

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

RESERVED ON : 9th FEBRUARY, 2015

DECIDED ON : 9th APRIL, 2015

+ CRL.A.1404/2011

MOHD. MASOOM

..... Appellant

Through : Ms.Rajni Singh, Advocate.

versus

STATE OF NCT OF DELHI

..... Respondent

**Through : Mr.M.N.Dudeja, APP for
Mr.Lovkesh Sawhney, APP.**

AND

+ CRL.A.1086/2011

RAJU DAWAR

..... Appellant

Through : Mr.M.L.Yadav, Advocate.

versus

STATE OF DELHI

..... Respondent

**Through : Mr.M.N.Dudeja, APP for
Mr.Lovkesh Sawhney, APP.**

**CORAM:
HON'BLE MR. JUSTICE S.P.GARG**

S.P.GARG, J.

1. Mohd.Masoom (A-1) and Raju Dawar (A-2) impugn a judgment dated 30.06.2011 of learned Addl.Sessions Judge / Special Judge (NDPS) Dwarka Courts, New Delhi, in Sessions Case No. 02/2/10 arising out of FIR No.199/09 PS Crime Branch, by which they were held guilty under Section 29 & 21 read with Section 23 of NDPS Act. By an order dated 30.07.2011, they were sentenced to undergo RI for ten years each with fine ₹ One lac each, under Section 29 of NDPS Act; RI for ten years each with fine ₹ One lac each, under Section 21 read with Section 23 of NDPS Act. The substantive sentences were to operate concurrently.

2. The prosecution case as reflected in the charge-sheet was that on 26.11.2009 at 09.30 a.m., Insp.Sunil Kumar received a secret information in his office at Inter State Cell, Crime Branch, to the effect that A-2 who was in contact with drug smugglers / peddlers from Afghanistan would receive a huge consignment of drugs from Afghan Nationals, who would arrive at IGI Airport at 01.00 p.m. by Ariana Airlines. Insp. Sunil Kumar shared the secret information with senior

officers and produced the secret informer before ACP, who after verification of the information directed Insp. Sunil Kumar to initiate necessary action. A raiding team comprising of Insp. Sunil Kumar, SI Sharat Chandra, SI Naresh Solanki, ASI Brahm Prakash, ASI Balbir, HC Om Prakash, HC Dhanvir and two constables was constituted immediately. They along with the secret informer left for House No.B-6, Old Double Storey, Lajpat Nagar-IV, in two vehicles; one government vehicle No.DL-6CJ-0517 and the other a private and reached there at around 11.30 a.m. Some public persons were requested to join the raiding party there but none agreed to join citing one or the other reason. At that moment, an individual identified by the secret informer as A-2 was noticed sitting in a white colour Matiz car bearing No.DL-2C Q7070. Raiding team followed the Matiz car till it reached in front of IGI Terminal-II, Arrival / Exit Gate No.2. A-2 parked his car near the place where construction for metro project was in progress. The raiding team also parked their vehicles at a distance of about 50 – 60 meters from A-2's car. Again, request was made there to some public persons to join the investigation but to no effect.

3. Further case of the prosecution is that Ariana Afghan Flight running late from scheduled time when finally landed at the airport at

07.30 p.m., A-2 proceeded towards Arrival Gate No.2 and was chased by them. At around 07.40 p.m., A-2 was seen coming along with A-1 with a large brief-case of silver colour in his hand. When they were about to sit in A-2's car, they were intercepted. After introducing themselves, the appellants were apprised about the secret information regarding the possibility of recovery of contraband substance from them. They were informed about their legal right to be produced before a Gazetted Officer or a Magistrate for search. Insp. Sunil Kumar gave notices under Section 50 of NDPS Act. Both A-1 and A-2 declined to be searched before a Gazetted Officer or a Magistrate and also declined to search the police party and their vehicles. Contents of the notice under Section 50 of NDPS Act were read over and explained to A-1 as he did not know how to write Hindi though he understood it. SI Sharat Chandra recorded his refusal in Hindi; A-2 recorded it in his own handwriting.

4. On checking the bag / briefcase, held by A-2, in the presence of ACP Rajender Bakshi, three pairs of clothes were found in it. When Insp. Sunil Kumar cut open the lower portion of the briefcase, it was found containing 'brown' colour powder. It was 7.100 kg. smack / heroin. Out of the recovered substance, two samples of 50 grams each were drawn and sealed in cloth pullandas with the seal of SK III S. On search of

A-1, 510 grams smack was recovered from the left side pocket of his black colour jacket. Two samples of 50 grams each were drawn and were sealed in cloth pullandas with the seal of SK III S. Insp. Sunil Kumar prepared rukka and sent SI Naresh Solanki and HC Om Prakash to lodge First Information Report with Police Station, Crime Branch. Further investigation was assigned to SI Naresh Sangwan who arrived at the spot before sending the rukka. Necessary proceedings were conducted by him at the spot.

