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IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: 21st July, 2018

Pronounced on: 8th January, 2019

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CRL.A. 831/2014

DEEPAK SHAMSHER THAPA

..... Appellant

Through: Mr. Yogesh Saxena,
Mr. Sikander Azam Khan and
Mr. Aditya Vikram (DLSA),
Advts.

versus

STATE

..... Respondent

Through Ms. Meenakshi Chauhan, APP
for the State
ASI Yasin Khan, PS Crime
Branch in person

CORAM:

HON'BLE MR. JUSTICE C. HARI SHANKAR

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J U D G M E N T

1. This appeal assails judgment, dated 13th May, 2014, whereby the learned Special Judge (NDPS-02) convicted the appellant for the offence punishable under Section 20(C) of the Narcotics, Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as “the NDPS Act”), as well as the consequent order, dated 24th May, 2014, whereby the learned Special Judge sentenced the appellant, for the said offence, to undergo 12 years rigorous imprisonment with fine of ₹1 lakh, and default simple imprisonment of 6 months.

2. The case of the prosecution, as upheld by the learned Special Judge, is that the appellant, a Nepali national, was intercepted, on 23rd June, 2012, at about 11:45 AM, and was found to be carrying 10 kg of hashish (*charas*), which constituted an offence under Section 20 of the NDPS Act. The appellant was arrested and, on his pleading not guilty, was tried for the said offence and, *vide* the impugned judgment and order, convicted and sentenced therefor.

The Evidence

3. The prosecution examined 11 witnesses, PW-1 to PW-11.

4. The MHC (M), PS Crime Branch, HC Jagnarain, deposing as PW-1, confirmed that three *pullandas* had been handed over, to him, by PW-6 Inspector C.R. Meena, on 23rd June, 2012, and that the *pullandas* were sealed with the seals of the Narcotics Bureau. He confirmed the depositing of the said samples in the *Malkhana* and, later, handing over the *pullanda* marked 'A', along with the FSL Form to PW-5 HC Manoj Kumar, as well as being handed over the result of the FSL (Ex. PW-1/A) by HC Manoj Kumar (PW-5), after deposit of the said samples. PW-1 further confirmed having received the official report on 29th August, 2012, and handed over the same to the I/O.

5. PW-2 HC Yogesh confirmed, in his examination-in-chief, being part of the raiding party organised by PW-10 SI Sunil Jain, which consisted of PW-10, himself and HC Rajesh (PW-3) on 23rd June, 2012. He also confirmed that the raiding party had been constituted

consequent to receipt of secret information that one person, named Deepak, who was a Nepali national, would be approaching the Indian Oil petrol pump, near Majnu Ka Tila, for supplying hashish (*charas*). He confirmed intercepting and overpowering the appellant (whom he recognised in court). He further deposed that notice, under Section 50 of the NDPS Act was served on the appellant, informing him of his legal right to be searched in the presence of a Gazetted Officer or a Magistrate, but that the appellant refused to exercise the said right, which was recorded as Ex. PW-2/B, on the body of the notice (Ex. PW-2/A). He further deposed that passers-by, though requested to join the raiding party, did not oblige. Thereafter, PW-2 deposed, search, of the bag carried by the appellant, was conducted by the I/O, which disclosed that it contained a polythene pouch with solid material in it which, on being tested using the Field Testing Kit carried by the raiding party, was found to be *charas*, weighing 10kg. He further deposed that, from the said 10 kg *charas*, two samples of 50g each were separated and kept in separate *pullandas*, marked 'A' and 'B'. The remaining *charas* was kept in a bag, which was marked 'C'. He deposed, further, that the I/O affixed the seal of the Narcotics Bureau on the FSL form and on the said three *pullandas*, whereafter the seal was handed over to PW-3 HC Rajesh. The property was seized by the I/O, *vide* seizure memo Ex. PW-2/C.

6. PW-2 further deposed taking the *rukka*, prepared by the I/O to the Police Station where, on the basis thereof, FIR was registered. He confirmed handover of the samples, by the SHO, to the MHC (M). PW-2 identified, in court, the various exhibits.

