

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

RESERVED ON : 4th APRIL, 2016

DECIDED ON : 14th JULY, 2016

+ CRL.A. 203/2013 & CRL.M.B.316/2013

PRAHLAD MEENA

..... Appellant

**Through : Mr.Sanjiv Kumar, Sr.Advocate with
Mr.S.K.Santoshi, Advocate.**

Versus

THE STATE (NCT OF DELHI)

..... Respondent

**Through : Mr.Vinod Diwakar, APP with SI
Dinesh Kumar.**

CORAM:

HON'BLE MR. JUSTICE S.P.GARG

S.P.GARG, J.

1. Challenge in this appeal is a judgment dated 15.01.2013 of learned Special Judge (NDPS), Delhi in Sessions Case No.42/2009 arising out of FIR No.90/09 PS Narcotics Branch whereby the appellant – Prahlad Meena was held guilty for committing offence punishable under Section 21(c) of Narcotic Drugs and Psychotropic Substances Act, 1985 (In short 'NDPS Act'). By an order dated 15.01.2013, he was sentenced to undergo RI for ten years with fine ₹1 lac.

2. Briefly stated, the prosecution case as set out in the charge-sheet was that on 16.06.2009 at about 11.15 a.m. the appellant was found in unlawful possession of 1.7 kg of Heroin concealed in a striped raxine bag,

containing 3.2% diacetylmorphine and 1.2% phenobarbital on road in front of main gate of Ramleela ground, Turkman Gate, Delhi.

3. On 16.06.2009 at around 09.45 a.m. PW-8 (SI Sunil Kumar) received a secret information at the office of Narcotics Cell to the effect that the appellant – Prahlad Meena r/o Distt. Bara (Rajasthan) involved in supply of Heroin and opium in bulk quantities in the areas of Delhi, U.P. and Punjab would come to supply Heroin to one Bablu in front of main gate Ramleela ground, Turkman Gate, in between 11.00 – 11.30 a.m. The secret informer was produced before PW-5 (M.L.Sharma). After satisfying himself about the information conveyed by the secret informer, PW-5 (M.L.Sharma) informed Mr.S.R.Yadav, ACP/N&CP who directed him to conduct the raid. The secret information was recorded vide DD No.8 (Ex.PW-4/D) at about 10.00 a.m. A raiding team was constituted. Certain public persons were requested to join the proceedings at various spots but they declined. At around 11.10 a.m. the appellant was seen coming from the gate of Ramleela ground from the side of Turkman Gate having a black colour bag. The secret informer identified him. The appellant came in front of the main gate and started waiting for someone. After 4 or 5 minutes, when he started to go back, he was apprehended at around 11.15 a.m. Notice (Ex.PW-2/A) under Section 50 NDPS Act served upon the appellant. On search of the bag, contraband weighing 1.700 kg. was recovered. Two samples of 5 grams each were drawn from the recovered Heroin. Necessary proceedings were conducted at the spot. Rukka (Ex.PW-8/B) was prepared and FIR was lodged. Subsequent investigation was taken over by PW-9 (SI Satyawan). The appellant was arrested. Special report (Ex.PW-6/E) under Section 57 NDPS Act was sent on 17.06.2009. Exhibits collected during

investigation were sent to Forensic Science Laboratory for examination. Upon completion of investigation, a charge-sheet was filed against the appellant in the Court. In order to establish its case, the prosecution examined ten witnesses. In 313 Cr.P.C. statement, the appellant pleaded false implication and denied his involvement in the crime. The trial resulted in his conviction as aforesaid. Being aggrieved and dissatisfied, the instant appeal has been preferred.

4. Learned Senior Counsel for the appellant urged that the Trial Court did not appreciate the evidence in its true and proper perspective. The incident was dated 16.06.2009 when Notification dated 18.11.2009 was not in force. Tremendous variation in the FSL reports remained unexplained. First FSL report revealed the contents of diacetylmorphine as 3.25 % and as per it, the total quantity of Heroin recovered was only 54.4 grams which was not a 'commercial' quantity. When the samples were re-examined, the second FSL report indicated the contents of diacetylmorphine as 0.2 % and if its actual weight is taken into consideration, the total quantity comes to 3.4 grams which is a 'small' quantity. Learned Senior Counsel would further submit that no sincere efforts were made to associate any independent public witness despite their availability. Mandatory provisions of Sections 52 and 55 were not complied. Learned Addl. Public Prosecutor urged that the Trial Court has given detailed reasons as to how there was variations between the two FSL reports. All efforts were made to associate / join the public witnesses at various stages but none had agreed.

