

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

Date of Decision: 4th March, 2016

+ **CRL.A. 457/2012**

VINOD SHARMA

..... Appellant

Through Mr. R.N.Sharma, Advocate

Versus

THE STATE (N.C.T OF DELHI)

..... Respondent

Through Mr.Akshai Malik, APP for the State
alongwith SI Bharat from Police Station
Hauz Khas.

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CORAM:

HON'BLE MS. JUSTICE SUNITA GUPTA

J U D G M E N T

: SUNITA GUPTA, J.

1. This appeal is directed against the judgment and order of sentence dated 27.01.2012 and 30.01.2012 passed by the Additional Sessions Judge, Special Judge, NDPS, South and South-East District, Saket Courts, New Delhi in Sessions Case No.20A/10 FIR No. 242/10 under Section 20 NDPS Act, Police Station Hauz Khas convicting the appellant under Section 20(b)(ii)(C) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short 'the Act') and sentencing him to undergo rigorous imprisonment for 10 years and a fine of Rs.1 lac in default, to suffer further simple imprisonment for a period of six months. Benefit of Section 428 Cr.P.C was also given to him.

2. Prosecution case, in nutshell, is that on 14.07.2010 at about 3.45 pm a secret information was received by ASI Bijender Singh (PW-5) in the police station that one person named Vinod Sharma resident of Himachal Pradesh who used to supply Charas in Delhi from Himachal Pradesh will come at the underpass near AIIMS Hospital i.e., under the road leading towards South Extension Part-II between 6.00 pm to 8.00 pm to supply Charas to someone. The information was conveyed by PW-5 to SHO Inspector Ramesh Kalsan (PW-2) who after satisfying himself regarding the correctness of the information, informed ACP Mehar Singh (PW-10) telephonically. DD No.20A Ex.PW-

5/A was recorded by ASI Bijender Singh in this regard and the same was sent to the ACP through the SHO who directed him to proceed further in the matter. A raiding party consisting of police officials reached the spot at about 5.00 pm. Some passersby were asked to join the raiding party but none agreed. At about 8.15 pm, accused came from the side of AIIMS hospital and was going towards South Extension Part-II by holding one rexine bag on his shoulder. He was apprehended. He was informed about the secret information and that his search was required to be conducted. He was further explained that he had a legal right to be searched in the presence of a Magistrate or a Gazetted Officer. PW-5 also offered his search as well as the search of the other members of the raiding team before taking his search. Notice under Section 50 of the Act Ex.P5 in this regard was served upon the accused, however, vide reply Ex.PW5/C, he declined to be searched before the aforesaid officers or to take search of the police party. Again, some public persons were asked to join the proceedings but none agreed. Contents of the rexine bag were checked. It was found to contain one old cloth bag which was found to contain one white polythene bag containing 36 square 'tikkiyas' giving foul smell which on weighing came to 3.5 Kg. From each of the tikkiyas some substance was taken and two samples of 50 gms each were taken out and kept in separate polythene. The remaining Charas was kept in the same polythene and cloth bag. All the three *pullandas* were sealed by the Investigating Officer of the case with the seal of BS, form FSL was filed up and the same seal was affixed thereon. The *pullandas* of sample, remaining case property and FSL form were taken into possession vide seizure memo Ex.PW5/D. Rukka Ex.PW5/E was sent through PW-8 Head Constable Sanjeev Kumar for registration of the case. He was also handed over sealed *pullandas*, form FSL and carbon copy of seizure memo for entrusting the same to the SHO. The *pullandas* and the documents were handed over to the SHO who in turn affixed his own seal of RK and thereafter deposited the same in *Malkhana*. FIR was registered and further investigation was carried out by SI Narender Kumar (PW-6). He sent the information/report under Section 57 of NDPS Act (Ex.PW-6/C) to the senior officers. Sample *pullandas* were sent to FSL. The appellant was charged for offence under Section 20(b)(ii)(C) of the Act and tried.

