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

Judgment delivered on 01st February, 2016

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CRL.A. 1078/2014

BRIJESH YADAV @ VIJAY YADAV

..... Appellant

Represented by: Ms. Manika Tripathy
Pandey and Mr. Ashutosh
Kaushik, Advs.

Versus

STATE (NCT OF DELHI)

..... Respondent

Represented by: Ms. Meenakshi Chauhan,
APP for the State with SI
Satvir Singh, PS
Kashmere Gate, Delhi.

CORAM:

HON'BLE MR. JUSTICE SURESH KAIT

SURESH KAIT, J.

1. By way of the present appeal filed under Section 374 (2) of Cr.P.C. appellant seeks directions thereby setting aside the impugned judgment dated 24.03.2014, whereby he was held guilty for the offences punishable under Sections 15/61/85 of NDPS Act.

2. Further seeks directions thereby setting aside the order on sentence dated 01.04.2014, whereby he was sentenced to undergo RI for four years with fine of Rs.10,000/- and in default of payment of fine, he was further sentenced to undergo SI for six months for the offence punishable under Section 15 of NDPS Act.

3. The aforesaid case was registered on the written complaint of Ct. Ravinder of PS-Kashmere Gate alleging therein that on 13.09.2012 at about 7.45 am when he was performing his duty at the out gate of ISBT, he saw the appellant coming from the side of foot-over Bridge having a Fauji Colour Bag on his left shoulder and on seeing the police constable he took u-turn and started taking fast steps. He was apprehended by the Constable named above on the basis of suspicion and was inquired and instructed to get his bag checked. However, the appellant started making excuses. But when Ct. Ravinder opened the above-noted bag, he found some powder like substance in his bag. Information in this regard was given in PP, ISBT. Accordingly, ASI Mahender Singh reached at the spot and recorded the statement of Ct. Ravinder and also verified the facts and circumstances from the appellant, but he could not give any satisfactory reply. The bag was checked and it was found containing the post powder and on being weighed on digital weighing machine, it was found to be of 16 Kg. One Kg of the sample was taken out from it and kept in a white polythene, mouth of which was closed with Stapler and was sent to FSL, Rohini for expert opinion.

4. Accordingly, case under Sections 15/61/85 of NDPS Act was registered against the appellant. Thereafter, on completion of investigation and compliance of the provisions of NDPS Act, police filed the chargesheet. Charges were framed to which he pleaded not guilty and claimed trial.

5. In order to prove its case, prosecution has examined 9 witnesses. Thereafter statement under Section 313 Cr.P.C. of the appellant was also recorded wherein the entire incriminating evidence has been put forth and explained to him to which he claimed to be an innocent person, however did not lead any defence evidence.

6. Ld. Counsel appearing on behalf of the petitioner submitted that there are clear contradictions in the quantity of alleged recovery of poppy straw from the appellant because as per the prosecution story and PW5, the quantity of alleged poppy straw when weighed was 16 kg but as per DD No. 19A, dated 13.09.2012, Ex.PW4/A, the quantity is of 15 kgs. Moreover, as per FSL Form No. FSL/ Delhi/ FM/ 03/ 23/ 10.02.2012 the weight of sample of alleged poppy straw was 1098.80 gm approx. with polythene.

7. Ld. Counsel for the appellant submitted that Id. Trial Court completely failed to appreciate that though the alleged recovery and arrest has been made from a public place, however no public witness was asked to join the investigation despite the fact that there were buses and its driver in the ISBT at the time of incident and the place where buses were stationed in ISBT is about 200 meter from the place of incident, which can be covered within 5 minutes. She further submitted that there were contradictory statements of the witnesses on this issue because as per the PW3, no security guards were there at the time of arrest of the appellant whereas as per the deposition of the

PW8, the distance between the spot and the place where security guards remained on duty at out gate was approximately 50 Yds. and it hardly takes 2-4 minutes to reach. Despite, no security guard was requested to join the investigation. It establishes that no contraband was recovered from possession of the appellant and the appellant has been falsely implicated in this case.

8. She further submitted that there are contradictions in the deposition of the prosecution witnesses regarding the bag which allegedly contained the post powder because as per PW3, he had not taken the search of the bag as the appellant had admitted that he was carrying post powder. Whereas as per PW5, the bag containing the contraband was weighed on electronic weighing machine and the polythene was not tied inside the bag.

