

*** IN THE HIGH COURT OF DELHI AT NEW DELHI**
RESERVED ON : 5th JUNE, 2017
DECIDED ON : 24th AUGUST, 2017

+ CRL.A.167/2013, CRL.M.A.Nos.12446/13 & 3396/17

MOHAMMAD BURHAN Appellant
Through : Mohd.Faraz, Advocate.

VERSUS

DIRECTORATE OF REVENUE INTELLIGENCE
..... Respondent
Through : Mr.Amish Aggarwala, Advocate
with Mr.Satish Aggarwala, Advocate.

CORAM:
HON'BLE MR. JUSTICE S.P.GARG

S.P.GARG, J.

1. Challenge in this appeal is a judgment dated 22.09.2012 of learned Addl. Sessions Judge in Sessions Case No.09A/08 by which the appellant – Mohammad Burhan was held guilty for committing offences punishable under Sections 21(c) and 29 of Narcotic Drug and Psychotropic Substances Act, 1985 (in short 'NDPS Act'). By an order dated 25.09.2012, he was sentenced to undergo RI for ten years with fine ₹1 lac each under Sections 21(c) and 29 of NDPS Act. The sentences were to operate concurrently.

2. Briefly stated, the prosecution case as reflected in the complaint was that on 17.08.2007 at about 05.00 p.m. Kamal Kumar, Intelligence Officer, Directorate of Revenue Intelligence (in short 'DRI') received a secret information on phone that two persons of the

given description would arrive at Yamuna Vihar Bus Stop on Wazirabad road at about 09.00 p.m. by a U.P. Roadways bus bearing registration No. UP 14M 6752 and they were in possession of narcotic drug in a shoulder bag. This information was recorded in writing (Ex.PW-2/A) and placed before senior officers. Complainant – Jyothimon Dethan was directed to take necessary steps.

3. Further prosecution case is that a raiding team was constituted and two public persons were called at the spot at about 08.30 p.m. to join the investigation. At around 08.45 p.m. the raiding team noticed two persons matching with the description given in the information (Ex.PW-2/A) alighting from the U.P. Roadways bus. When the individuals were trying to hail a pedal rickshaw, they were apprehended and introduced to the members of the raiding team and the panch witnesses. One of them was the appellant and the other one was Arif Butt – a Pakistani National (since Proclaimed Offender). They were informed about the secret information regarding narcotic drug in their shoulder bags. Since the spot was not conducive for thorough examination, they were taken to DRI office at D-Block, 7th Floor, I.P. Bhawan, I.P. Estate, New Delhi. Notices under Section 50 of the NDPS Act (Ex.PW-10A & Ex.PW-10/B) were served upon them. On search of the red and black colour shoulder bag carried by the appellant six polythene packets were found; these contained heroin. On weighing, its gross weight was 6.318 kg. and the net weight came to be 6.026 kg. On search of the bag carried by Arif Butt, ₹50,000/- were recovered; two bus tickets were also recovered in the personal search of the accused Arif Butt. All these articles were

seized and a panchnama was prepared after conducting necessary proceedings. During investigation, statements of the witnesses conversant with the facts were recorded. The appellant and his associate - Arif Butt were arrested; they recorded their statements under Section 67 of the NDPS Act. Upon completion of investigation, a complaint case was filed against the appellant and his associate - Arif Butt. It is relevant to note that during pendency of the trial, Arif Butt defaulted in appearance and finally he was declared Proclaimed Offender vide order dated 05.08.2010.

4. To establish its case, the prosecution examined total fourteen witnesses. In 313 Cr.P.C. statement, the appellant denied involvement in the crime and pleaded false implication. The trial resulted in conviction as aforesaid. Being aggrieved and dissatisfied, the instant appeal has been preferred by the appellant.

5. Learned counsel for the appellant urged that the Trial Court did not appreciate the evidence in its true and proper perspective and fell into grave error to base conviction on the sole testimony of PW-10 (Jyothimon Dethan). No independent public witness was produced for examination to corroborate his version. The appellant was falsely implicated in this case and nothing was recovered from his possession. Learned counsel for DRI urged that there are no valid reasons to disbelieve the testimonies of the police officials who had no prior animosity with the appellant to falsely implicate him in the crime. The huge recovery from appellant's possession cannot be doubted.

