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

% *Judgment reserved on : 05.10.2015*
Judgment delivered on : 14.10.2015

+ CRL.A. 858/2013

KIRAN Appellant

Through Mr.Sharad Malhotra, Amicus Curiae.

versus

STATE Respondent

Through Ms.Meenakshi Dahiya, APP.

CORAM:

HON'BLE MS. JUSTICE INDERMEET KAUR

INDERMEET KAUR, J.

1 This appeal is directed against the impugned judgment and order on sentence dated 04.4.2013 wherein the appellant had been convicted under Section 21(C) of the Narcotic and Psychotropic Substances Act, 1985 (NDPS Act) and had been sentenced to undergo RI for a period of 10 years and to pay a fine of Rs.1,00,000/- in default of payment of fine to undergo SI for 6 months. Benefit of Section 428 of the Cr.P.C. had been granted to the appellant. The nominal roll of the appellant has been requisitioned. This reflects that, as on date he has undergone
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incarceration of 2 years 7 months and 28 days.

2 Version of the prosecution is that pursuant to a secret information that a lady by the name of Kiran who used to sell smack was to bring smack from one lady named Rama through street no.4, Bagichi Allaudin between 8.15 a.m. to 9.15 a.m. on 16.11.2011 a raiding party was constituted. ASI Devinder Singh (PW-8) along with Head Constable Charan Singh (PW-7) and Lady Constable Janita Meena (PW-9) reached the spot. On the pointing out by the secret informer the appellant was apprehended. The raiding party introduced themselves to the appellant. She was informed that she was required to be searched as the raiding party suspected her to be carrying contraband. Prior to that a notice under Section 50 of the NDPS Act (PW-7/A) was served upon the appellant. She was informed that she has a legal right to get her search conducted either before a Gazetted Officer or before a Magistrate. She declined this option. On her search 270 grams of smack was found from her possession. It was weighed. The contraband when tested with a field testing kit tested positive for smack. Out of the 270 grams, two samples of 5 grams each were drawn. The samples as also the remaining contraband were seized and sealed with the seal impression of

DS; FSL form was also prepared at the spot. After the use of the seal, the same was handed over to PW-9. The case property, the samples and FSL form were deposited in the Malkhana through Inspector Vivek Pathak (PW-3). The MHCM Head Constable, Jag Narain was examined as PW-1. After depositing the contraband and the samples in the Malkhana, the sample parcel had been sent to FSL on 24.11.2011 vide road certificate no.547/21 through Head Constable Jagdish Ram (PW-5). The FSL vide its report Ex.PX had tested the drawn samples positive for smack.

3 In the statement of the appellant recorded under Section 313 Cr.P.C. her claim was that she has been falsely implicated. In the defense she had produced one witness who was examined as DW-1. She was Sharda, the neighbour of the appellant and her version was to the effect that the police had picked up the appellant from her grocery store. This was pursuant to a dispute which had arisen between the police party and the son and the daughter-in-law of the appellant whom they had attempted to pick up.

4 On the basis of the aforementioned evidence collected by the prosecution, while rejecting the evidence of the defense, the conviction

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of the appellant stood founded and she was sentenced as aforementioned.

5 On behalf of the appellant learned counsel for the appellant has made his submission. It is pointed out that the secret information was not transmitted to the senior officer and as such the mandate of Section 42 of the NDPS Act was not complied with. Further submission being that even as per the prosecution the appellant used to sell smack but there was no search conducted of her house from where the alleged recovery could have been made. The source Rama from whom she had allegedly procured this smack has neither been arrayed as an accused nor as a witness. The case is concocted. The contraband which was recovered was about 270 grams but the percentage of Diacetylmorphine was only 2.32% and as such the conviction of the appellant for a commercial quantity is ill-founded. Learned counsel for the appellant also submits that there is no explanation as to why public persons had not been joined. There was no sincere effort made and to substantiate this argument he has placed on reliance upon 2009(5) AD (Delhi) Sehdev Vs. State, 2006(12) SCC 321 Ritesh Chakarvarti Vs. State of Madhya Pradesh, 2015 (219) DLT 271 Mohd. Masoom Vs. State of NCT of Delhi and 1997 CRLJ 4611 State of Punjab Vs. Om Prakash

Appellant is entitled to a benefit of doubt.

6 Arguments have been refuted.

7 Recorded has been perused and the submissions and counter submissions have been appreciated. The members of the raiding party had been examined are PW-7, PW-8 and PW-9. The secret information had been received by PW-8. He had deposed that at about 6.30 a.m. on 16.11.2011 he had received a secret information at the Narcotics Cell of Crime Branch that a lady by the name of Kiran who sells smack would in between 8.15. a.m. to 9.15 a.m. bring smack from a lady by the name of Rama for the purposes of sale. This information was passed on to Inspector Vivek Pathak (PW-3). The secret information had been reduced into writing vide DD No.5. This DD has been proved as Ex.PW-3/A. PW-8 has reiterated that the secret information was passed on to PW-3. No cross-examination has been effected of this witness on this score. Version of PW-8 is corroborated by the version of PW-3. He has also deposed that the secret information recorded in Ex.PW-3/A was received by him through PW-8 and after receipt of the same by him he had forwarded it to the concerned ACP. It was on the direction of PW-3 that the raiding party was constituted. Mandate of Sections 42(1)

and 42(2) of the NDPS Act stood complied with. The first argument of the learned counsel for the appellant has no merit.

