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

+ **CRL.A. No.322/2001**

Date of Decision : 23rd December, 2016

KAMLESH@BABY PETITIONER
Through Mr.Manoj Sharma, Adv. with
Mr.Saurabh Sharma, Adv.

versus

THE STATE RESPONDENT
Through Mr.Sudershan Joon, APP for State.

CORAM:
HON'BLE MR. JUSTICE P.S.TEJI

P.S.TEJI, J

1. Aggrieved by the judgment of conviction dated 18th April, 2001 convicting the appellant finding her guilty under Sections 21/61/85 of the Narcotic Drugs & Psychotropic Substances Act, 1985 (hereinafter referred to as NDPS Act, 1985) and order on sentence dated 19th April, 2001 vide which the sentence was passed to undergo rigorous imprisonment for a period of ten years and to pay a fine of Rs.1,00,000/- for the offence punishable under Section 21 of the NDPS Act, in default of payment of fine, convict was to suffer further simple imprisonment for three years.

2. The facts in brief are that a secret information was received on the basis of which the police of Narcotic Branch, on 13th November, 1999 at about 12.15 p.m., apprehended the appellant Kamlesh@Babby from Nala while coming from Pankha Road side.

Notice under Section 50 of the NDPS Act, 1985 was issued but the accused refused to exercise the said option and then SI offered search by lady Cont.Kanta. However, the accused refused to be searched by the lady Constable Kanta. On search, 50 gram of smack was alleged to have been recovered from her possession. Out of 50 gram smack recovered, two samples of five grams each were separated and were marked as 'A' & 'B' and remaining smack was kept in the same polythene from which the same was recovered and marked as 'C'. It appears from the record that the sample parcels and remaining smack were converted into three different parcels and form FSL was filled. All the parcels and FSL form were thereafter sealed with the seal of ASY. A seizure memo was prepared in this regard; FIR No.26/1999 was registered by Police Station Narcotics, Kamla Market, Delhi and the appellant was arrested. It emerges from the record that charge under Section 21 of the NDPS Act was framed against the accused to which she pleaded not guilty and claimed trial.

3. The prosecution had examined as many as nine prosecution witnesses namely PW 1 Mrs.Kamlesh Miglani; PW 2 Cont.Luder Mani; PW 3 Cont. Satbir Singh;; PW 4 Cont.Ajit Singh;; PW 5 HC Bijender Singh; PW 6 SI Dasrath Singh; PW 7 Lady Cont.Kanta; PW 8 HC Bharat Singh; PW 9 Inspt.Sahib Ram & PW 10 HC Nar

Singh Inspt.Mahesh Sharma & PW 9 Cont.Sumer Singh; PW 10 HC Nar Singh & PW 11 SI Attar Singh. The statement of the accused Kamlesh@Babby was recorded under Section 313 of the Cr.P.C.

4. The appellant was held guilty by the learned Special Judge, Delhi and by an order dated 19th April, 2001, sentenced to undergo rigorous imprisonment for ten years and fine of rupees one lakh for the offence punishable under Section 21 of the NDPS Act, 1985.

GROUND OF CHALLENGE

(a) The main ground of challenge is that the impugned judgment is contrary to law in as much as the mandatory provisions of the NDPS Act have not been complied with. The notice given by the investigating officer under Section 50 of the NDPS Act was mentioned in the FIR and that the possibility of non-compliance of Section 50 of the Act cannot be ruled out. The other ground taken up is that the Trial Court did not take into consideration the fact that the raiding team did not join any public witness thereby causing prejudice to the appellant. Further ground taken is that the impugned judgment is bad in law inasmuch as learned ASJ did not take into consideration the fact that PW 7 Lady Ct.Kanta in her testimony, could not assign satisfactory explanation regarding the non-joining of public witness despite availability of two hours

between the receipt of secret information and conducting raid. It is also challenged by learned counsel for the appellant that the alleged secret information was not reduced to writing which casts aspersion on the story of the prosecution. The impugned judgment is also challenged on the ground that the learned Trial Court failed to appreciate the fact that as per the prosecution, five grams of sample was sent to Forensic Science Laboratory (FSL) for its examination; however, the FSL received only four and a half grams of sample which casts serious doubts on the story of the prosecution. A challenge to the judgment passed by learned Additional Sessions Judge, is also laid on the ground that the possibility of tampering with the case property cannot be ruled out inasmuch as the case property sealed by PW 11 Attar Singh, IO was not handed over to the private individual witness and that the same was given to SI Prem Chand posted in the same department. Challenge is also made on the ground that all the witnesses in the alleged recovery were police witnesses and that there was no eye witness. It is further a ground of challenge that the case property was not immediately handed over to the SHO concerned and that in the *Malkhana* register, there was no entry as to who deposited the case property in the police station.