5. Secret information reduced into writing vide DD No.8 (Ex.PW-4/D) reveals that the appellant – Prahlad Meena would arrive in between 11.00 – 11.30 a.m. in front of main gate Ramleela ground, Turkman Gate, to

supply Heroin to one Bablu. On the basis of the secret information a raiding party was organised and the raiding team along with the necessary equipments left the office in government vehicle No. DL 1CJ 3481 driven by ASI Rajbir Singh vide DD No.9 (Ex.PW-8/A) at around 10.25 a.m. PW-8 (SI Sunil Kumar) deposed that four public persons after crossing ITO red light; four in front of LNJP Hospital and five individuals at the spot were requested to join the raiding party but none of them agreed and all left without disclosing their names and addresses. At around 11.15 a.m. the appellant was arrested at the spot and the contraband was recovered from the bag in his possession. Service of notice under Section 50 NDPS Act is not under challenge. It contains endorsement from point 'P' to 'P1' in the appellant's handwriting whereby he declined to be searched in the presence of the Gazetted Officer or Magistrate. The appellant has not denied that the endorsement from 'P' to 'P1' (Ex.PW-2/A) is not in his handwriting. He did not furnish any explanation for putting endorsement from 'P' to 'P1' on the notice under Section 50 NDPS Act. PW-8 (SI Sunil Kumar), the Investigating Officer, further deposed that search of the bag was conducted. The bag was opened with the help of its zip and green colour checkdar used towel was recovered. Under the towel, a transparent polythene tied with rubber band containing soily colour powder was recovered. On checking the soily colour powder, it was found positive for Heroin. Its total weight came to 1.700 kg. Two samples of 5 grams each were drawn from the recovered Heroin and converted into cloth pulandas given Mark 'A' and 'B'. The remaining 1.690 kg of Heroin was put in a transparent polythene and given mark 'C'. FSL form was filled after sealing of the three cloth pullandas mark 'A', 'B' and 'C' with the seal of '5B PS NB DELHI'. The articles

were seized vide seizure memo (Ex.PW-2/B). Rukka (Ex.PW-8/B) was prepared and sent through HC Om Prakash to lodge FIR. Subsequent investigation was taken over by PW-9 (SI Satyawan) at about 04.15 p.m. The witness identified the recovered case property in the Court. He also proved the report (Ex.PW-6/E) under Section 57 NDPS Act sent on 17.06.2009 regarding the recovery of the Heroin. This witness was cross-examined at length. In the cross-examination, he disclosed that the informer had supplied secret information earlier also prior to 16.06.2009. Information received from the secret informer was lodged in Rojnamcha vide DD No.8. He fairly admitted that the secret informer had not given the complete address of Bablu to whom contraband was to be supplied. Information to ACP was conveyed on landline phone by Mr.M.L.Sharma. He admitted that names and addresses of the public persons to whom request to join the investigation was made were not recorded. Rukka (Ex.PW-8/B) was in the handwriting of Const.Sompal on his dictation. Reply to the notice under Section 50 NDPS Act was written by the accused on his own. Intimation about appellant's arrest was given to his uncle Phool Singh on mobile. No railway ticket was recovered from the accused. He finally left the spot at around 06.15 p.m. He denied the suggestion that the investigation was not conducted fairly or the case property was planted upon the accused.

6. On scrutinising the entire statement of the witness, it reveals that despite searching cross-examination nothing material could be elicited to discredit the testimony of this official witness. Material facts deposed by the witness remained unchallenged and uncontroverted in the cross-examination. No ulterior motive was assigned to this official witness to falsely implicate him in the crime. Nothing was suggested if the witness

nurtured any grievance against him to concoct a false case of huge recovery of Heroin from his possession at a public place. The witness categorically denied that the accused was lifted from his house. It was not elaborated by the accused by putting questions in the cross-examination as to when and at what time, he was allegedly lifted from his house.

