

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

RESERVED ON : 23rd SEPTEMBER, 2016

DECIDED ON : 21st DECEMBER, 2016

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CRL.A.572/2014

BHERU LAL

..... Appellant

Through : Mr.Sanjeev Bhatnagar, Advocate with
Ms.Rupi Sagar, Advocate.

versus

STATE

..... Respondent

Through : Ms.Meenakshi Dahiya, APP.

AND

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CRL.A.565/2014

NARAYAN

..... Appellant

Through : Mr.Sanjeev Bhatnagar, Advocate with
Ms.Rupi Sagar, Advocate.

versus

STATE

..... Respondent

Through : Ms.Meenakshi Dahiya, APP.

CORAM:

HON'BLE MR. JUSTICE S.P.GARG

S.P.GARG, J.

1. Aggrieved by a judgment dated 26.02.2014 of learned Special Judge (NDPS)/Addl. Sessions Judge in Sessions Case No. 66/12 arising out of FIR No. 214/12 PS Crime Branch by which the appellants – Bheru Lal (A-1) and Narayan (A-2) were convicted for committing offences punishable

under Section 18(b) and 18(c) of the Narcotic Drugs & Psychotropic Substances Act, 1985 (in short 'NDPS Act'); they have preferred the instant appeals. By an order dated 28.02.2014, A-1 was sentenced to undergo RI for fifteen years with fine ₹1.5 lac; default sentence being SI for one year. A-2 was sentenced to undergo RI for four years with fine ₹1 lac; default sentence being SI for one year.

2. Briefly stated, the prosecution case, in nutshell, as set up in the charge-sheet was that on 26.08.2012 at around 05.40 P.M. at Service Road, Ring Road in front of Water Treatment Plant, Industrial Area Lawrence Road, MCD Shamshan Ghat, Shakur Pur, Delhi, the appellants were found in possession of 3.470 kg and 1.30 kg of opium respectively in the bags carried out by them on their shoulders.

3. Prosecution case is that on 26.08.2012 at around 12.40 a.m. PW-12 (HC Veerpal) received a secret information at the office of Narcotics Cell that two persons namely Bheru Lal (A-1) and Narayan (A-2), resident of Udaipur, Rajasthan would arrive at near Water Treatment Plant, Lawrence Road, near Cremation Ground at about 05.30 p.m. to supply opium to someone. The secret informer was produced before PW-7 (SI Anil Malik) who verified the information and telephonically informed Insp. Jitender. Insp. Jitender, in turn, intimated about the secret information to Addl. DCP/SIT Joy Tirkey. Directions were given to conduct the raid. SI Sunil Kumar recorded DD No. 6 (Ex. PW-2/A) at 04:15 P.M. A raiding team consisting of SI Anil Malik and other police staff was constituted and they all reached the spot at about 05.15 P.M in two private vehicles. Certain public persons were requested to join the proceedings at various stages but none of them agreed. At 5:40 P.M, both the appellants were noticed coming

from the side of Wazirpur towards Indian Oil Petrol Pump on service road on foot. On the pointing out of the secret informer, the appellants were apprehended and were apprised of their legal right to get themselves searched either before a Gazetted Officer or a Magistrate. Notices (Ex.PW-5/A1 and Ex.PW-5/B1) under Section 50 NDPS Act were served upon the appellants. The bags in their possession were searched. It led to recovery of 3.470 kg of opium from A-1's bag and 1.30 kg of opium from A-2's bag. Two samples of 50 grams each were taken; FSL form prepared and the contraband was seized. Rukka (Ex.PW-7/A) was prepared and FIR was lodged. Subsequent investigation was taken over by PW-9 (ASI Jagdish Prasad). Both the appellants were arrested. Statements of the witnesses conversant with the facts were recorded. Exhibits collected during investigation were sent to Forensic Science Laboratory for examination. Upon completion of investigation, a charge-sheet was filed against both the appellants in the Court. In order to establish its case, the prosecution examined twelve witnesses in all. In 313 Cr.P.C. statements, the appellants denied their involvement in the crime and pleaded false implication. The trial resulted in conviction as aforesaid. Being aggrieved and dissatisfied, the instant appeals have been preferred.