5. Apart from challenging the judgment of conviction, learned

counsel for the appellants further submitted that in the nominal roll filed by the Deputy Superintendent, Central Jail, Tihar on 3rd January, 2003, it was mentioned that as on 2nd January, 2003, the appellant had undergone sentence of three years and six days.

6. In support of his contention, learned counsel for the appellant relied on the pronouncement of the Supreme Court in ***Ashok Kumar Sharma Vs. State of Rajasthan 2013(1)LRC 100(SC)***.

7. Per contra, arguments advanced by learned Additional Public Prosecutor for the State is that the appellant was rightly held guilty under Sections 21/61/85 of the Narcotic Drugs and Psychotropic Substances Act, 1985. It is submitted that on secret information received by the police, the search was affected through a lady constable after serving the notice under Section 50 of the NDPS Act giving her option to give search either before a Gazetted Officer or a Magistrate which the appellant declined and that sixty gram of smack was recovered from her possession.

8. Arguments advanced by learned counsel for the appellant as well as learned Special Public Prosecutor for the CBI have been heard.

(I) PW 1 Mrs. Kamlesh Miglani, in her testimony deposed that while working as Senior Scientific Officer (Chemistry), she

received sample parcel sealed with the seal of ASY. The same was marked for analysis and that she found that seal on the sample parcel was the same seal as on the specimen parcel. She in her statement deposed that the sample was found to contain light brown powder of approx. 4.5 gm which upon examination, was found to contain diacetylmorphine and that the same was exhibited as Exh.PW 1/A.

(II) PW 2 Const.Luder Mani who was posted in PS Narcotic Branch, Kamla Market deposed that he along with PW 11 SI Attar Singh; SI Prem Chand & PW 7 Lady Cont.Kanta reached at Pankha Road at about 11.00 a.m. and that PW 11 SI Attar Singh & SI Prem Chand briefed the staff and held nakabandi. Thereafter, PW 11 SI Attar Singh handed over to him one rukka, three parcels marked 'A'; 'B' & 'C' from CFSL with the seal of ASY and copy of seizure memo. The said witness gave rukka to the duty officer and the remaining three parcels and copy of seizure memo to the SHO. This witness deposed that none of the case property was tampered with as long as the same was in his custody.

(III) PW 3 Cost.Satbir Singh in his statement deposed that while posted at PS Narcotics Branch, Kamla Market, Delhi, he received a sample parcel sealed with the seal of ASY & SR vide RC No.36/21 from HC Vijender Singh and that the same was deposited by him

with the FSL Malviya Nagar. This witness also deposed that as long as the case property was in his possession, it was not tampered with.

(IV) PW 4 Ct.Ajit Singh deposed that while posted in PS Narcotics Branch, he received the sample parcel mark 'A' and FSL form both duly sealed with the seal of ASY& SR from HC Vijender Singh vide RC No.34/21 for getting the same submitted to the FSL, Malviya Nagar but the receipt of same was refused to him for the reason that the same was not given along with the forwarding letter of DCP, Crime & Railways. This witness returned the sample parcel along with the FSL Form intact to MHC(M) along with RC No.34/21. This witness also deposed that as long as the case property was in his possession, it was not tampered with.

(V) PW 5 HC Bijender Singh in his statement stated that while posted at PS Narcotics Branch, he received three sealed parcels 'A'; 'B' & 'C' from Inspector Sahib Ram, SHO; CFSL form bearing seal of ASY & SR along with copy of seizure memo and that the same were entered by him in the register no.19 at serial no.86. This witness further deposed that on 1st December, 1999, he had sent sample parcel mark 'A' along with the sealed FSL form to FSL, Malviya Nagar which were, however, not accepted for the

reason that one of the paper was mistakenly not attested. This witness next stated that on 13th November, 1999, SI Dashratha Singh had deposited the articles found during house search which included seven watches of different make, a mobile phone, 2.7 k.g. coins of different denomination worth Rs.10,547/-.

