

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

Judgment Reserved on: 12th February, 2018

% *Judgment Delivered on: 21st August, 2018*

+ **CRL.A. 786/2016**

AKACHUKWU CHRISTOPHER NNADI Appellant

Represented by: Mr.J.S.Kushwaha, Advocate

versus

STATE Respondent

Represented by: Mr.Ashok Kumar Garg, APP for the
State

CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA

MUKTA GUPTA, J.

1. The present appeal is directed against the judgment dated 1st August, 2016 passed by the learned Special Judge, NDPS whereby appellant was convicted for the offence punishable under Section 21(b) of Narcotics Drugs and Psychotropic Substances Act, 1985 (in short 'NDPS Act'). Vide order on sentence of the even date, he was sentenced to undergo rigorous imprisonment for five years and to pay a fine of ₹10,000/- and in default of payment of fine, to further undergo simple imprisonment for one month for the offence punishable under Section 21(b) of NDPS Act.

2. Briefly stated, prosecution case is that on 10th October, 2013 at about 3:00 PM, one secret informer came to the office of Insp.Satyawan (PW-12) and informed him that one Nigerian namely Christopher who used to reside somewhere in Delhi would come near the main gate of Guru Gobind Singh Indraprastha University near GPO, Kashmere Gate at about 4:00-5:00 PM to

supply cocaine to someone. He recorded the aforesaid information vide DD No.16 (Ex.PW-2/A). Thereafter, he constituted a raiding party consisting of himself, HC Bharat Singh (PW-7) and HC Rohtash (PW-8) and Ct.Sohan Pal. He made the departure entry vide DD No.17 at about 3:45 vide Ex.PW-12/A. After reaching the spot, he along with HC Bharat Singh and the secret informer took position near the main gate of Guru Gobind Singh Indraprastha University by 4:35 PM. At about 4:40 PM they noticed a Nigerian coming from GPO side whom the informer identified as Christopher (appellant). Christopher stood near the gate of the university and waited for someone and after some time started moving. Insp.Satyawan with the help of other police officials apprehended that person. On interrogation, that person revealed his name as Akachuqwu Christopher. He was informed about his legal rights and thereafter, Insp.Satyawan prepared and served the notice under Section 50 NDPS Act vide Ex.PW-7/A which the appellant refused to sign and requested for senior officers to be called at the spot. He informed ACP Zile Singh about the same who reached the spot. He, on instructions from ACP Zile Singh, conducted the search of the appellant and recovered one polythene containing white colored powder from the right pocket of the appellant's half pant. On testing the powder, it was found to be cocaine. Thereafter, he checked the weight of the polythene which turned out to be 102 grams. He then prepared two samples of 2 grams each out of the contraband and they were given serial No.A and B and the remaining cocaine was given mark C. He prepared the FSL form and affixed his seal 7APS NB DELHI on all the cloth parcels i.e. Mark A, B and C and FSL form. He took the case property into possession vide seizure memo Ex.PW-7/C.

3. Further investigation of the case was handed over to SI Sumit Kumar (PW-11). He prepared the site plan (Ex. PW-11/B) at the instance of Insp.Satyawan. He conducted the personal search of the appellant vide personal search memo Ex.PW-7/B and recorded his disclosure statement vide Ex.PW-7/A. He thereafter arrested the appellant vide arrest memo Ex.PW-7/D. Thereafter, he went to the appellant's house situated at F-8, Gali No.8, IV floor, Sant Garh, Tilak Nagar, Delhi and searched it in the presence of Harbajan Singh (owner of house), Ms.Shera Tansu (wife of appellant) and Insp.Satyawan but no incriminating drugs were found there so he made a memo to this effect vide Ex.PW-11/D. He then inquired from the appellant about his passport and visa to which the appellant stated that his passport and visa had been deposited in FIR No.405/2010 PS Mandawali. After completion of the investigation, charge sheet was filed under Section 21 NDPS Act. Vide order dated 5th March, 2014, charge was framed for offence punishable under Section 21 NDPS Act against the appellant.

4. As per the FSL report (Ex. PX), on chemical, TLC & GC examination, the powder recovered from the appellant (Exhibit A) was found to contain cocaine (24.1%).