4. I have heard the learned counsel for the parties and have examined the file. Learned counsel for the appellants urged that the contraband allegedly recovered from the appellants' possession cannot be taken as 'opium'. The pure 'opium' must contain active ingredients i.e. Morphine, Codeine, Thebaine, Papaverine & Noscapine. In the instant case, only 'morphine' has been found in the recovered substance in the chemical examination report. The 90% material is adulterated mixture of unknown

composition. He further urged that adulterated mixture would attract only Section 32 of NDPS Act for awarding sentence. He further urged that opium recovered from the appellants weighing 4.50 kg contained 1.18% and 1.09% morphine respectively i.e 40.94 grams and 1.92 grams respectively. Apparently, the quantity recovered from the appellants was below the 'commercial' one. Reliance was placed on the judgment of the Apex Court '*E. Micheal Raj vs. Intelligence Officer, Narcotic Control Bureau*', (2008) 5 SCC 161. It is further urged that no sincere efforts were made to associate any independent public witness despite their availability. Mandatory provisions of Sections 42 and 50 were not complied with. Contrary to that learned Addl. Public Prosecutor urged that all the mandatory provisions have been complied with. Since the recovery was effected from the handbag, compliance of Section 50 of NDPS Act was not mandatory. Minor contradictions highlighted by the appellants' counsel are of no consequence.

5. At the outset it may be mentioned that the 'contraband' allegedly recovered from the possession of the appellants was 'opium'. All the witnesses who were members of the raiding team at the time of recovery of the contraband in question have categorically stated that the substance recovered from appellants was opium (afeem). No suggestion whatsoever was put to any of the witnesses that the recovered substance was not 'opium' and the case of the appellants would fall under Section 32 of NDPS Act for awarding sentence. Prosecution relied upon FSL report (Ex.PW-9/B). As per report, on chemical examination (TLC & LC-MASS examination), Ex.1/A (Brownish black resinous coagulated material) & Ex.2/A (Brownish black resinous coagulated material), were found to be opium. It further found that Ex.1/A and Ex.2/A contained morphine 1.18% and 1.09%

respectively. This report declaring the substance to be 'opium' specifically was never challenged during trial. The appellants did not bother to examine the FSL expert describing the chemical recovered as 'opium'. The said report and opinion has remained unchallenged and uncontroverted throughout.

6. In the instant case, the contraband recovered falls in the definition of Clause (a) of Section 2(xv) of the NDPS Act and Clause (b) thereof is not attracted for the reasons that the substance recovered was 'opium' in the form of the coagulated juice of the opium poppy; it was not a mixture of opium with any other neutral substance. For the purpose of imposition of punishment if the quantity of morphine in opium is taken as a decisive factor, Entry No. 92 would totally become redundant. Entry No. 92 is exclusively applicable for ascertaining whether the quantity of opium falls within the category of small quantity or commercial quantity. Entry No.77 deals with Morphine; Entry 92 deals with Opium. If it is Opium as defined in Clause (a) of Section 2(xv) then the percentage of Morphine contents would be totally irrelevant. If only substance is found in the form of a mixture as specified in Clause (b) of Section 2(xv) of NDPS Act, then the quantity of morphine contents becomes relevant.

7. I do not subscribe to the view of the appellants' counsel that the purity contents of the adulterated mixture are to be taken into consideration for determination whether it is a commercial or small quantity. It is relevant to note that Notification dated 18.11.2009 has replaced the part of the Notification dated 19.10.2001 and reads as under :

“In the Table at the end after Note 3, the following Note shall be inserted, namely:

(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 or 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.”

8. Thus, it is evident that under the aforesaid Notification, the whole quantity of material recovered in the form of mixture is to be considered for the purpose of determination of the nature i.e. whether chemical or otherwise for the purpose of imposition of punishment. In view of it, the judgment cited by the learned counsel ‘*E. Micheal Raj (Supra)*’ is not applicable to the facts and circumstances of this case.