5. During investigation, statements of the witnesses conversant with the facts were recorded. Exhibits were sent to Forensic Science Laboratory for examination. After completion of the investigation, a charge-sheet was filed in the Court against the appellants. They were duly charged and brought to trial. The prosecution examined fourteen witnesses in all. Statements of the appellants were recorded under Section 313 Cr.P.C.; they denied their involvement in the crime and pleaded false implication. Kulvinder Dawar appeared in defence as DW-1. After appreciating the evidence and documents on record and considering the rival contentions of the parties, the Trial Court by the impugned judgment held the appellants guilty for the offences mentioned previously and

sentenced them accordingly. Being aggrieved and dissatisfied, they have filed the appeals.

6. I have heard the learned Addl. Public Prosecutor and learned defence counsel for the appellants, and have examined the record. Learned counsel for A-1 strenuously urged that the Trial Court did not appreciate the evidence in its true and proper perspective and fell in grave error to convict the appellants relying upon the testimonies of police officials alone without independent corroboration. The prosecution witnesses have given divergent statements regarding the recovery from the possession of the accused persons. Contradictions and discrepancies emerging on record go to the root of the case. A-1 was not apprised of the legal right under Section 50 of NDPS Act. Written submissions have been placed on record.

7. Learned counsel for A-2 urged that there was no enough evidence to implicate A-2 in the crime. He had gone to the airport along with one Mohd. Majid, a customer, whose acquaintances were to arrive there by Ariana Afghan flight. A-2's only purpose was to take the said passengers to his shop to effect sale of his articles. No recovery of any prohibited substance were made / effective from him. Mandatory provisions of Sections 42 and 50 of the Act were not complied and they

were deprived of a reasonable opportunity to be searched before the Gazetted Officer or the Magistrate. Their signatures were obtained on blank papers at Crime Branch.

8. Supporting the judgment, learned Addl. Public Prosecutor urged that the prosecution has established its case beyond reasonable doubt. A-1 and A-2 were apprehended at IGI Airport and huge recovery of contraband was effected from their possession. Repeated attempts made by the Investigating Officer to associate independent public witnesses proved futile as none agreed to join for one or the other reason. The police officers did not nurture any grievance or enmity with the appellants to falsely implicate them. The Trial Court has discussed all the relevant aspects minutely in the impugned judgment which warrants no interference.

9. Admitted position is that A-1 arrived at IGI Airport from Kabul by Afghan Airlines (flight No. FG 311) on 26.11.2009. In 313 Cr.P.C. statement, he admitted his arrival from Kabul by the said flight. He denied to have any baggage in his possession. He elaborated as to how and in what manner, he was intercepted near the exit gate by some individuals in plain clothes and was thereafter taken to their office. He denied apprehension and recovery of contraband along with A-2. A-2 in

313 Cr.P.C. statement disclosed that on that day, he had gone along with Mohd.Majid, an Afghan National to the airport and he was to receive some of his acquaintances who were to arrive from Kabul. He denied to have been in touch with the smugglers. Before the Court all relevant and material prosecution witnesses have implicated the appellants for recovery of contraband from them as detailed in the charge-sheet.

10. Appellants' conviction is primarily based upon the testimonies of the police officers / officials only. Admittedly, no independent public witness was associated at any stage of the investigation. True, it is no rule of law that public witnesses should be joined in every eventuality and no conviction can be based upon the testimonies of the police officials. Sometimes it becomes highly difficult for the police officials to associate independent public witnesses for various reasons. At the same time, it is undoubtedly true that joining of independent public witnesses is not a mere formality. Simply saying by the police witnesses that public witnesses were not available without any evidence to that effect would not be suffice. The Investigating Officer is required to make genuine efforts to associate independent public witnesses if available. This is insisted so as to lend authenticity and credibility to the search and recovery that are effected. It is of course not

an absolute rule and fact of each case has to be appreciated and scrutinized on its own merits.

