

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

% *Judgment Reserved on: August 22, 2017*
Judgment Delivered on: August 31, 2017

+ **CRL.A. 1083/2016**

MOHD. ASHRAF Appellant

Through: Mr.Harsh Prabhakar, Advocate
with Mr.Anirudh Tanwar,
Advocate

versus

STATE Respondent

Through: Mr.Kewal Singh Ahuja, APP
for the State with SI Rakesh
Kumar Special Cell NR

CORAM:
HON'BLE MS. JUSTICE PRATIBHA RANI

JUDGMENT

CRL.A. 1083/2016

1. The appellant Mohd. Ashraf impugns the judgment dated 9th August in Sessions Case No.17/12 arising out of FIR No.9/2012, under Section 21(c), 22(c) and 20(b)(ii)(C) of the NDPS Act, PS Special Cell, by which he has been held guilty under Section 21(c), 22(c) & 20(b)(ii)(C) NDPS Act and sentenced as under:

Offence	Sentence
U/S 21(c) NDPS Act	RI for 10 years and fine of ₹1 lakh. In default SI for 2 months.

U/S 22(c) NDPS Act	RI for 10 years and fine of ₹1 lakh. In default SI for 2 months.
U/S 20(b)(ii)(C) NDPS Act.	RI for 10 years and fine of ₹1 lakh. In default SI for 2 months.

The substantive sentences awarded to the appellant were ordered to run concurrently.

2. In brief the prosecution case is that on 3rd April, 2012 at about 12:30 PM secret information was received in the office of Special Cell/NR that the appellant Mohd. Ashraf, who was a drug supplier, would come at 4:30-5:00 PM from Jagat Cinema side to go towards Matia Mahal side via Jama Masjid, Gate No.1 to supply Heroin. The information was recorded vide DD No.11 and after apprising the Inspector, it was produced before the ACP, Special Cell along with the informer. Raiding party was constituted and efforts were made to join public witnesses but none agreed. After reaching Jagat Cinema naka bandi was done. At about 4:50 PM, appellant Mohd. Ashraf, who was identified by the secret informer, came with a black colour rexin bag and after walking towards Matia Mahal for about 100 mtr., waited for someone. After about 10 minutes he tried to call someone and thereafter proceeded towards Jama Masjid, Gate No.1 and was followed by the members of the raiding party. When he started taking hasty steps on seeing the members of the raiding team, he was apprehended at about 5:00 PM near National Guest House Jama Masjid. Again efforts were made to join public persons but none agreed. After compliance of Section 50 NDPS Act, the bag carried by

him was searched and was found containing 1 kg. Heroin out of which two samples of 5 grms. each were separated and procedure regarding sealing and seizure was completed. Thereafter Rukka was sent for registration of the case and the sealed case property with FSL form was handed over for production before the SHO, PS Special Cell. SHO affixed his seal on all the pullandas and documents and also put the FIR number on the carbon copy of seizure memo. FSL form and all the pulandas were deposited with the MHCM.

3. Further investigation was handed over to SI Virender Tyagi. During interrogation, supplementary disclosure statement of the appellant was recorded wherein he had disclosed that 1 kg. of heroine, which was purchased by him from Mohd. Alam, was kept in his house No.18, A-Block, Gali No.1 near Tagore Public School, Dayalpur, Delhi. He also disclosed that 1.5 kg charas was also kept at his house which was given to him by Azad. The appellant further disclosed that on 4th April, 2012 at about 8.00 am Alam would come to Bhajanpura Chowk near Mazaar to deliver half kilogram of heroine and he would give money to Alam for the same. Another raiding party was constituted by SI Virender Tyagi and recovery was effected from Alam. Since Alam has expired and proceeding against him stands abated, it is not necessary to mention the details of the recovery made from Alam.

4. The third recovery was made next day at the instance of the appellant Mohd.Ashraf from his residence. He led the police raiding team to the first floor of the house where one iron box was kept in a corner of the room. Accused Mohd.Ashraf opened the said box and

produced one milky colour polythene and informed that there was Heroin in the packet. The substance of the packet was checked with the help of field testing kit which gave positive for Heroin. The recovered substance was also weighed and its weight came out to be 1 kg. After taking the samples from such substance the case property was sealed and seized. FSL form was also filled.

