

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

% *Judgment reserved on :03.8.2015*
Judgment delivered on :10.8.2015

Crl. Appeal No. 2/2013

SHAMBHU NATH YADAV Appellant

Through Mr.Krishan Kumar, Adv.

versus

STATE Respondent

Through Ms. Kusum Dhalla, APP for the
State.

CORAM:

HON'BLE MS. JUSTICE INDERMEET KAUR

INDERMEET KAUR, J.

1 This appeal is directed against the impugned judgment and order on sentence dated 14.9.2012 and 28.9.2012 respectively wherein the appellant had been convicted under Section 20(b)(ii)(C) of the NDPS Act. He had been sentenced to undergo RI for a period of 10 years and to pay a fine of Rs.1 lacs, in default of payment of fine to undergo SI for a period of 6 months.

2 The version of the prosecution is that on 27.7.2011 at about 9.15 p.m. the police party noticed the appellant coming from outer gate of the

foot over bridge at ISBT. On seeing the police party he took a turn and retraced his steps. This created suspicion in the mind of the police party. He was apprehended. He was carrying a black bag. On opening the bag it was found containing a polythene bag. Notice under Section 50 of the NDPS Act was served upon the appellant. The appellant refused to get his search conducted in the presence of a Magistrate or a Gazetted Officer. On checking the polythene it was found to contain Charas. It was weighed and its weight was found to be 7 kg 500 grams. Two samples of 50 grams each were taken out from the contraband and the same were sent to CFSL for examination. CFSL report had tested the samples positive for Charas. Challan was filed.

3 Nine witnesses were examined by the prosecution to prove its case. In the statement of the accused recorded under Section 313 Cr.P.C. he had stated that the contraband was planted upon him.

4 On the basis of the evidence adduced by the prosecution, both oral and documentary, the appellant stood convicted and sentenced as aforenoted.

5 On behalf of the appellant, arguments have been addressed by the learned Amicus Curiae. It is stated that the NCB guidelines No.1/88
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dated 15.3.1988 cast a mandate upon the investigating agency to send the samples within an outer limit of 72 hours. In the instant case the samples were drawn on 27.7.2011 but were sent to the CFSL on 9.8.2011 i.e. after a gap of 11 days. There is no explanation for this shortcoming. To support this submission reliance has been placed upon 2008(4) RCR (Criminal) 294 Jarnail Singh Vs. State of Punjab. There is no explanation as to why no public witness had jointed the raid. Non-joining of public witness inspite of the raid having been conducted in a busy area has not been explained. Benefit of doubt in this connection must accrue to the appellant. To support this argument, reliance has been placed upon 2006(12) SCC 321 Ritesh Chakarvarti Vs. State of Madhya Pradesh. It is pointed out that the sample seal had also not been handed over to any independent witness. Even as per the version of PW-9 he had brought the weighing equipment. How the samples of 50 grams were drawn has not been explained as the weights brought by him did not include a weight of 50 grams. It is pointed out that there are inherent contradictions in the version of the recovery witnesses. Attention has been drawn to the testimony of PW-5 and PW-9. It is pointed out that PW-5 in one part of his statement stated that the

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weighment was done by ASI Shiv Lal whereas in another part he had stated that ASI Shiv Lal had reached the spot after the rukka had been taken by PW-5. These contradictions remained unexplained. There is a non-compliance of the provisions of Section 50 of the NDPS Act. On all counts benefit of doubt must accrue in favour of the appellant.

6 Needless to state that these arguments have been refuted by the learned APP for the State. It is submitted that the NCB Standing Instructions are only guidelines and they are not a mandate upon the Court. If for any reason there is a non-compliance of the Standing Instructions this cannot itself benefit the accused. The evidence adduced by the prosecution is trustworthy and the impugned judgment has noted all these arguments which have been now projected by the learned counsel for the appellant. On no count does the impugned judgment call for any interference.

7 Arguments have been heard. Record has been perused.

8 The recovery witnesses have been examined as PW-5, PW-8 and PW-9.

9 PW-5 had deposed that on the fateful day i.e. 27.7.2011 while he was posted at police station Kashmere Gate he along with constable

Vedpal (PW-9) and ASI Mahender Singh (PW-8) reached the outer gate of the foot over-bridge, ISBT where at about 9.15 p.m. they noticed the accused having a bag coming from the out gate. On seeing the police party he turned back. This created suspicion in the mind of the police party. He was overpowered. He disclosed his name as Shambhu Nath Yadav. His bag was checked. A black polythene type bag tied with a white thread was found. The accused disclosed that this contained Charas. 5-6 passersby were asked to join the raid but none agreed. Notice under Section 50 of the NDPS Act (Ex.PW-5/A) was served upon the accused informing him of his right to get his search conducted in the presence of a Magistrate or a Gazetted Officer to which he refused. On this the Investigating Officer opened the black polythene and it was found to contain Charas wrapped in plastic sheets. Weighing equipment was brought by PW-9 to the spot. The Charas was weighed. It was found to be 07 kg 500 gms. Two samples of 50 gms each were taken out; the same were marked S1 and S2. The samples which were taken as also the remaining contraband were sealed. The FSL form was filled at the spot. The contraband was taken into possession vide memo Ex.PW-5/C. The accused was arrested vide memo Ex. PW-3/C. His

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personal search was conducted vide memo Ex.PW-3/D from which the copy of notice under Section 50 of the NDPS Act was recovered.

