the information Ex.PW1/A was put up by PW-1 Madan Kumar and he had directed the complainant to take further action in the matter.

3. The learned Special Judge on appreciation of evidence on record accepted the prosecution case and convicted and sentenced the appellant, as indicated above. The legality and validity of the impugned judgment was challenged by learned counsel for the appellant primarily on the following grounds:

(i) The notice under Section 50 of NDPS Act served upon the appellant was defective and not in accordance with the provisions of NDPS Act. Section 50 of NDPS Act confers a statutory right upon the accused to be searched before a Gazetted Officer or a Magistrate. It was imperative on the part of the empowered officer to apprise the person intended to be searched

of his right to be searched before a Gazetted Officer or a Magistrate. The notice given in the present case shows that the appellant was merely given an option and not apprised about her right of being searched before a Magistrate or a Gazetted Officer. Reliance was placed on *Ashok Kumar Sharma vs. State of Rajasthan*, (2013) 2 SCC 67; *State of Delhi vs. Ram Avtar @ Rama*, (2011) 12 SCC 207; *Gujrant Singh @ Janta vs. State of Punjab*, 2013 (13) SCALE 295. Due to non-compliance of provisions of Section 50 of NDPS Act, the appellant is entitled to acquittal.

(ii) The seal after use was not handed over to any independent witness despite they being present at the time of search and seizure which creates doubt in the prosecution story. Reliance was placed on *Eze Val Lkeke alias Val Eze vs. Narcotic Control Bureau*, 2005 (1) JCC (Narcotics) 57;

(iii) There are contradictions in the testimony of the prosecution witnesses;

(iv) Statement under Section 67 of NDPS Act was retracted by the appellant at the earliest opportunity as such, it has no evidentiary value to base the conviction of the appellant;

(v) The judgment and the order of sentence were pronounced on the same day as such, the same stands vitiated. Reliance was placed on *Matloob vs. State (Delhi Administration)*, 1997 IV AD Delhi 178.

4. Rebutting the submissions of learned counsel for the appellant, learned counsel for DRI submitted:

(i) It was not disputed that the provisions of Section 50 of NDPS Act are mandatory and mere giving option to the accused is not sufficient. He has to be informed of his right that he can be searched by a Gazetted Officer or a Magistrate however, such a requirement is imperative only when person of the accused is to be searched. No notice is required to be given when the belongings are to be searched. In the instant case, the recovery was effected from the baggage carried by the appellant. That being so, no notice was required to be given to the accused yet a notice was given. Even if there is any shortcoming in the notice that does not give any right to seek acquittal on this ground. Reliance was placed on *Ruiz Guerrero Dolores vs. Customs*, 83 (2000) DLT 191; *Narcotics Control Bureau vs. Chen Ching Sung*, 2015 (1) JCC (Narcotics) 1;

(ii) The mere fact that the sample seal was not given to independent witness is of no consequence in as much as the sealing system is different in the case of DRI then the one when investigation is carried out by the police officials. Moreover, the paper slip was also signed by the accused as such, there was no possibility of tampering with the case property. Reliance was

placed on *Siddiqua vs. NCB*, 2007(1) JCC (Narcotics) 22 and *Namdi Francis Nwazor vs NCB*, 1994 (1) Crimes 579.

(iii) As regards contradiction in the testimony of the witnesses, it was submitted that in every case some or the other discrepancy is likely to occur. In case discrepancy does not materially affect the case of prosecution, it has to be ignored. Reliance was placed on *Amrita @ Amritlal vs. State of M.P.*, 2004 (1) CC Cases (SC) 220.

(iv) As regards retraction of statement under Section 67 of the Act, it was required to be proved by the appellant that the statement under Section 67 of the Act was not voluntary, however, no such evidence was led by her. There is no evidence of the appellant having actually been beaten, tortured so as to arrive at a conclusion that the statement was not made voluntarily. Reliance was placed on *Kanhiya Lal vs. Union of India*, AIR 2008 (SC) 1044.

(v) As regards pronouncement of the judgement and sentence on the same day, it was submitted that no prejudice is caused to the appellant as the minimum sentence prescribed under the Act has been awarded to the appellant.

5. I have given my considerable thoughts to the respective submissions of learned counsels for the parties and have perused the record.