6. On perusal of the evidence on record, it transpires that appellant's conviction is primarily based upon the sole testimony of PW-10 (Jyothimon Dethan), the Investigating Officer. His testimony has not been corroborated by any other member of the raiding team. In the examination-in-chief, he informed that the raiding team consisted of he himself, SIO S.K.Sharma, IO D.P.Saxena, IO Kamal Kumar, IO R.Roy and IO Madan Singh. However, none of the members of the raiding team in whose presence the contraband was recovered from the appellant's possession was examined. No plausible explanation has been offered by the investigating agency as to why all these material prosecution witnesses were not produced for examination. Seemingly, a trend has emerged not to examine the other members of the raiding team, apparently, to avoid inconsistencies or contradictions emerging in their cross-examination. PW-1 (R.Roy) to whom search warrant (Ex. PW-1/A) for search of the premises at V-96, Gali No.1, Khajurwali Gali, Arvind Nagar Mohalla, Brahmpuri, Delhi was issued by PW-2 (Pankaj Kumar Singh) appeared as a witness. He deposed that he had searched the said premises on 19.08.2007; however, nothing incriminating was recovered from there. PW-1 (R.Roy) did not claim if he was member of the raiding team at the time of recovery of the contraband from appellant's possession on 17.08.2007. The prosecution also examined PW-5 (S.K.Sharma); he had issued DRI seal No.10 to IO Jyothimon Dethan on 17.08.2007. He did not depose beyond issuance of the DRI seal No.10 and its return on 18.08.2007 at 02.00 a.m. He too did not assert if he was member of the raiding team constituted by the

Investigating Officer or had participated in the proceedings at the time of recovery of the contraband. He did not claim if recovery of narcotic drugs was effected in his presence or he had put signatures on various documents allegedly prepared by PW-10 (Jyothimon Dethan).

7. The prosecution has claimed that at the spot two independent public witnesses Manoj and Suresh were associated and the recovery was effected in their presence. However, both these witnesses were not examined during trial. The addresses allegedly given by them were found incorrect. This Court has noticed in various cases investigated by DRI officials including the present one that names of certain individuals are recorded in the proceedings to have joined the investigation. However, these so called independent public witnesses are not produced during trial. A general excuse is given that the addresses given by such individuals were incorrect and the investigating agency was not in a position at that time to verify it. This explanation does not inspire confidence. The secret information was received at around 05.00 p.m. at the DRI office. The perpetrators of the crime were to arrive at around 09.00 p.m. as recorded in the secret information (Ex.PW-2/A). Apparently, the DRI officials had sufficient and ample opportunity/time to procure independent public witnesses having fixed places of residence or work; it was not done so. The raiding team without associating any independent public witness from the nearby place proceeded to the spot. Only at the spot, two individuals whose identity is unknown were purportedly joined in the investigation. Strange enough, these two individuals were available to the Investigating Officer for recording their statements under Section

67 NDPS Act subsequently. However, when turn came to record their statements before the Court they were not traceable and available. Seemingly, no such individual was associated during the investigation and only their names were incorporated to obviate the contention that independent public witnesses were not joined at the time of recovery. Joining of independent public witness is not a mere formality; it is a vital safeguard to avoid false implication of the individual. In number of cases either no independent public witnesses are associated on the pretext that none of them is available; in some cases only passersby are requested to join the investigation. Recent trend has emerged to just put the names of certain individuals in the proceedings and subsequently during trial to claim that independent public witnesses were associated during investigation but could not be examined during trial due to their non-availability. Number of cases have been noted where no such individuals are produced on the ground that their addresses were not found correct. It cannot happen in most of the cases. Non-examination of the independent public witnesses, in the instant case, is a serious flaw and adverse inference is to be drawn against the prosecution for withholding them. The Investigating Officer did not opt to join the conductor and driver of the bus from where the appellant and his associate had allegedly alighted.