10 In his lengthy cross-examination he had stuck to his stand. He reiterated that when they were near the foot over-bridge; they noticed the accused was approaching the out gate. The accused started moving back which created suspicion in the mind of the police party. Before the notice was served upon the accused he was informed of his right to get his search conducted in the presence of a Magistrate or a Gazetted Officer. The bag was not searched till the time notice was served upon the accused. The black bag which the accused was carrying was found to contain Charas. Weights of 5 kgs, 2 kgs, 1 kg and 500 grams were brought by PW-9. He denied the suggestion that nothing happened and that is why no public witnesses had joined the raid. He denied the suggestion that he was deposing falsely.

11 PW-9 has also deposed on the same lines. He had also deposed that when the accused saw the police party he tried to retrace his steps which created suspicion in the mind of the police party. 5-6 passersby were asked to join the raid but none agreed. He deposed about the manner in which the notice under Section 50 of the NDPS Act was

served upon the accused. The refusal by the accused (Ex.PW-5/B) was witnessed by PW-9 as well. He reiterated the manner in which the samples and the remaining contraband were seized and the manner in which they were sealed. FSL form was filled at the spot. This witness was subjected to a lengthy cross-examination. He reiterated that the accused was overpowered by chasing him and ASI Mahender caught him first. The rukka was taken by PW-5. He admitted that public persons were asked to join the raid but none had agreed to join the raid. It took 5-7 hours to complete the proceedings.

12 ASI Mehender, the Investigating Officer was examined as PW-8. PW-5 and PW-9 had joined him in the raid. He reiterated the same position. He had reiterated that notice under Section 50 of the NDPS Act was served upon the accused before the search of his bag was conducted. Thereafter on the search of the bag a black colour substance wrapped in a plastic paper was recovered. These were wicks of charas. Weighing instrument was brought by Constable Vedpal (PW-9). The contraband was weighed; it was found to be 7 kg 500 grams. Two samples of 50 gms each were taken out from the contraband. He had affixed his seal of MS on the pullandas marked S1, S2 and A. FSL form

was also filled at the spot. This witness was subjected to a lengthy cross-examination. He admitted that PW-9 had brought the packing material and weighing scale. He denied the suggestion that he was deposing falsely and the accused has been falsely implicated.

13 Relevant would it be to note that in the cross-examination of all the three recovery witnesses none has been given a suggestion that the accused has been falsely implicated for any personal reason of the police party. It is not the case of the defence that the Investigating Officer (PW-8) or either PW-5 or PW-9 had an personal enmity with the accused for his false implication.

14 The most vehement submission of the learned counsel for the appellant was that the public persons had not been asked to join the raid. This has been explained in the version of PW-5 and PW-8. Efforts had been made to join public persons but none had agreed. It is a common knowledge that people do not join easily agree to join police raid as they know the entire exercise is cumbersome and they would be called several times later on. It is a normal human reaction.

15 In this context the Apex Court in AIR 1988 SC 696 Appabhai and Anr. v. State of Gujarat had noted as under:

“The prosecution case cannot be thrown out or doubted on that ground alone. Experience reminds us that civilized people are generally insensitive when a crime is committed even in their presence. They withdraw both from the victim and the vigilante. They keep themselves away from the Court unless it is inevitable. They think that crime like civil dispute is between two individuals or parties and they should not involve themselves. This kind of apathy of the general public is indeed unfortunate, but it is there everywhere whether -in village life, towns or cities. One cannot ignore this handicap with which the investigating agency has to discharge its duties.

The principle of law laid down hereinabove is fully applicable to the facts of the present case. Therefore, mere non-joining of an independent witness where the evidence of the prosecution witnesses may be found to be cogent, convincing, creditworthy and reliable, cannot cast doubt on the version forwarded by the prosecution if there seems to be no reason on record to falsely implicate the Appellants.

16 Second submission of the learned counsel for the appellant is that the NCB guidelines have been violated and the samples which were seized from the contraband on 27.7.2011 and sent to the FSL only on 09.8.2011 for which the inordinate delay of 11 days had not been explained. The instructions of the NCB which have used the word “should” entail a mandate upon the Department to send the samples

within 72 hours and thus not having been complied with benefit has to be given to the accused.

