

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

Date of Decision: 05 February, 2016

+ **CRL.A. 770/2011**

LYDIA NINGLIANTING Appellant

Through Mr. Sudhansu Palo & Mr. Tapan Kumar
Mahapatra, Advocates

versus

DIRECTORATE OF REVENUE INTELLIGENCE Respondent

Through Ms. Satish Aggarwala, Advocate

+ **CRL.A. 1046/2012 & Crl. M (Bail) 434/2014 & Crl. MA 12801/2015**

SHEIKH DILSHAD Appellant

Through Mr. Saurbah Kansal & Ms. Pallavi S.
Kansal, Advocates

versus

STATE Respondent

Through Mr. Akshai Malik, APP for the State.

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CORAM:

HON'BLE MS. JUSTICE SUNITA GUPTA

J U D G M E N T

: SUNITA GUPTA, J.

1. On 20.11.2006 at about 1100 hours, an information was received by Mr Madan Singh, Intelligence Officer, DRI (PW1) that two women of Indian origin shall be carrying narcotics drug in their baggage while travelling from Jalandhar to Delhi by Punjab Roadways bus and likely to reach ISBT, Kashmere Gate, Delhi between 1400 hours to 1430 hours. The said information was reduced into writing vide Ex.PW1/A and was submitted to Pankaj K Singh, Deputy Director DRI, (PW3), New Delhi for suitable action.

2. Mr Pankaj K. Singh called the Intelligence Officer – M.C. Maheshwari and directed him to take necessary action on the information. Thereupon, Mr. Maheshwari (PW-6) and other officers of DRI reached local bus stand, opposite ISBT, Kashmere Gate, Delhi at about 2 pm and saw two ladies of the same description alighting from Punjab Roadways bus at the local bus stand, opposite ISBT Kashmere Gate alongwith green colour and blue colour bags. They were intercepted at 2.05 pm. After showing

their identity cards, the women were asked whether they were carrying any narcotics drug with them in person or in their luggage to which they replied in negative. Both the ladies were informed that they have an intelligence that they may be carrying narcotic drugs with them and since that place was a busy place and was not suitable, therefore, they were asked to come to DRI office to which they agreed. Thereafter, all of them alongwith both the ladies intercepted at the bus stand reached DRI office where two panch witnesses were called and asked to join the proceedings. Both the ladies revealed their names as Lydia Ninglianting and Sheikh Dilshad. Notice under Section 50 of the NDPS Act (for short, 'the Act') Ex.PW6/B and Ex. PW6/C was served upon them inquiring whether they wanted to be searched in the presence of a Gazetted Officer or a Magistrate to which they replied that any lady officer in DRI can take search of their person as well as baggage. Thereafter, Ms Parminder Kaur, Administrative Officer, DRI (PW8) took search of their person in total privacy but nothing incriminating was found from their person. Thereafter, the green colour bag carried by the appellant - Lydia Ninglianting was searched and after removing her personal effects, two heat sealed polythene packets containing some substance were found. On checking, it was found to contain off-white colour powdery substance which was given mark X1 and X2. Thereafter, the blue colour bag of brand name 'Splendid' was searched which was found to be containing three heat sealed polythene packets containing off-colour powdery substance. The packets were given mark Y1, Y2 and Y3. The small quantity of powdery substance was taken from each bag – one by one and tested with drug detection kit which gave positive result for heroin. The substance of all the packets was weighed one by one and the total weight came to 5.017 kgs. Five gm each was taken out from the packets as sample and were sealed with the seal of DRI. One paper slip was also affixed which was signed by both the accused, the panch witness and the lady officer Parminder Kaur. The sealed parcels were duly deposited and thereafter sent to CRCL which were examined by R.P.Meena, Assistant Chemical Examiner, CRCL (PW-5) who gave his report Ex.PW5/A opining that the samples analyzed by him were found to be heroin (diacetyl morphine). Summons were issued to both the accused in pursuance of which they appeared and their statements Ex.PW6/H and Ex.PW6/K were recorded under Section 67 of the Act. After completing investigation, the complaint under Section 21 and 29 of the NDPS Act, 1985 was filed against them.

3. The charge for offence under Section 21(C) read with Section 8(C) as well as under Section 29 of NDPS Act was framed against both the accused to which they pleaded not guilty and claimed trial.

4. In order to substantiate its case, the prosecution examined nine witnesses. All the incriminating evidence was put to both the appellants while recording their statements under Section 313 Cr.PC wherein they denied the case of the prosecution. According to them, they had come to Delhi at the instance of one Raja. They had nothing to do with the contraband nor anything was recovered from their possession. As regards their statement under Section 67 of the Act, it was alleged that no such statement was given by them and they were made to sign documents against their will.

