

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

Judgment Reserved on: 2nd April, 2018
% *Judgment Delivered on: 17th September, 2018*

+ **CRL.A. 79/2017**

KINUANI FEZA JOHNSON Appellant

Represented by: Mr. Nitish Chaudhary,
Advocate for Mr. Chetan
Lokur, Advocate.

Versus

DRI Respondent

Represented by: Mr. Satish Aggarwala,
Advocate.

CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA

MUKTA GUPTA, J.

1. The present appeal is directed against the judgment dated 30th July, 2013 passed by the learned ASJ/Special Judge, NDPS whereby appellant was convicted for the offence punishable under Section 21(c) of Narcotics Drugs and Psychotropic Substances Act, 1985 (in short 'NDPS Act') and the order on sentence dated 3rd August, 2013, whereby she was sentenced to undergo rigorous imprisonment for a period of ten years and to pay a fine of ₹1,00,000/- and in default of payment of fine, to further undergo simple imprisonment for six months.

2. Briefly stated, prosecution case is that on 2nd February, 2009 at about 10:00 A.M., Kamal Kumar (PW-1), Intelligence Officer DRI, received a specific information on telephone that one African Lady wearing blue pants, light brown jacket and a shawl would bring some narcotic drugs concealed on her person or in a dark brown coloured bag and she would reach near B-22/21, Vasant Vihar, New Delhi at about 12:00 hours on the same day.

Aforesaid information was reduced into writing vide Ex.PW-1/A and put up to B. K. Banerjee (PW-2), Appraiser, GI Section of DRI Head Quarter, New Delhi. B. K. Banerjee, after perusing the information, issued directions to Jyotimon Dethan (PW-4) for constituting a team for search and seizure. Jyotimon Dethan along with the officers of DRI and one lady officer namely Poonam Aggarwal (PW-7) went to the spot and at around 11:30 A.M., two public witnesses namely Ashok Kumar and Imranuddin were called and he told them about the aforesaid information and they were requested to remain present and witness the search proceedings, to which they agreed. The team of officers kept a discreet watch on the spot and at about 12:10 P.M., one African lady carrying a brown colour bag was noticed. Thereafter, they went towards the lady and intercepted her. They disclosed their identity to the lady as officers of DRI. The lady revealed her name as Kinuani Feza Johnson (appellant herein) and that she was a Congo National. Kinuani Feza Johnson was asked about the concealment of narcotic drugs and she denied the possession of the same. Thereafter, she was told that her personal search was required to be conducted and since the place of interception was not a proper place for search, being a busy place, thus she was asked to accompany the team of officers and witnesses to the office of DRI situated at IP Estate.

3. On reaching the office, notice under Section 50 of NDPS Act was given to Kinuani Feza Johnson by Jyotimon Dethan and she was informed that she had the legal right to get her personal search or search of her bag conducted in the presence of a Gazetted Officer or a Magistrate and she noted her reply in writing on the notice that any lady officer of DRI can take her search and that of the bag. Notice under Section 50 of NDPS Act was

proved vide Ex.PW-4/A. Poonam Aggarwal conducted personal search of Kinuani Feza Johnson in complete privacy and in the personal search, nothing incriminating was recovered except her passport. On searching her brown colour bag, 16 packets were found. Those 16 packets were transparent polythene packets inside which there was a cloth packet containing some rubber stamp marking. Inside the cloth packets was another transparent polythene packet which contained off white coloured granular substance. Cloth packets were given marking as X1 to X7, Y1 to Y7 and Z1 to Z3. Net weight of the contraband was 16.231 kg. Search of residential premises of Kinuani Feza Johnson at B-2/21, 2nd floor, Vasant Vihar, New Delhi was also conducted. Search authorization was proved vide Ex.PW-6/B. After conducting the search, panchanama was prepared vide Ex. PW-13/A.

4. Statement of Kinuani Feza Johnson was recorded vide Ex.PW-4/F. Her passport was seized vide memo Ex.PW-4/G. Her arrest cum jamathalashi memo was proved vide Ex.PW-4/H. Report under Section 57 of NDPS Act was proved vide Ex. PW-2/A. Summons were issued to Ashok Kumar vide Ex. PW-4/J. Statement of Ashok Kumar was recorded on 16th March, 2009 vide Ex.PW-4/K. On 20th April, 2009 summons were issued to Imranuddin and acknowledged copy of summons was proved vide Ex.PW-4/L. Statement of Imranuddin was recorded under Section 67 of NDPS Act vide Ex. PW-4/M.