7. The testimony of PW-2 was supported by PW-3 HC Rajesh Kumar and the I/O SI Sunil Jain, who testified as PW-10. One significant difference, in the statement of the I/O PW-10 SI Sunil Jain, as compared to the statements of PW-2 and PW-3, is, however, that PW-10 testified that he “conducted cursory search of accused and during his search one *badami* colour rexine bag was recovered and the same was checked” and found to contain *charas*, whereas PW-2 and PW-3 made no reference to conducting of the search of the petitioner. PW-10 SI Sunil Jain, the I/O, also testified to having prepared the special report under Section 57 of the NDPS Act (Ex. PW-7/C) and submitting the same to PW-9 Inspector Kuldeep Singh, for onward transmission to higher officers. PW-10 further confirmed being the recipient of the information conveyed by the secret informer, on the basis thereof the raiding party, which later apprehended the appellant, was constituted.

8. The fact of collection of the samples, storage thereof in the *malkhana* and transmission, of the samples, to the FSL, were also proved by the statements of PW-5 HC Manoj Kumar and PW-6 Inspector C.R. Meena.

9. The appellant, in his statement under Section 313 of the Code of Criminal Procedure (hereinafter Cr.P.C), completely denied all the allegations against him, and asserted that there had been no recovery from him and that the case property had been planted on him. He alleged that he had been forcibly taken to the Narcotics Cell where, under pressure and threat, his signatures were obtained on various

blank papers. He first stated that he would lead defence evidence but, thereafter, submitted that he did not wish to lead any evidence in defence.

10. The report, dated 17th August, 2012, of the FSL (Ex. PW-11/D), certified that Ex. 'A', was found to contain *charas*. However, no witness, from the official, was examined, to prove the said report.

The impugned judgment

11. Various submissions were advanced, on behalf of the appellant, before the learned Special Judge, of which the only submission which has been pressed by learned counsel for the appellant, before this Court, is that, as PW-10 (the I/O SI Sunil Jain) had handed over the seal, after sealing the exhibits, to PW-3 HC Rajesh Kumar, and had admitted, in cross-examination, that he had three seals with him, the chances of the sample having been tampered, before it reached the FSL, could not be ruled out. The learned Special Judge has rejected this submission on the ground that there were two sets, of three seals each, in the possession of PW-10 and PW-11 SI Satyavan, of which the three seals in the possession of PW-10 started with the number '3', whereas the three seals in the possession of PW-11 started with the number '7'. PW-10 having confirmed, in cross-examination that, after sealing the alleged contraband, he had handed over the sealed samples to PW-3 HC Rajesh Kumar, and had obtained the seal back only after five to six days, the possibility of tampering was ruled out, as no other seals were used on the samples. Other submissions advanced by, and

on behalf of, the appellant, before the learned Special Judge, such as the existence of minor discrepancies in the testimonies of various witnesses, the absence of any public witness, and absence of any connection between the Road Certificate and Memo number mentioned on the official receipt of the FSL, have been rejected by the learned Special Judge, on cogent grounds. These submissions, it may be noted, were not advanced before this Court.

Rival contentions before this Court

12. Learned counsel appearing for the appellant has advanced the following submissions, before this Court:

(i) The FSL report was not proved. Neither was the custody of the samples, at the FSL, proved by any official custodian. In the absence of any evidence having been led, of any official, the report of the FSL lost credibility.

(ii) The seal used on the samples had not been handed over to any independent person. PW-10 SI Sunil, had handed over the seal, after a fixation thereof, to PW-3 HC Rajesh Kumar. HC Rajesh Kumar could not be regarded as an independent person, as he was a part of the raiding team. It was well settled, in law, that the I/O had, necessarily, after sealing the contraband article, to entrust the seal to an independent witness, so as to avoid the possibility of tampering. Reliance was placed, in this regard, on the judgments of this Court in *Safiullah v. State, (1993 25 DRJ*

248 and *Prem Singh v. State*, 1996 Cri LJ 3604 and of the High Court of Punjab and Haryana in *Bhola Singh v. State of Punjab*, (2005) 2 RCR (Cri) 520 and *Gurjant Singh v. State of Punjab*, (2007) 4 RCR (Crl) 226.

(iii) PW-6 Inspector C.R. Meena had deposed that PW-2 HC Yogesh had reached the Crime Branch with the case property at 4:05 PM, whereas the FIR was shown to have been registered at 4 PM.