5. Another polythene produced by the appellant Ashraf from the same iron box was informed to be Charas weighing 1.5 kg. Two samples of 25 grms. of each were separated from the said Charas and the case property was sealed and seized. After completion of the proceedings the appellant along with the seized case property were taken to the PS Special Cell and case property was produced before the SHO who after affixing his seal deposited the same in malkhana. Special report under Section 57 NDPS Act was prepared and sent.

6. The appellant was charged for committing the offence punishable under Section 21(c), 20(b)(ii)(C) and 21(c) and 29 NDPS Act. The accused pleaded not guilty to the said charge and claimed trial.

7. Prosecution examined 26 witnesses in support of its case. The appellant examined his wife in his defence.

8. Learned Trial Court after considering the evidence led by the prosecution, held that the recovery of Heroin of 1 kg. from Mohd. Ashraf, near Jama Masjid, Gate No.1 on 3rd April, 2012 and further recovery of 1 kg. Heroin and 1.5 kg. Charas from his residence was duly proved by the prosecution. It was also held that non-joining of public witnesses in this case was not fatal and considering the heavy

recovery of Heroin and Charas from Mohd. Ashraf and at his instance, ruled out that it was planted. The learned Trial Court while convicting him for the offences punishable under Section 21(c), 20(b)(ii)(C) and 22(c) NDPS Act, acquitted him of the charge under Section 29 NDPS Act as prosecution failed to prove the charge of conspiracy with the co-accused Mohd. Alam who had expired.

9. Learned counsel for the appellant Mr. Harsh Prabhakar, has placed on record summary of written submissions and also made oral submissions.

10. Learned counsel for the appellant submits that it is a case where the appellant was apprehended from a thickly populated area in old Delhi near Jama Masjid. Despite that no plausible explanation has been given for non-joining of the public witnesses which itself raises a doubt in the entire prosecution case. It has also been contended that there are material contradictions as to how the secret information was conveyed to the ACP i.e. by personally visiting or telephonically. Inspector Attar Singh, who informed about the secret information received, has also not been examined during trial. It has also been contended that though the appellant was seen making a call from his mobile but no effort was made to know as to whom he was calling. The Call Detail Record of the mobile phone being carried by the appellant shows that even after his apprehension he was receiving calls on his mobile phone that itself strikes a discordant note with the prosecution case. The ownership of the mobile phone being used by the appellant has not been proved. The calls on mobile numbers used by the appellant were intercepted and taped but still the transcript does

not disclose that he was scheduled to meet co-accused Mohd. Alam at Bhajanpura or someone else at Jama Masjid/Matia Mahal. The black colour rexin bag which the appellant was carrying was not seized. Even during search of the house of the appellant, no public witness was joined and there is discrepancy in the statement of the prosecution witnesses as to whether landlord/land lady was contacted or not and whether the appellant accompanied the raiding team to his house, as PW-3 Moorti Devi deposed that when the police officials visited, the accused was not with them. There is also discrepancy about the shape of the Charas being recovered. As per prosecution case that 12 long stripes of Charas have been recovered from the house of the appellant but the learned Trial Court observed that twelve plate type substance stated to be Charas were produced. Learned Trial Court also failed to note that the defence witness was produced by the appellant i.e. DW-1 Zareena, his wife but in para 39 of the judgment it is noted that no defence witness was produced. He has been acquitted of the charge of conspiracy under Section 29 NDPS Act and no appeal has been preferred by the State against order of acquittal under Section 29 NDPS Act.

11. It has been contended that in view of the above submissions, recovery of heavy/commercial quantity, in itself is no ground to believe the prosecution witnesses who are police officials as public witnesses have not been joined, despite they being available at each place.

