

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

Reserved on: 1st August, 2018

% *Delivered on: 27th August, 2018*

+ **CRL.A. 1112/2016**

EARNEST @ AIK

..... Appellant

Represented by: Mr. Harsh Prabhakar, Amicus
Curiae and Mr. Anirudh
Tanwar, Advocate.

Versus

STATE

..... Respondent

Represented by: Mr. Meenakshi Chauhan, APP
for the State with SI Pawan
Kumar, Special Cell.

CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA

MUKTA GUPTA, J.

1. The present appeal is directed against the judgment dated 1st October, 2016 passed by the learned 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 5th October, 2016 sentencing him to undergo rigorous imprisonment for ten years and to pay a fine of ₹1,00,000/- and in default of payment of fine, to further undergo simple imprisonment for three months. Manvinder Singh Marwah @ Romy, the co-accused, was also convicted under Section 21 (b) NPDS Act vide the aforesaid impugned judgment, however, he was sentenced to the period already undergone.

2. Briefly stated, prosecution case is that on 22nd August, 2012, at about 8:00 P.M., one secret informer came to Special Cell, New Friends Colony Southern Range and informed SI Shiv Kumar (PW-9) that one Romy who

was indulging in illegal supply of cocaine, would deliver cocaine to his known customer near Moolchand Hospital at about 10:50 P.M. He along with the informer went to Insp. Devender Singh (PW-12) who verified the said secret information from the informer. Thereafter, Insp. Devender Singh (PW-12) discussed the matter with ACP S.K. Giri, who directed Insp. Devender Kumar (PW-12) to take necessary action. Aforesaid information by secret informer was recorded vide DD No.14 (Ex.PW-9/X). A raiding party was constituted under the supervision of Insp. Devender Singh consisting of himself, ASI Hardwari (PW-10), HC Udaiveer, HC Arvind, HC Jaiveer, Ct. Guruvendra, Ct. Rajpal and Ct. Upender and the secret informer. The raiding party left the office around 9:25 P.M. in official vehicle bearing no. DL 1 CJ 5299 and one private car. SI Shiv Kumar asked 4-5 passerby to join the raiding team, but none of them agreed. At about 10:05 P.M., they reached Moolchand Hospital. Thereafter, Insp. Devender Singh briefed the raiding team and deployed them at different points. At about 10:50 P.M., one Swift Car bearing registration number UP 25 AM 4422 came from the side of Moolchand crossing and stopped near the gate of Moolchand Hospital. The driver of the said car came out, stood near the gate, started waiting for someone and remained there for 4-5 minutes.

3. The secret informer identified the said person as Romy. Romy thereafter turned towards the car and as he was about to leave when the raiding party apprehended him. He revealed his identity as Manvinder Singh @ Romy. Notice under Section 50 NDPS Act (Ex.PW-9/A) was served upon Manvinder Singh @ Romy. He was apprised of his right to be searched in front of a gazetted officer or Magistrate. However, he refused to get himself searched in front of a magistrate or gazette officer. Upon his

search, one polythene was recovered from right side pocket of his half pant. The said pouch had a zip lock, and it contained white powder. The said substance was tested by smelling and by the field testing kit, which gave positive response for presence of cocaine. The said pouch was weighed on electronic scale and found to be 46 grams in weight. One sample of 2 grams was taken out from the substance and it was kept in another transparent zip lock polythene pouch and this pouch was converted into a cloth parcel. The remaining substance was also converted in a cloth parcel. 'SK' seal was applied on both parcels and FSL form. All these items were seized and exhibited as Ex.PW-5/A. SI Shiv Kumar prepared rukka (Ex.PW-9/B) and handed over to ASI Hardwari Lal along with FSL form, copy of seizure memo and sealed parcels, with the instructions that the rukka was to be handed over to the duty officer at the Police Station, while the remaining items were to be produced to the SHO. In the meanwhile, SI Ashish Kumar (PW-11) reached the spot and SI Shiv Kumar handed over the investigation to him. Consequently, FIR No.20/2012 (Ex.PW-4/A) was registered at PS Special Cell for the offence punishable under Section 21 NDPS Act.