(iv) The official receipt (Ex. PW-1/A) did not record receipt of the FSL forms or other documents. Neither did it make any reference to the Road certificate number. The Road certificate, too, did not bear any details of receipt or seal of the FSL. The official form had not been exhibited in evidence either. These facts were put to PW-5 HC Manoj Kumar in cross-examination. Reliance was placed, for this purpose, on the judgment of a learned Single Judge of this Court in *Heera Lal v. State*, 1993 (52) DLT 231.

(v) The entire proceedings were initiated for violation of Section 50 of the NDPS Act. For this purpose, reliance was placed on the judgment of the Supreme Court in *Arif Khan v. State of Uttarakhand*, 2018 SCC OnLine SC 459 and *State of Rajasthan v. Parmanand*, (2014) 5 SCC 345

(vi) There were no independent witnesses. Cases, where the only available evidence was by way of the testimonies of police

witnesses, had to be scrutinised with great care. Reliance was placed, in this regard, on ***Krishan Chand v. State of Himachal Pradesh, (2018) 1 SCC 222*** and ***Rajesh Kumar v. State of NCT Delhi, (2014) 8 HCC (Del) 157***.

(vii) The method of sampling was faulty, as two samples, 50g each, had been retrieved from a total quantity of 10 kg which consisted of broken pieces adhered together. Reliance was placed, for this proposition, on the judgment of a learned Single Judge of this Court in ***Basant Rai v. State, (2012) 191 DLT 403*** which, in turn, relied on the judgment of the Supreme Court in ***Gaunter Edwin Kircher v. State of Goa, (1993) 3 SCC 145*** and the judgment of the High Court of Bombay in ***Javed A. Bhatt v. UOI, 2007 Cri LJ 3145***.

13. Learned APP, arguing *per contra*, reiterated the findings of the learned Special Judge and relied on the well-known decision of the Supreme Court in ***Ajmer Singh v. State of Haryana, (2010) 3 SCC 746***, to contend that the absence of public witnesses did not vitiate the search or the seizure, or the consequent conviction of the appellant.

14. Having heard learned counsel and perused the material on record, I am of the opinion that the reliance, by the learned Counsel appearing for the appellant, on the judgments of the Supreme Court in ***Parmanand (supra)*** and ***Arif Khan (supra)***, is well taken, and that the appellant is entitled to succeed even on that ground, so that it becomes unnecessary to enter into other aspects of the controversy.

15. I have already considered, in my earlier decisions in *Dharambir v. State*, (2018)254 DLT 354 and *Gurtej Singh Batth v. State*, (2018)254 DLT 551, the above decisions. I have noted, in these decisions, that the cumulative effect of the judgments of the Supreme Court in *Parmanand (supra)* and *Arif Khan (supra)* is that (i) where recovery, though effected from the baggage of the accused, is effected during a search operation in which the person of the accused is also searched, Section 50 of the NDPS Act would apply and (ii) even where the accused refuses the offer to have his search conducted by a Judicial Magistrate or a Gazetted Officer, the raiding party would, nevertheless, be bound to do so, failing which Section 50 of the NDPS Act would stand infracted. I have also observed that, in *Arif Khan (supra)*, a specific contention had been raised, by the prosecution, before the Supreme Court, that the accused had been apprised of his rights under Section 50, but had refused the offer to have a search conducted before a Judicial Magistrate or by a Gazetted Officer, but that the Supreme Court held, nevertheless, that Section 50 stood violated, and acquitted the accused in the said case.

16. The said principle applies, on all fours, to the facts of the present case as well, as the alleged recovery of the *charas* was effected from the baggage of the appellant, whose person was also searched at the same time, by the I/O himself.

17. The search, seizure and recovery of the alleged contraband, and all proceedings, thereafter, accordingly stand vitiated. The appellant is entitled to be acquitted of the charges against him.

Conclusion

18. In view of the above discussion, the appeal succeeds and is allowed. The appellant is acquitted of the charge, against him, of having committed the offence contemplated by Section 20 of the NDPS Act. The impugned judgment, dated 13th May, 2014, and order on sentence, dated 24th May, 2014 are, therefore, quashed and set aside.

19. The appellant is, accordingly, directed to be released forthwith, unless required to be detained in any other case.

20. Trial Court record be sent back, forthwith. A copy of this judgment be also served on the concerned Jail Superintendent, for compliance.

C. HARI SHANKAR, J

JANUARY 08, 2019

HJ