6. The first challenge made by learned counsel for the appellant is non-compliance of provisions of Section 50 of NDPS Act by urging that though a notice under Section 50 of NDPS Act Ex.PW3/A was allegedly given to the accused by PW-3 Mr. M.C.Maheshwari but the notice is defective and was not in compliance with the aforesaid provisions because nowhere it is incorporated in the notice that it was a legal right of the accused to get her searched as well as search of her baggage conducted before a Gazetted Officer or a Magistrate. Only an option was given to the accused for getting the search conducted in the presence of aforesaid officers. It does not meet the requirement of law.

7. It was rightly not disputed by learned counsel for the respondent that wherever giving of notice under Section 50 of NDPS Act is mandatory, it is incumbent upon the Investigating Officer of the case to inform the suspect that he has legal right to be searched before a Gazetted Officer or a Magistrate but it was submitted that since in the instant case the secret information was regarding carrying of contraband articles in the baggage therefore since the person of the accused was not required to be searched therefore compliance of Section 50 of the Act was not mandatory. That being so, even if there is any defect in the notice, same is inconsequential.

8. As per the prosecution case, the secret information was that the accused was carrying a bag which was containing contraband articles, that being so, the main question for consideration is whether in that eventuality provisions of Section 50 of the Act are attracted or not. In ***Aimer Singh v. State of Haryana***, (2010) 3 SCC 746 this aspect was specifically considered and dealt with. Following earlier Constitution Bench judgment, the Court held that when search and recovery from a bag, brief case, container etc. is to be made, provisions of Section 50 of the Act are not attracted. It is so stated in the following manner:

*“14. The object, purpose and scope of Section 50 of the Act was the subject-matter of discussion in a number of decisions of this Court. The Constitution Bench of five Judges of this Court in **State of Punjab v. Baldev Singh**, (1999) 6 SCC 172 after exhaustive consideration of the decisions of this Court in **Ali Mustaffa Abdul Rahman Moosa v. State of Kerala**, (1994) 6 SCC 569 and **Pooran Mal v. Director of Inspection (Investigation)**, (1974) 1 SCC 345 have concluded in para 57:*

“(I) When search and seizure is to be conducted under the provisions of the Act, it is imperative for him to inform the person concerned of his right of being taken to the nearest gazetted officer or the nearest Magistrate for making search.

(II) Failure to inform the accused of such right would cause prejudice to an accused.

(III) That a search made by an empowered officer, on prior information, without informing the accused of such a right may not vitiate trial, but would render the recovery of the illicit article suspect and vitiate the conviction and sentence of an accused, where the conviction is solely based on the possession of the illicit article recovered from his person, during such search.

(IV) The investigating agency must follow the procedure as envisaged

by the statute scrupulously and failure to do so would lead to unfair trial contrary to the concept of justice.

(V) That the question as to whether the safeguards provided in Section 50 of the Act have been duly observed would have to be determined by the court on the basis of the evidence at the trial and without giving an opportunity to the prosecution to establish the compliance of Section 50 of the Act would not be permissible as it would cut short a criminal trial.

(VI) That the non-compliance of the procedure i.e. informing the accused of the right under Sub-section (1) of Section 50 may render the recovery of contraband suspect and conviction and sentence of an accused bad and unsustainable in law.

(VII) The illicit article seized from the person of an accused during search conducted without complying with the procedure Under Section 50, cannot be relied upon as evidence for proving the unlawful possession of the contraband.”

15. The learned Counsel for the Appellant contended that the provision of Section 50 of the Act would also apply, while searching the bag, briefcase, etc. carried by the person and its non-compliance would be fatal to the proceedings initiated under the Act. We find no merit in the contention of the learned Counsel. It requires to be noticed that the question of compliance or non-compliance with Section 50 of the NDPS Act is relevant only where search of a person is involved and the said section is not applicable nor attracted where no search of a person is involved. Search and recovery from a bag, briefcase, container, etc. does not come within the ambit of Section 50 of the NDPS Act, because firstly, Section 50 expressly speaks of search of person only. Secondly, the section speaks of taking of the person to be searched by the gazetted officer or a Magistrate for the purpose of search. Thirdly, this issue in our considered opinion is no more *res integra* in view of the observations made by this Court in **Madan Lal v. State of H.P.**, (2003) 7 SCC 465. The Court has observed:

“16. A bare reading of Section 50 shows that it only applies in case of personal search of a person. It does not extend to search of a vehicle or a container or a bag or premises (see Kalema Tumba v. State of Maharashtra (1999) 8 SCC 257, State of Punjab v. Baldev Singh (1999) 6 SCC 172 and Gurbax Singh v. State of Haryana (2001) 3 SCC 28. The language of Section 50 is implicitly clear that the search has to be in relation to a person as contrasted to search of premises, vehicles or articles. This position was settled beyond doubt by the Constitution Bench in Baldev Singh case. Above being the position, the contention regarding non-compliance with Section 50 of the Act is also without any substance.

16. In **State of H.P. v. Pawan Kumar**, (2005) 4 SCC 350 this Court has stated:

“11.A bag, briefcase or any such article or container, etc. can, under no circumstances, be treated as body of a human being. They are given a separate name and are identifiable as such. They cannot even remotely be treated to be part of the body of a human being. Depending upon the physical capacity of a person, he may carry any number of items like a bag, a briefcase, a suitcase, a tin box, a thaila, a jhola, agathri, a holdall, a carton, etc. of varying size, dimension or weight. However, while carrying or moving along with them, some extra effort or energy would be required. They would have to be carried either by the hand or hung on the shoulder or back or placed on the head. In common parlance it would be said that a person is carrying a particular article, specifying the manner in which it was carried like hand, shoulder, back or head, etc. Therefore, it is not possible to include these articles within the ambit of the word ‘person’ occurring in Section 50 of the Act.

17. After discussion on the interpretation of the word “person”, this Court concluded:

“14.....that the provisions of Section 50 will come into play only in the case of personal search of the accused and not of some baggage like a bag, article or container, etc. which [the accused] may be carrying.”

The Court further observed:

“27.....In view of the discussion made earlier, Section 50 of the Act can have no application on the facts and circumstances of the present case as opium was allegedly recovered from the bag which was being carried by the accused.”

9. In view of the above, Section 50 of the Act has no application to the facts and circumstances of the present case as heroine was allegedly recovered from the bag which was being carried by the accused. That being so, judgments relied upon by counsel for appellant has no application to the facts of the case in hand.

10. As regards the next limb of argument that the seal after use was not handed over to independent witnesses despite their presence at the time of search and seizure, the same therefore cast doubt on the prosecution story, the same deserves rejection. Similar plea was taken in *Siddiqua vs. NCB*, 2007 (1) JCC (Narcotics) 22 and it was observed as under:-

“....It has to be noted that there was no provision under the NDPS Act for handing over of the seal by the Investigating officer after use to some independent witness. An investigating officer has to do investigation day out and day in, in several cases. It is not that after every recovery, a new seal has to be got prepared by the investigating officer and the old seal is to be discarded. The Court cannot consider some imaginary doubts as the basis of attack on a judgment. It is not the stand of the counsel for the appellant that the seal was misused by the investigating officer after sealing of the samples and the case property. No such suggestion has been given to any of the prosecution witness. The only stand is that the seal was not given to an independent witness and there was possibility of misuse. Mere possibility of a thing does not cast doubt on the prosecution case. In this case, the samples and the case property were sealed with paper slips, containing the signatures of the panch witnesses. These paper slips were found intact by the learned trial court when the case property was produced in the court. Similarly, when the samples were received by the CRCL, the seals were found intact with the paper slips. There is another factor. The samples in this case were sent to CRCL on the very next day i.e. on 26th March, 1998. Any possibility of tampering the seals, therefore, stands ruled out.”

11. In *Namdi Francis Nwazor vs. NCB*, 1994(1) crimes 579 also similar plea was taken which was held to be not tenable in view of the fact that there is neither a statutory requirement nor a precedential mandate of handing over the seal used by the police officer in the course of an investigation to a third person. Learned counsel for the appellant had relied upon *Eze Val Lkeke alias Val Eze* (supra). In that case, the accused was

acquitted on several grounds including the fact that the seal was not handed over to any public witness. In the instant case, sufficient material is available on record regarding the fact that the case property was never tampered with in as much as after the search when the contraband article was recovered from the bag in the presence of two independent witnesses, the sealing process was carried out. A paper slip was affixed which not only bore the signatures of the Investigating Officer, two independent witnesses but also the accused. The aforesaid paper slips appended on samples were found intact by the learned Trial Court when the case property was produced in the court. Similarly, when the samples were received by the CRCL, the seals were found intact with the paper slips. Therefore, the mere fact that the seal was not handed over to the independent officer is not sufficient to raise any presumption that the same was tampered with.