5. Assailing the conviction, learned counsel for the appellant contended that the search of the appellant is tainted as notice under Section 50 NDPS Act was given only at DRI office even though the appellant was apprehended from below her house. The appellant cannot be fastened the

liability of conscious possession as the alleged contraband was in 2 opaque covers and it is difficult to carry a bag weighing 16 kgs. Chain of custody of brown bag has not been proved. Furthermore, two public witnesses allegedly joined the search and arrest proceedings, however, Ashok Kumar was not traceable and Imranuddin who was examined as PW-11 turned hostile. Reliance was placed upon the decision of the Supreme Court reported as (2013) 16 SCC 31 Tofan Singh v. State of Tamil Nadu. While placing reliance on the decision of this Court reported as 233 (2016) DLT 547 Jagroop Singh @ Ceeta v. Directorate of Revenue Intelligence, it was submitted that joining of independent witnesses in investigation is not a mere formality and no sincere efforts were made to examine the witnesses. It was also urged that no sanctity can be attached to statement recorded under Section 67 NDPS Act when the appellant was in the custody of DRI officers for the whole day. No plausible explanation was given for not conducting the necessary proceedings at the spot from where the appellant was apprehended.

6. Per contra, learned counsel for DRI submits that the panchnama Ex.PW-4/A dated 2nd February, 2009 gave the reasons for taking the appellant to the DRI office and not conducting the necessary proceedings at the spot. Compliances of all necessary procedure established by law have been done. Further since the recovery of the contraband was from the bag, there was no necessity of giving notice under Section 50 NDPS Act. In view of Section 35 and 54 of the NDPS Act onus was on the appellant to rebut the presumption that she was not in conscious possession of the contraband. Even though Ashok Kumar was not found residing at the address mentioned and Imranuddin turned hostile, no inference can be

drawn that the public witnesses were planted. Retraction application was filed after one month from the date of first appearance before the Court hence no credibility can be attached thereto. Further the retraction was not proved by the appellant.

7. Jyotimon Dethan, Intelligence Officer who was the search and seizing officer, Ms. Poonam Aggarwal, the lady officer who took the search of the appellant and R.Roy (PW-13) deposed in sync with the contents of the complaint noted above and the crime scene. Ms. Sheela Devi, Senior Intelligence Officer deposed that on 2nd February, 2009 statement of Ms. Kinuani Feza Johnson who was present in Court was recorded in her presence which bears his signatures.

8. Kamal Kumar deposed about the specific information received by him at 10.00 AM on 2nd February, 2009 while working as an Intelligence Officer in DRI which he conveyed to B.K. Banerjee his senior officer on whose directions Jyotimon Dethan constituted a team and conducted search and seizure. Ram Kanwar (PW-5) who retired as Tax Assistant, Headquarter stated that on 3rd February, 2009 he was called by K.K. Sood, Assistant Director, DRI and was asked to deposit the sample packet to CRCL. He handed over 16 sample packets for depositing along with the test memos and forwarding letter which he duly deposited against acknowledgment receipt.

9. K.K. Sood (PW-6) deposed about the issuance of search warrant in favour of R. Roy and the search authorization issued by him vide Ex.PW-6/B and that after seizure and seal of the case property and completion of the documents the same were handed over to him in safe custody on 2nd February, 2009 and he authorized Ram Kanwar to deposit the same in the CRCL along with the text memo and authorization letter and also deposit the

seized goods in valuable godown, New Customs House, New Delhi.

10. J.M. Sharma (PW-9) also appeared in the witness box to depose that on 3rd February, 2009 while working as Inspector, In-charge of Armoury Godwon, he received the case property which he deposited and thereafter handed over on 7th February, 2009 to Lakhi Ram.

11. Lakhi Ram (PW-8), Inspector, Customs ICD, TKD, New Delhi stated that on 7th February, 2009 he received a sealed case property from the Armory Godown, Customs as it pertained to the valuable godown through J.M. Sharma, Inspector In-charge, Armoury Godown and he deposited the same.

12. Imran Uddin (PW-11) stated that on 20th April, 2009, he was in his factory at T-759, DCM Road, Bara Hindu Rao (Tyre Market). He didn't know anything about the instant case and he had never visited Vasant Vihar on the above date. He further stated that he had not signed any document pertaining to the present case and that he had never given or made any statement to the DRI officers in connection with the present case. During the cross examination, he denied the suggestion that on 2nd February, 2009, he was passing through D-2 Block, Vasant Vihar and at around 11:30 hours he was requested by the officers of DRI to join the proceedings with regard to the interception of one African Lady who would be carrying the narcotic drugs and she would be coming around 12 hours on that day. He also denied the suggestion that one lady officer of the DRI team had informed him that the team of officers had intercepted one African lady and requested him to witness the search proceedings for which he voluntarily agreed.

