

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

Judgment Reserved on: 17th July, 2018

% *Judgment Delivered on: 9th May, 2019*

+ **CRL.A. 278/2016**

FRANK EZENWA

..... Appellant

Represented by: Mr. Jivesh Tiwari, Advocate.

Versus

STATE

..... Respondent

Represented by: Mr. Ashok Kumar Garg, APP
for the State with SI Vinod
Kumar, Narcotics Cell, Crime
Branch

CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA

MUKTA GUPTA, J.

1. The present appeal is directed against the judgment dated 21st January, 2016 passed by the learned Special Judge, NDPS whereby appellant was convicted for the offences punishable under Section 21(b) of Narcotics Drugs and Psychotropic Substances Act, 1985 (in short 'NDPS Act'), Section 471 IPC and Section 14 of Foreigners Act, 1946. Vide order on sentence dated 28th January, 2016, he was sentenced to undergo rigorous imprisonment for four years and to pay a fine of ₹25,000/- and in default of payment of fine, to further undergo simple imprisonment for three months for the offence punishable under Section 21(b) of NDPS Act, rigorous imprisonment for two years and to pay a fine of ₹2,000/- and in default of payment of fine, to further undergo simple imprisonment for one month for the offence punishable under Section 14 of Foreigners Act and rigorous

imprisonment for two years and to pay a fine of ₹2,000/- and in default of payment of fine, to further undergo simple imprisonment for one month for the offence punishable under Section 471 IPC.

2. Briefly stated, prosecution case is that on 28th February, 2012, at about 8:00 P.M., one secret informer came to Narcotics Cell, Crime Branch, Shakarpur, Delhi and met SI Paramjeet Singh (PW-11) and informed him that one person, namely, Frank, who resided in the area of IGNOU Road and used to supply cocaine in large and small quantities would come between 10:00 P.M. – 10:30 P.M., near Red light, Uphar Cinema, Green Park, Delhi to supply the same to someone. At around 8:10 PM., SI Paramjeet Singh produced the secret informer before Insp. Vivek Pathak (PW-9). After enquiring about the information, Insp. Vivek Pathak forwarded the information to ACP Udaivir Singh (PW-4) on telephone. ACP Udaivir Singh directed Insp. Vivek Pathak to take legal action and to conduct a raid who in turn directed SI Paramjeet Singh to conduct the raid. At 8:20 P.M., SI Paramjeet Singh lodged DD No. 28 (Ex.PW-4/A) and the same was sent to Insp. Vivek Pathak. SI Paramjeet Singh constituted a raiding party consisting of HC Sanjeev Kumar (PW-3), HC Harender Singh and Ct. Manjeet Singh (PW-6).

3. SI Paramjeet Singh along with the secret informer reached near Uphar Cinema Red light, Green Park around 9:30 P.M. On the way, at ITO bus stand and INA market, SI Paramjeet Singh asked passengers to join the raid but none of them agreed and left the spot without disclosing their names or addresses. The vehicle was parked on the service road, near the gate of the Metro Station and SI Paramjeet Singh, HC Sanjeev Kumar and secret informer took positions at the corner of the red lights with other members of

the raiding team on the opposite side. At 10:00 P.M., a Nigerian man who was wearing blue jeans and a striped shirt came from the side of the metro station and was identified by the secret informer as the person in question. On reaching near the raiding party, the person tried to turn away, however he was apprehended and due to catching him, he received minor injury near his left eye. On enquiry, he revealed his name as Frank Ezenwa. Notice under Section 50 NDPS was prepared vide Ex.PW-3/A by HC Sanjeev and the appellant was informed about his right to be searched before a gazetted officer or magistrate. Appellant replied vide Ex.PW-3/B to the notice stating his refusal for being searched in front of a magistrate or gazetted officer. Public persons were asked to join the proceedings but none agreed. On the formal search of the appellant, one semi-transparent white polythene was recovered from the front pant pocket, which was tied with a rubber band and was found containing white coloured substance/powder. On testing it with the field testing kit, it was found to be cocaine weighing 17 grams. Two samples (Mark A and Mark B) of 2 gm each were sealed and the rest of the powder was again put in the semi-transparent white polythene (Mark C). They were all seized with the seizure memo exhibited as Ex.PW-3/C.

4. Consequently, FIR No. 50/2012 (Ex.PW-1/A) was registered at PS Crime Branch under Section 21 NDPS Act.

5. SI Rajbir Singh (PW-10) came at the spot along with HC Rajesh and prepared the site plan vide Ex.PW-10/A. Appellant was arrested vide arrest memo Ex.PW-3/D and his personal search was conducted vide memo Ex.PW-3/E. During his personal search, one copy of notice, one purse containing visiting cards, metro card, ₹1200, passport and one black color mobile phone were recovered. His disclosure statement was recorded vide

Ex.PW-3/F. SI Paramjeet Singh prepared special report under Section 57 NDPS Act vide Ex.PW-4/B.

6. Assailing the conviction, Learned Counsel for the appellant contends that the prosecution case is based only on the testimony of police witnesses. No public witness was examined even though secret information was received and reduced in writing. It was further urged that sample seals were not sent to the FSL. Though the samples were taken of 2 gms. each, however, the samples found at FSL weighed 2.08 gms. Furthermore, in the absence of certificate under Section 65B of Indian Evidence Act, the evidence cannot be looked into. Lastly, it is highly improbable that the police apprehended the appellant from the spot at 10:00 P.M. and they remained at the spot till 5:00 A.M.

7. Per contra, Learned APP for the State submits that the necessary provisions of NDPS Act have been complied with and all the witnesses have supported the case of the prosecution.

8. Contention of learned counsel for the appellant that prosecution case is based only on the testimony of police witnesses and thus the same be discarded deserves to be rejected. It is trite law that conviction can be safely based on the testimony of the police witnesses who are also competent witnesses. In the present case version of the police officers is corroborated by other documentary evidence on record. The difference in weight of the sample being more by .08 gms. is immaterial for the reason in the FSL the measurement is by electronic precision instruments whereas at the spot, highly accurate weighing machines are not used. Seal was not required to be sent to the FSL as the sample seal was affixed at the FSL form which is evident from the FSL report which states that the seals tallied. None of the

documents exhibited is a computer generated document which would need certificate under Section 65B of the Indian Evidence Act. The fact that the police officers spent around seven hours at the spot is not improbable for the reason Section 50 Notice was given at the spot thereafter search was conducted, recovery was weighed, rukka was prepared and sent and thereafter the Investigating Officer took over the investigation after registration of FIR and all this process would have taken sufficient time.

9. In view of the discussion aforesaid, this Court finds no merit in the appeal. The same is dismissed.

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

11. TCR be returned.

(MUKTA GUPTA)
JUDGE

MAY 09, 2019
‘anu/rk’