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

Date of Decision: 28th May, 2015

+CRL.A. 1113/2011

EDWARD KHIMANI KAMAU Appellant

Through: Mr.Vikas Gautam, Advocate

versus

THE NARCOTICS CONTROL BUREAU Respondents

Through: Mr.Mukesh Malik, Advocate

CORAM:

HON'BLE MS. JUSTICE SUNITA GUPTA

J U D G M E N T

: SUNITA GUPTA, J.

1. Edward Khimani Kamau impugns the judgment dated 06.05.2011 and the order on sentence dated 11.05.2011 vide which he was convicted under Section 21(C) read with Section 23 read with Section 28 of NDPS Act and was sentenced to undergo rigorous imprisonment for a period of 10 years and to pay a fine of Rs.1 lac in default thereof, to undergo simple imprisonment for a period of one year in Sessions Case No. 13/09.

2. Shorn of unnecessary details, the prosecution case is that the Respondent-Narcotic Control Bureau (NCB) through its intelligence officer Sh Akhilesh Kumar Mishra filed a complaint against the accused inter alia

on the allegations that on 05.02.2009 at about 6.00 pm Sh P.C.Khanduri received a secret information that a group of African persons are actively involved in the illegal export of heroin and drugs to various countries through courier and this group has a member namely Edward resident of Uttam Nagar who books parcels containing drugs through courier in Delhi. It was further informed that he would come to DTDC office at 1666-C, first floor, Govind Puri Extension on the night of 05.02.2009 to book a parcel in which drug has been concealed. This information was reduced into writing and was put up before the Superintendent Sh.Ajay Kumar who issued search authorization in his favour and directed him to organize raid. Sh.P.C.Khanduri alongwith Sh.Ajay Kumar, Sh.Manoj Kumar, Sh.Vikas Kumar and the informer went to the DTDC Franchise office in a government vehicle bearing no. DL-9CC-3009 and reached there at about 8.30 pm and waited for Edward to come. At about 8.45 pm hours the accused came on a cycle rickshaw. He was carrying a cardboard box in his hand with which he went to the office of DTDC. On the identification of the informer, he was intercepted at the counter of DTDC office. Sh.P.C.Khanduri gave his introduction and told him about the information. Sh.Arvind Kumar, In-charge of DTDC office was joined to witness the proceedings. The accused was served with a notice under Section 50 of

NDPS Act apprising of his legal right to be searched before a Gazetted Officer or a Magistrate explaining its meaning but he declined. The Investigating Officer also offered the search of the raiding party to the accused prior to his search which also he refused. On checking the cardboard box, it was found to contain six sarees of different colours. On its minute checking, nine long packets concealed inside the layers of the cardboard box containing off white powder were recovered which on testing gave positive for heroin weighing 770 grams. Two samples of 5 grams each were taken out from the powder. The remaining substance and the nine empty packets were kept in a cloth. Torn pieces of cardboard box and six sarees were also kept in a cloth. All the parcels were sealed with the seal of Narcotics Control Bureau DZU 2. The accused was also carrying a paper containing the consignor and consignee details which was taken into possession vide Ex.PW3/DA. Summons under Section 67 NDPS Act was served upon the accused to appear in the NCB office where he tendered his statement admitting his complicity in the business of drug trafficking. He was thereafter arrested. The seizing officer and the arresting officer submitted their reports under Section 57 NDPS Act to the Superintendent. The case property was deposited in the Malkhana. The sample alongwith the forwarding letter and the test memo was sent to CRCL through Shiv Ratan,

Hawaladar. As per report Ex.PW4/A dated 23.03.2009, the sample mark A1 was found to contain diacetylmorphine with its purity 77.0%. After the investigation, the accused was sent for trial for the offence punishable under Sections 21, 23 and 28 of the NDPS Act.

3. In order to substantiate its case, prosecution examined as many as 8 witnesses. In his statement recorded under Section 313 Cr.P.C, the accused controverted the entire prosecution case and pleaded his innocence. He stated that he never dealt with narcotic drugs and he was forcibly taken by the NCB officers to their office where they illegally kept him and forcibly made him to sign some written and blank papers and later on completed all the formalities. He denied visiting DTDC office. After hearing arguments and scrutinising the evidence, vide impugned judgment dated 06.05.2011, the appellant was convicted and sentenced, as mentioned hereinbefore.