3. The appellant abjured his guilt. The learned special Judge on an assessment of the evidence adduced by the prosecution accepted the prosecution case and convicted

and sentenced the appellant, as indicated above. Feeling aggrieved, the appellant has preferred the present appeal.

4. Learned counsel for the appellant assailed the findings of the learned Special Judge on number of counts:

(i) The information, as per prosecution case was received at 3.45 pm whereas the appellant was apprehended at 8.30 pm. There was more than sufficient time available with the police officials to join independent witnesses, more particularly, when he was apprehended from a busy area but no independent witness was joined in the proceedings;

(ii) As per the prosecution case, the secret information was received at 3.45 pm, accused was apprehended at 8.30 pm and only thereafter recovery is alleged to have been effected. However, as per testimony of PW-3, Head Constable Afsar Pasha who was working as Reader to ACP, the report under Section 42 of NDPS Act Ex.PW3/A was received in the office at about 1.30 pm. The very fact that the information was received even prior to the recovery, makes the entire case of prosecution doubtful.

(iii) The initial investigation was carried out by ASI Bijender Singh, however, he being an Assistant sub-Inspector was not competent to carry out search;

(iv) There was substantial delay of 15 days in sending the parcels to FSL as such, possibility of tampering with the case property cannot be ruled out. Moreover, while according to the recovery witnesses, two samples of 50 gms were taken out, however, only one parcel was sent to FSL. No explanation is forthcoming as to why the other parcel was not sent to FSL;

(v) There is non-compliance of provisions of Section 50 of NDPS Act as the original notice under Section 50 of the Act does not bear signatures of the accused. Moreover, the reply is not in his handwriting although he signed the same in Hindi;

(vi) The entry made in register no.19 falsifies the entire case of prosecution as, as per this entry the case property was deposited with Head Constable Lallu Ram on 14.07.2010 at 11.55 am. How could the case property be deposited in the *Malkhana* in the morning hours when its recovery is alleged to be effected during night.

As such, it was submitted that the prosecution has failed to bring home the guilt of the accused beyond shadow of doubt, as such, accused is entitled to get benefit of doubt. Accordingly, he be acquitted of the offence alleged against him.

5. Per contra, learned Public Prosecutor submitted;

- (i) Sincere efforts were made to join public persons pre and post apprehension of accused but none agreed to join, however, mere non-joining of the independent witnesses is no ground to discard the testimony of the police officials which is consistent and with whom no enmity is alleged by the appellant;
- (ii) As regards information received at the office of ACP at 1.30 pm, it seems to be a typographical error which is fortified by the other material available on record.
- (iii) ASI Bijender Singh was competent to carry out the search and in this regard reliance was placed on ***Kamal Thakur vs. The State (Delhi Administration)*** 1995 JCC 76.
- (iv) Mere delay of 16 days in sending the parcels to FSL is not fatal as the seals on the parcels were found to be in intact condition when received by the FSL authorities.
- (v) There was substantial compliance of Section 50 of NDPS Act. The original notice Ex.P5 was recovered from the personal search of accused. Copy of the notice bears an endorsement of the accused that it was received by him. Moreover, since the accused claimed to be illiterate, therefore, his reply was recorded by ASI Bijender Singh which was duly signed by him at point 'X' on Ex.PW5/C;
- (vi) As regards taking out two parcels and sending one of them to FSL, it was submitted that the two samples were taken only for precautionary sake because if for some reason the FSL authorities wanted another sample then it could have been sent to FSL;
- (vii) As regards entries in register no. 9 of the *Malkhana Moharar*, reliance was placed on DD No.39A vide which the case property was deposited in the *Malkhana* which clearly makes a mention that it was deposited at 11.55 pm.

It was submitted that all the submissions made by counsel for the appellant were duly considered by the learned Special Judge while convicting the appellant and the impugned judgment does not suffer from any infirmity calling for any interference. That being so, appeal is liable to be dismissed.

6. I have given my considerable thoughts to the respective submissions of learned counsels for the parties and have perused the record.