11. In the instant case, despite availability of independent public witnesses, no genuine and sincere efforts were made by the Investigating Officer to associate them. The explanation offered by the Investigating Officer does not inspire confidence. Secret information was received at around 09.30 a.m. at Crime Branch, Chanakyapuri. Allegedly, A-2 was to receive a huge consignment of Heroin / smack at IGI Airport from Afghan Nationals who were to arrive in India by Afghan National flight at about 12.30 p.m. or thereafter. Apparently, the police officials had sufficient time to make sincere efforts to associate independent public witnesses in the raiding team. However, nothing was done. For the first time, when the raiding team reached Lajpat Nagar at about 11.30 a.m., some passers-by were allegedly asked to join the raiding party. They purportedly declined to participate taking the plea that they were busy in their own work. It has come on record that there were number of shops at Lajpat Nagar, where the police party had followed A-2's car. None of the shopkeepers was requested to be a part of the raiding team. Again, at 06.30 p.m., an attempt was allegedly made at the airport to join some public persons in the raiding team but none was willing and they left without disclosing their

names and addresses. It is a matter of record that the raiding team remained at the spot till 03.00 a.m. It is strange that for about thirteen hours the Investigating Agency was not able to associate even a single independent public witness at any stage of the investigation. Admitted position is that there were number of police officials, government / private employees, Traffic Police Control Room, Prepaid Taxi-booth, CISF officials and shopkeepers, etc. at the crowded and busy airport. It is not explained as to why only the passers-by were requested to join the investigation. Even their names or addresses were not recorded and no action whatsoever was taken for their refusal to assist in the investigation. Apparently, the Investigating Agency were not interested to make any independent witness to be a part of the raiding team.

12. Observations of this Court in similar circumstances in ‘*Ram Prakash vs. State*’, 2014 (146) DRJ 629 are relevant to note :

“....16. Mr. Gaur pointed out that while the Appellant was apprehended around 3.30 pm, the formal arrest was recorded at 11 pm i.e. after eight hours. Throughout this period the police remained present at the spot and yet they could not get a single public witness to be associated.

17. This is perhaps the weakest link in the entire case of the prosecution. In his evidence PW-9 stated that “he requested 5-6 public persons to join the

proceedings but they did not join the investigation.” It is not clear who those public persons were. Their names were not noted. In his cross-examination PW-9 stated: “People who were managing the parking were present in the parking. I did not call any person from the parking, any employee of the Railway and the police officials deployed there to join the proceedings.”

18. It seems extraordinary that although PW-9 and the entire raiding party remaining at the spot i.e. the parking lot of Old Delhi railway Station, well beyond 11.15 pm, i.e., nearly eight hours (they ultimately left the spot at 11.45 pm to reach the Crime Branch at 12.30 am) they were unable to locate a single public witness including any railway official or any personnel of any other security force to be associated in the proceedings.

19. The trial Court has referred to the decision in Ajmer Singh v. State of Haryana 2010 (2) RCR (Crl) 132 to hold that the failure to associate independent witness is not fatal to the prosecution case, as long as it is shown that efforts were made and none was willing. However, it is seen that in the said decision the Supreme Court emphasised that it had to be shown that after making efforts, which the Court considers in the circumstances of the case reasonable, the police officer was not able to get public witnesses to associate with either the raid or the arrest of the culprit. In other words in every case it will have to be examined whether serious efforts made by the police to associate public witnesses. In Ram Swaroop v. State (Govt. NCT of Delhi) (2013)14 SCC 235 the Supreme Court found the evidence of the police witnesses "absolutely unimpeachable" and therefore held that the failure to associate independent witnesses did not affect the prosecution case. However, as will be seen hereafter, that cannot be said of the prosecution witnesses in the present case.

20. In the present case as already noticed the entire raiding party remained at the Old Delhi Railway parking lot which is an extraordinarily busy area from around 3.30 pm till midnight. This is a place where apart from security personnel, there are bound to be parking attendants and railway employees as well. The IO in his cross-examination has admitted that he did not make any effort to associate any such member of the security forces (including the railway forces, parking attendants or railway employee). In other words no sincere effort was made.

21. It has almost become a routine practice for the police to state that passersby were asked to join and they declined and went away without disclosing their names. The Court should be wary of readily accepting such explanations. In a case where a raid takes place in broad daylight in a busy area, a more convincing explanation has to be offered why despite remaining at the spot for about eight hours the police did not find a single public witness to join the proceedings. Shoddy investigation....”

13. In the case in hand, there was ample opportunity / time for the Investigating Agency to associate independent public witnesses. In corruption cases while conducting raid CBI or Anti Corruption Bureau generally ensure to join independent witnesses. Testimonies of such Panch witnesses are given due weightage. It is unclear as to why the said procedure is not replicated in such cases. At least, in those cases where the Investigating Agencies has plenty of time, they can requisition the services of independent public witnesses / public servants.

