

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

Date of Decision: February 22, 2019

+ **CRL.A. 785/2014**

SAYAED MD. RIDWAN @ MUNNA Appellant
Through: Ms. Manika Tripathy, Delhi High
Court Legal Services Committee's
Panel Advocate, Mr. Ashutosh
Kaushik and Mr. Braham Kumar,
Advocates

Versus

STATE Respondent
Through: Dr. M.P. Singh, Additional Public
Prosecutor for respondent-State
with SI Vikram Singh

+ **CRL.A. 1235/2014**

GULZAR SHEIKH @ SONU & ORS. Appellants
Through: Ms. Manika Tripathy, Delhi High
Court Legal Services Committee's
Panel Advocates

Versus

STATE Respondent
Through: Ms. Neelam Sharma, Additional
Public Prosecutor for respondent-
State with SI Vikram Singh

CORAM:
HON'BLE MR. JUSTICE SUNIL GAUR

JUDGMENT
(ORAL)

1. The above-captioned two appeals pertain to one incident and are directed against judgment of 17th April, 2014 vide which appellants have been convicted for the offence under Section 20(C) of *the Narcotic Drugs*

and Psychotropic Substances Act, 1985 (hereinafter referred to as 'the NDPS Act') and vide order of 29th April, 2014, appellants have been sentenced to rigorous imprisonment for 10 years and fine of rupees one lac each and in default, they are directed to undergo simple imprisonment for six months.

2. The above-captioned appeals have been filed through jail and in the above-captioned first appeal, Ms.Manika Tripathy, Delhi High Court Legal Services Committee's Panel Advocate appears on behalf of appellant. However, the *Amicus Curiae* in the above-captioned second appeal is not present. As such, Ms.Manika Tripathy, Advocate has been called upon to appear as *Amicus Curiae* on behalf of appellant in the above-captioned second appeal.

3. The crux of the prosecution case, as noticed in the opening paragraphs of the impugned judgment, is as under: -

"The case of prosecution is that on 31.05.2011 at about 7.30 p.m. at Railway Line near Coaching Yard, New Delhi Railway Station, accused Akram Mohd Khan was found in conscious possession of 2 KG 7 grams of charas, accused Sayyad Mohd Ridwan was found in conscious possession of 1 KG 26 grams of Charas and accused Gulzar Sheikh was found in conscious possession of 1 KG 10 grams of charas. The accused persons were arrested and after completion of investigation, the charge sheet was filed.

Accused persons were charged for the offence punishable u/s 20 NDPS Act to which accused persons pleaded not guilty and claimed trial."

4. On the basis of secret information, raiding party headed by *SI Abhishek Singh (PW-7)* had apprehended appellants and their co-accused

and after effecting recoveries from appellants, the investigation conducted had culminated into filing of the charge-sheet against appellants for offence under Section 20 of *the NDPS Act*. Both the appellants were charged for the offences under Sections 20, 61 & 85 of *the NDPS Act* and they had claimed trial. Prosecution had got examined 14 witnesses. Appellants in their statements under Section 313 of Cr.P.C. had denied the prosecution case and pleaded false implication and had also got examined an employee-Surender Sharma (DW-1) from *Anuj Guest House* regarding the plea of *alibi* taken by appellants' co-accused/Mohd. Akram Khan. On the basis of evidence led, trial court vide impugned judgment has convicted and sentenced appellants for the offence under Section 20 of *the NDPS Act* as noticed hereinabove.

5. Since the challenge to the impugned judgment by appellants in these appeals is on identical grounds, therefore, both the appeals have been heard together and are being decided by this common judgment.