4. SI Ashish Kumar prepared the site plan (Ex.PW-11/A) at the instance of SI Shiv Kumar. He seized the Swift Car bearing No. UP 25 AM 4422 and took it into possession vide seizure memo Ex.PW-5/E. He formally arrested Manvinder Singh @ Romy vide arrest memo Ex.PW-5/C and conducted his personal search vide Ex.PW-5/D. During his personal search, one personal notice under Section 50 NDPS in original, ₹220/- in cash, two bracelets and seven rings of white metal were recovered. His disclosure statement was recorded vide Ex.PW-5/B. SI Shiv Kumar prepared a report under Section 57 NDPS (Ex.PW-11/B) regarding arrest of Manvinder Singh

@ Romy and recovery of 46 grams cocaine and forwarded the same to SI Daler Singh (PW-7), Reader to ACP S.K. Giri.

5. Supplementary disclosure statement (EX.PW-1/A) of Manvinder Singh @ Romy was recorded wherein he revealed that he used to purchase cocaine from a Nigerian National named Aik and he would further sell the same to his customers. He further revealed that Aik often comes to South Extension near ICICI Bank at around 8:00 P.M. and he had previously purchased cocaine from Aik at that spot from where he could get him apprehended. SI Ashish Kumar conveyed the aforesaid information to Insp. Devender Singh who further apprised ACP S.K. Giri. A raiding party was constituted comprising of Insp. Devender Singh, SI Shiv Kumar, ASI Hardwari Lal, HC Harish Chander, HC Udaiveer, Ct. Gurvinder, Ct. Jagat who along with Manvinder Singh @ Romy left for the spot along with field testing kit and electronic weighing machine in an official car bearing no. DL 1 CJ 5299, a private car and one private motor cycle. They reached South Extension Bus Stand at about 7:30 P.M., where Insp. Devender Singh asked 5-7 passersby to join the raiding team, but none of them agreed. Insp. Devender Singh briefed the raiding party and deployed them surrounding the bus stand. At about 7:55 P.M., Manvinder Singh @ Romy pointed towards a Nigerian national named Earnest @ Aik (appellant herein) who used to supply him cocaine. Earnest @ Aik came in front of ICICI Bank, waited for 3-4 minutes and then started walking back towards AIIMS. At the instance of Insp. Devender Singh, Earnest @ Aik was apprehended. He was apprised of his right to get searched in the presence of Gazetted Officer or Magistrate. Notice under Section 50 NDPS Act (Ex.PW-11/C) was served upon him, however, he declined the offer to search the members of the

raiding party and also refused to get himself searched before a Magistrate or a Gazetted Officer vide Ex.PW-11/D.

6. Upon the search of Earnest @ Aik, from his right pocket of the capri one transparent inter locked polythene was recovered. The polythene was opened and it was found containing the white color substance which was confirmed by field testing kit as cocaine. The polythene was found to be 105 grams in weight, of which two samples of 2 grams each were taken and were kept in two separate small polythene, which were tied with rubber band. Both the samples were converted into two separate cloth parcels and sealed with the seal of AK. The remaining substance in recovered polythene was also converted into a cloth parcel and FSL form was filled. The parcels were sealed with seal of AK and after use the seal was handed over to HC Harish Chander.

7. Earnest @ Aik was arrested vide arrest memo Ex.PW-1/C and his personal search was conducted vide memo Ex.PW-1/D. On his personal search, notice under Section 50 NDPS Act, one dark brown small bag containing ₹480/- cash and some visiting cards were recovered. Site plan was prepared vide Ex.PW-1/DA. Thereafter Earnest @ Aik was interrogated and his disclosure statement (Ex.PW-11/E) was recorded. A report under Section 57 NDPS Act was further prepared (Ex. PW-11/F) and the same was produced before SI Daler Singh, Reader to ACP S.K. Giri.

8. On completion of investigation, charge sheet was filed. Vide order dated 18th July 2013, charge was framed for the offences punishable under Section 21(b) and 21(c) NDPS Act read with Section 29 NDPS Act.