13. Bhuwan Ram (PW-10) stated that on 3rd February, 2009, Sh. S. C. Mathur, the then Chemical Examiner, In-charge Narcotic Section had

directed him to receive 16 sealed sample packets brought to laboratory by the officer of DRI for the purpose of analysis. He further stated that the aforementioned sealed sixteen sample packets were having marks X1A to X7A, Y1A to Y6A, Z1A to Z3A. After he had satisfied himself that the seals of the above packets were intact condition and he also tallied the facsimile of the seal appearing on the sample packet with the facsimile given on the test memo which were also brought along with the above sample packet, the same were diarised by him vide Diary No. 31 dated 3rd February, 2009 and the same were registered in the laboratory vide CLD No. 84 to 99 (L). Acknowledgment receipt was proved vide Ex.PW-5/B.

14. Dr. Raj Kumar (PW-14) stated that he was working as Assistant Chemical Examiner in CRCL, Pusa, New Delhi. On 27th March, 2009, 16 sealed sample packets were allotted to him by Sh. S.C Mathur, Chemical Examiner, In-charge Narcotic Section, for the purpose of analysis of samples. Thereafter, he recorded the gross weight of the samples and then analysed the samples. On chemical and chromatographic examination, all the samples were found positive for the presence of heroine and the percentage of diacetylmorphine was also determined. The report was proved vide Ex.PW-14/A and short analysis report was proved vide Ex.PW-4/D.

15. Contention of learned counsel for the appellant that the notice under Section 50 NDPS Act is tainted for the reason the same was handed over to the appellant not at the spot but in DRI office does not impact the prosecution case for the reason in the present case the recovery of the contraband was not from the personal search of the appellant but from the bag in her possession. Thus it was not even mandatory for the prosecution to have issued a notice under Section 50 of the NDPS Act as held in 2011

(1) SCC (Cri) 1191 Jarnail Singh vs. State of Punjab and 2003 (8) SCC 666 Megh Singh vs. State of Punjab.

16. The main contention on behalf of the appellant is that the appellant cannot be fastened with the liability of conscious possession for the reason the contraband was in two opaque covers, it was humanly impossible for a person to carry a bag weighing 16 kgs. on the shoulder as alleged and the bag would not have continuously remained in her possession on way to the office, thus tampering cannot be ruled out.

17. Statements of witnesses in this regard have been recorded, particularly the statement of Ms. Poonam Aggarwal, who was the member of the raiding team and on identification of the appellant she with other officers and public witnesses approached the appellant, intercepted her and was introduced to the team. Further she had accompanied the appellant from the spot to the office in the same vehicle when the bag continued to be in the possession of the appellant and from the car to the 7th Floor of the office. She clarified that at the time of apprehension the bag was on the shoulder of the appellant and perhaps on the right shoulder. The distance between the spot of arrest and the house of the appellant was 10-15 yards and the appellant was conversing in English language. She deposed that a shawl and one more cloth was taken out from the bag whereafter the contraband in 16 transparent polythenes was recovered which was thereafter kept in cloth packets and on opening the 16 cloth packets they were found containing 16 transparent polythene bags which contained white granular substance and the total weight of the contraband was more than 16 kgs. Thus it cannot be said that the appellant was not in conscious possession of the contraband recovered.

18. As regards the public witness no doubt that Ashok Kumar at the time

of examination in the court could not be traced and thus he was given up however, Imranuddin appeared in the witness box. The name and address of Imranuddin given in the list of witnesses was the same on which he was served the notice and stated the same address in the Court. Merely because the public witness turned hostile would not be a ground to assume that no public witness was associated with the search and seizure. Even in the absence of deposition of public witness if the deposition of the official witnesses is found credible conviction can be safely based thereon.

19. As noted above, the appellant retracted her statement after one month of arrest and first appearance before the court. Statement of the appellant under Section 67 NPDS Act was recorded in the presence of Sheela Devi who countersigned the statement and in her cross-examination nothing has been elicited to show that the statement was not voluntary. Suggestion to the said witness is that no statement of the appellant was recorded and not that the same was not voluntarily and under duress.

20. Considering the evidence led by the prosecution, this Court finds no error in the impugned judgment of conviction or the order on sentence. Appeal is accordingly dismissed.

21. Copy of this order be sent to Superintendent Central Jail Tihar for updation of the Jail record and intimation to the appellant.

22. TCR be returned.

(MUKTA GUPTA)
JUDGE

SEPTEMBER 17, 2018
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