7. PW-2 (HC Mukesh Kumar), member of the raiding team has fully corroborated the testimony of PW-8 (SI Sunil Kumar) without any inconsistency. In the cross-examination, he reiterated that response to the notice under Section 50 NDPS Act was in the handwriting of the accused. He also admitted that no metro train ticket or card or bus ticket was recovered from the accused. The accused was not in possession of any mobile. He further admitted that Bablu did not meet them at the spot. Seal was returned by him to SI Sunil Jain after 10 / 12 days of the present recovery. He denied the suggestion that SI Satyawar had not visited the spot. He denied that the accused was picked from his house and later on falsely implicated in this case. Similar is the testimony of PW-3 (HC Om Prakash). It is in consonance with the testimonies of PW-8 (SI Sunil Kumar) and PW-3 (HC Om Prakash). In the cross-examination, he informed that he along with SI Sunil Jain remained at the spot for about three hours. No mobile was recovered from the accused at the spot. He denied the suggestion that no recovery was effected from the accused. Apparently, material and crucial facts proved by the witness were not challenged in the cross-examination. PW-5 (Insp. M.L.Sharma) has supplemented the statements of the official Investigating Officer. PW-9 (SI Satyawar), the subsequent Investigating Officer, has also supported the prosecution on relevant aspects.

8. The statements of all the members of raiding party are consistent and no infirmities have come out in their statements to disbelieve their version. The accused has furnished inconsistent and conflicting version about his apprehension. In the cross-examination of various members of the raiding team, specific suggestions were put that the accused was lifted from his house. It was, however, not elaborated as to when, where, in whose presence and by whom, he was lifted from his house. No complaint whatsoever was lodged against any police official by the appellant's family members for his false implication. It has come on record that soon after the appellant's arrest, vide arrest memo (Ex.PW-2/C) information about his arrest was conveyed to his uncle Phool Singh. The accused did not opt to examine Phool Singh if no such information about his arrest was received by him. He also did not appear in the witness box to state if the accused was lifted from his house on any particular day or time. In 313 Cr.P.C. statement, for the first time, the appellant came with a new plea. He set up a new story stating that on 15.06.2009, he had come to Delhi from his village Ladpuria. He took a bus from Dhaula Kuan for Pahar Ganj. During journey, a quarrel took place between him and a passenger who was actually a police official over smoking. The said police official brought him to the police station where he was given beatings and was made to put signatures on various documents. He was subsequently implicated in this case. The appellant did not examine any witness in defence to substantiate his defence. He did not give any specific reason about his visit to Delhi on 15.06.2009. No such defence was put to any member of the raiding team in their cross-examination. Throughout, the appellant's case was that he was lifted from his house. For the first time in 313 Cr.P.C. statement, he

admitted his presence in Delhi on 15.06.2009. The inconsistent version given by the appellant lends-credence to the prosecution story that the accused was apprehended on 15.06.2009 at the gate of Ramleela ground, Turkman Gate. The accused did not furnish any plausible explanation for his presence without any specific purpose at that place on the relevant time and date.

9. The Trial Court has dealt with the aspect of non-joining of independent public witnesses during investigation and the conclusion arrived at by the Trial Court based upon fair appreciation needs no deviation. It is well settled that non-joining of independent public witnesses per se is not fatal to the prosecution case. The evidence of the police officials is required to be perused with great care and caution in such an eventuality. In the instant case, the Investigating Officer and other members of the raiding party have given sufficient explanation for the non-joining of the public witnesses. Since no contradictions or discrepancies have come out in the cross-examinations of official / police witnesses and no specific motive has been attributed to them for false implication, there are no specific reasons to discard their statements particularly when the defence taken by the accused is conflicting and inconsistent. The recovery of the contraband from the accused cannot be suspected.

10. Admitted fact is that when the samples were sent for the first time for analysis, FSL report (Ex.PX) showed percentage of diacetylmorphine and phenobarbital as 3.2% and 1.2% respectively. In the second FSL report dated 04.06.2012 (Ex.DA), the Expert found that quantity of diacetylmorphine was to the extent of 0.2% and that of phenobarbital to the extent of 1.4%. Apparently, there were variations regarding the contents

of the contraband recovered from the accused in both the reports. The Trial Court has dealt with all the relevant contentions in this regard and relied upon the authorities reported in '*Rahul Saini vs. The State*', 2006 (3) JCC (Narcotics) 134 and '*Union of India vs. Farid*', 2011 (4) JCC (Narcotics) 213 to support the view. There was delay of about more than two years when the accused opted to apply for fresh sample from the residue. The fact, however, remains that in both the reports despite variation, contents of diacetylmorphine were observed. The variation per se is not fatal to the prosecution case as the appellant did not opt to cross-examine the Expert to explain the reasons / factors for conflicting reports.