14. Since appellants' conviction is based on the testimonies of the police officers / officials only, their testimonies require to be perused with great care and caution as they were interested in the outcome of the raid.

15. All the material police witnesses who were members of the raiding team deposed that they had left the Crime Branch office in two vehicles; one a government vehicle No.DL-6CJ-0517 and other a private car. It was, however, not divulged by any of them as to what was the registration number of the private vehicle; from where it was arranged; who was its registered owner; when it was requisitioned and when it was finally released. It is also unclear as to who had brought the private vehicle at the Crime Branch; if so at whose instructions and at what time. Repeatedly, the police witnesses were asked about the use of the private car on various dates of their examination but none was able to respond. Number of the private car used in the raid does not find mention in any of the DD entries or other documents purportedly prepared at the spot. If the prosecution witnesses were able to reveal minute details of the occurrence, it is unbelievable that they were not aware of the registration number of the private vehicle allegedly used in the raid.

16. PW-9 (ACP Rajender Bakshi) is omnipresent during investigation. At 09.30 a.m. when secret information was allegedly received, he was at his office and had verified the authenticity of the information from the secret informer. At about 01.30 p.m. he was informed through telephone that the flight was late from the scheduled arrival time. He reached at IGI Airport at about 02.30 p.m. where Insp. Sunil Kumar and his team had already laid a trap. He was present at the time of recovery of the contraband from the appellants and left the spot at around 10.30 p.m. In the night intervening 26/27.11.2009, he was present at his office at 04.15 a.m. when a report was received under Section 42 NDPS Act from ASI Brahm Prakash sent by SI Naresh Sangwan on the basis of A-1's disclosure statement. It is unclear as to why ACP Rajender Bakshi had reached at IGI Airport clandestinely at 02.30 p.m. and what had prompted him to remain there till 10.30 p.m. when he was not a member of the raiding team. The prosecution witnesses have given divergent version regarding his arrival and stay. PW-5 (Insp. Sunil Kumar) deposed that ACP Rajender Bakshi reached the airport at 06.30 p.m. He did not reveal if he had made any telephone call to him about the late arrival of the flight. He also did not disclose the purpose of ACP's visit there. In the cross-examination, he improved the version and stated

that ACP had arrived at the airport at 02.30 p.m.; met him at about 06.30 p.m. and remained with him thereafter. He was unaware as to where ACP Rajender Bakshi remained from 02.30 p.m. to 06.30 p.m. He volunteered to add that he was keeping a watch on the members of the raiding party during that time. PW-9 in examination-in-chief did not say that he had reached the airport to have supervision over the staff and had not met any of them till 06.30 p.m. In the cross-examination, he disclosed that he had reached IGI Airport to supervise the operation / raid. He gave a contradictory statement that at 02.30 p.m., he had met PW-5 (Insp. Sunil Kumar) for a minute. Thereafter, he did not meet any member of the raiding team though both SI Sharat Chandra and ASI Brahm Prakash were visible around. He further stated that after 06.30 p.m. he remained present on the side of Arrival Gate No.2 alone till 07.30 p.m. PW-6 (Insp. Naresh Solanki) testified that at about 02.30 p.m., ACP Rajender Bakshi came at the spot in his private vehicle and went towards the main gate of the arrival where Insp.Sunil and SI Sharat Chandra were present. At 06.30 p.m., he spotted ACP Rajender Bakshi near the arrival gate. In the cross-examination, he stated that he had not met ACP Rajender Bakshi. When he arrived there in Innova car at 02.30 p.m., he had seen him in Innova towards the arrival area. Thereafter, he had seen him many times but he

was alone and at 06.30 p.m. he saw him along with Insp. Sunil Kumar. When he was confronted with the statement under Section 161 Cr.P.C. he admitted that ACP Rajender Bakshi had come at about 02.30 p.m. in a private car and reached near Insp. Sunil Kumar. He, however, volunteered to add that ACP Rajender Bakshi though had reached near Insp. Sunil Kumar but had not met him. PW-10 (Insp. Sharat Chandra) disclosed about arrival of ACP in Innova at 02.30 p.m. In the cross-examination, he disclosed that ACP on reaching the airport continued to move from one place to another all alone. He had seen him in front of arrival gate No.2 at about 02.30 p.m. from a distance of 15 – 20 paces. Nothing has been explained as to why after coming to know of the arrival of ACP, he did not deem it fit to meet him. When confronted with his 161 Cr.P.C. statement, he admitted that it was recorded therein that ACP Rajender Bakshi had also come near them at about 02.30 p.m. He clarified in response to the Court question that ACP came near them at 02.30 p.m. where all the members of the team were deputed. It is not understandable as to why was that hide-and-seek game. Presence of ACP at the spot is highly suspect.