5. Vide impugned judgment dated 29.07.2010, both the accused were convicted for offence punishable under Section 21(C) read with Section 8(C) of the Act. However, they were acquitted of the charge under Section 29 of the Act on the ground that no evidence has come on record to prove that the accused were party to any conspiracy to commit any offence punishable under Chapter IV of the Act. Except for the statement of accused under Section 67 of the Act, there is no evidence on record to link either of the accused in any conspiracy with the said Raja who had not been arrested in the case.

6. Vide order on sentence dated 31.07.2010, both the accused/appellants were sentenced to undergo rigorous imprisonment for a period of ten years and fine of Rs.1 lac each, in default to undergo simple imprisonment for a period of one month.

7. Feeling aggrieved separate appeals being CRL.A. Nos. 770/2011 and CRL.A. 1046/2012 have been preferred by both the convicts. Since both the appeals are arising out of the common judgment and order on sentence as such they are taken up together.

8. Assailing the findings of learned Special Judge, NDPS Act, learned counsel for the appellants submits that prosecution has failed to prove the guilt of the accused beyond reasonable doubt as the entire case of prosecution rests on the testimony of two officers of DRI, namely, Sh M.C.Maheshwari and Ms Parminder Kaur. Although it is the case of the prosecution that two panch witnesses were joined in the investigation, however, none of the panch witnesses have been examined. Similarly, no other member of the raiding party have been examined. Furthermore, although it is alleged that both

the accused/appellants were apprehended from a very busy place i.e. ISBT, Kashmere Gate, Delhi, however, no person from the public was asked to join the proceedings at ISBT. Counsel further submits that the tampering of the case property is not ruled out.

9. Counsel further submitted that there is contradiction in the testimony of PW6 – M.C. Maheshwari and PW8 – Parminder Kaur as according to PW6 the statements of the accused was recorded from 7.15 to 10.15 pm by PW8, however, PW8 has deposed that she left the office of DRI at 7 pm. Reliance was placed on *Narcotics Control Bureau v. Anju Tiwari & Anr.*, 2015 [1] JCC [Narcotics] 11; *Gurnam Singh v. State of Punjab* [Crl. Appeal No.1034-SB of 2004 decided on 28.11.2013]; and *Hannan vs. State of NCT of Delhi* 2013 (3) JCC 94.

10. Countering the submissions of learned counsel for the appellants, learned counsel for the respondent – DRI urged that all the submissions made by counsel for the appellants were also taken before the learned Special Judge and the same were dealt with appropriately. The mere fact that the panch witnesses were not examined does not weaken the case of DRI as no animosity has been alleged by any of the appellants with any officer of DRI for which reason they would falsely implicate the accused in this case or would plant such a heavy recovery upon them. It is further submitted that the judgment relied upon by learned counsel for the appellants has no applicability to the present case as Hanan (supra) relied upon by learned counsel for the appellants pertains to the recovery effected by the police officials. It is further submitted that the system of sealing is entirely different in the case of DRI. After the recovery of contraband articles the same are sealed. A paper slip is affixed on the same which bears not only the signatures of the officers of DRI but also signatures of the accused persons. It has come in the statement of witnesses that the paper slips were affixed bearing the signatures of the accused as well and the same were found intact. Moreover, there is no delay in depositing of case property as the recovery was effected on 20.11.2006 and the same was deposited with CRCL on 21.11.2006. Further, besides the testimony of the Intelligence Officer, recovery of contraband articles recovered from the possession of the appellants, there is statement of accused recorded under Section 67 of the Act wherein they have admitted the recovery from their possession, which is another clinching evidence against the appellants as such the impugned judgment does not suffer from any infirmity which calls for any interference.

11. The main thrust of arguments of learned counsel for the appellants is that panch witnesses – Vikas Singh and Rohan Malik were not examined and, therefore, the entire prosecution case has to be rejected. In the absence of any independent witness, the conviction based on official witnesses cannot be sustained.

12. A perusal of record goes to show that summons were sent to the panch witnesses but summons of Vikas Singh was received back with the report that he is not residing at the given address. However, as regards the other panch witness, Rohan Malik, there is no report. Therefore, at best it can be said that he was not examined by the prosecution.