(VI) PW 6 SI Dasrath Singh in his statement stated that while posted at PS Narcotics Branch, he received the investigation of this case and that he along with PW 2 Const.Luder Mani, visited the spot. This witness stated that upon reaching the spot, he received the original rukka and copy of the FIR from the DO. Thereafter, this witness received the papers prepared by PW 11 SI Attar Singh and that a site plan Exh.PW 6/A was chalked out by him when PW 11 SI Attar Singh; SI Prem Chand & PW 7 Lady Ct. Kanta were also present. This witness further recorded the statement of PW 2 Ct.Luder Mani and PW 11 SI Attar Singh, interrogated the accused Kamlesh@Baby and arrested her vide personal search memo Exh.PW 6/B. PW 6 further deposed that he along with the team visited the house of the accused, carried out a search and recovered seven watches of different make, a mobile phone, 2.7 k.g. coins of different denomination worth Rs.10,547/- vide recovery memo Exh.PW 6/C. Thereafter, the disclosure statement Exh.PW 6/D of the accused was recorded by this witness whereafter he produced

the accused and the case file before the SHO. This witness deposited the recovered articles with the MHC(M), recorded the statement of the witnesses; got the accused medically examined vide Exh.PW 6/F. The application made to the JPN Hospital in this regard is Exh.PW 6/F while medical report is Exh.PW 6/G. This witness further deposed that he sent the sample parcel through Const.Ajit Singh but initially the same were not accepted but later on during his absence, the same were sent to FSL Malviya Nagar by ASI Manwar Patwal. The sample parcel and investigation were again handed over to this witness who filed the same to Court.

(VII) PW 7 Lady Constable Kanta in her statement deposed while she was posted at PS Narcotic Branch, on 13th November, 1999, after receiving secret information regarding possession of contraband i.e. smack with the accused, she along with SI Prem Chand, PW 11 SI Attar Singh & PW 2 Ct.Luder Mani when to the spot. She further deposed that upon reaching the spot, PW 11 SI Attar Singh asked the five to seven passers by for becoming part of the raiding party but none of them joined. Thereafter, PW 11 SI Attar Singh briefed the staff on the basis of which nakabandi was effected. The said witness further stated that the accused Kamlesh@Baby was apprehended on the pointing out of the secret informer, who was thereafter served with a notice Exh.PW 7/A

under Section 50 of the NDPS Act by PW 11 SI Attar Singh, informing her about possession of contraband i.e. smack. She also deposed that it was explained to the accused that she would be required to be searched and if she wanted, she could be searched before a Gazetted Officer or a Magistrate, to which the accused declined in writing which is marked as Exh.PW 7/B. The said witness thereafter conducted a search upon the accused and recovered a white colour polythene packet containing brown colour powder which upon checking, was found to be smack weighing 50 grams. This witness further stated that out of the said quantity of smack recovered, two samples of five grams each were separated and was marked 'A' & 'B' and the remaining 40 grams was kept back in the polythene from which it was recovered and the same was marked as parcel 'C' while the CFSL form was filled in and all the said three parcels bearing the seal of ASY were handed over to SI Prem Chand. The rukka was also prepared by PW 11 SI Attar Singh before this witness, which was later on taken by PW 2 Luder Mani along with the three parcels & CFSL form vide seizure memo Exh.PW 7/C. Thereafter PW 7 Ct.Kanta in her statement stated that she accompanied the team for conducting the search at the house of the accused from where they recovered articles which included seven watches of different make, a mobile phone, 2.7 k.g.

coins of different denomination worth Rs.10,547/-.

(VIII) PW 8 HC Bharat Singh in his statement stated that while posted at PS Narcotic Branch as duty officer, he received a rukka from PW 2 Luder Mani which was sent by PW 10 SI Attar Singh and based thereon, he recorded FIR No.26/99 in his handwriting and signed it. The carbon copy thereof is Exh.PW 8/A. This witness next stated that on the direction of the SHO, further investigation of the case was given to PW 6 SI Dashrath Singh.