12. Learned APP for the State submitted that learned Trial Court has referred to the testimony of the recovery witnesses in detail before

returning the finding that 1 kg. of Heroin was recovered on 3rd April, 2012 when the appellant was apprehended from Jama Masjid, Gate No.1 and third recovery of 1 kg heroine and 1.5 charas was made on the next day at his instance from his house from an iron box. It was only during interrogation of the appellant after his apprehension that co-accused Alam was apprehended from whom also recovery was effected but since he has already expired no discussion is required in this regard. It has been contended that merely because public witnesses have not been joined in itself is no ground to discard the testimony of the prosecution witnesses who have absolutely no enmity towards the appellant to falsely implicate him in such a heinous offence.

13. Learned Trial Court has convicted the appellant under Section 21(c), 22(c) & 20(b)(ii)(C) NDPS Act Inter-alia for the following reasons:-

(i) All the mandatory/directory requirements under Section 42, 50 and 57 of NDPS Act have been complied with. It being a case of recovery of heroine from the rexin bag on 3rd April, 2012 and heroine and charas from the iron box next day from his residence, requirement to serve a notice under Section 50 NDPS Act, though served, was not mandatory.

(ii) While rejecting the contentions regarding non-seizure of the black colour bag or preparing the list of other articles contained therein, observed that though the Investigating Officer should have been vigilant to do the same but in view of the credible testimony of the prosecution witnesses, no benefit can be given to the accused for

defect in the investigation unless any prejudice has been caused to the accused. Non-seizure of the bag can only be a irregularity.

(iii) There is no tampering with the case property as the link evidence has been examined to prove that right from the stage of seizure of the case property till it was sent to FSL it was not tampered with. The sample has been sent after about six days and there was no delay in this regard.

(iv) The discrepancies/contradictions in the statement of prosecution witnesses itself is no ground to discard their testimony as the witnesses do not possess photographic memory to recall the incident as held in Bhagin Bhai Hirji Bhai vs. State of Gujarat AIR 1983 SC 753.

(v) Non-joining of public witnesses does not create a dent in the case of prosecution as held in State of Kerala vs. M.M.Mathew 1978 CrL.L.J. 1690.

14. At the outset, it is necessary to note that Mr.Harsh Prabhakar representing the appellant has fairly conceded that all the mandatory requirements under the NDPS Act have been complied with in this case. He has laid emphasis mainly on the issue of non-joining of public witnesses despite having ample opportunities especially when the recovery has been claimed to be made from near Jama Masjid and the residence of Mohd.Ashraf which is very thickly populated area.

15. In the instant case, it is not in dispute that the mobile phones in use by the appellants were under surveillance. Irrespective of the fact that during the conversation intercepted, the meeting with the Alam near Gate No.1, Jama Masjid was not detected, the fact remains that the secret information was received and recorded in DD Ex.PW15/A.

It was to the effect that on 3rd April, 2012 at 12.30 pm the secret informer visited the office of Speciall Cell (NR), Delhi and informed SI Jitender Tiwari that one Mohd. Ashraf @ Puttan, R/o Village Dayal Pur, Delhi, who is in the business of supplying heroine would come between 4.30 pm to 5.30 pm from Jagat Cinema side and via Jama Masjid Gate No.1 would go towards Matia Mahal Chowk side to supply heroine to someone. It has been proved on record by the prosecution witnesses constituting raiding party that not only on way to Jagat Cinema but even after reaching there, efforts were made to join public witnesses but none agreed and thereafter the appellant was apprehended and recovery of 1 kg heroine was effected from the black colour bag he was carrying.

16. It is, no doubt, true that the place of apprehension is a congested area and public witnesses could have been joined. However, explanation has been given by the members of the raiding team that efforts made in this regard could not succeed as none was willing.

17. The main thrust of the argument on behalf of the appellant is that not only Jama Masjid area is thickly populated, even the house of the appellant is situated in a residential area and if landlord was an old person, his family could have been made witnesses to the recovery. This argument is of no help to the appellant for the reason that if they could have been cited to prove that the appellant was residing as a tenant in the property had they been willing to join the seizure proceedings, then they could have been made witness to the recovery as well.