13. Substantially similar plea was taken in *Sumit Tomar vs. The State of Punjab*, (2013) 1 SCC 395 which was a case under Narcotic Drugs and Psychotropic Substances Act, 1985. One Kaur Singh was joined by the prosecution, but was not examined. It was held by the Hon'ble Supreme Court that the prosecution should have examined him but it was the stand of prosecution that in spite of necessary steps taken by issuing summons, he did not appear and for that reason prosecution case cannot be thrown out. If the statements of police officials are reliable and no animosity is established against them by the accused then the conviction based on their statements cannot be faulted with. *Sucha Singh vs. State of Punjab*, 2015 SCC Online P&H 15, again was a case under Narcotic Drugs and Psychotropic Substances Act, 1985, where the independent witness was given up as having been won-over by the accused. Similar plea was taken that on the uncorroborated statements of official witnesses, conviction cannot be based. Repelling the contentions, it was observed by Punjab and Haryana High Court that rule of prudence demands that there should be some corroboration through independent source of the statements of the official witnesses, but if the independent witness though joined by the prosecution, had been given up as having been won over by the accused, that would not be fatal for the prosecution case and the conviction can well be based on the testimony of official witnesses if the same inspire confidence in the mind of the Court regarding guilt of accused. The testimony of official witnesses are at par with the testimony of the non- official witnesses.

14. Again *Brijesh Kumar Gupta vs. Narcotics Control Bureau*, 2014 CrI. L.J. 4203, was a case under Narcotic Drug and Psychotropic Substances Act, where two public witnesses were joined in the proceedings but could not be produced since it was

reported that no such person was residing at the given address. Similar plea was taken that non-examination of independent witness is fatal. Repelling the contention, it was held that:

“13. If the public witnesses chose not to disclose their correct address to the NCB officials, NCB cannot be faulted for not producing them in the Court. It is quite possible that though the aforesaid witnesses did agree to join the proceedings on being persuaded by NCB officials, they gave wrong address to NCB officials so that they do not have to visit the Court for the purpose of giving evidence during trial. The other possibility in this regard is that the witnesses had left the place where they were residing at the time of seizure of the drug, without conveying their fresh address to NCB.... Presuming, however, that no public witness was joined before seizing drug from the appellant, that by itself cannot be a good ground to reject the testimony of NCB officials, who, on receipt of an information, which was duly reduced in writing and brought to the notice of the superior officer, went to the spot and apprehended the appellant, on his being identified by the informer and seized the narcotic drug from him. The appellant does not claim any previous enmity or ill-will between him and the NCB officials. Therefore, they had no reason to depose falsely against him and implicate him in a false case of recovery of narcotic drugs.”

15. In ***State of Haryana v. Asha Devi & Ors.*** 2015 VI AD (SC) 449, accused were acquitted of offence under Section 20 and 29 of the Act on the ground that there was no independent witness, tampering of seal could not be ruled out. High Court declined to grant leave to appeal to State against acquittal of accused. Hence, appeal was filed before the Hon'ble Supreme Court. Same was allowed observing that the police officers and Investigating Officer deposed that public persons were available when contraband was recovered, however, none acceded to their request of joining investigation, Court below found it unbelievable but no reason for same was recorded, all persons possessed contraband samples were brought on record to support that no tampering was done with samples hence accused were held guilty under Section 20 of the Act for possession of contraband substance.

16. Learned counsel for the appellants relied upon ***Gurnam Singh*** (supra) which was also a case under NDPS Act. In that case, one of the co-accused was acquitted while the appellant was convicted. He was acquitted by Punjab & Haryana High Court on number of counts one of which was non-examination of the independent witnesses.

There were other factors as well as the place in question from where the alleged recovery was effected was not owned by the accused; the prosecution failed to explain as to what was the source of contraband recovered from the appellant; the seals of gunny bags were cracked and not legible and therefore the possibility of tampering with the case property could not have been ruled out; co-accused had been acquitted. In those circumstances, the appellant in that case was acquitted.

17. Similarly *Narcotics Control Bureau v. Anju Tiwari & Anr.* (supra) was an appeal against acquittal of the accused persons under Section 21 and 29 of the NDPS Act. The learned Trial Court had acquitted the appellant on several counts such as non-compliance of provisions of Section 42 of NDPS Act, non-examination of independent witnesses, the statement under Section 67 of NDPS Act allegedly made by the accused persons were found not to be voluntary and it was alleged against the accused that recovery of USD 30,000 was effected but that was also disbelieved. Under those circumstances, the High Court did not find any ground to interfere with the order of acquittal by granting leave to the appeal and the petition was dismissed.