11. I do agree with the submissions of the learned Senior Counsel that the Trial Court erred in not taking into consideration the fact that the incident pertained to the date 16.06.2009 when Government Notification dated 18.11.2009 was not in force. This Notification came to existence on 18.11.2009 for the purpose to determine the quantity of the contraband (commercial or small) under the NDPS Act, weight of the whole substance was to be considered and not merely the pure drug contents. The actual quantity of diacetylmorphine and phenobarbital comes to 54.4 grams and 20.4 grams respectively. As per authorities '*Ansar Ahmed & Ors. vs. State*', 2005 (3) JCC 193 and '*E.Micheal Raj vs. Intelligence Officer, Narcotic Control Bureau*' 2008 (5) SCC 161 applicable at the relevant date, in order to determine the quantity of the contraband, the actual weight of the narcotic drug and psychotropic substance was required to be taken into consideration and not the whole substance. The plea raised by the learned Addl. Public Prosecutor about the retrospective application of the Government Notification dated 18.11.2009, authority '*Sunil @ Bhure @ Mahanand vs.*

State Govt. of NCT of Delhi, 2014 (1) JCC 9 is fully applicable to the facts and circumstances of this case. It held :

“6. A Notification dated 18.11.2009 replaced a part of the earlier notification dated 19.10.2001 by inserting the following note in the Table at the end after Note 3:

(4) the quantities shown in column 5 and column 6 of the Table relating to the respective drugs shown in column 2 shall apply to the entire mixture or any solution or any one or more narcotic drugs or psychotropic substances of that particular drug in dosage form of isomers, esters, ethers and salts of these drugs, including salts of esters, ethers and isomers, wherever existence of such substance is possible and not just its pure drug content.

Thus, under above-referred notification, the whole quantity of material recovered in the form of mixtures came to be considered for the purpose of imposition of punishment.

The question whether the aforesaid amendment can be applied to a case where the offence was committed before amendment of the notification came up for consideration before the Hon'ble Supreme Court in Harjit Singh vs. State of Punjab MANU/SC/0269/2011 : (2011) 4 SCC 441 and the following view was taken :-

It is a settled legal proposition that a penal provision providing for enhancing the sentence does not operate retrospectively. This amendment, in fact, provides for a procedure which may enhance the sentence. Thus, its application would be violative of restrictions imposed by Article 20 of the Constitution of India. We are of the view that the said Notification dated 18.11.2009 cannot be applied retrospectively and, therefore, has no

application so far as the instant case is concerned.”

12. Considering the law enunciated above, it can safely be held that the quantity of contraband recovered from the appellant's possession was only actual quantity of diacetylmorphine and phenobarbital, which was to the extent of 54.4 grams and 20.4 grams respectively which is an intermediate quantity i.e. more than 'small' quantity and less than 'commercial' quantity. The findings of the learned Trial Court to the extent that the quantity of the contraband recovered from the appellant was 'commercial quantity' cannot be sustained and are set aside. Conviction is altered to Section 21(b) NDPS Act.

13. The appellant was sentenced to undergo RI for ten years with fine ₹1 lac under 21(c) of NDPS Act. The quantity recovered from his possession was found by the Trial Court to be 'commercial'. Since the quantity of the contraband recovered has been ascertained as 'intermediate' the sentence order requires modification. Nominal Roll dated 10.11.2015 reveals that the appellant has already undergone incarceration for about three years, nine months and four days as on 10.11.2015. He is not a previous convict. Nominal Roll further reflects that he is involved in FIR 239/02 under Section 21 NDPS Act PS Crime Branch. It is, however, not clear if conviction has taken place in the said case. His overall jail conduct is satisfactory. It appears that the appellant was only a carrier and not a kingpin. Taking into consideration all these relevant facts, the appellant is sentenced to undergo RI for five years with fine ₹50,000/-. Default sentence

for non-payment of fine shall be SI for two months. Benefit under Section 428 Cr.P.C. shall be given.

14. The appeal stands disposed of in the above terms. Pending application also stands disposed of.

15. 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.

(S.P.GARG)
JUDGE

JULY 14, 2016 / *tr*