17 This Court is not in agreement with this submission of the learned counsel for the appellant. There is no doubt that the samples had been taken from the contraband on 27.7.2011 but they were sent to the FSL on 09.8.2011. Testimony of PW-6 H.C.Satyapal is relevant. He was posted as MHCM at police station Kashmere Gate on that date. He had deposed that three sealed pullandas marked S1 and S2 and A sealed with the seal of MS and MR were deposited by him in the Malkhana and entry in Registrar No.19 at serial number 3557 was made to the said effect. On 09.8.2011 two sealed pullands (samples) S1 and S2 were sent to the FSL through ASI Shiv Lal (PW-3) and entry to this effect had been made in the Register No.19 which had been proved as ExPW-6/C. These witnesses were not cross-examined inspite of opportunity.

18 The SHO Inspector Madhukar Rakesh was examined as PW-7. In his cross-examination he reiterated that along with the samples, sample seal was also sent to the FSL and the case property was not taken out prior thereto. The samples along with the seal were received in the FSL in an intact condition. They had tested positive for charas. It would

also be relevant to note that NCB Standing Instructions no doubt postulate that the samples must be dispatched to the laboratory within 72 hours of seizure to avoid any legal obligation; in the instant case, there was a delay of 8 days (samples having been sent after 11 days) but no cross-examination has been effected to the Investigating Officer in this context which would have enabled him to explain the reason as to why the samples were sent after such a delay. It is most likely for the reason that FSL was over burdened (as is common knowledge) and for this reason FSL had not accepted the parcels prior to 11 days. Even otherwise these Standing Instructions are only the guidelines for the purpose of investigation and even if there has been no strict adherence to these Instructions it would not accrue in favour of the accused. This is especially so keeping in view the fact that it has not come in the version of all the relevant witnesses that the samples were intact. There was no tampering.

19 This Court would be concerned only if the appellant would be able to highlight that the delay in sending the samples to the FSL had caused a miscarriage of justice for the reason that the samples had been tampered in the intervening period. No such argument has been raised.

20 In this context, the observation of the Apex Court (2002) 4 SCC
380 Khet Singh Versus Union of India while dealing with same set of
Standing Instructions of the NCB had noted as follows:

“Since there are guidelines to be followed, deviation from those guidelines cannot affect the prosecution, at least so long as it is not shown that the departure caused any prejudice to the accused. In view of this, the contentions based on the manner of recording the information and it's being sent to the official superior have to be rejected.”

21 This argument of the learned counsel for the appellant is thus without any merit. It is rejected.

22 The non-handing of the seal to any public witness is also not material in the facts of the instant case as admittedly, no public witness had joined the raid. At the cost of repetition, it is not the case of the appellant that the samples have been tampered with. Thus, the arguments of the learned counsel for the appellant that the seal was not handed over to any public witness which creates a doubt on the version of the prosecution is also an argument without any merit.

23 The weights which were brought by PW-9 were 5 kg, 2 kg, 1kg and 500 grams. This is the version of PW-9 as also PW-8. Submission

of the learned counsel for the appellant is that how 50 grams of charas was drawn had not been explained by the prosecution. To answer this submission, learned APP for the State has rightly pointed out that it was an approximate weight of 50 grams had been drawn from the contraband. There were two samples of 50 grams which drawn and sent to the FSL. The FSL vide its report Ex.PW-3/E had reported that two parcels had been received on 09.8.2011 through ASI Shiv Lal (PW-3). They were marked S1 and S2. The seals were intact and they tallied with the specimen seal. On examination samples tested positive for Charas. The road certificate Ex.PW-6/B shows that 50 grams of Charas was taken. This was an approximate weighment. Even presuming that it was less or more would not make any difference as again at the cost of repetition the version of the prosecution is that the samples which were homogenously drawn from the contraband had tested positive for Charas. Whether it was 50 grams or 55 grams would not dent the version of the prosecution. This argument is also noted only to be rejected.

24 Learned counsel for the appellant fairly concedes that notice under Section 50 of the NDPS Act was not really mandated as this was

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one of a chance recovery. He does not press any argument on this score.

25 This Court is of the considered opinion that the prosecution has been able to fully establish its case. The accused even in his statement under Section 313 Cr.P.C. had set up no defence; this was rightly for the reason that he has no defence. In the last question which had been put to him he had stated that the contraband has been planted upon him. This was not his version in the defence set up by him while cross-examining the witnesses of the prosecution. At that time it was a plain suggestion stating that the accused had been falsely implicated and it was not the defence of the accused that the contraband had been planted upon him.

26 The impugned judgment suffers from no infirmity. On no count does it call any interference. The appellant has already been awarded the minimum sentence. He having been found to be in illegal and unlawful possession of Charas for which the minimum sentence prescribed 10 years and a minimum fine of Rs.1 lacs.

27 Appeal is without any merit. Dismissed.

INDERMEET KAUR, J

AUGUST 10, 2015/ndn