12. The submissions that there are several contradictions in the testimony of the prosecution witnesses which create doubt in the prosecution story, the same is without substance in as much as it has to be kept in view that in every case some or other discrepancy is likely to occur. In case discrepancy does not materially affect the case of the prosecution, it has to be ignored. Minor discrepancies are bound to occur in the testimony of different

witnesses and the testimony of a witness cannot be rejected on the ground that there are minor discrepancies or contradictions. Perusal of the testimony of the relevant witnesses goes to show that on the material aspect all the witnesses have corroborated the testimony of each other. It is one of those rare cases where two independent witnesses were also joined during the proceedings and even these witnesses have supported the prosecution.

13. The other submissions of learned counsel for the appellant that the statement recorded under Section 67 of NDPS Act was subsequently retracted was not voluntary statement and, therefore, the same cannot be considered, again deserves rejection. This aspect of the matter was succinctly dealt with by the learned Trial Court by observing as under:-

*“39. The legal position with regard to a statement made by an accused U/S 67 of the NDPS Act is now that such a statement is admissible in evidence and can be acted upon if the same is found to be made voluntarily. Earlier the view of the higher courts had been that if such a statement of an accused is found to be voluntary then the same can be made the sole basis of conviction of the accused, but if the same is not voluntary then the same is only a waste paper. To find out if such a statement of the accused is voluntary or not, the court has to see and examine the circumstances under which the same was made. In the case of **M.Prabhu Dayal vs. The Assistant Director, DRI**, 2003 (Suppl.2) SCC 459, it was held by the Hon’ble Supreme Court that even if such a statement is subsequently retracted by the accused, the same should be believed and acted upon by the court, if found to be made voluntarily, unless the retraction statement of the accused is proved on record as per the Evidence Act.*

*40. However, the view which has subsequently developed is that the court must look for some independent corroboration and conviction should not be based solely on a statement U/S 67 of the NDPS Act of the accused and that too when the same has already been retracted. Reference in this regard can be made to the judgments in the cases of **Noor Agah vs. State of Punjab & Anr.**, 2008 (3)*

JCC (Narcotics) 135; Union of India vs. Bal Mukund & Ors., 2009 (2) Crimes 171 (SC) and NCB vs. Aziz Ahmed, 2010 (1) JCC (Narcotics) 6 etc.

41. In the instant case the accused was apprehended with the above contraband substance on 27.09.2005 in the evening time from the Domestic Airport of Delhi and her statement U/S 67 of the NDPS Act Ex.PW3/F was recorded in this case on the same day, i.e. after the conclusion of the panchnama proceedings. However, her above statement only contains her personal details and the circumstances under which she had come to Delhi from her native State and since she was feeling tired, on her request the recording of her further statement was deferred till next date. In continuation of her above statement Ex.PW3/F, one more statement of her Ex.PW3/G dated 28.09.2005 was also recorded next morning and it is in this statement that she had admitted her apprehension by the DRI Officers from the above Airport and the recovery of the above contraband substance from her baggage and had also stated specifically as to the circumstances under which she was carrying the above baggage containing the above contraband substance for the above Malaysian lady named Maliska for some monetary considerations. Her above two statements Ex.PW3/F and PW3/G, which were made prior to her formal arrest in this case, are to be read together and in continuity.

42. One hand written retraction application/statement of the accused (undated) was also received in this court through the Jail Superintendent concerned on 07.10.2005 and after the same was seen by the court, it was directed to be placed on record. However, there is nothing on record to show that any copy thereof was supplied to Ld SPP for DRI for filing any reply to the same and the reply of the DRI to the above retraction application was only filed on 06.07.2011, when during an inspection of the case file the above retraction of the accused had come to their knowledge. In any case, the above reply of the DRI is also to be considered by this court.