18. In the instant case, despite lengthy cross examination, nothing material could be elicited to discredit the testimony of PW6 - M.C.Maheshwari and PW8 – Parminder Kaur. Both these witnesses stood the test of cross examination. Learned counsel for the appellants pointed out a slight discrepancy in their testimony that according to PW6, statements of the appellants was recorded from 7.15 pm to 10.15 pm by PW8, however, PW8 stated that she left the office at 7 pm. However, the recovery was effected in the year 2006 while these witnesses came to be examined in the year 2009 and 2010. Human memory fades away with lapse of time and such a minor discrepancy which does not go to the root of the matter does not cast any doubt on the prosecution version. Moreover, none of the appellants alleges any animosity, ill-will or grudge against any of the officers of DRI for which reason they will falsely implicate them and plant such a heavy recovery upon them.

19. Coming to the next limb of argument of learned counsel for the appellants that the possibility of tampering with the case property cannot be ruled out is devoid of any substance. The recovery of contraband was effected in the presence of PW6 – Mr M.C. Maheshwari and PW8 – Ms Parminder Kaur. It has come in the statement of Mr M.C. Maheshwari that after recovery of the articles and taking samples from them, the

packets were wrapped in a white cloth bag and sealed with the seal of Directorate of Revenue Intelligence. Paper slip was also affixed under the lakh seal bearing the signatures of panch witnesses as well as of lady officer Ms Parminder Kaur and accused persons. After recovery, the case property was handed over by Mr M.C. Maheshwari to Mr Alok Aggawal (PW9). Thereafter, as directed by PW7 – Mr S.K. Sharma, Mr M.C. Maheshwari took the samples to office of CRCL vide letter and test memo in triplicate which fact is confirmed by PW2 Jaiveer, Lab Assistant, CRCL. He contacted Mr S.K. Mittal, chemical examiner who checked the seal on the sample packets with the facsimile given on the test memo and after testing the same, directed him to receive the samples. He received the samples in intact condition alongwith forwarding letter and test memo and handed the same to Mr S.K. Mittal, the Chemical Examiner. The seal on the sample packets were in intact condition. On 21.11.2006, Mr S.K. Mittal, In-charge Narcotic Section allotted two samples to Mr R.P. Meena (PW5), test memo in duplicate and forwarding letter with seals intact. Thereafter, analysis of the sample was carried out which gave positive test for heroin. On 22.11.2006, Mr M.C. Maheshwari deposited one packet in Valuable Godown of New Customs House vide deposit memo Ex.PW4/A with Mr D.B. Sharma (PW4), Inspector, Custodian of Valuable godown in intact condition. The aforesaid evidence led by prosecution goes to show that there was no delay in sending the samples to CRCL as the recovery itself was effected on 20.11.2006 and the samples were deposited with PW2 at CRCL on the very next day i.e. 21.11.2006. Moreover, all the link evidence have been examined. Furthermore, after sealing the samples, the paper slip was also affixed on the same bearing the signatures of the officer of DRI, panch witnesses as well as the accused persons. The same were found in intact condition throughout. All the persons who possessed the contraband sample have been brought on record to support that no tampering was done with the samples. The defence failed to bring out anything in the cross examination of the witnesses with respect to tampering of the samples. Under the circumstances, the prosecution has sufficiently proved its case to establish the guilt of the accused in the present case.

20. **Hannan** (supra), relied upon by learned counsel for the appellants was a case where the search was effected by the police officials. It was pleaded that there was unexplained delay in sending the samples to CFSL as the alleged recovery was made on 25.07.2006 and the samples were sent on 28.08.2006. There was material

contradictions in the statement of witnesses regarding colour and description of the bag, colour of substance recovered. Moreover, it was alleged that after sealing the samples and the case property, the seals were handed over to HC Samim Akhtar but he was silent about the seals and till when they were in his custody. The details of FSL were not given in register number 9 though mentioned in road certificate. There was no clinching evidence that the case property was not tampered with, as such, considering all these circumstances, it was held that the prosecution failed to prove the case beyond reasonable doubt as such the appellant was acquitted. As seen above, things are entirely different in the present case.

21. Last but not the least, pursuant to the notice given by Mr M.C. Maheshwari, statements of both the accused Ex.PW6/H and PW6/K were recorded under Section 67 of the Act wherein they gave a detailed narration of various facts which were within their special knowledge and also recovery of the contraband articles from their possession. Moreover, the statement under Section 67 of the Act was reduced into writing by the appellant - Lydia Ninglianting in her own handwriting while that of the appellant - Sheikh Dilshad was recorded by PW8 – Parminder Kaur. Although it is alleged that the accused persons were made to sign the statement against their will, however, at no point of time they retracted from their statements.