8 Testimony of the members of the raiding party has been appreciated. PW-8 had received the secret information and on the direction of PW-3 a raiding party was constituted comprising of himself, PW-7 and PW-9. All the aforementioned witnesses have categorically stated that on the pointing out by the secret informer the appellant was apprehended and before her search was conducted she was given a notice under Section 50 of the NDPS Act (PW-7/A) informing her of her legal right to have her search conducted either before a Gazetted Officer or a Magistrate to which she declined. Her refusal has been recorded at point P-P1 on Ex. PW-7/A. The contraband was weighed on an electronic scale which weighed 270 grams. Two samples of 5 grams each were drawn has also been deposed; the case property and the samples as also the FSL form were deposited with PW-1. The entries in the relevant Register i.e. Register no.19 had been proved in the version of PW-1. The concerned entry i.e. the entry no.1412 has been proved in Register No.14 as Ex.PW-1/A. Thereafter on 24.11.2011 the sample parcel along with FSL form had been taken by PW-5 to the FSL. The

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report of the FSL dated 20.12.2011 clearly describes that one sealed parcel marked A with the seal intact and tallying with the specimen seal along with the letter had been received in the department and when tested, this sample was found to contain Diacetylmorphine; the percentage of the Diacetylmorphine was found to be 2.32 %. The submission of the learned counsel for the appellant that it is only the purity content of the Diacetylmorphine which would be the determining factor for conviction and the subsequent sentence of the appellant is incorrect.

9 The Amending Act of 2001 had taken into account the sentence procedure. The notification dated 18.11.2009 has been issued by the Ministry of Finance in exercise of the powers conferred under Section 2 of the said Act by virtue of which the Central Government had issued the said Notification. The earlier Notification dated 19.10.2001 stood amended by this Notification and the language of this Notification with clarity specifies that it is not the percentage of the drug which has to be taken into account to determine as to whether it falls within the bracket of a small or a commercial quantity but the entire mixture of the narcotic drug/psychotropic substance and not its pure drug content alone to

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return a finding as to whether the recovered contraband fall within the bracket of a small quantity or a commercial quantity. The Notification being published and having amended the earlier notification dated 19.10.2001 (relied upon in the judgment of AIR 2008 SC 1720 Michael Raj Vs. Intelligence Officer, Narcotic Control Bureau), the submission of the learned counsel for the appellant that the Trial Judge had committed an illegality in relying upon this Notification and holding that the drug recovered from the appellant was in the commercial quantity is an argument noted to be rejected. The recovered contraband which was 270 grams of smack was a commercial quantity haul. It clearly specified that it is the entire drug and not itself the purity alone which has to be taken into account to determine the quantity of the contraband which was recovered. The recovery of 270 grams smack falls within the bracket of commercial quantity. The conviction of the appellant under Section 21(C) of the NDPS Act is not ill founded as is the submission of the learned counsel for the appellant. It is a commercial quantity.

10 The argument of the appellant that the house of the appellant was not searched and Rama has not been examined is also an argument

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bereft of any force as neither was Rama a necessary witness nor search of the house of the appellant necessary in view of the secret information that the appellant who used to sell smack would bring smack through street no.4 Bagichi Allaudin, the appellant was apprehended and the secret information proved to be correct. Non-examination of Rama and non-search of the house of the appellant does not detract from the otherwise well proved version of the prosecution.

11 On the count of joining of raid by the public persons, PW-7 has cogently and coherently stated that efforts had been made to join public persons but none had agreed. PW-8 had stated that when the appellant had reached the corner of the street which was at about 8.30 a.m. she was apprehended and the information was disclosed to her. Although there was no specific deposition that he had asked public persons to join the raid but the cross-examination effected of PW-8 shows that no such question was put to him. Had it been put to him he may have given explanation for non-joining of public persons. PW-7 on the other hand categorically stated that 7-8 persons have been asked to join the raid. Their names and parentage had not been recorded. He had reiterated this position in his cross-examination. PW-9 the third member of the

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raiding party in one part of his cross-examination had stated that although there were houses in street no.4, the Investigating Officer did not ask the persons from the houses to come and join the raid proceedings. This part of the cross-examination of PW-9 has been vehemently highlighted by the learned counsel for the appellant to substantiate his argument that efforts to join public persons was not a sincere effort. This Court is not in conformity with this submission of the learned counsel for the appellant as PW-7 has categorically stated that public persons were asked to join the raid but none agreed. It was not the duty of PW-9 to go to the houses at street no.4 inviting them to join the raid. This was in fact not the procedure to be adopted by the Investigating Officer; it was only the passerby's or persons present at the spot who could be asked to join the raid.

12 In view of the categorical version of PW-7 on this score that the public persons had been asked to join the raid but none had agreed to do so, it cannot be said that the efforts to join public persons was not a sincere effort.

13 The defense of the appellant had been rightly rejected. DW-1 has come into the witness box. She was a neighbor of the appellant. It was

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for the first time in her version stated that the appellant has been falsely implicated and the appellant had been picked up by the police officials pursuant to a quarrel between the police officials and her son and daughter-in-law. This was never a defense raised at the time of cross-examination of the witnesses of the prosecution nor at the time when the statement of the appellant was recorded under Section 313 Cr.P.C. It was clearly for the reason that this was a belated defense which was taken on a legal advice that it did not find any mention at the earlier stages.

14 On no ground does the impugned judgment call for any interference. The appellant has been granted the benefit of the minimum sentence of RI 10 years having found to be in illegal possession of narcotic drug. The fine amount is also the minimum.

15 The appeal is without any merit. Dismissed.

INDERMEET KAUR, J

OCTOBER 14, 2015

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