9. Ld. Counsel further submitted that there was delay on the part of the prosecution as the incident is of 13.09.2012, the sample was deposited with the FSL after a long gap on 21.09.2012 and the report was also received after a long delay in the month of December, 2012. Moreover, PW3 could not tell who prepared the notice under Section 50 of NDPS Act.

10. On the other hand, ld. APP appearing on behalf of the State submits that on receipt of DD No. 5PP regarding apprehension of one person by Ct. Ravinder with contraband, ASI Mahender Singh, Investigating Officer of the case with Ct. Sudhir reached near footover

bridge, outgate ISBT, where the appellant with the fauji colour bag recovered from his possession was produced by Ct. Ravinder before ASI Mahender Singh. He recorded the statement of Ct. Ravinder and inquired the same from the appellant and gave notice under Section 50 of NDPS Act to him. The bag recovered from the possession of the appellant was found to be containing some powder like substance and from its smell and appearance it appeared to be post powder. ASI Mahender Singh requested the passersby to join the proceeding, but they did not join and left away without telling their names and addresses. After weighing the post powder along with the bag it came to be 16 kg. Thereafter, 1kg of the post powder was taken from the bag and it was kept in white coloured polythene and stapled. The polythene was kept in a cloth parcel and it was given mark S1. The remaining post powder was kept in the same bag itself, the chain of the bag was closed and it was kept in cloth parcel and given as mark A. ASI Mahender Singh prepared FSL Form at the spot and affixed his seal on cloth parcel marked S1 and marked A and the seal was also affixed on FSL Form. He took the case property in his possession through seizure memo vide Ex.PW3/B which bears his signature at point Y. He handed over the original tehrir, FSL Form, carbon copy of seizure memo and both the sealed parcels marked S1 and marked A to Ct. Sudhir, who thereafter, handed over original tehrir to the Duty Officer for registration of the case and the sealed parcels, FSL Form and carbon copy of seizure memo to SHO. Case property was

deposited with the Malkhana and exhibits were sent to FSL Rohini for examination.

11. So far as the difference in quantify of sample of the post powder is concerned, Id. APP submits that PW3 Ct. Ravinder, PW5 Ct. Sudhir, PW8 ASI Mahender Singh, PW4, SHO Madhukar Rakesh, PW1 H.Ct. Chiranji Lal (MHCM), Kashmere Gate deposed on the identical lines. Id. APP further submitted that no witnesses were cross-examined on this issue. Thus, in view of the facts that the issue was not challenged during trial, seal was not tampered and observations of Id. Trial Court that the prosecution witnesses were trustworthy, the plea taken by the defence is not sustainable and does not affect and falsify the prosecution case.

12. On the issue of delay in sending the FSL Report, Id. APP has relied upon a case of *Jarnail Singh v. State of Punjab (2011) 3 SCC 521*, wherein it was observed that mere delay in sending the sample of the narcotic to the office of the Chemical Examiner would not be sufficient to conclude that the sample has been tampered with. There is sufficient evidence to indicate that in the present case the delay, if any, was wholly unintentional.

13. On the issue of no independent witness, Id. APP has relied upon a case of *Ajmer Singh v. State of Haryana 2010 (2) Scale 362*, wherein it was observed as under:

“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.”

14. Further relied upon ***Ramswaroop v. State of Delhi in Crl. Appeal no. 1327/2010*** wherein the Supreme Court relied upon the case of ***State of Govt. of NCT of Delhi v. Sunil and Anr. (2001) 1 SCC 652***, wherein it is observed as under:

“.....But it is not a legally approvable procedure to presume the police action as unreliable to start with, nor to jettison such action merely for reason that police did not collect signature of independent persons in the documents made contemporaneous with such actions.”

15. On the issue of compliance of notice under Section 50 Id. APP has relied upon a case of ***Jarnail Singh (Supra)*** wherein the Hon’ble Supreme Court relied upon the case of ***Kalema Tumba v. State of Maharashtra (1999) 8 SCC 257*** wherein provisions pertaining to ‘personal search’ under Section 50 of the NDPS Act were discussed as under:

“.....if a person is carrying a bag or some other article with him and narcotic drug or psychotropic substance is found from it, it cannot be said that it was found from his person.”

Also relied upon ***Megh Singh v. State of Punjab (2003) 8 SCC 666***, in ***Jarnail Singh (supra)***, wherein the Apex Court observed that:

“A bare reading of Section 50 shows that it applies in case of personal search of a person. It does not extend to a search of a vehicle or container or a bag or premises.”

