

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

Judgment Reserved on: 14th February, 2019
% *Judgment Delivered on: 22nd April, 2019*

+ **CRL.A. 125/2017**

TAHEJUL SEIKH @ SIRAJ Appellant
Represented by: Mr.P.K.Anand, Advocate

versus

THE STATERespondent
Represented by: Mr.Ashok Kumar Garg, APP for the
State with ASI Abdul Barkat,
Narcotics Cell/Crime Branch

+ **CRL.A. 592/2017**

NASEEM Appellant
Represented by: Mr.Harsh Prabhakar, Advocate

versus

STATE Respondent
Represented by: Mr.Ashok Kumar Garg, APP for the
State with ASI Abdul Barkat,
Narcotics Cell/Crime Branch

CORAM:
HON'BLE MS. JUSTICE MUKTA GUPTA

1. The present appeals are directed against the judgment dated 22nd December, 2016 passed by the learned Special Judge, NDPS whereby the appellants Tahejul Seikh @ Siraj and Naseem were convicted for offence punishable under Section 21(c) of Narcotics Drugs and Psychotropic Substances Act, 1985 (in short 'NDPS Act'). Vide order on sentence dated 22nd December, 2016, they were sentenced 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 six months.

2. Briefly, the prosecution case is that on 30th May 2013 at about 8:00 A.M., a secret information was received regarding one person namely Tahejul, a resident of Paharganj who was involved in supply of heroin in the area of Delhi and was to come near Idgah Mor, Rani Jhansi Road, Delhi between 9:30 A.M. to 10:00 A.M. to supply heroin to one man namely Naseem, resident of Raghubir Nagar. The secret informer was produced before Inspector Vivek Pathak who made inquiries from him and further informed ACP Udaivir Singh who directed that a raiding party be constituted. Aforesaid information was recorded vide DD No.6 (Ex.PW-3/B). SI Sunil Jain constituted a raiding party consisting of himself, HC Yogesh, Ct. Kheta Ram and HC Om Prakash and informed them regarding the secret information. At around 8:45 A.M. they left from the Narcotics Cell in government vehicle bearing number DL-1-CM-4228 and reached the spot near Idgah Mor, Rani Jhansi Road at about 9:15 A.M. via Pusa Road, Shantivan Flyover, Paharganj. On the way he requested five persons at Pusa Road and JPN Hospital road and four persons at the spot to join the raiding party but they refused to join. They parked the government vehicle at Rani Jhansi Road at a distance of about 50 meters from the spot towards Jhandewalan mandir. Thereafter, he along with the informer took the position on the footpath near the corner of idgah. HC Om Prakash was standing at Rani Jhansi Road towards Jhandewalan Mandir. At about 9:35 A.M., one person wearing khaki colour trousers and having a black colour polythene in his right hand was seen coming from the side of Sadar Bazar Police Station on foot, he crossed them and stood on the road in front of HC

Om Prakash and started waiting for someone. The secret informer identified this person as Tahejul. Few minutes later one person wearing brown colour check shorts was seen coming from the opposite side of the road, he crossed the road and came near Tahejul. The secret informer identified this person as Naseem. Tahejul and Naseem started talking to each other after which Tahejul handed over the black polythene to Naseem. Thereafter, SI Sunil with the help of the members of the raiding team apprehended the appellants at about 9:45 A.M. On enquiry they revealed their names as Tahejul Sheikh and Naseem. He informed the appellants of their legal right to be searched in the presence of a Gazetted Officer or Magistrate but both of them refused to exercise their legal right. He prepared and served the notice under Section 50 NDPS Act vide Ex.PW-1/A and Ex.PW-1/B on Tahejul and Naseem respectively which they refused to sign. Thereafter he searched the Appellants. On personal search of Naseem a black colour polythene was recovered which was found containing a transparent polythene tied with a rubber band. The polythene was found containing matiala colour powder. On testing the powder, it was found to be heroin. Thereafter, he checked the weight of the polythene which weighed 520 grams. He prepared two samples of 5 grams each and kept the same in two separate cloth parcels that were given the mark A and B and the remaining heroin was given the Mark C. He prepared the FSL form and affixed his seal 3 APS 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-1/E. Thereafter, he conducted the search of Tahejul and nothing incriminating was found in his possession. A memo to this effect was prepared vide Ex.PW-1/F. Thereafter, rukka was prepared vide Ex.PW-1/DX. On the basis of the rukka, FIR no.

95/2010 (Ex.PW-2/A) was registered at PS Crime Branch under Section 21/29 NDPS Act.