9. The prosecution has produced ample, convincing and credible evidence on record to prove recovery of the contraband from appellants’ possession on 26.08.2012 at around 05.40 p.m. The appellants undisputedly belonged to Udaipur, Rajasthan. They, in their 313 statements, have admitted their apprehension and arrest in Delhi on 26.08.2012. It was urged on their behalf that the purpose of their visit to Delhi was to visit temple. However, no cogent evidence has emerged on record to prove if both the appellants had travelled to Delhi to visit temples. No evidence has surfaced on record to establish if both the appellants were apprehended on 25.08.2012

at 03.00 a.m. at the time of their visit to a specific temple. They were not found in possession of any bus ticket. Contradictory statements have emerged to falsify their claim.

10. PW-7 (SI Anil Malik) posted in the office of SIT, Crime Branch, received information from PW-12 (HC Veer Pal) to the effect that on 26.08.2012 two individual namely Bheru Lal and Narayan, both resident of Udaipur, Rajasthan, who used to supply opium to truck drivers of Azadpur Mandi, would come near Water Treatment Plant, Lawrence Road near Cremation Ground at about 5:30 P.M to supply it to 'someone'. The secret informer was produced before him and he after verifying the information telephonically informed Insp. Jitender who intimated about it to Addl. DCP/SIT Joy Tirkey. Secret information was lodged vide DD No. 6 (Ex.PW-2/A) at about 04.15 P.M. and SI Anil Malik was authorized to constitute a raiding team. PW-6 (DCP Joy Tirkey) and PW-12 (HC Veer Pal) have corroborated PW-7's version regarding receipt of secret information.

11. The raiding team left the office along with the secret informer at about 04.45 P.M vide DD No.7 in two private vehicles No. HR 12 Q 4227 and DL3C L 0211 and reached the spot at about 05.15 P.M. The Investigating Officer requested four to five passersby to join the investigation but they declined. The appellants were apprehended at about 05.40 P.M. After introducing the raiding party to the appellants, they were apprised of the secret information. They were also informed their legal right to be searched before a Magistrate or a Gazetted Officer. Notices under Section 50 NDPS Act (Ex. PW-5/A1 and Ex. PW-5/B1) were served upon them. They, however, declined to avail the offer. Their refusal was recorded

vide memos Ex. PW-5/A and Ex. PW-5/B respectively. PW-7 further deposed that A-1 was having a bag of light greenish colour. On its search, 'Brownish' colour substance was found inside translucent polythene which was contained in a transparent polythene. On checking, the brown colour substance from the polythene with the field testing kit, it was found to be 'opium'. On weighing, its weight came to be 3.470 kg. Two samples of 50 gram each were taken and kept in two separate plastic containers. The residual substance and FSL form filled by him were seized. On checking of A-2's bag again 'Brownish' colour substance was found and on weighing, its quantity came to be 1.30 kg. Rukka (Ex.PW7/A) was prepared to lodge FIR through PW-5 (HC Sunil Kumar). At about 8:43 P.M, PW-9 (ASI Jagdish Prasad) came at the spot and took over the further investigation. SI Anil prepared a special report under Section 57 of NDPS Act (Ex.PW-7/B) on the next day.

12. This witness was cross-examined at length. In the cross-examination, he elaborated that the secret informer was not acquainted with him prior to the occurrence. He denied the suggestion that the appellants were falsely implicated and no such recovery was affected from their possession.

13. On scanning the testimony of this material witness, it reveals that crucial facts deposed by him in the examination-in-chief have remained unchallenged and uncontroverted. Mere suggestions were put in the cross-examination denying the appellants' apprehension and recovery from their possession. No ulterior motive whatsoever was assigned to the Investigating Officer for falsely implicating the appellants. As observed above, the appellants were not from Delhi; they were resident of Udaipur, Rajasthan.

In the absence of any prior animosity or ill-will, the Investigating Officer who had no familiarity with any of the appellants was not expected to falsely implicate them in this serious case. No material infirmities have been extracted in the cross-examination of this witness to suspect the version given by him.

14. PW-5 (HC Sunil Kumar) and PW-12 (HC Veerpal) have corroborated the version given by the Investigating Officer in its entirety without any major variation. They both have stood the test of cross-examination. PW-9 (ASI Jagdish Prasad), the subsequent Investigating Officer, has supplemented their version. It is relevant to note after the apprehension of the appellants, sincere efforts were made to find out the real culprit from whom the appellants had procured the contraband / substance. Record reveals that the Investigating Agency was able to reach to the residence of the said individual and was able to collect call details record. The said individual, however, could not be traced and booked. Nothing has come on record to show that the said individual did not exist at the particular place.