8. Secret information allegedly received on 17.08.2007 by PW-3 (Kamal Kumar) on phone was recorded on a loose sheet / paper. It was not reduced into writing in any register duly maintained in the office. The investigating agency has failed to explain as to why such information was not recorded in the duly maintained register to avoid

its manipulation. Though recording of the secret information under Section 42 of NDPS Act in the register is not mandatory, however, to ensure that such an information was received and to attach certain sanctity to it, it is impressed in number of cases that such an important information should be recorded in a duly maintained register having serial number. This is never done by the Investigating Officers for the reasons known to them. PW-3 (Kamal Kumar) informed that the secret information was not received by him from the secret informer directly; it was received in the control room of the office. It is unclear as to why the secret information was received only by PW-3 (Kamal Kumar) when other senior officers were available in the office. The secret information did not reveal the names of the culprits. It is silent as to what was the quantity of the contraband being carried by a specific individual. The prosecution has not been able to establish as to from where the appellant and his associate - Arif Butt had originated their journey and when they both came into contact with each other.

9. No Call Detail Records have been placed on record to ascertain if both - the appellant and Arif Butt were acquainted with each other or were in constant touch. It is unclear as to when both of them hatched conspiracy to procure huge quantity of contraband. The investigation is silent as to from where the contraband was procured; by whom it was procured; for what consideration it was purchased. It is also not ascertain as to whom the contraband was to be delivered. The Investigating Officer did not wait to find out as to, to whom the appellant and his associate were to deliver the contraband. Arif Butt

was not found in possession of any contraband. His motive to remain present with the appellant is not established. The appellant retracted the confessional statement allegedly made by him under Section 67 of NDPS Act on 01.09.2009. It was revealed by him that he was in possession of mobile No.999777904, however, no efforts were made by the investigating agency to collect Call Detail Records pertaining to the mobile in question. The appellant was a resident of Aligarh. Nothing incriminating was recovered from his residence in the follow-up action. The Investigating Officer was unable to disclose the number of the vehicles used to reach the spot. For no plausible reasons, log books pertaining to the vehicles used for apprehension of the appellant were not produced or proved.

10. The sole testimony of the Investigating Officer - PW-10 (Jyothimon Dethan) is not enough to prove the case of the prosecution beyond reasonable doubt. The offences under the NDPS Act are punishable with stringent sentence and the prosecution is required to establish its case beyond reasonable doubt irrespective of the weakness of the appellant's case. All the proceedings were conducted at the DRI office so much so the panchnama dated 17.08.2007 is computer typed. Notices under Section 50 NDPS Act (Ex.PW-10A & Ex.PW-10/B) appear to be a mere formality; they seem to have been prepared in advance.

11. PW-10 (Jyothimon Dethan) disclosed in the cross-examination that he had not recorded the statement of any other official of the DRI who had participated in this case; their statements under Section 67 of NDPS Act were not recorded. All the witnesses

of the prosecution are located at same office premises. The Court notices in various cases that the officials merely change their roles while carrying out different investigations.

12. The investigation conducted by the investigating agency is not up-to-the-mark and suffers from apparent defects and material irregularities. Appellant's conviction on the solitary statement of the Investigating Officer who is interested in the success of his case cannot be sustained in the absence of any independent corroboration.

13. In the light of above discussion, the appeal is allowed. Conviction and sentence recorded by the Trial Court are set aside. The appellant shall be released forthwith if not required in any other case. Crl.M.A.12446/2013 also stands disposed of.

14. Trial Court record be sent back forthwith with the copy of the order. Intimation be sent to the Superintendent Jail.

CRL.M.A.No. 3396/2017 in CRL.A.167/2013

The above application has been moved by the respondent for destruction of case property i.e. 6.026 kg heroin and representative samples.

The case property as well as the representative samples be destroyed as per rules after the expiry of period of appeal.

The application stands disposed of.

**(S.P.GARG)
JUDGE**

AUGUST 24, 2017 / tr