(IX) PW 9 Inspt.Sahib Ram in his statement stated that while posted as SHO at PS Narcotic Branch, secret information was received by SI Attar Singh and the secret information was produced before him who apprised them that the accused Kamlesh@Baby while reaching her residence via Pankha Road at about 12 noon on 13th November, 1999, would be in possession of smack. This witness thereafter stated that this position was apprised to the ACP following which PW 10 Attar Singh was to constitute raiding party. On the same day at about 2.55 p.m., PW 2 Const.Luder Mani produced before this witness the case property comprising of three sealed parcels 'A'; 'B' & 'C'; CFSL form bearing seal of ASY along with copy of seizure memo. This witness further stated in his statement that he affixed the seal of SR

on all the three parcels and CFSL form and that the same was handed over to MHC(M), PW 5 HC Bijender Singh upon which DD No.11 was lodged.

(X) PW 10 HC Nar Singh in his statement stated that while posted as SO to ACP, PS Narcotic Branch, a report under Section 57 of the NDPS Act was received through SHO on which he gave diary no.53/SO/ACP/N&CP and this witness produced this report before the ACP who signed the same at point 'A'. This report in original was exhibited as Exh.PW 10/A.

(XI) PW 11 SI Attar Singh in his stated that while posted at PS Narcotic Branch, on 13th November, 1999 at about 9.45 a.m. he received a secret information to the effect that one lady namely Kamlesh@Baby , resident of Chankaya Place, while going to her house via Pankha Road, would be having smack in her possession. This witness apprised this information to the SHO who thereafter informed the same to the ACP. This witness further stated that he recorded departure entry DD No.6 which is Exh.PW 8/B. This witness accompanied by SI Prem Chand; PW 7 Lady Ct. Kanta; PW 2 Ct.Luder Mani and Ct.Driver Vijay along with the secret informer, reached the spot at about 11.00 a.m. This witness in his statement stated that at about 12.15 p.m., the accused Kamlesh@Baby was apprehended upon being pointed out by the

secret information. This witness informed the accused that he got information of her possessing contraband i.e. smack and thereby served upon her notice Exh.PW 7/A under Section 50 of the NDPS Act. The witness thereafter offered the accused to be searched before a Gazetted Officer or a Magistrate to which she declined which was recorded in writing and exhibited as Exh.PW 7/B. This witness thereafter asked the accused that she could be searched through a lady constable but the accused Kamlesh@Baby refused to permit her search. This witness, thereafter, directed PW 7 Lady Ct.Kanta to effect search upon the accused on one side and upon search, PW 7 Lady Ct.Kanta recovered brown colour powder which upon checking, was found to be smack weighing 50 grams. This witness further stated that out of the said quantity of smack recovered, two samples of five grams each were separated and were marked 'A' & 'B' and the remaining 40 grams was kept back in the polythene from which it was recovered and the same was marked as parcel 'C' while the CFSL form was filled in and all the said three parcels bearing the seal of ASY were handed over to SI Prem Chand. Thereafter, rukka was prepared by this witness which was marked as Exh.PW 11/A. This witness thereafter gave the rukka and the case property to PW 2 Luder Mani along with the three parcels & CFSL form vide seizure memo Exh.PW 7/C. This

witness further stated that at about 4.15 p.m. on the same day, PW 6 SI Dasrath Singh along with PW 2 Ct.Luder Mani and Driver Vijay reached the spot upon which further investigation was handed over to PW 6 SI Dasrath Singh who prepared the site plan Exh.PW 6/A at his instance. The accused was also arrested by PW 6 SI Dasrath Singh before this witness. This witness also accompanied PW 6 Dasrath Singh for conducting the house search of the accused.