17. Prosecution case is that at 07.40 p.m., A-1 and A-2 were apprehended / intercepted when they were about to sit in the Matiz car.

Inconsistent version has been given by the prosecution witnesses about the timings of arrival of ACP at the place of their apprehension / interception. PW-5 (Insp.Sunil Kumar) disclosed that ACP Rajender Bakshi arrived after they had introduced themselves and the appellants were apprised of their legal right to conduct search before a Magistrate or a Gazetted Officer by serving notices under Section 50 of NDPS Act. PW-10 (Insp.Sharat Chandra) disclosed that ACP reached the spot before serving notices under Section 50 of NDPS Act to the appellants. Admitted position is that ACP was a Gazetted Officer. It is unexplained as to why the appellants were not informed that Gazetted Officer i.e. ACP Rajender Bakshi was present near the spot and they could be produced before him for search. The recovery is alleged to have been effected thereafter in the presence of ACP Rajender Bakshi.

18. The prosecution witnesses have given conflicting version regarding filling up of FSL form at the spot. PW-5 (Insp. Sunil Kumar) was certain that only one FSL form for both the recoveries effected from A-1 and A-2 was filled up by him without preparation of any copy. He further disclosed that he had signed the said FSL form but did not remember who else had put signatures over it. He elaborated that generally they prepared only one FSL form and used to prepare its two

photocopies; one for placing on judicial record and the other to send to the malkhana along with the case property. PW-9 (ACP Rajender Bakshi) who was allegedly present at the spot at the time of recovery introduced a new version and was categorical to depose that two separate FSL forms were filled up by PW-5 (Insp. Sunil Kumar) for different recoveries from A-1 and A-2. In the cross-examination, he claimed that he had put his signatures on both the FSL forms. PW-8 (Insp. Akshay Kumar) in the cross-examination, admitted that he was not aware if separate FSL forms or one FSL form was filled regarding two recoveries. He was not aware if the FSL form was fully handwritten; partly typed and partly handwritten or completely typed. He was unable to admit or deny if he had written particulars on any other FSL form or put his seal on 10 / 15 or 20 FSL forms. He further admitted that the original FSL form received by him was not signed by any police official. It belies PW-9's plea to have signed the FSL form. The glaring inconsistencies remained unexplained.

19. PW-5 (Insp. Sunil Kumar) in his Court statement described the colour of the recovered contraband as 'light brown colour'. However, case property produced before the Court was of light yellow / mustard colour. He attempted to explain that during night time, in the light, it appeared to be of 'light brown colour'. PW-9 (ACP Rajender Bakshi), in

examination-in-chief, described the colour of the polythene in the attachi-case containing the substance as 'blue'. When learned Addl. Public Prosecutor drew his attention to the statement Ex.PW-9/PA, he admitted that its colour was 'yellow and blue'. He also described the colour of recovered heroin as 'white' in his examination-in-chief. In the cross-examination by Addl. Public Prosecutor, after declaring him partly hostile, he admitted that the colour of heroin was 'brown'. The prosecution witnesses were not expected to record the colour of the contraband as 'brown' though it was of light yellow / mustard colour.

20. Admitted position is that A-1 had travelled from Kandhar (Afghanistan) to Delhi by Ariana Airlines. It had landed at around 07.30 p.m. The appellants were allegedly intercepted at around 07.40 p.m. It is unclear if the bag (Ex.P2) from which the contraband was allegedly recovered was carried by him as a 'check-in baggage' or a 'cabin baggage'. No worthwhile evidence surfaced in this regard. PW-13 (SI Naresh Sangwan), who was specifically directed by ACP Rajender Bakshi to investigate in this regard, fairly admitted in the cross-examination that from the Passenger Manifest (Ex.PW-7/A), he was unable to say if the baggage (Ex.P2) was 'checked-in baggage' or a 'cabin baggage'. As per Ex.PW-7/A (Passenger Manifest), A-1 had carried one baggage. It does