18. The appellant in his statement under Section 313 Cr.P.C. has denied the case of the prosecution. The defence of the appellant before the learned Trial Court has been recorded in answer to question No.53. In his own words his defence is as under:

“I am innocent. I have been falsely implicated in this case. On 3/4/2012 I had gone to one Doctor Mahesh behind Golcha Cinema to take medicine for treatment of stone for my wife in between 9:00-10:30 a.m. I was apprehended by some persons who were in civil clothes near a police post. Thereafter I was falsely implicated in the present case. I was doing work of selling the parts of mobile. I categorically state that nothing was recovered from my possession or at my instance from my residence. I even did not know my co-accused Alam prior to the case. I am illiterate. My signatures were obtained on many blank and semi written papers forcibly by threatening me. I am innocent.”

19. From the arrest memo Ex.PW15/D of the appellant, it is proved that after his arrest in this case on 3rd April, 2012 SI Virender Tyagi (NR) informed Ms.Zareena, wife of the appellant on Mobile No.9953486906 about his arrest. This arrest memo is also signed by the appellant.

20. Although not noted by learned Trial Court, the defence witness examined by the appellant is his wife Ms.Zareena (DW-1). Ms.Zareena has admitted that she was informed on 3rd April, 2012 about the arrest of her husband. Her statement is extracted hereunder:

“DW-1 Statement of Ms.Zareena, w/o Ashraf, r/o 279, Nehru Vihar, Near Bhajanura, Delhi.

On S.A.

I have brought my Aadhar card bearing no.5323 6738 8428 and copy of the same is Ex.DW1/1 (OSR). I am suffering from problem of stone in pitt ki thaili. On the date of incident my husband Mohd.Ashraf had gone to the clinic of Dr.Mahesh at Daryaganj to take my medicine. He did not return home. I tried to contact him on phone but in vain. In the evening, I received a telephone call of police and in pursuance of the same, I went there and I came to know that my husband had been arrested by the police in this case. I am still under treatment from Lady Harding Medical College vide OPD vide OPD No. 14948 dated 07.03.2016. The prescription slip of the said date is Ex.DW1/2 (OSR).

XXXX by Ld.APP for the State.

I do not remember the date of incident. I do not have any documentary evidence to show that my husband had gone to Dr.Mahesh at Daryaganj to take my medicine. Vol.Dr.Mahesh said that it was old matter and he did not have any record of the same. I do not have any treatment papers of Dr.Mahesh to show that I was under his treatment. It is correct that neither myself nor any other member of our family was accompanying my husband at the relevant time. Vol.I was not well and I have small children. Earlier my husband was a junk dealer but later on he started selling mobile covers and mobile chargers for the livelihood. I do not know what was the earning of my husband. My husband used to give me around ₹8,000/- per month. I have five daughters. We live in a rented accommodation and I am paying ₹1300/- per month as rent. It is wrong to suggest that my husband was involved in the selling of narcotic drugs. It is correct that the police did not have any enmity with my husband. I and my family were not harrassed by the police after the registration of this case till date.”

21. From the statement of DW-1 Zareena, his wife, the contents of the arrest memo of the appellant stands confirmed. Though she had received information about the arrest of her husband on the same day and met him, she did not complain to any authority that her husband left home in the morning to buy medicines for her. She also did not make any call to him to find out his whereabouts when he failed to return with the medicines within a reasonable time. Thus, her testimony in this regard cannot be accepted.

22. Further recoveries have been effected from his residence on 4th April, 2012. The wife and son of the landlord have been examined to prove that the appellant was a tenant on the first floor of their house. However, the wife of the appellant when examined as DW-1 is silent in respect of the recovery effected from their house. No doubt, the landlady has stated that when the police came to their house, the appellant was not with them. But it appears that she could notice the police officials only. Had the recovery of heroine and charas from the residence of the appellant being in his absence by the police only, his wife Zareena (DW-1) would have deposed in this regard.