7. As regards the first limb of argument regarding non-joining of independent witnesses it has come in the testimony of PW-5 ASI Bijender Singh that after forming the raiding party when they left the police station and reached the spot, on the way near South Extension Part-II near bus stop and also on the spot, he asked 4-5 passersby to

join the raiding party but none agreed and went away after giving their reasonable excuses. Even after apprehension of the accused, public persons were tried to be joined but none agreed. His testimony in this regard find corroboration from PW-7 Const. Anil and PW-8 Head Constable Sanjeev Kumar. Despite cross-examination no serious discrepancy could be pointed out which could discredit the testimonies of all these witnesses. The case of the prosecution cannot be thrown away simply because no public witness has been joined at the time of recovery of Charas. This view finds support from the observation made by Supreme Court in ***P.P.Beeran vs. State of Kerala*** 2001(9)SCC 571 where Supreme Court observed that the testimony of the police officials cannot be rejected on the ground that police official was the sole witness of the recovery of Ganja and the public witness who was examined, turned hostile. Supreme Court further observed that conviction can be based on the sole testimony of a sub-Inspector if other circumstances existed to corroborate his testimony.

8. Dealing with the aspect of reluctance of the public persons to join the police proceedings, this Court in ***Jawahar vs. State*** (2007) ILR 2 Delhi 146 observed as under:-

“As far as non association of public witnesses at the time of recovery is concerned, I consider that this is not an infirmity sufficient to throw out the case of the prosecution. It is very hard these days to get association of public witnesses in criminal investigation. Investigation itself is a tedious process and a public witness, who is associated, has to spend hours at the spot. Normally, nobody from public is prepared to suffer any inconvenience for the sake of society. The other reason for the public witness not readily agreeing to associate with investigation is harassment of public witness that takes place in the courts. Normally a public witness should be called once to depose in the court and his testimony should be recorded and he should be discharged. But experience shows that adjournments are given even in criminal cases on all excuses and if adjournments are not given, it is considered as a breach of the right of hearing of the accused. These adjournments are specifically taken by counsels for accused persons, when witnesses are present, just to see that witnesses get harassed by calling them time and again. The excuses normally given in the courts are; the counsel having urgent personal work, left the court; death of some near relatives etc; the counsel being busy in arguing other matter in other court or cross examining other witness in some other court. This attitude of the courts of sending witness back is a major cause of harassment which discourages public from associating in the investigation of any case. Since the police is faced with this handicap, the police cannot be blamed for not associating public witness. There is no presumption that the police witnesses are not credible witnesses. The testimony of every witness, whether from public or police, has to be judged at its own merits and the court can believe or disbelieve

a police witness considering the intrinsic value of his testimony. Police witnesses are equally good witnesses and equally bad witnesses as any other witness and the testimony of police witness cannot be rejected on the ground that they are official witnesses”.

9. Presumption of honesty is as much available to a police officer which is available to any other official witness. There is no presumption that police officials are liars. The effect of non-joining of independent witness is only that the court has to view the submission of the police or other witnesses with caution and circumspection and the veracity of the same has to be decided before placing reliance upon them for arriving at any conclusion regarding the guilt of the accused. Learned counsel for the appellant placed reliance on **Munni Lal vs. The State** 1995 JCC 110 wherein the appellant who was convicted under Section 21 of the Act was acquitted and one of the grounds for acquittal was non-joining of independent witnesses. However, this judgment does not help the appellant as in that case, there was non-compliance of Section 50 of the Act, there was no entry made by the SHO in the *Roznamcha* regarding the case property nor there was any note in the copy of seizure memo that he fixed his seal on the case property. Therefore, non-joining of independent witnesses was considered to be an additional factor while acquitting the accused. Similar is the case of **Mohd. Javed vs. State** I (2000) CCR 402 where besides not joining any independent witness in the raiding party even the gunny bag from which the recovery was alleged to have been effected, was not produced nor mentioned in the search memo. Again, **Gulam Mohd. vs. The State** 1996 JCC 533 was a case where one independent witness was alleged to have been joined but was not examined in the Court for which no reason was assigned. Besides that, link evidence regarding sanctity of the case property was also missing. Therefore, none of the judgments relied upon by learned counsel for the appellant helps him. Moreover, in none of these cases the accused was acquitted on the solitary ground of non-joining of independent witnesses. Present is not a case where no efforts were made by the police officials to join independent witnesses but, as stated above, none agreed to join the proceedings but that *ipso facto* is not a ground to discard the testimony of police officials who stood the test of cross-examination and nothing material could be elicited to discredit their testimony. Moreover, the accused is not alleging any animosity, ill will or grudge against any of the police officials. He is not even a resident of Delhi and had come from Himachal Pradesh, therefore, there was no plausible reason to plant such a heavy case property on the accused.