5. Assailing the conviction, learned counsel for the appellant contends that the notice under Section 50 NDPS Act was defective. To buttress this argument, reliance is placed upon the decision reported as 2014 (1) JCC (Narcotic) 13 Rakesh @ Shankar v. State. Further, it is urged that there was delay in sending the contraband to FSL. Contraband was seized on 10th October, 2013, however the same was sent to FSL on 15th October, 2013. Reliance is placed upon the decision titled as Ramji Singh v. State of

Haryana (Crl. A. 1042- SB of 2002; decided on 23rd February, 2007). Furthermore, while placing reliance on the decision reported as 2014 II AD (CRL) (DHC) 61 Directorate of Revenue Intelligence v. Manjinder Singh, it was submitted that there was no authorization in favour of the investigating officer to investigate.

6. Per contra, learned APP for the State submits that the impugned judgment and the order of sentence suffer from no illegality.

7. The defence of the appellant in his statement under Section 313 Cr.P.C. was that a false case has been foisted on him and the police picked him up from his house and told him that they were looking for some Mr.D.J. The appellant did not know such person. In his defence, the appellant examined Ct.Yogender (DW-1) to prove the log book register of Vehicle No.DL-1CH-9804 and examined himself as DW-2. In his deposition before the Court, appellant stated that he and his wife who is an Indian lady married in the year 2005 and on 10th October, 2013 they were residing as tenants at House No.F-9, Tilak Nagar, Delhi. On that date, three police officials came to the tenanted premises and enquired from the appellant whether he was Mike D.J. to which he replied in the negative. They directed him to follow them to the police station where he was made to forcibly sign various papers, falsely implicated in the case and nothing incriminating was recovered from him. On cross-examination by the learned APP, the appellant stated that he was staying in the third floor of the premises and did not know whether the dwellers of the other portions were present at their houses or not at the time when the police came to his house.

8. As admitted in cross-examination, there is no witness to substantiate that the appellant was picked up from his home and implicated in this case.

9. Plea of the learned counsel for the appellant that Section 50 NDPS Act was not complied with as the right of search being conducted before a Gazetted Officer or a Magistrate was not informed to him deserves to be rejected. Notice under Section 50 given to the appellant Ex.PZ reads as under:-

“Notice u/S 50 NDPS Act

You Mr.Akachukwu Christopher Nnadi, R/o Street No.4, Anyigba, Lagur, Nigeria, Age-34 years are hereby informed through this notice that we (police) have the information that you have come here to deliver the cocaine to someone and hence there is a possibility of recovery of cocaine from your possession and therefore your search will be taken but before search you have the legal rights that your search would be conducted before gazetted officer or magistrate. The arrangement of the same can be made accordingly and you have the legal right that you can take search of police party and the vehicle.”

10. A perusal of the notice reveals that the appellant was informed of both the legal rights i.e. his legal right of search to be conducted before a Gazetted Officer or Magistrate and also the legal right that he can take search of the police party and vehicle before his search is conducted. Not only the legal right was informed to the appellant but on his refusal to sign the notice under Section 50 NDPS Act, Gazetted Officer ACP Zile Singh PW-9 was called at the spot and search was taken in his presence.

11. ACP Zile Singh deposed before the Court that on 10th November, 2013, he was posted as ACP, Narcotics Cell, PS Shakarpur and an information was given to him by Insp.Vivek Pathak at 3:20 PM informing that SI Satyawar had received a secret information from a secret informer. The secret informer was also produced before him and informed him that

Christopher used to supply cocaine and would come in front of main gate of Guru Gobind Singh Indraprastha University, GPO, Kashmere Gate between 4 to 5 PM to supply cocaine to someone. He further states that on his orders the raid was directed to be conducted and he signed copy of DD No.16 in relation to the information. He further deposed that at about 5:30 PM, he received a call from SI Satywan that Christopher had been apprehended and he was served with carbon copy of the notice under Section 50 NDPS Act, but he refused to sign the same and thus he reached the spot. On his questioning the appellant as to why he did not sign the notice under Section 50 NDPS Act, he did not give any response. Thereafter, on his direction and in his presence, SI Satyawar conducted the search of the appellant and from the right pocket of the half pant worn by the appellant, one transparent polythene tied with a rubber band was recovered. On checking the white powder on the field testing kit, it was found to contain cocaine. The total cocaine was 102 grams out of which two samples of 2 grams each were taken. ACP Zile Singh also deposed about the further proceedings of affixing the seals and preparation of the FSL form before him. He further deposed that the seal after use was handed over to HC Bharat Singh and he left the spot.