23. The appellant or his wife have not disputed that they were residing as tenant at House No.A-1/18, Dayalpur, Delhi on the first floor on monthly rent of ₹1,000 per month. The case of the prosecution that it was the appellant who after his interrogation led the police party to his residence and got 1 Kg. Heroin and 1.5 kg. Charas recovered, stands corroborated from the fact that PW-13 Moorti Devi, her son Jai Prakash (PW-14) though not witness to the recovery have proved that the police visited the premises wherein the appellant along

with his family was tenant on the first floor which fact was further proved from the tenant verification form Ex.PW-13/B.

24. The appellant has not placed on record any documentary evidence that he was dealing in mobile spare parts, place of business, any invoice, bill of purchasing the parts of mobile or its sale were proved.

25. DW-1 Zareena, wife of the appellant has specifically stated that the police had no enmity with her husband and she or her family members were not harassed by the police after the registration of this case. This proves that the police officials have conducted the investigation in a fair manner. There being three raiding parties who recovered the Heroin and Charas at three different times from three different places.

26. Whether the conviction can be based on the testimony of official witnesses has been examined in catena of judgments. In the decision reported as Mahatam Prasad vs. State of Delhi in Crl.A.No.78/1995 decided on 1st September, 1996, this Court has observed as under:-

'(9) This Court in Horilal Vs. State 1996 Jcc 410 has also held that the testimony of a witness should not be disbelieved merely on the ground that he happened to be an official witness. In Sudarshan Vs. State, it has been again held by this Court that "after all there was some urgency in organising the raiding party so that the raid may not fall with I.O. spending more time in making efforts to join some more public witnesses. It is evident that if I.O. had proceeded to make efforts to join shopkeepers and persons from the offices, the same would have taken a considerable time and thereby would have allowed the opportunity to apprehend the culprit slipped from his hand". In

case, the police officials had proceeded' to book those persons who had refused to join the raiding party so as to prosecute them under Section 187 of the Ipc, they would have not been able to apprehend the real culprits. It depends upon the facts and circumstances of each case as to when and how a person should be prosecuted under Section 187 Indian Penal Code for his having refused to join the raiding party. In the present case, the information was received by the I.O. while he was on petrol duty and he could not have, Therefore, lost any time in organising the raiding party and I, Therefore, do not find any infirmity in the investigation or trial merely because independent witness could not be associated in the raid. In my opinion, it cannot be laid down as broad proposition of law that if public witnesses are not joined in the raiding party, the recovery effected by the police is always' doubtful or that the accused should not be convicted merely on their statement. It has not been even suggested nor has been pointed out to me or to the trial Court that the police had any enmity with the appellant or there was any motive in their implicating him. The testimony of the witness in my view would not be doubted or discarded merely on the ground that he happens to be an official witness. I have gone through the statement of all the witnesses and I do not find any reason as to why they should be disbelieved. There is no infirmity in the statement of any of the prosecution witnesses and I have no hesitation in accepting their testimony.'

27. Merely because the place of apprehension is thickly populated area or public witnesses were available is no ground to discard the testimony of official witnesses. It is also a matter of common knowledge that public persons do gather at the spot, to see a person in custody and ongoing proceedings but are reluctant to join as witness. The recovery of contraband from the possession of the appellant on 3rd April, 2012 near Jama Masjid and on the next date i.e. 4th April, 2012 from his residence is commercial quantity and the possibility of his

involvement in false case is ruled out especially when there are no cogent reasons for his false implication in this case. The investigating agency has clearly come out with the information that the appellant was on their radar and his mobile phones were under surveillance, calls were intercepted and that he was apprehended on the basis of specific secret information about time and place of his arrival to supply the Heroin.

28. In view of my discussion as above, I am of the view that prosecution had successfully proved its case against the appellant Mohd. Ashraf beyond reasonable doubt. Since the appellant had been awarded minimum sentence prescribed for the offence and the sentences have been ordered to run concurrently, no interference is warranted even on this aspect.

29. The appeal is dismissed.

CRL.M.B.1280/2017

Dismissed as infructuous.

**PRATIBHA RANI
(JUDGE)**

AUGUST 31, 2017
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