10. Before coming to the next submission of learned counsel for the appellant regarding non-compliance of Section 42 of NDPS Act, it will be in fitness of things to reproduce this Section. It reads as under:-

“42. Power of entry, search, seizure and arrest without warrant or authorization. - (1) Any such officer (being an officer superior in rank to a peon, sepoy or constable) of the departments of central excise, narcotics, customs, revenue intelligence or any other department of the Central Government including para-military forces or armed forces as is empowered in this behalf by general or special order by the Central Government, or any such officer (being an officer superior in rank to a peon, sepoy or constable) of the revenue, drugs control, excise, police or any other department of a State Government as is empowered in this behalf by general or special order of the State Government, if he has reason to believe from persons knowledge or information given by any person and taken down in writing that any narcotic drug, or psychotropic substance, or controlled substance in respect of which an offence punishable under this Act has been committed or any document or other article which may furnish evidence of the commission of such offence or any illegally acquired property or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act is kept or concealed in any building, conveyance or enclosed place, may between sunrise and sunset, -

- (a) enter into and search any such building, conveyance or place;
- (b) in case of resistance, break open any door and remove any obstacle to such entry;
- (c) seize such drug or substance and all materials used in the manufacture thereof and any other article and any animal or conveyance which he has reason to believe to be liable to confiscation under this Act and any document or other article which he has reason to believe may furnish evidence of the commission of any offence punishable under this Act or furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act; and
- (d) detain and search, and, if he thinks proper, arrest any person whom he has reason to believe to have committed any offence punishable under this Act;

[Provided that in respect of holder of a licence for manufacture of manufactured drugs or psychotropic substances or controlled substances, granted under this Act or any rule or order made thereunder, such power shall be exercised by an officer, not below the rank of sub-inspector:

Provided further that] if such officer has reason to believe that a search warrant or authorization cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place at any time between sunset and sunrise after recording the grounds of his belief.

(2) Where an officer takes down any information in writing under sub-section (1) or records grounds for his belief under the proviso

thereto, he shall within seventy-two hours send a copy thereof to his immediate official superior.]”

11. A bare perusal of this Section goes to show that the provisions of this Section are applicable only when the secret information pertains to concealment of any narcotic drug or psychotropic substance in any building, conveyance or any enclosed place and when seizure has taken place at a public place. Section 43 of the Act contemplates seizure made in the public place. There is a distinction between Section 42 and Section 43 of the Act. If a search is made in a public place, the officer taking the search is not required to comply with sub-Section (1) and (2) of Section 42 of the Act. Reference in this regard can be made to *Directorate of Revenue and Anr. vs. Mohd. Nisar Holia* (2008) 2 SCC 370, *State, NCT of Delhi vs. Malvinder Singh* (2007) 11 SCC 314 and *Mohan Lal vs. State of Rajasthan* 2015 V AD (SC) 581. In view of the above, the provisions of Section 42 of the Act were not legally required to be complied with.