6. Appellants' counsel submits that in view of Supreme Court's decision in *Arif Khan @ Agha Khan v. State of Uttarkhand*, AIR 2018 SC 2123, the Investigating Officer of this case was required to produce the accused before a gazetted officer, despite accused giving consent in writing to be searched by police officers/raiding party, as Section 50 of *the NDPS Act* mandates the Raiding Officer to produce the accused before a gazetted officer. It is pointed out that PW-1, who was working as Reader to the ACP concerned, has in cross-examination stated that the entries made in the Register regarding the report under Section 57 of *the NDPS Act* has not been made in his handwriting and he does not have any personal knowledge of these entries. It is further pointed out that this

witness (*PW-1*) has admitted that some pages of the Register in-between are blank and some are half-written, without any endorsement. It is submitted that as per *PW-3*, a member of the raiding team, there were eight members in the raiding team and according to this witness (*PW-1*), secret informer had not accompanied the raiding team. It is pointed out that as per evidence of Investigating Officer (*PW-7*), the secret informer had accompanied the raiding team. So, it is submitted that it is doubtful that the secret informer had accompanied the raiding team. It is pointed out that as per *PW-3*, the weighing scale was separately carried by Constable and according to another member (*PW-8*), the weighing scale was carried by the Investigating Officer. It is also pointed out that as per deposition of *PW-3*, no inventory of the bag (Investigation kit) carried by the Investigating Officer was made. It is further submitted that neither the Investigating Officer nor *PW-3* or *PW-8* had made any departure entry before leaving the police station nor after the return from the raid. It is pointed out that as per the version of Investigating Officer, the informer was taken to the room of the SHO and at that time, no one else was present in the room whereas, as per evidence of the concerned SHO (*PW-14*), the secret information was conveyed to him by Investigating Officer (*PW-7*) and the secret informer was not produced before the SHO (*PW-14*).

7. It is further submitted that as per MHC(M), the Head Constable (*PW-5A*) had not produced any authority to collect the samples for depositing the same with the FSL, but still the samples of this case were handed over by MHC(M) to Head Constable-*Satish*. It is also pointed out that there is delay of 23 days in depositing the samples with the FSL.

Attention of this Court is drawn to cross-examination of MHC(M) to point out that this witness has admitted that he had not filled the name, age and parentage of accused in the Register and the time of dispatch of samples to FSL. It is further pointed out that this witness (*PW-5*) admits that the sample of another case was also handed over to Head Constable-*Satish* for depositing in the FSL and so, there was a mix-up, leading to planting of the recovery upon appellants. It is also pointed out that MHC(M) (*PW-5*) is silent about the sending of FSL Form alongwith sample to FSL. It is further submitted that the alleged recovery is from railway-yard, but no official from railway was joined in the recovery proceedings, which renders the recovery effected doubtful.

8. It is submitted on behalf of appellants that as per deposition of the members of the Raiding Team, the SHO had remained at the spot for about 10-15 minutes, but according to the Investigating Officer (*PW-7*), SHO had remained there for about 45 minutes. Lastly, it is submitted on behalf of appellants that Investigating Officer (*PW-7*) admits in his cross-examination that he had not made any entry of his arrival in or departure from the police station on that day and that the secret information received by him was not reduced into writing and that the Investigating Officer had not prepared any memo regarding refusal of the accused to search the Investigating Officer's bag before effecting the recovery. Thus, it is submitted that the prosecution case set up against appellants is doubtful and so, benefit of doubt ought to be given to appellants.

9. On the other hand, learned Additional Public Prosecutor for respondent-State support the impugned judgment and order and submit that the discrepancies pointed out by appellants' counsel do not go to the

root of the matter and that a Co-ordinate Bench of this Court in CrI.A.676/2016 titled *Ram Gopal v. State*, rendered on 16th October, 2018, has distinguished Supreme Court's decision in *Arif Khan (supra)* to uphold the conviction of accused in a case under *the NDPS Act*. It is submitted that a Constitution Bench of Supreme Court in *Vijaysinh Chandubha Jadeja v. State of Gujarat*, 2011 (1) SCC 609 has not made it mandatory to produce the accused before a gazetted officer and so, conviction of appellants is borne out from the evidence on record. It is pointed out that departure entry i.e. DD No.18-A was made by Investigating Officer before the raiding team had left the police station and after the raid, arrival entry was made vide DD No.4-A. It is submitted that FSL Form is mandatorily sent with the samples to FSL as without FSL Form, the sample is not received by the FSL. It is pointed out that it has come in the evidence of PW-6 that railway officials were called upon to join the raid proceedings, but they had refused. Thus, it is submitted that these appeals lack merit.