9. Thus, as per the testimony of PW 11 SI Attar Singh, on the date of incident, on receipt of secret information that the appellant who was in possession of contraband i.e. smack, he organised a raiding party. A raid was conducted and the accused was apprehended at Nala, near Chanan Devi Hospital. A notice under Section 50 of the NDPC Act, 1972 Exh.PW 7/A was served upon her and thereafter on her search, brown colour powder was recovered which upon checking, was found to be smack weighing 50 grams. After preparing a separate sample packet, remaining smack was seized. Rukka Exh.PW 11/A was prepared and case was got registered. PW 6 SI Dasrath Singh prepared site plan PW 6/A. Search of the appellant was conducted by PW 7 Lady Ct.Kanta. The information about the arrest of the appellant was given to her son Harbans vide memo Ex.PW 6/E and a report under

Section 57 of the NDPS Act was prepared. PW 11 SI Attar Singh identified the pouch recovered from the appellant, two samples of five grams each separated and marked 'A' & 'B' and the remaining 40 grams marked as 'C' kept back in the polythene from which it was recovered.

10. The testimony of PW 11 SI Attar Singh has duly been corroborated by other raiding party members i.e. SI Prem Chand; PW 7 Lady Ct. Kanta; PW 2 Ct.Luder Mani & Ct.Driver Vijay. All these witnesses in a same breath have stated that raid was conducted in which the appellant was apprehended with the contraband i.e. smack. They have also stated in the same line that the proceedings were conducted by the investigating officer and the in-charge of raiding team at the spot and that recovery of smack, its seizure, search of appellant, notice under Section 50 of NDPS Act were served upon the appellant and the other proceedings were effected.

11. All the above witnesses were cross-examined at length but the defence had failed to put any dent to their testimony. They remained unshaken with regard to conducting of raid and apprehension of the appellant with the contraband i.e. smack. They have also stated in a single voice that smack weighing 50 grams was recovered from the appellant; serving of notice under Section

50 of the NDPS Act upon her and with regard to the proceedings conducted at the spot.

12. Contention of the learned counsel for the appellant that there was no proper service of notice under Section 50 of the NDPS Act upon the appellant, is without any basis inasmuch as notice under Section 50 of the NDPS Act Exh.PW 7/A shows that after apprehension of the appellant, she was offered to get herself searched in the presence of a gazetted officer or a Magistrate before conducting her search. Endorsement Exh.PW 7/B on the said notice Exh.PW 7/A shows that the appellant herself chose not to be searched before any gazetted officer or a magistrate. She also chose not to be searched through any female. Refusal of the accused/appellant was recorded in her own handwriting and marked as Exh.PW 7/B. This clearly proves that the contents of notice under Section 50 of the NDPS Act were duly explained to the appellant before conducting her search and thus there is mandatory compliance of Section 50 of the NDPS Act by the police before conducting search of the appellant.

13. The testimony of the raiding party members has also been duly corroborated by CFSL report which shows that when the sealed sample was opened and examined, the same was identified as diacetylmorphine. The FSL report duly proves the case of the

prosecution that the recovered substance from the appellant was a contraband i.e. smack.

14. The discussion made above shows that the testimony made by the police officials including the raiding party members is trustworthy and their testimony coupled with CFSL report brings the case of prosecution within the four corners of the alleged commission of offence which culminated into the conviction of the appellant. This court is of the considered opinion that the prosecution has successfully proven the guilt of the appellant.

15. As a result, no error or illegality is found in the view taken by the Trial Court and the judgment of conviction dated 18th April, 2001 and the same is upheld.

16. A prayer is made by learned counsel for the appellant to the effect that a lenient view may be taken in terms of sentence awarded to the appellant keeping in view the fact that the appellant is facing trial since 1999 and that almost seventeen years have been elapsed. Learned counsel for the appellant has further submitted that the appellant was awarded punishment under the Narcotic Drugs & Psychotropic Substances Act, 1985 which was amended in the year 2001 and in view of the amended Act, the punishments for the offences under the Act, have been reduced. Likewise, the sentence in the present case may also be reduced.