15. The Investigating Agency had produced on record comprehensive call details records to show that the appellants were in touch with Loba Chand. No explanation has been offered by the appellants as to on what account they used to be in conversation with him.

16. True, the entire case of the prosecution is based upon the testimonies of the police officials and no independent public witness was associated during investigation. It has, however, come on record that efforts were made to join the independent public witnesses at various stages but none agreed.

17. The question whether the failure to join public witnesses before effecting the recovery of the contraband would be fatal to the prosecution or not came to be considered by Apex Court in ‘Ajmer Singh Vs. State of Haryana’, (2010) 3 SCC 746, it was contended that the evidence of the official witness cannot be relied upon as their testimony had not been corroborated by any independent witness. The Hon'ble Supreme Court, rejecting the contention, held as under:

“16. The minimum sentence prescribed under the Act is imprisonment of 10 years and fine. In this situation, it is normally expected that there should be independent evidence to support the case of the prosecution. However, it is not an inviolable rule. Therefore, in the peculiar circumstances of this case, we are satisfied that it would be travesty of justice, if the appellant is acquitted merely because no independent witness has been produced. We cannot forget that it may not be possible to find independent witness at all places, at all times. The obligation to take public witnesses is not absolute. If after making efforts which the court considered in the circumstances of the case reasonable, the police officer is not able to get public witnesses to associate with the raid or arrest of the culprit, the arrest and the recovery made would not be necessarily vitiated. The court will have to appreciate the relevant evidence and will have to determine whether the evidence of the police officer was believable after taking due care and caution in evaluating their evidence.”

18. Rejecting a similar contention in '*Kashmiri Lal Vs. State of Haryana*', (2013) 6 SCC 595, the Hon'ble Supreme Court inter alia observed as under:

“9.it is evincible from the evidence on record that the police officials had requested the people present in the 'dhaba; to be witnesses, but they declined to cooperate and, in fact, did not make themselves available. That apart, there is no absolute command of law that the police officers cannot be cited as witnesses and their testimony should always be treated with suspicion. Ordinarily, the public at large show their disinclination to come forward to become witnesses. If the testimony of the police officer is found to reliable and trustworthy, the court can definitely act upon the same. If in the course of scrutinising the evidence the court finds the evidence of the police officer as unreliable and untrustworthy, the court may disbelieve him but it should not do so solely on the presumption that a witness from the department of police should be viewed with distrust. This is also based on the principle of quality of the evidence weighs over the quantity of evidence. These aspects have been highlighted in State of U.P. v. Anil Singh 1988 Supp SCC 686 and Ramjee Rai and others v. State of Bihar (2006) 13 SCC 229.”

19. Dealing with a similar contention in '*Ram Swaroop Vs. State (Govt. NCT) of Delhi*', 2013(7) SCALE 407, where the alleged seizure took

place at a crowded place yet no independent witness could be associated with the seizure, the Apex Court inter alia observed as under:

“7.We may note here with profit there is no absolute rule that police officers cannot be cited as witnesses and their depositions should be treated with suspect. In this context we may refer with profit to the dictum in State of U.P. v. Anil Singh MANU/SC/0503/1988 : 1988 Supp SCC 686, wherein this Court took note of the fact that generally the public at large are reluctant to come forward to depose before the court and, therefore, the prosecution case cannot be doubted for non-examining the independent witnesses.”

20. In ‘Ramjee Rai and others v. State of Bihar’, (2006) 13 SCC 229, it has been opined as follows:

“26. It is now well settled that what is necessary for proving the prosecution case is not the quantity but quality of the evidence. The court cannot overlook the changes in the value system in the society. When an offence is committed in a village owing to land dispute, the independent witnesses may not come forward.”

21. Resultantly, no adverse inference can be drawn against the prosecution on account of the inability of the raiding party to join public witnesses. It is not as if no effort was made by them in this regard. They did make efforts at several places but no member of the public agreed to be associated for various reasons.