not mention if it had any baggage tag number or baggage stub. PW-9 (ACP Rajender Bakshi) too was unable to disclose if the baggage was a 'check-in baggage' or a 'cabin baggage'. No investigation in this regard was conducted at the spot or soon thereafter. On 08.03.2010, the Investigating Officer approached PW-7 (Rajesh Kumar), Traffic Supervisor, Ariana Afghan Airlines, and collected the Passenger Manifest (Ex.PW-7/A) and other documents i.e. general declaration and passenger list (Ex.PW-7/B and Ex.PW-7/C). Nothing was enquired from him if the baggage Ex.P2 was carried by A-1 as a 'checked-in baggage' or a 'cabin baggage'. In case of 'check-in baggage', normally baggage stub is the affixed after ascertaining its weight for identification purpose to be collected subsequently on the conveyer belt. In case of 'cabin baggage', generally a baggage tag is attached for security reasons. It is unclear if the baggage tag Ex.P1 bearing ticket No.0002645 was a 'baggage tag' or stub. Air tickets Ex.PW-13/A recovered in the personal search of A-1 did not contain any baggage tag or stub. PW-13 (SI Naresh Sangwan) was unable to differentiate 'baggage tag' or 'stub'. He was categorical to admit that he did not make any enquiry from Ariana Afghan Airlines if they had allotted any baggage tag against the checked-in baggage. In case, A-1 had travelled with 'checked-in baggage', it was not possible to move out of

arrival hall within ten minutes, at 07.40 p.m. after collecting it from the conveyer belt. Surprisingly, the baggage containing huge contraband went unnoticed during security checks. It is also unbelievable that the A-1 was able to carry contraband in his pocket of jacket by dodging the security checks. It is alleged that A-1's associate succeeded to slip away with the contraband from the airport and was subsequently arrested pursuant to the A-1's disclosure statement. The Investigating Officer did not record statement of any official to ascertain as to what precautions / security checks were applied before clearance of the checked-in baggage / cabin baggage by the airlines staff / security officers.

21. Prosecution witnesses were conspicuously silent about A-2's movement after he allegedly reached at IGI Airport before 12.30 noon. It is unclear if for more than seven hours, he remained confined in the car without having any food, etc. None of the prosecution witnesses has even stated if he had visited the arrival hall to verify as to how much was the delay and when the flight was to land at the airport. All the members of the raiding team have spoken that after the flight landed at around 07.30 p.m., A-2 was seen 'proceeding towards arrival gate'. None of them was sure if A-2 had entered inside the arrival hall and had met A-1 therein.

Admitted position is that none of the prosecution witnesses saw A-1

carrying any baggage (Ex.P2). It was not handed over by him to A-2 to their view. It is not certain as to at which place exactly the bag Ex.P2 was transferred to A-2. PWs have omitted to explain the exact place where A-1 and A-2 met; whether A-2 had entered inside the arrival hall to receive A-1; whether he had purchased any ticket to enter it and whether any member of raiding team had kept a constant watch over A-2 who was to receive the alleged smugglers. No efforts were made by any member of the raiding party to ascertain if any other passenger / smuggler in the airline was also in possession of any contraband. No such other passenger was intercepted or interrogated. Subsequently, at the spot, appellants' disclosure statements (Ex.PW-11/H and Ex.PW-11/J) were recorded after the arrival of the Investigating Officer PW-13 (SI Naresh Sangwan). As per disclosure statement (Ex.PW-11/H), A-2 had received a call on his phone from Daud in between 10.00 a.m. to 11.00 a.m. about the arrival of his two associates with contraband, from Kandhar in between 01.00 p.m. to 01.30 p.m. having brief-cases of black and silver colour and his duty was to collect and leave the brief-cases in their hotel. He further disclosed that one of them was arrested and the other had gone to Kabli Hotel with the briefcase. It is unclear as to how this information came to A-2's knowledge when he had not come into contact with A-1's associate any

time. None of the PWs has explained as to why A-1's associate was not kept under surveillance. A-1's disclosure statement (Ex.PW-11/J) revealed that he and his associate Mohammad had arrived at Delhi with 15 Kg. smack in two suitcases along with 500 grams sample and it were to deliver to A-2. He further disclosed that his associate Mohammad had slipped at the airport and might had gone to Kabli Hotel, Bhogal; he was also having a suitcase containing 7.5 Kg. smack and could get him arrest and recover it. Subsequently a separate FIR No.200/09 under Section 21 (C) NDPS Act was registered against one Mohammad in similar circumstances. Case file of Sessions Case No.9A/10 vide FIR No. 200/09 PS Crime Branch where one Mohammad alone is facing trial under Section 8/21 (C) of NDPS Act was requisitioned to record satisfaction whether in the said case any of the appellants was involved. Most of the material members in the raiding team in the instant case constituted / formed another raiding team to catch hold of A-1's associate. PW- SI Naresh Sangwan, Investigating Officer of this case become initial Investigating Officer in the said case. It is curious as to why the appellants particularly A-1 was not implicated as an accused in the said FIR especially when recovery was allegedly effected pursuant to his disclosure statement at his instance. It does not appeal to mind that so many police

officials having specific information present at the arrival gate since long would allow A-1's associate with the contraband to slip / escape.