3. Further investigation of the case was handed over to SI Rajveer Singh. He prepared the rough site plan vide Ex.PW-8/B at the instance of SI Sunil Jain. He arrested Tahejul Sheikh and Naseem vide arrest memos Ex.PW-1/G and Ex.PW-1/K, conducted their personal search vide memos Ex.PW-1/J and Ex.PW-1/M and recorded their disclosure statements vide Ex.PW-1/H and Ex.PW-1/L. Thereafter, he went to PS Crime Branch, Malviya Nagar and deposited the personal search items of the appellants with the MHCM. He prepared special report under Section 57 NDPS Act and submitted the same to Insp. Vivek Pathak. After completion of the investigation, charge sheet was filed. Vide order dated 28th October 2013 charge was framed against Tahejul for offence punishable under Section 29 NDPS Act and against Naseem for offence punishable under Section 21 NDPS Act.

4. Assailing the conviction, learned counsel for Tahejul Seikh @ Siraj contends that the charge against Tahejul was framed under Section 29 NDPS Act but he has been convicted by the Trial Court for offence under Section 21(c) NDPS Act and thus is liable to be acquitted by this court alone as Section 21 is an offence independent of Section 29 NDPS Act.

5. Learned counsel for Naseem contends that the prosecution failed to crease out a vital inconsistency between the depositions of SI Sunil Jain and Insp Vivek Pathak with respect to the evidence of ASI Om Prakash. It was the stand of SI Sunil Jain and Insp. Vivek Pathak that on 30th May 2013 at about 8:15 A.M. Inspector Vivek Pathak had telephonically informed the concerned ACP at his office about the secret information which was received and in furtherance thereof, ACP had directed to conduct raid.

However, ASI Om Prakash, reader of the ACP deposed that on 30th May 2013 ACP came to the office at around 10:00 A.M. Moreover, the investigating agency did not associate any independent public persons to join the raiding party even though the recoveries were made from thickly populated places during the day. Furthermore, no photographs were taken nor any videography was conducted to grant greater credibility to the proceedings. The site plan reveals that the official gypsy of the police was visible from the spot where the appellants were allegedly exchanging contraband. It is unnatural that the appellants would go about their illegal activities in presence of the police. The site plan also does not depict the presence of houses and shops in the vicinity. Reliance is placed upon the decisions of the Delhi High Court reported as (2015) 219 DLT 271 Mohd. Masoom v. State of NCT of Delhi and (2014) 146 DRJ 629 Ram Prakash v. State.

6. Learned counsel for Naseem further submits that the search conducted in the case is not in accord with the mandate of Section 50 NDPS Act wherein the search has to be mandatorily conducted in the presence of a gazetted officer or magistrate. Reliance is placed upon the decision of the Supreme Court reported as AIR 2018 SC 2123 Arif Khan v. State of Uttarakhand. The statutory notice under Section 50 NDPS Act was not served at the time of apprehension and search but was ante-timed later as HC Yogesh deposed that notice under Section 50 was given to the Appellant after 20-25 minutes of his apprehension. Moreover, the log book of the vehicle was not produced and proved before the Trial Court which casts doubt over the probity of the investigation. Driver of the vehicle HC Rajesh was also not examined by the prosecution. Reliance is placed upon the

decision of the Delhi High Court reported as (2014) 146 DRJ 629 Ram Prakash v. State. He submits that it is difficult to believe that the appellants and members of the raiding team were not carrying mobile phones. The investigating agency willfully suppressed the fact that the Appellants and the members of the raiding party were having mobile phones as their CDRs would have revealed that they were at different location at the time of apprehension. Moreover, the seal applied to the pullandas was not handed over to independent public persons and the possibility of tampering with the case property cannot be ruled out. Reliance is placed upon the decision of the Delhi High Court reported as 49 (1993) DLT 193 Safiullah v. State and the decisions of the Punjab & Haryana High Court reported as 2007 SCC OnLine P&H 573 Gurjant Singh v. State of Punjab, 2013 SCC Online P&H 18887 Prakash Singh v. State of Punjab. He further submitted that the sample seal and Form FSL were not even produced by the prosecution before the Court. The courts must have the benefit of inspecting and comparing the seal. Reliance is placed on the decision of the Supreme Court reported as (1998) 8 SCC 449 State of Rajasthan v. Gopal and the decision of the Delhi High Court reported as 67 (1997) DLT 372 Matloob v. State. He also points out that when the pullanda Mark A was produced during examination in chief of the members of the raiding party, seal allegedly applied by SI Sunil Jain was not observed by the Court and there is reference only to the seal of Insp. Padam Singh Rana.

7. Learned counsel for Tahejul adopts the contentions raised by Learned counsel for Naseem.

8. Per contra, learned APP for the State contends that the Form FSL was filled up at the spot and the seal was handed over to HC Yogesh. He further

submits that the prosecution completed the link evidence of the case by examining all the material witnesses.