12. However, it has come on record that the secret information received by PW-5 was got reduced by him in writing vide DD No. 20A attested carbon copy of which is proved as Ex.PW5/A. Another attested copy of the information was proved as Ex.PW3/A and the same was put up by PW-5 before the SHO concerned i.e., PW-2 Inspector Ramesh Kalsan. The same was also forwarded by him to ACP concerned Mr.Mehar Singh and it was duly received in the office of ACP vide entry no. 4073 of dak register dated 14.07.2010. Head Constable Afsar Pasha who was working as Reader to the ACP has proved the relevant entry Ex.PW3/C and deposed that the same was put up to ACP which was seen and endorsed by him. There is force in the submission of learned Public Prosecutor for the State that there seems to be a typographical error in the cross-examination of this witness wherein it was recorded that the report Ex.PW3/A was received in the office at about 1.30 pm because voluminous evidence is available on record to prove that the secret information itself was received at 3.45 pm, therefore, there was no question of sending the information to ACP at 1.30 pm. Under the circumstances, it was rightly observed by learned Special Judge that despite the fact that the provisions of Section 42 of NDPS Act were not legally required to be complied within this case but there is substantial compliance of the same.

13. As regards the doubts raised by learned counsel for the appellant regarding competency of ASI Bijender Singh who seized the contraband substance on the ground

that a police officer below the rank of a sub Inspector is not competent to exercise the powers under NDPS Act, the same is devoid of merit. The matter came up for consideration before this Court in ***Kamal Thakur vs. The State (Delhi Administration)*** 1995 JCC 76. In that case, the investigation was completed by a Head Constable of Delhi Police regarding recovery of 5 Kg and 500 gms of Charas from the possession of the accused. The question for consideration, therefore, was whether Head Constable of Delhi police is an officer superior in rank to a Constable as Section 42 of the Act authorizes officers superior in rank to a peon, sepoy or constables of different departments, as referred in the Section to enter, seize, search and arrest without warrant or authorization. A single Judge of this Court referred to the following notification issued by the State Government:

“No.F.10(76)/85-Fin.(G) – in exercise of the powers conferred by sub-Section (1) of Section 42 of the Narcotics Drugs and Psychotropic Substances Act, 1985 (61 of 1985) read with Government of India, Ministry of Home Affairs Notification No.S.O.818(E) dated the 8th November, 1985, the Administrator of the Union Territory of Delhi is pleased to empower all officers (being officers superior in rank to a peon or constable) of the following Departments of the Delhi Administration, Delhi, if they have reason to believe from personal knowledge or information given to any person and taken down in writing, that any narcotic drug or psychotropic substance in respect of which an offence punishable under Chapter IV of the said Act has been committed or any document or other article which may furnish evidence of the commission of such offence is kept or concealed in any building, conveyance or enclosed place within the Metropolitan Area of Delhi between sunrise and sunset, to:-

- (a) Enter into and search any such building, conveyance or place,
- (b) In case of resistance, break open any door and remove any obstacle to such entry,
- (c) Seize such drug or substance and all material used in the manufacture thereof and any other article and any animal or conveyance which he has reason to believe to be liable to confiscation under the said Act and any document or other article which he has reason to believe may furnish evidence of the commission of any offence punishable under Chapter IV of the said Act, relating to such drug or substance, and
- (d) Detain and search, and, if he thinks proper, arrest any person whom he has reason to believe to have committed any offence punishable under Chapter IV of said Act relating to such drug or substance.

Provided, that if such officer has reason to believe that a search warrant or authorization cannot be obtained without affording opportunity for the concealment of evidence or facility for escape of an offender, he may enter and search such building, conveyance or enclosed place at any time between sunset and sunrise after recording the grounds of his belief,

- 1. Revenue Department.
- 2. Drugs Control Department,
- 3. Excise Department, and

4. Police Department.”

for holding that a Head Constable being superior in rank to Constable is competent to investigate the matter. In the instant case PW-5 Bijender Singh was Additional sub-Inspector in Delhi Police and, therefore, was competent to carry out the search and seizure. Therefore, this submission has no merit.