22. The learned Counsel for the Appellants contended that the provision of Section 50 of the Act would also apply, while searching the bag, briefcase, etc. carried by the person and its non-compliance would be fatal to the proceedings initiated under the Act. I find no merit in the contention of the learned Counsel. It requires to be noticed that the question of compliance or non-compliance with Section 50 of the NDPS Act is relevant only where search of a 'person' is involved and the said section is not applicable nor attracted where no search of a 'person' is involved. Search and recovery from a bag, briefcase, container, etc. does not come within the ambit of Section 50 of the NDPS Act, because firstly, Section 50 expressly speaks of search of 'person' only. Secondly, the section speaks of taking of the person to be searched by the Gazetted Officer or a Magistrate for the purpose of search. The issue is no more res integra in view of the observations made by Hon'ble Supreme Court in '*Madan Lal vs. State of H.P.*', (2003) 7 SCC 465. The Court has observed:

"16. A bare reading of Section 50 shows that it only applies in case of personal search of a person. It does not extend to search of a vehicle or a container or a bag or premises (see Kalema Tumba v. State of Maharashtra (1999) 8 SCC 257, State of Punjab v. Baldev Singh (1999) 6 SCC 172 and Gurbax Singh v. State of Haryana (2001) 3 SCC 28).

The language of Section 50 is implicitly clear that the search has to be in relation to a person as contrasted to search of premises, vehicles or articles. This position was settled beyond doubt by the Constitution Bench in Baldev Singh case. Above being

the position, the contention regarding non-compliance with Section 50 of the Act is also without any substance.”

23. In the instant case recovery of contraband from the bags allegedly carried by the appellants Bheru Lal and Narayan, being not from their ‘person’, the Investigating Officer was under no legal obligation to act in compliance with Section 50. However, the investigating officer did serve notice under Section 50 NDPS Act. The accused, however, refused to avail that benefit. Since Section 50 had no application in the given case, non-compliance therewith in any respect would not render the search of the appellants illegal and their conviction on the basis of recovery of contraband out of such search bad in law.

24. In 313 Cr.P.C. statements the appellants did not give plausible explanation to the incriminating circumstances proved against them. They did not produce convincing and firm evidence to prove their false implication and also the purpose of their visit to Delhi. Minor discrepancies and infirmities highlighted by the appellants’ counsel are of no consequence as they do not affect core of the prosecution case. The Trial Court has dealt with all these aspects in the impugned judgment and it deserves no intervention. Conviction under Sections 18(b) and 18(c) of the NDPS Act based upon fair appreciation of the evidence cannot be faulted.

25. Regarding Sentence Order, A-1 has been sentenced to undergo RI for fifteen years with fine ₹1.5 lac. Nominal Roll dated 26.10.2015 reflects that he has already undergone three years, one month and twenty-three days incarceration as on 24.10.2015. It further reveals that he is not a previous convict and is not involved in any other criminal case. His overall

jail conduct is satisfactory. The 'individual' from whom the contraband were procured could not be apprehended and brought to trial. Considering these mitigating circumstances, the Sentence Order is modified to the extent that RI shall be ten years with fine ₹1 lac; default sentence would be SI for three months.

26. A-2 was sentenced to undergo RI for four years with fine ₹1 lac. Nominal roll dated 01.02.2015 reveals that he has already undergone two years, five months and two days incarceration as on 28.01.2015. It further reveals that he is not a previous convict and is not involved in any other criminal case. His overall jail conduct is satisfactory. Nothing has emerged if after suspension of sentence vide order dated 06.02.2015 he was found involved in any other similar crime. Considering the mitigating circumstances, the Sentence Order is modified to the extent that default sentence for non-payment of fine would be SI for three months. Other terms and conditions of the Sentence Order are left undisturbed.

27. The appeals stand disposed of in the above terms.

28. A-2 shall surrender before the Trial Court on 7th January, 2017 to serve out the remaining period of sentence.

29. Trial Court record be sent back forthwith with the copy of the order. A copy of the order be sent to the Superintendent Jail for information.

(S.P.GARG)
JUDGE

DECEMBER 21, 2016 / tr