22. In *Kanhaiyalal v. Union of India (UOI)*, AIR 2008 SC 1044, it was held that conviction can be maintained solely on the basis of a confession made under Section 67 of the NDPS Act. In that case, reliance was placed on *Raj Kumar Karwal v. Union of India and others* (1990) 2 SCC 409 wherein it was held that officers of the Department of Revenue Intelligence who have been vested with powers of an Officer-in-Charge of a police station under Section 53 of the NDPS Act, 1985, are not ‘police officers’ within the meaning of Section 25 of the Evidence Act. Therefore, a confessional statement recorded by such officer in the course of investigation of a person accused of an offence under the Act is admissible in evidence against him. It was further observed that statement made under Section 67 of the N.D.P.S. Act is not the same as a statement made under Section 161 of the Code, unless made under threat or coercion. It is this vital difference, which allows a statement made under Section 67 of the N.D.P.S. Act to be used as a confession against the person making it and excludes it from the operation of Sections 24 to 27 of the Evidence Act.

23. Again in **Ram Singh vs Central Bureau Of Narcotics**, (2011) 11 SCC 347, the question arose whether a conviction can be based solely on the basis of a confessional statement made under Section 67 of the Act and it was observed as under:

“18 In our opinion, when an accused is made aware of the confession made by him and he does not make complaint within a reasonable time, same shall be a relevant factor to adjudge as to whether the confession was voluntary or not. Here in the present case appellant was produced before the Court on several dates and at no stage he made any complaint before the Special Judge of any torture or harassment in recording the confession. It is only when his statement was recorded under Section 313 of the Code of Criminal Procedure that he retracted and denied making such a confession and went to the extent of saying that his signatures were obtained on blank pages. In the facts and circumstances of the case we are of the opinion that the confessional statements made by the appellant were voluntary in nature and could form the basis for conviction.

19. The view which we have taken above finds support from the judgment of this Court in the case of *M. Prabhulal v. Assistant Director, Directorate of Revenue Intelligence*, 2003 (8) SCC 449, in which it has been held as follows:

"It has been established that the Customs Office was about 20 km from the place where the truck and the car were apprehended. Having regard to the large quantity of the heroin, the said vehicles with Accused 2, 3 and 6 were brought to the Customs Office. Further, Accused 1 and 2 did not know Tamil. A Hindi-knowing officer had to be arranged. There was, under the circumstances no delay in recording the statements of the appellants. Further, it is also to be borne in mind that the appellants did not make any complaint before the Magistrate before whom they were produced complaining of any torture or harassment. It is only when their statements were recorded by the trial Judge under Section 313 of the Code of Criminal Procedure that a vague stand about the torture was taken. Under these circumstances, the confessional statements cannot be held to be involuntary. The statements were voluntarily made

and can, thus, be made the basis of the appellants' conviction."

(emphasis supplied)

20. *The same view has been reiterated by this Court in the case of Kanhaiyalal (supra)*¹ *in which it has been observed as follows:*`

"Since it has been held by this Court that an officer for the purposes of Section 67 of the NDPS Act read with Section 42 thereof, is not a police officer, the bar under Sections 24 and 27 of the Evidence Act cannot be attracted and the statement made by a person directed to appear before the officer concerned may be relied upon as a confessional statement against such person. Since a conviction can be maintained solely on the basis of a confession made under Section 67 of the NDPS Act, we see no reason to interfere with the conclusion of the High Court convicting the appellant."

24. In the instant case, the statement under Section 67 of the Act was written by the appellant - Lydia Ninglianting in her own handwriting while that of the appellant – Sheikh Dilshad was recorded by PW8 – Ms. Parminder Kaur. The appellants were produced before the Court on several dates and at no stage any complaint was made before the Special Judge of any torture or harassment in recording the confession. It is only when their statement under Section 313 Cr.PC was recorded that it was pleaded that no such statement was made by them and they were made to sign documents against their will. In the facts and circumstances of the case, it was rightly observed by learned Special Judge that the statement made by the appellants were voluntarily in nature and could form the basis of conviction. Moreover, the conviction was based not only on the basis of statement under Section 67 of the Act but also ample corroborative evidence in the shape of testimony of intelligence officers coupled with the recovery effected from the bags.

25. No other point was urged or pressed during the course of arguments.

¹ (2003) 8 SCC 449

26. The impugned judgment and order on sentence does not suffer from any infirmity which warrants any interference. That being so, there is no merit in both the appeals and the same are accordingly dismissed.

Trial Court record be sent back forthwith alongwith a copy of this judgment.

(SUNITA GUPTA)
JUDGE

FEBRUARY 05, 2016/rd