12. In the decision reported as 2018 SCC OnLine SC 459 Arif Khan Vs. State of Uttarakhand, the Supreme Court reiterating the law laid down in the decision reported as (2011) 1 SCC 609 VijaySingh Chandubha Jadeja Vs. State of Gujarat held that the accused is required to be informed of his legal right and not merely of the option, and that the accused was also required to be searched before the Gazetted Officer or Magistrate. In the present case, as noted above and is evident from the testimony of ACP Zile Singh and

other witnesses, search and recovery was made in the presence of ACP Zile Singh after due notice under Section 50 was given to the appellant which he refused to sign which amounts to sufficient compliance of Section 50 NDPS Act.

13. Contention of learned counsel for the appellant that since the contraband seized on 10th October, 2013 was sent belatedly to the FSL on 15th October, 2013, the appellant is entitled to acquittal also deserves to be rejected. In the decision Ramji Singh (supra) of the Punjab and Haryana High Court, the appellant therein was acquitted not only on the ground that the samples were sent belatedly to the FSL but also for the reason that when the case property was produced in Court, the seals were broken and indecipherable, no attempt appears to have been made by the prosecution to show as to how the seals were broken. On these facts the Court held that the possibility of case property being tampered with cannot be ruled out. In the present case, all the prosecution witnesses have stated that after the contraband was recovered and on field testing kit, it was found to be cocaine, two samples of 2 grams each were taken and both the samples and the residuary contraband were sealed with the seal of the Investigating Officer 8A PSNB Delhi. Even the form FSL was filled up at the spot and specimen seal affixed thereon. The case properties and samples and personal search items of the accused were handed over to the SHO and MHC(M) whose statements were recorded on the same date and appeared in the witness box. The seal was handed over to HC Bharat Singh immediately and it remained in his custody. HC Bharat Singh who appeared as PW-7 in his deposition stated about the seal having been handed over to him immediately after the sealing was over and there is no suggestion to this

witness that before the case property was deposited in the FSL he had returned the seal to the Investigation Officer or the MHC (M). Thus the plea that since the samples were sent to FSL after 5 days and the appellant is therefore entitled to acquittal deserves to be rejected.

14. Contention of learned counsel for the appellant referring to the decision of this Court in Manjinder Singh (supra) that there being no authorization in favour of the Investigating Officer to investigate is also liable to be rejected.

15. In Manjinder Singh (supra) the prosecution was conducted by Directorate of Revenue Intelligence. The case of the prosecution in the said case was that the respondents therein were allegedly carrying approximately 5 kgs of heroine concealed in a greenish colour VIP suitcase lying in the boot of the jeep and the Court acquitted the respondent Manjinder Singh on the ground that notice under Section 50 of the NDPS Act appears to be a fake document created belatedly. Though the seizure was on the basis of the specific prior information Section 41, 42 and 43 were not complied with. The Investigating Officer therein did not possess a valid authorization to affect the seizure. The authorization was given by Sanjay Bansal to one N.D.Azad who in turn authorized Devender Singh, however Devender Singh was neither the Seizing Officer nor a Member of the raiding team of the DRI and the seizure was effected by one K.Shashi Bhushan in whose favour there was no authorization. It is in the light of these facts, this Court held that the Seizing Officer did not have a valid authorization. In the present case, SI Satyawan, the Seizing Officer is a police officer of the rank of Sub-Inspector. In terms of Section 42 and 43 of the NDPS Act any officer being an officer superior in rank of a peon, sepoy or constable of the departments

of Central Excise, Narcotic, Customs etc. and the police department are competent to carry on a search and seizure without a warrant or an authorization under Section 42 in a building or conveyance etc. and under Section 43 at a public place.

16. In view of the cogent testimony of the prosecution witnesses and the plea of the appellant that he was falsely implicated not being probablized, this Court finds no error in the impugned judgment of conviction or order on sentence.

17. Appeal is accordingly dismissed.

18. Copy of this order be sent to Superintendent, Central Jail Tihar for updation of the Jail record.

19. TCR be returned.

(MUKTA GUPTA)
JUDGE

AUGUST 21, 2018
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