22. It is also a mystery as to why A-1 would keep 510 grams smack in his pocket when allegedly major portion of it was kept in the attachi-case. Intimation was given by PW-13 (SI Naresh Sangwan) to Afghan Embassy vide letter Ex.PW-13/C about A-1's apprehension on 27.11.2009. This letter talks of recovery of only 510 grams smack from A-1. Investigating Officer has not explained the omission for the recovery of smack from the attachi-case allegedly smuggled by him.

23. The prosecution has not given any explanation as to why cellular evidence was not brought on record. It has come on record that A-2 had conversation on mobile in his possession at IGI Airport. Personal search memo (Ex.PW-11/C) shows recovery of two Nokia mobiles (IMEI Nos.35605403783846 and 35435000560360); with Vodafone and Idea chips. Similarly on personal search of A-1 vide Ex.PW-11/D, one mobile make Fashion with two SIMs was recovered. The Investigating Officer did not attempt to collect Call Details Records pertaining to these mobile phones to ascertain as to with whom, at what time and place, the appellants were in regular and constant touch. Call Details Records were

relevant to ascertain appellants' location at the relevant time and their nexus with themselves and others.

24. The prosecution witnesses have given divergent and inconsistent versions about the arrival of the secret informer in the Crime Branch. PW-5 (Insp. Sunil Kumar) claimed that the secret informer came to his office at 09.30 a.m. ACP was apprised of the secret information and the secret informer was produced before him. DD No.8 (Ex.PW-5/A) was recorded in this regard. In the cross-examination, he disclosed that after the ACP had verified the information from the secret informer in his room in his absence, he (ACP) called him to his room to proceed in the matter. He did not claim presence of any other police officer when the secret informer met him or the ACP. PW-6 (Insp. Naresh Solanki) claimed himself to be present in the office of Crime Branch at 09.30 a.m. when the secret informer conveyed the secret information to PW-5 (Insp. Sunil Kumar). In the cross-examination, he deviated from his earlier statement and stated that the secret informer did not come to the police station and he was not produced before the ACP in his presence. PW-10 (Insp. Sharat Chandra) deposed that the secret informer revealed the secret information to Insp.Sunil Kumar at about 09.30 a.m. in his presence. He was categorical to admit in the cross-examination that when the secret

informer approached the office, only he was present along with Insp.Sunil Kumar. Contrary to that, PW-11 (SI Brahm Prakash) claimed that the secret informer approached Insp.Sunil Kumar at 09.30 a.m. and in his presence, divulged the secret information. Insp.Sunil Kumar discussed the matter with the secret informer before the ACP who was also present there. PW-1 (Const.Shiv Prasad) at the time of his examination on 12.01.2011 did not depose about recording of DD No.895. He proved DD entries recorded at Sl.Nos.896 and 897. However, when he was recalled for examination on 14.05.2011, he disclosed that the secret information was recorded by him at Sl.No.895 in the Daily Diary register, the photocopy of which was Ex.PW-1/C. Secret information allegedly received by PW-5 (Insp. Sunil Kumar) was not separately reduced into writing. Departure entry (Ex.PW-5/B) does not show if the raiding team had left for B-6, Lajpat Nagar. DD No.8 when produced in original Ex.PW-9/A was in loose condition.

25. No investigation was carried out to find out if the appellants hatched criminal conspiracy and if so, on what date and time. Nothing has surfaced on record to infer if A-2 was in constant touch with A-1 or other kingpins.