14. The next submission regarding delay in sending the samples of this case to FSL by 15 days and therefore possibility of tampering with the case property cannot be ruled out, is devoid of merit. In **Ramesh Kumar Rajput @ Khan vs. The State of NCT of Delhi** Manu/DE/0786/2008 delay of 13 days in sending the sample *pullandas* to FSL was not considered to be fatal keeping in view the fact that there was nothing on record to suggest or to infer that the sample *pullandas* were tampered in the Malkhana. Similarly, in **Ahmad vs. State** 2011 III AD (CrI.) (DHC) 293 delay of 59 days in sending samples was not considered to be fatal in the absence of any evidence or inference of tampering with the sample *pullandas* on the basis of record. In **Mohan Lal** (supra) again a plea was taken that the seized articles were not sent immediately for chemical examination. Supreme Court relied upon **Hardip Singh vs. State of Punjab** (2008) SCC 557 where a two-Judge Bench while dealing with the question of delay in sending the samples of Opium to the FSL opined that it was of no consequence for the fact that the recovery of the said sample from the possession of the appellant had been proven and established by cogent and reliable evidence and that apart, it had also come in evidence that till the date parcels of samples were received by the chemical examiner, the seal put on that parcels was intact. Under the circumstances, the delay of 40 days in sending sample to FSL was considered to be immaterial and would not dent the prosecution case.

15. In the instant case, it has come in the testimony of PW-7 as well as PW-8 that *pullandas* of the samples as well as remaining case property were sealed by PW-5 at the spot itself and seal of BS was affixed thereon. Thereafter, PW-8 Head Constable Sanjeev Kumar took the sealed *pullandas* alongwith FSL form and copy of the seizure memo and handed over the same to SHO/PW-2 who affixed his seals of RK on the parcels as well as form FSL. All the sealed *pullandas* alongwith documents were deposited by PW-2 with MHC(M)/PW-4 Lallu Ram in the *Malkhana* vide entry No.1881 of Register No.19. PW-4 has specifically deposed about the seals of BS and RK found affixed on these *pullandas* and the form FSL. FSL result Ex.PX also goes to

show that the above description of the seal were found to be mentioned and that the seals affixed on the sample *pullandas* were found to be in intact condition and it tallied with the specimen seals as per the forwarding letter. Moreover, nothing has come on record from which it can be presumed that the sealed *pullandas* of the samples or the remaining case property were tampered with at any stage.

16. Heavy emphasis was laid by learned counsel for the appellant for submitting that as per storeroom register Ex.PW-4/A, the case property was deposited on 14.07.2010 at 11.55 am. This submission, which initially seemed to be attractive, was dispelled by learned Public Prosecutor for the State by submitting that the deposit was made vide DD No. 39A, therefore, the original DD No.39A was summoned which clearly reflects that the deposit was made by Inspector Ramesh Kalsan at 11.55 pm. That being so, there is nothing on record to show that the case property was at any point of time tampered with till it reached FSL. Therefore, mere delay in sending the samples to FSL does not cast any dent on prosecution case.

17. Similarly, the submission regarding non-compliance of Section 50 of the Act is devoid of merit because it has come in evidence that before taking search of the accused he was apprised of the legal right to be searched before a Magistrate or a Gazetted Officer and thereupon a notice under Section 50 NDPS Act Ex.P5 was duly served upon him. Mere fact that this notice does not bear his signatures does not raise any suspicion in regard to serving of this notice because the carbon copy of the notice Ex.PW5/B bears his signatures regarding receipt of the notice and thereafter since he claimed himself to be illiterate his reply was written by ASI Bijender Singh which is Ex.PW5/C and bears signatures of accused at point X.

18. Similarly, the submission that although two samples were taken out but only one of the parcel was sent to FSL does not make the prosecution case suspicious because out of the entire case property, two samples were taken. That being so, even if only one parcel is sent to the FSL and as stated by learned Public Prosecutor for the State that second sample was taken as a precautionary measure that if for some reason the FSL require another sample, the same could have been sent to FSL, deserves credence.

19. No other point was urged or pressed into service. In fact, all the submissions made by learned counsel for the appellant were dealt with in detail by the learned Special Judge and by a well reasoned judgment had convicted the appellant and

sentenced him to the minimum sentence prescribed under the Act. The impugned judgment does not warrant any interference. The appeal being meritless, is accordingly dismissed.

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

(SUNITA GUPTA)
JUDGE

MARCH 04, 2016

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