43. In the above retraction application, the accused had alleged that her earlier statements dated 27.09.2005 and 28.09.2005 taken by the DRI Officers were not her voluntary statements and no recovery was effected from her. She had also claimed that the above statements were extracted from her by pressurizing and coercing her and hence the same should not be read against her.

44. However, apart from the vague submissions made in the above retraction application regarding the exercise of any pressure or coercion etc. upon her to extract the said statements, there is nothing on record to suggest or infer the use of any force, pressure or other compulsive means by the DRI officers to force the accused to make such confessional statements. Rather, her personal details disclosed in the above statement Ex.PW3/F by the accused in her own handwriting are suggestive of the voluntariness of the same and the above retraction of the accused is found to be belated as the same had not been made at the first instance or the initial opportunity.

45. *After her formal arrest in this case she was also got medically examined from the RML Hospital vide MLC Ex.PW3/V and vide application of the IO/PW3 Ex.PW3/U addressed to the CMO of the above hospital. Though the doctor concerned has not been examined on record by the prosecution, but the exhibition of the above MLC was never objected to on behalf of the accused and as per the above MLC no fresh external injuries were observed in the said MLC of the accused. Hence, there is no evidence or material on record to substantiate the claim of the accused regarding the exercise of any physical or mental torture upon her by the DRI Officers for forcing her to make the above statements. Rather, the voluntariness of the above statements stands also proved on record from the depositions made by PW6 Ms Kanwaljit Bakshi, who had remained present throughout during the recording of the above statements of the accused before the IO/PW3."*

14. The aforesaid findings of the learned Trial Court does not call for interference. Even otherwise, there is no evidence that the appellant was beaten, tortured or subjected to any third degree method. The appellant has not come in the witness box to substantiate the plea taken in her application. Moreover, had she been subjected to torture and use of third degree method, she would have complained to the Magistrate at the time when she was produced before him for the first time. Besides the confessional statement of the appellant, there was ample evidence on record to prove the case of prosecution.

15. As regards last limb of the argument that judgment and the sentence stands vitiated in as much as the same were pronounced on the same day for which reliance was placed on *Matloob vs. State (Delhi Administration)* (supra), this submission is without substance in as much as in *Matloob*

(supra), the appellant was convicted for offence under Section 20 of NDPS Act the minimum sentence prescribed was 10 years and fine of Rs. 1 lac which could have extended upto 20 years and fine of Rs.2 lacs. The Trial Court awarded the sentence of 12 years rigorous imprisonment and fine of Rs.1.5 lacs on the same day when the judgment was pronounced. The judgment was set aside on various counts including the fact that the conviction and sentence was on the same day. However, in the instant case the appellant was awarded the minimum sentence prescribed under the said section for which even after hearing the counsel for the appellant, the learned Trial Court was not competent to award any lesser sentence. That being so, even if the judgment and the order on sentence were pronounced on the same day, no prejudice is caused to the appellant.

16. No other point was urged during the course of the argument. That being so, the conviction of the appellant under Section 21(c) of NDPS Act as awarded by the learned Special Judge does not warrant any interference.

17. Coming to the quantum of sentence, learned counsel for the appellant urged that out of 10 years sentence awarded to the appellant she has already served more than 9 years, she is not involved in any other case as such, liberal view be taken. As regards the minimum sentence awarded to the appellant and the fine imposed upon her, the same is the minimum sentence

prescribed under that section. There is no enabling provision to Court for reduction of sentence by giving special or adequate reasons. Hence, plea as to reduction of sentence would not be tenable. As per the nominal roll dated 22.04.2015, the appellant has already served a sentence of 9 years 6 months 24 days leaving behind the unexpired portion of sentence of 5 months and 6 days. No previous involvement has been reported, her conduct has been reported to be satisfactory. Under the circumstances, while maintaining the quantum of fine of Rs.1 lac, the default sentence of six months is reduced to one month simple imprisonment. With this modification, the appeal is dismissed. Pending applications, if any, stand disposed of.

Trial Court record along with copy of the judgment be sent back.

Appellant be informed through the Superintendent Jail.

(SUNITA GUPTA)
JUDGE

APRIL 28, 2015
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