26. A-1 and A-2 were taken on police remand for number of days to unearth the conspiracy. Their supplementary disclosure statements were recorded wherein they claimed to pin-point the individuals to whom they were to deliver the contraband. Admitted position is the Investigating Agency was unable to find out any individual for whom the contraband was meant for delivery. No evidence emerged on record to infer if the appellants were in touch with any such individual any time for delivery of the contraband, and if so, for what price and at which place. The prosecution also did not collect any evidence if A-2 was involved in any other similar case. No incriminate article was recovered from B-6, Lajpat Nagar. Disclosure statement reveals that A-2 was involved in performing similar acts earlier also. However, no such evidence emerged to confirm it. It is unclear as to how A-2 was beneficiary in the transaction. The secret informer had not given A-1's description. It is again unclear as to how A-2 was able to recognize and identify A-1 soon after his arrival at the airport in 'no' time.

27. Actual registration number of the Matiz car allegedly chased by the members of the raiding team was DL-3C Q7070. However, all the witnesses have revealed its number as DL-2C Q7070. Attempt was made to justify the variance alleging that fake number-plates were used to

conceal the real registration number. This explanation does not appeal to mind as no such fake number plates were seized by any seizure memo. A-2 was not charged for forgery. The documents prepared at the spot do not reflect if forged number plates were used.

28. PWs have given conflicting statements about the opening of the attachi-case / bag allegedly recovered from A-2. PW-5 (Insp. Sunil Kumar) in examination-in-chief did not divulge how the locked bag was opened. In the cross-examination, he disclosed that it was opened by him after numerical code of the attachi was provided by A-1. Contrary to that, PW-6 (Insp. Naresh Solanki) deposed that bag was opened by A-1 as it was bearing a number lock. PW-9 (ACP Rajender Bakshi) gave another version and stated that the bag was opened by Insp. Sunil Kumar after asking numerical code from A-1. PW-10 (Insp. Sharat Chandra) deposed that the bag was opened after getting numerical code from A-2. Apparently, the witnesses have given divergent version in this regard.

29. Site plan (Ex.PW-5/G) does not reflect true picture. It does not show location of each member of the raiding team. Similar was the position in '*Ram Prakash vs. State*' (supra). This Court observed therein :

“The site plan presented to the Court by the prosecution was most rudimentary. The place of apprehension was supposed to be the parking lot of the Old Delhi Railway Station in the afternoon at 3.30 pm and yet, there are no photographs, and importantly no scaled plan which would shown the relative positions of the Appellant, the bags, the raiding party and where the paperwork is supposed to have taken place with some precision. What has been presented to the Court is an imprecise kind of site plan which even does not remotely resemble the railway parking lot of the Old Delhi Railway Station. Learned APP offered a weak explanation states that the raiding party is not given any specific training in preparing site plans and make best of the available resources. The Court can only observe that with so many technological advances where satellite imagery to the smallest degree of precision of any location in the world is available, the Delhi police can no longer be excused for not improving its methods of gathering and presenting evidence. Considering that the raid was going to take place in a busy place like the Old Delhi Railway Station parking lot, and in broad daylight, it should have been possible for the police to arrange for a videograph of the place of the raid itself, if not photographs.”

30. Another suspecting circumstance in the story is about arrival of PW-13 (SI Naresh Sangwan) at the spot at around 11.25 p.m. before sending rukka at 11.30 p.m. He was assigned the further investigation of this case even before the sending of rukka by the initial Investigating Officer. No written orders from any senior officers have been produced to show if the investigation was assigned to him. No call details of the

mobiles of members of the raiding party are on record to confirm if ACP had informed the initial Investigating Officer about assignment of the investigation of this case to PW-13 (SI Naresh Sangwan). PW-13 did not make any arrival or departure entry.

31. In the light of above referred deficiencies, inconsistencies and discrepancies, statements of the official witnesses without corroboration from independent sources cannot be believed to base conviction for stringent provisions of the Act. The law on this aspect is that “stringent the punishment stricter the proof”. In such like cases, the prosecution evidence has to be examined very zealously so as to exclude every chance of false implication. The prosecution has failed to establish the commission of offence by the appellants beyond reasonable doubt. It cannot take benefit of appellants’ inability to establish their defence pleaded in 313 statements beyond reasonable doubt. Mere apprehension of the appellants is not enough. The evidence is scanty and lacking to establish that the contraband was recovered from the possession of the appellants in the manner alleged by the prosecution on the said date and time. They deserve benefit of doubt.

32. Resultantly, the appeals filed by the appellants are accepted. The conviction and sentence are set aside. The appellants shall be released forthwith if not required to be detained in any other criminal case.

33. Trial Court record be sent back immediately with the copy of the order. A copy of the order be sent to the Superintendent jail for information.

34. File of Sessions Case No.9A/10 requisitioned from Saket Courts, be sent back immediately.

(S.P.GARG)
JUDGE

APRIL 09, 2015 / tr