17. In the judgment passed by the High Court of Rajasthan, it was held as under:-

“When a legislation is brought into existence, it is for the benefit of the people and the Court should give such interpretation which is not only beneficial to the person who takes benefit out of it but it should also be in consonance with the Statement of Objects and Reasons given in the Amending provisions. The Statement of Objects and Reasons appended to the Bill is as follows:

Statement of Objects and Reasons:-
Amendment Act 9 of 2001:- The Narcotic Drugs and Psychotropic Substances Act, 1985 provides deterrent punishment for various offences relating to illicit trafficking in narcotic drugs and psychotropic substances. Most of the offences invite uniform punishment of minimum ten years rigorous imprisonment which may extend upto twenty years. While the Act envisages severe punishments for drug traffickers, it envisages reformatory approach towards addicts. In view of the general delay in trial, it has been found that the addicts prefer not to invoke the provisions of the Act. The strict bail provisions under the Act add to their misery. Therefore, it is proposed to rationalise the sentence structure so as to ensure that while drug traffickers who traffic in significant quantities of drugs are punished with deterrent sentences, the addicts and those who commit less serious offences are sentenced to less severe punishment. This requires rationalisation of the sentence structure, provided under the Act. It is also proposed to restrict the application of strict bail provisions to those offenders who indulge in serious offences.

12. This Statement of Objects & Reasons itself is beneficial for the interest of the accused who are languished in jail for a considerable time on account of being minimum ten years punishment

in contraband drugs and are denied right of bail as against those who are indulged in large scale quantity of drugs trafficking. This Amendment provides rationalization in the matter of grant of bail as well as in the matter of awarding sentence by distinguishing the narcotic drugs & psychotropic substances in three categories viz; (i) small, (ii) commercial and (iii) in between small & commercial. If the legislation is silent on a particular issue which has apparently in the present case about applicability of the Amending Act' In case where sentence has been passed prior to Amendment and no appeal has been filed after the Amendment, then the Court should give that interpretation which is in furtherance of the intention of the legislature given under its preamble or Statement of Objects & Reasons.”

[Prema alias Prem Singh Vs. State of Rajasthan in S.B. CrI.J. Appeal No.738/2001 Dt.19.07.2007]

18. This Court on similar facts and circumstances, has held as under:-

“It is a fundamental right of every person that he should not be subjected to greater penalty than what the law prescribes, and no ex post facto legislation is permissible for escalating the severity of the punishment. But if any subsequent legislation would downgrade the harshness of the sentence for the same offence, it would be a salutary principle for administration of criminal justice to suggest that the said legislative benevolence can be extended to the accused who awaits judicial verdict regarding sentence.”

[Sultan Vs. State 2004 (73) DRJ 460]

19. *India is a party to three United Nations Drug Conventions and to give effect to the treaties, NDPS 1985 enacted in order to provide adequate penalties for drug trafficking, strengthen*

enforcement powers, implement international conventions to which India was a party and enforce controls over the contraband. NDPS Amendment Act 1989 came into effect to combat drug trafficking which was influenced by the signing of 1988 Convention by India. After this amendment, people caught with small amounts of drugs faced long prison sentences and hefty fines. The said amendment of 1989 was criticized for harsh and disproportionate sentencing structure and a momentum for reform was created. By way of amended Act of 2001, scale of sentencing and fine was reduced depending upon the substance and quantity found. It basically provides for determining the amount of drugs involved in an offence while sentencing an accused. It also provides for deterrent punishment for the drug traffickers while a reformatory approach towards addicts has been adopted. Therefore, three different quantity of drugs have been involved i.e. small, commercial or intermediate while sentencing. The legislature was wise enough to provide different punishments for possessing small or commercial quantity of drugs.

20. The amended Act of 2001 is a beneficial legislation which provides for lesser punishment in case of drug addicts who are found with the lesser quantity of prohibited substance as compared to the drug traffickers who are found having

commercial quantity of contraband which attracts harsh punishment and hefty fines.

21. In the present case, the appellant has already undergone three years and six days incarceration for possession of 50 grams of smack. The peculiar circumstances of the present case are that the appellant was arrested on 13th November, 1999 and as per the sentence awarded to her, she would have completed ten years in the year 2009 if she remained confined in jail for the said period. Keeping in view the judgment in the case of **Sultan (supra)** and the beneficial provisions of the amended NDPS Act of 2001, the sentence awarded to the appellant is reduced to the period already undergone with fine of Rs.1,00,000 /-. In default of payment of fine, the appellant shall undergo the sentence awarded by the Trial Court.

22. The appellant is directed to pay the fine within a period of one month else surrender before the trial court concerned to serve the sentence in default of payment of fine.

23. With the above modification in the sentence of imprisonment, the present appeal is disposed of.

**(P.S.TEJI)
JUDGE**

DECEMBER 23, 2016

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