16. While concluding her arguments, ld. APP submitted that with the testimony of the members of the raiding party and documentary evidence, the prosecution has proved its case beyond reasonable doubt. The mandatory provisions of NDPS Act have been properly complied with while conducting the raid and effecting the recovery. Moreover, the FSL report has also confirmed recovery of post powder from the possession of the appellant.

17. I heard ld. Counsel for the parties and perused the record.

18. PW8, ASI Mahender Singh, Investigating Officer of the case deposed that on 13.09.2012, on receipt of DD NO. 5PP, given to him by Duty Officer regarding apprehension of appellant by Ct. Ravinder with contraband near footover bridge, Outgate, ISBT, he along with Ct. Sudhir reached the spot where Ct. Ravinder produced the appellant with one Fauji Colour Bag which was recovered from him. He recorded the statement of Ct. Ravinder and inquired from the appellant and gave notice under Section 50 of NDPS Act, Ex.PW3/B. He told

the appellant that he has a legal right to be searched before any gazetted officer or the Magistrate as there is apprehension that the bag recovered from him is containing contraband. Appellant was also informed regarding his legal right to the effect that he can take search of police officials before his search is taken and gave reply Ex.PW3/C to the notice under Section 50 of NDPS Act, and stated that he does not want to be searched in the presence of any Gazetted Officer or a Magistrate. He also does not want to take search of police officials. Accordingly, on checking the bag by ASI Mahender Singh, matiala colour post powder was found. He requested 4-5 passersby to join the proceedings, but they did not join and left away without telling their names and addresses. Thereafter, he weighed the post powder along with the bag and it came to be of 16 kg. He had taken out 1 kg. post powder as sample and kept it in a white coloured polythene and after stapling the polythene kept it in a cloth parcel and given as marked S1. The remaining post powder was kept in the same bag itself, which was kept in a cloth parcel and was given marked A. He prepared FSL form at the spot, affixed his seal on cloth parcel marked S1 and marked A and the seal was also affixed on FSL Form. The case property was taken into possession vide seizure memo Ex.PW3/B. He gave the original tehrir, FSL Form, carbon copy of seizure memo and both the sealed parcels marked S1 and marked A to Ct. Sudhir, who as per the instructions of the Investigating Officer handed over the tehrir to the Duty Officer for registration of the case and sealed parcels, FSL Form

and Carbon copy of seizure memo to the SHO. He interrogated the appellant and prepared the site plan at the instance of Ct. Ravinder vide Ex.PW8/B and arrested the appellant vide memo Ex.PW3/G. Personal search of the appellant was conducted vide memo Ex.PW3/GA, from which one carbon copy of notice under Section 50 of NDPS Act, one wrist watch of golden colour, one brown colour leather purse containing an amount of Rs.350/- and a bus ticket were recovered. Thereafter, the appellant was got medically examined and a report under Section 57 of NDPS Act Ex.PW8/C was prepared. Later on, exhibits were sent to FSL, Rohini.

19. PW1 HC Chiranji Lal, the member of the raiding party deposed about the manner of conducting the raid and recovery of contraband from the appellant.

20. PW2, ASI Mandodari, being the Duty Officer of the present case recorded the FIR vide Ex.PW2/A on 13.09.2012 and proved endorsement on rukka as Ex.PW2/B.

21. PW3 Ct. Ravinder, supported the prosecution case, deposed about secret information, constitution of raiding party, apprehension of appellant, recovery of contraband and further investigation conducted in this regard.

22. PW4, Inspector Madhukar Rakesh, SHO, PS-Kashmere Gate deposed that on 13.09.2012, he was informed by ASI Mahender Singh

regarding apprehension of appellant and received two sealed pullandas along with FSL form from Ct. Sudhir. He put his seal and FIR no. on the aforesaid documents and got the case property deposited in the Malkhana.

23. Recovery Witness Ct. Sudhir, PW5 supported the case of the prosecution and deposed about the constitution of raiding party, apprehension of appellant, recovery of seized material and further investigation conducted in this regard. He identified the case property, i.e., post powder as Ex.P1 and P2 and carbon copy of the notice under Section 50 of NDPS Act.