9. Appellant in his statement recorded under Section 313 Cr.PC stated that he had been falsely implicated in the present case. He was taken away

from INA Market while he was purchasing some food stuff on saying that police officials had to conduct enquiry about his passport and visa. He was carrying his original passport and visa and he had shown and given the same to them but despite that they took him to the police station and took his signatures on some endorsements under pressure and beating. He was not carrying any contraband with him. He did not know Manvinder Singh @ Romy earlier and has seen him for the first time in the police station.

10. Assailing the conviction, learned Counsel for the appellant contends that the investigating agency has failed to associate any independent witness in the searches that were conducted and no justifiable reason has been adduced for such a lapse. He additionally submits that the prosecution had advance notice of the information and had planned the search which was conducted in South Extension Market which is a busy area but still failed to engage any public witness. He further submits that the visual site plan is bereft of material details and does not inspire confidence. To buttress this argument, reliance is placed upon the decision of this court titled as Ram Prakash v. State (2014) 146 DRJ 629. It was further urged that SI Ashish Kumar, SI Shiv Kumar, and HC Sanjeev have given divergent versions with respect to whether the FSL Form was typed/print form or handwritten. He also submits that the case property including the recovered contraband was not deposited contemporaneously in the Malkhana contrary to the claim of the investigating agency. A perusal of the entries in Malkhana register reveals that the sealed pullandas along with FSL Form pertaining to recovery of contraband from Manvinder Singh @ Romy and sealed pullandas containing contraband allegedly recovered from Earnest @ Aik were deposited together at the same time. Lastly, he submits that R.S.

Sehrawat, HC Sanjeev and SI Ashish Kumar did not depose that while the case property remained in their possession it was not tampered. In alternative it was prayed that the conviction be altered from one under Section 21(c) of NDPS Act to one under Section 21(b) of the NDPS Act as there exists a reasonable possibility that the quantity of alleged contraband could actually be less than the stipulated threshold of 100 grams.

11. Per contra, learned APP for the State submits that the appellant has been rightly convicted since the prosecution has proved beyond reasonable doubt the recovery of 105 grams of cocaine from the appellant. Thus the impugned judgment of conviction and order on sentence suffers from no illegality.

12. A perusal of the evidence on record reveals that as per the Malkhana Register at Serial No. 1999 (Ex.PW-2/A) the alleged recovery of 46 grams of cocaine from Manvinder Singh @ Romy and alleged recovery of 105 grams of cocaine from Earnest @ Aik were deposited at the same time on 23rd August 2012 though recovery was made from Manvinder Singh on 22nd August, 2012 at about 10.55 P.M. whereas thereafter from Earnest @ Aik on 23rd August, 2012 at about 8.05 P.M. However, DD No.13 (Ex.PW-13/A) recorded at PS Special Cell reveals that the pullandas marked as S1 and A and sealed with the seal of SK (alleged recovery from Manvinder Singh @ Romy) were deposited in the Malkhana at 2:40 A.M. on the intervening night of 22nd and 23rd August, 2012 and DD No. 10 (Ex.PW-13/B) reveals that the pullandas marked as S2, S3 and B were deposited in the Malkhana on 23rd August 2012 at 11:10 P.M. The contradiction with respect to deposit of case properties pursuant to the two recoveries in the Malkhana goes to the root of the matter. The same creates a serious doubt in the link evidence

that case properties were kept properly in safe custody and were not tampered with and does not rule out that the recovery from Manvinder was not planted on Earnest @ Aik, particularly for the reasons Insp. R.S.Sehrawat (PW-13), HC Sanjeev (PW-2) and SI Ashish Kumar (PW-11) did not depose that the case property was not tampered with while it remained in their possession. Thus the appellant is entitled to the benefit of doubt.

13. The impugned judgment of conviction and order on sentence are set aside. Appeal is disposed of acquitting the appellant of offence punishable under Section 21(c) of the NDPS Act Appellant is directed to be released forthwith if not required in any other case.

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

15. TCR be returned.

(MUKTA GUPTA)
JUDGE

AUGUST 27, 2018
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