10. With the able assistance of Ms. Manika Tripathy, Delhi High Court Legal Services Committee's Panel Advocate and Dr.M.P.Singh and Ms. Neelam Sharma, learned Additional Public Prosecutors, I have considered the submissions advanced by both the sides and scrutinized the evidence on record and thereafter, it transpires that the discrepancies pointed out by learned counsel for appellants do not destroy the substratum of prosecution case and are not sufficient to dislodge the otherwise reliable case set up by prosecution against appellants. The tampering aspect vehemently highlighted by appellants' counsel fails into insignificance as the sample was duly received by the FSL and judicial notice can be taken

of the fact that in such like cases, FSL does not receive any sample without FSL form. It is difficult to comprehend as to how such a heavy recovery of about 3½ kgs. of *Charas* would be planted to falsely implicate appellants. Otherwise also, the evidence on record does not justify the plea of planting of 3½ kgs of *Charas* upon appellants.

11. A Constitution Bench of Supreme Court in *Vijaysinh Chandubha Jadeja (supra)* has ruled that Section 50 of *the NDPS Act* itself gives an option to the raiding officer to search any person and if such person requires, then such person ought to be produced before the nearest gazetted officer. In the instant case, appellants had refused to exercise their option to be searched in the presence of a gazetted officer. Supreme Court in *Arif Khan (supra)* has taken note of the afore-referred legal position, but has chosen to acquit accused on facts of said case. While relying upon the dictum of Constitution Bench in *Vijaysinh Chandubha Jadeja (supra)*, this Court holds that the giving of option to appellants to be produced before a gazetted officer is sufficient compliance of Section 50 of *the NDPS Act*. As far as appellant-Sayaed Md. Ridwan @ Munna signing notice under Section 50 of NDPS Act in English is concerned, I find that though he claims to be illiterate, still such persons can and do sign in English and on this count also, benefit of doubt cannot be extended to appellant-Sayaed Md. Ridwan @ Munna.

12. As regards appellant-Gulzar Sheikh @ Sonu, he had clearly written on the Notice under Section 50 of *the NDPS Act* that he does not want to be searched in the presence of a gazetted officer. So, on this count, conviction of appellants cannot be faulted with.

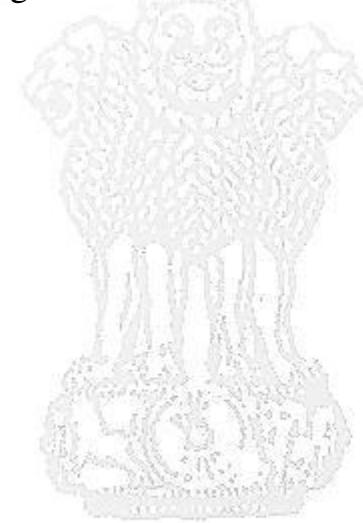
13. In light of the aforesaid, conviction and sentence awarded to appellants is hereby affirmed. However, this Court deems it necessary to direct the police to henceforth produce an accused arrested under *the NDPS Act* before a nearest gazetted officer without going into the option aspect, referred to above, as it would bring transparency in the search proceedings. To ensure compliance, let it be brought to notice of Commissioner of Police, Delhi forthwith.

14. Both these appeals are accordingly dismissed. Appellants be apprised of this judgment forthwith through concerned Jail Superintendent.

(SUNIL GAUR)
JUDGE

FEBRUARY 22, 2019

s



सत्यमेव जयते