24. PW6 Ct. Dev Raj deposed that on 21.09.2012 on the directions of the Investigating Officer, he took one sealed pulanda along with FSL form, forwarding letter, sample seal vide RC No. 148/21/12 and deposited the same with FSL Rohini and handed over the receipt and copy of FSL form to MHC(M) on his return at Police Station. During the tenure, the abovesaid sealed pulandas remained in his custody and were not tampered or allowed to be tampered.

25. PW7 Ct. Ambill Kuttan deposed that on 13.09.2012, special report under Section 57 of NDPS Act duly forwarded by SHO, PS-Kashmere Gate vide DD No. 163 dated 12.09.2012 was received by him, copy of which is Ex.PW7/A. Copy of the diary, where the receipt of the same is mentioned at Point A at serial no. 51, was proved as Ex.PW7/B.

26. The main contention raised by the ld. Counsel for the appellant is that since no public witness has joined the investigation, the testimonies of the police officials should not to be relied upon. However, on consideration of the testimony of the witnesses as well as the documentary evidence, no ground to discard the prosecution evidence is made out. It is established from the record that PW8, ASI Mahender Singh had asked many public persons to join the proceedings, but they did not cooperate. Moreover, no suggestion was given to the prosecution witnesses that no such efforts were made by the IO. Therefore, merely no public person joined the raid, the testimony of the witnesses cannot be disbelieved. It has been held in *Ajmer Singh (Supra)* that non joining of independent witness is not fatal to the prosecution case particularly when after making efforts, the police officer is not able to get the public witnesses associated with the raid or arrest of the culprit.

27. On evaluation of testimony of prosecution witnesses, who were the members of the raiding party, i.e., PW1 HC Chiranji Lal, PW3 Ct. Ravinder and PW8 ASI Mahender, it stands established that they remained consistent and confident in their depositions and no infirmities or discrepancies have emerged during their cross-examination. No contradictions favouring the defence of the appellant have come out from the cross-examinations of these witnesses. Thus, there is no reason to discard the credibility and reliability of these witnesses. Furthermore, from the documentary evidence, particularly

notice under Section 50 of NDPS Act, Ex.PW3/B and seizure memo Ex.PW3/D it stands proved that the proceedings have been conducted meticulously and in full compliance of the provisions of the Act. The appellant has given reply Ex.PW3/C to the notice under Section 50 of NDPS Act, which was reduced in writing, however, was not even challenged by the appellant during trial.

28. The testimonies of prosecution witnesses although they are police officials, inspire confidence and their statements were duly corroborated with the documents. No concrete reason has been attributed to them for false implication of the appellant. Even the appellant has not opted to lead defence evidence. The record reveals that the provisions of Sections 42, 50, 55 and 57 have been properly complied with. The samples were sent to FSL within reasonable time and thus the recovery of poppy straw from the possession of the appellant has been sufficiently proved. Though, it was argued by the Id. Counsel for the appellant that as per the DD entry, the post powder was 15 Kg., however, from perusal of the same it is clearly established that the quantity of the post powder was 16 kg and 1 kg for sample was taken out of it. However, as per FSL report dated 06.12.2012, the weight of sample was 1098.80 gm. approx. It is not in dispute that the weighing machine of the police and FSL was different. Therefore, marginal difference was obvious. This does not affect the prosecution case.

29. In view of above, I am of the considered opinion that the testimony of the prosecution witnesses is consistent and trustworthy and the recovery of the contraband, i.e., 16 kg of post powder from the possession of the appellant is clearly established. Accordingly, the prosecution has proved its case, before trial court, beyond doubt.

30. In view of the facts recorded above and the case law relied upon by the parties, I find no merit in the instant appeal. Therefore the judgment of conviction is confirmed.

31. The incident took place in the year 2012. More than 3 years have already passed. As per nominal roll dated 27.04.2015, the appellant has already undergone 2 years 7 months and 14 days of his sentence. Thus, as on date, the appellant has already undergone more than 3½ years of his sentence.

32. Keeping in view the sentence awarded to the appellant, the period of sentence already undergone by him and the fact that he is the sole bread earner of his family comprising of younger brothers, wife and old aged father, while maintaining judgment of conviction dated 24.03.2014, order on sentence dated 01.04.2014 is modified to the extent of period of sentence already undergone. Accordingly, the appellant be set free on the period of sentence already undergone. Accordingly, the Jail Authority is directed to release the appellant forthwith if not wanted in any other case.

33. The appeal is partially allowed accordingly.

34. A copy of this order be sent to the jail authorities for information and compliance.

SURESH KAIT, J

FEBRUARY 01, 2016

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