4. Feeling aggrieved, present appeal has been preferred.

5. I have heard learned counsels for the parties and have also perused the written submissions filed by them. The impugned judgment has been challenged by learned counsel for the appellant inter alia on the following grounds:

(i) Receipt of information from informer is doubtful and Section 42 of NDPS Act was not complied with;

- (ii) Presence of the accused at DTDC office and his arrest is doubtful;
- (iii) The accused was not searched in the presence of a Gazetted Officer or a Magistrate hence Section 50 of the NDPS has been violated;
- (iv) Accused is not the owner of the alleged parcel/packets and the same is planted by NCB after failing to locate the actual owner of the consignment;
- (v) Prosecution did not join at least two independent witnesses in the seizure and search of the alleged recovery and testimony of PW-3 is not reliable;
- (vi) The samples were not drawn as per the guidelines laid by Supreme Court and were not drawn on the spot;
- (vii) There is evidence of tampering with the case property;
- (viii) Statement of accused under Section 67 of NDPS Act is not proved and was retracted;
- (ix) The documents are fabricated and it is even doubtful that the panchanama was prepared on the alleged spot;

6. On the other hand, learned counsel for NCB submitted that the appellant was served with summons under Section 67 NDPS Act and in response to the summons, he appeared before Sh.Manoj Kumar and gave his voluntary statement Ex.PW-7/A where he admitted his involvement in the commission of offence under NDPS Act. No complaint was made by him to

the Court when he was produced for the first time that he was forced to write the statement. No allegation of any torture was made by the appellant and only bald and vague allegations were made that he was mistreated and threatened. There was no injury on his person during medical examination. There is substantial compliance of Sections 42, 50, 55 and 57 of NDPS Act. Independent witness PW-3 Arvind Kumar supported the case of prosecution. All the link witnesses were examined to rule out the possibility of tampering with the case property. The learned Trial Court had rightly convicted the appellant and the appeal has no merit and is liable to be dismissed.

7. Heard and considered the arguments advanced at the Bar and the written submissions filed by the parties.

8. Although the impugned judgment has been challenged by learned counsel for the appellant on number of grounds, however, the appeal filed by the appellant can be decided on the ground (vi) alone. It is the case of prosecution as reiterated from the seizure memo Ex.PW3/A and the testimony of PW-2, PW-3, PW-6 and PW-7 that on checking the cardboard box nine long polythene boxes were recovered. On checking of all the nine boxes they were found to contain off white coloured powder which gave positive test for heroin. The powder in all the nine boxes were transferred into one polythene and was weighed with the help of electronic weighing

machine which came to be 770 gms. Two samples of 5 gms each were taken out and kept inside two polythene pouches and the remaining heroin in polythene packet alongwith nine empty polythene packets were converted into a cloth parcel. One sample was sent to CRCL which gave positive test for heroin. Learned counsel for the appellant relied upon ***Basant Rai vs State 2012 VI AD (DELHI) 707***. In that case also as per the prosecution case the accused was carrying a green coloured polythene bag which contained 8 similar polythene bags having black coloured substance. Two samples of 25 gms each were taken after breaking charas from each of the 8 slabs the samples were sent to FSL and it found to be charas. Reliance was placed on ***Gaunter Edwin Kircher vs. State of Goa 1993(3) SCC 145*** where in similar factual matrix their Lordship held as under:-

“5. We shall first consider whether the prosecution has established beyond all reasonable doubt that the accused had in his possession two pieces of Charas weighing 7 gms. and 5 gms. respectively. As already mentioned only one piece was sent for chemical analysis and P.W.1 the Junior Scientific Officer who examined the same found it to contain Charas but it was less than 5 gms from this report alone it cannot be presumed or inferred that the substance in other piece weighing 7 gms also contained Charas. It has to be borne in mind that the act applies to certain narcotic drugs and psychotropic substances and not all other kinds of intoxicating substances. In any event in the absence of positive proof that both the pieces recovered from the accused contained Charas only, it is not safe to hold that 12 gms. of Charas was recovered from the accused. In view of the evidence of P.W.1 it must be held that the prosecution has proved positively that Charas weighing about 4.570 gms. was recovered from the accused. The failure to send the other piece has given rise to this inference. We have to observe that to obviate this difficulty, the concerned authorities would do better if they send the entire quantity seized for chemical analysis so that there may not be any dispute of this nature regarding the quantity seized. If it is not

practicable in a given case, to sent the entire quantity then sufficient quantity by way of samples from each of the packets of pieces recovered should be sent for chemical examination under a regular panchnama and as per the provisions of law."

9. Following this judgment, it was held by a single Judge of this Court that a wrong process of taking samples was adopted by the police. The police should have taken the samples from each packet instead of mixing all samples into two representative samples. This is precisely for the reasons that if the 8 packets were allegedly recovered from the appellant and two packets have contraband substance and rest 6 packets did not contain contraband, though all may be of the same colour but when the contraband substances of all 8 packets are mixed into one or two then definitely the result would be of the total quantity and not of the two pieces. Therefore, the process adopted by the prosecution creates suspicion. In such a situation, the benefit thereof should go in favour of the accused. Substantially similar question arose in *Netram vs. State of Rajasthan 2014(2)WLN394 (Raj.)* wherein also the recovered material was found packed in two separate gunny bags weighing 40 kgs each. The seizure officer mixed the material packed in the two gunny bags and then collected the samples which were forwarded to FSL. Relying upon *Gaunter Edwin Kircher (supra)* and *Ghewar Ram vs. State of Rajasthan reported in 2007(2) Cr.L.R.(Raj.) 1695*, it was held that the procedure adopted by the seizure officer in mixing the articles contained

in different packets and collecting a single sample from the same and having it analysed by the FSL was found defective and caused prejudice to the accused.

10. In the instant case also, transferring the powder of all 9 packets into one polythene and then taking out two samples and sending one sample to CRCL causes serious prejudice to the appellant as it cannot be ascertained whether all the 9 packets were containing heroin or not.

11. Further, as per the prosecution case, the appellant was also carrying a paper Ex.PW3/DA containing the details of the consigner and consignee according to which the parcel was to be consigned at USA and name of the consigner was shown as Pinto Deep C-33, Kalkaji, New Delhi-17 India. Admittedly no enquiry regarding Pinto Deep or the consignee was made by the prosecution. Moreover, as per the testimony of PW-3 Arvind Kumar the accused was carrying the photocopy of passport in the name of Pinto Deep and also one invoice in his hand. He had seen invoice wherein the address was mentioned and also the passport which was in the name of Pinto Deep. According to him, accused informed him that Pinto Deep was his boss who was not in Delhi. Admittedly, neither the invoice nor the copy of the passport in the name of Pinto Deep were seized nor placed on the judicial file. Moreover, no enquiry was made by the NCB officials as to who had

handed over the cardboard box containing the narcotic drug to the appellant and where the same was to be sent. As per the information, the parcel was destined for South Africa and according to PW-3, the accused had also told him that the parcel was to be sent to South Africa, however, he admitted that on the parcel, address of South Africa was not mentioned. This also cast a suspicion on the prosecution story.

12. Further, there is a lot of discrepancies and contradictions regarding the colour, smell and texture of the contraband allegedly recovered from the appellant in the testimony of the witnesses. As per the prosecution case, two samples were drawn one was sent to CRCL and the other sample was kept in the malkhana alongwith the case property but that sample was never produced in the Court during the course of trial. PW-4 S.C.Mathur, the chemical examiner on 10.02.2010 had deposed that the colour of the alleged contraband was light brown. The polythene pouch containing the alleged recovered substance was having a small hole in the middle. On 11.02.2010 PW-3 deposed that the substance was of off white colour. On 19.05.2010 PW-6 P.C.Khanduri, the Additional SHO deposed that colour of the alleged contraband was yellowish while PW-8 Budwan Ram, the Chemical Examiner mentioned that colour was dark brown. Furthermore, there was difference in weight of the sample in the test memo. The net weight of the

sample sent for analysis was given as 5 gms while the sample received at the laboratory was 5.7 gms. Furthermore, it is not clear as to what was the texture of the sample allegedly recovered from the possession of the accused whether it was powder or tikiya or pebbles.

13. In view of above mentioned discrepancies appearing in the prosecution case, it is not necessary to go into the other submissions made by learned counsel for the appellant assailing the findings of the learned Trial Court regarding non-compliance of Sections 50, 42 or retraction of confessional statement made under Section 67 of NDPS Act. As observed by Hon'ble Supreme Court time and again that since the punishment prescribed under the Act is very serious in nature, that being so, the compliance of provisions incorporated in the Act are required to be fulfilled substantially. Burden to prove the case beyond reasonable doubt was upon the prosecution. The provisions of the Act and the punishment prescribed therein being indisputably stringent, the extent of burden to prove the foundational facts on the prosecution i.e., proved beyond reasonable doubt would be very onerous. A heightened scrutiny test would be necessary to be invoked. It is also a settled principle of criminal jurisprudence that more serious the offence, the stricter the degree of proof.

14. In the light of above discussion, I am of the view that prosecution has failed to establish the case beyond reasonable doubt as such, accused is entitled to benefit of doubt. The impugned judgment cannot be sustained and is set aside. The appeal is accordingly allowed. The appellant be released forthwith, if not required in any other case. All pending applications stand disposed of.

Copy of the order be sent to accused/appellant through Superintendent Jail.

Trial court record alongwith the copy of this order be sent back.

(SUNITA GUPTA)
JUDGE

MAY 28, 2015
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