9. ASI Om Prakash (PW-3) in his testimony stated that on 30th May 2013, DD no.6 was received in the ACP office duly forwarded by Ins. Narcotic Cell recorded by SI Sunil Jain and it was entered at serial no. 1280 in their register vide Ex PW 3/A and he put the same before the ACP Sh. U S Rathi. On 31st May 2013, two special reports under Section 57 NDPS Act duly forwarded by Insp. Narcotic Cell, Delhi were received vide diary no. 1311 and 1312. One of the reports was with regard to the seizure of 520 gms heroine and other was in respect of arrest of accused persons. He further stated that the said reports were placed before ACP Zile Singh and were signed by him. In his cross examination, he stated that the information was received in office at 10 am by the reader, namely Ct. Sohan Pal of Ins. Narcotics Cell, Shakar Pur. He further deposed that no time was mentioned against serial no.1311 and 1312 and the name of the accused persons were also not mentioned in the register. He also deposed that he did not obtain the signatures of Ct. Sohan Pal in the register and nor did he give any receipt to him.

10. HC Om Prakash (PW-4) in his testimony stated that on 3rd June, 2013 at about 7:00 A.M., he went to PS Crime Branch, Malviya Nagar and by the order of SHO collected one sealed parcel, FSL form and other documents from MHC(M) and deposited them at FSL, Rohini vide RC No. 179/21/13 and handed over the acknowledgment and copy of RC to MHC (M). In his cross examination, he stated that the documents which he collected from MHC(M) were copy of FIR and copy of seizure memo. He further stated that FSL form was not in the envelope. He further stated that FSL form was

a printed white colour paper filled with hand, bearing the signatures of SI Sunil Jain.

11. HC Jag Narain (PW-6) stated that on 30th May 2013 at about 3:10 P.M, Insp. Padam Singh Rana called him in his office along with register no. 19 and handed over 3 pullandas Mark A, B and C and FSL Form duly sealed with the seal of 2APSNB Delhi and PSR and carbon copy of seizure memo. On the same day at around 10:00 P.M., ASI Rajbir had produced the personal search articles of the appellants and carbon copy of notice u/s 50 NDPS Act.

12. Section 29 of the NDPS Act reads as under:-

“29. Punishment for abetment and criminal conspiracy-

(1) Whoever abets, or is a party to a criminal conspiracy to commit an offence punishable under this Chapter, shall, whether such offence be or be not committed in consequence of such abetment or in pursuance of such criminal conspiracy, and notwithstanding anything contained in section 116 of the Indian Penal Code (45 of 1860), be punishable with the punishment provided for the offence.

(2) A person abets, or is a party to a criminal conspiracy to commit, an offence, within the meaning of this section, who, in India abets or is a party to the criminal conspiracy to the commission of any act in a place without and beyond India which –

(a) would constitute an offence if committed within India; or

(b) under the laws of such place, is an offence relating to narcotic drugs or psychotropic substances having all the legal conditions required to constitute it such an offence the same as or analogous to the legal conditions required to

constitute it an offence punishable under this Chapter, if committed within India.”

13. Section 21 reads as under:-

“21. Punishment for contravention in relation to manufactured drugs and preparations –

Whoever, in contravention of any provision of this Act or any rule or order made or condition of licence granted thereunder, manufactures, possesses, sells, purchases, transports, imports inter-State, exports inter-State or uses any manufactured drug or any preparation containing any manufactured drug shall be punishable,

(a) where the contravention involves small quantity, with rigorous imprisonment for a term which may extend to six months, or with fine which may extend to ten thousand rupees, or with both;

(b) where the contravention involves quantity, lesser than commercial quantity but greater than small quantity, with rigorous imprisonment for a term which may extend to ten years and with fine which may extend to one lakh rupees;

(c) where the contravention involves commercial quantity, with rigorous imprisonment for a term which shall not be less than ten years but which may extend to twenty years and shall also be liable to fine which shall not be less than one lakh rupees but which may extend to two lakh rupees: Provided that the court may, for reasons to be recorded in the judgment, impose a fine exceeding two lakh rupees.”

14. A perusal of the two provisions reveal that Section 21 NDPS Act deals with the substantive offence of the manufacturing, possessing, selling, purchasing, transporting, importing, exporting or using any manufactured drug or any preparation in contravention of the provisions of the Act

whereas Section 29 provides for punishment for abetment or if a person is a party to a criminal conspiracy to commit the said offence. In the present case charge for offence punishable under Section 29 NDPS Act was framed against the Tahejul Seikh @ Siraj however he has been convicted for offence punishable under Sections 21 (c) NDPS Act. During the course of trial charge qua Tahejul Seikh had not been amended.

15. As noted above the case of the prosecution is that Tahejul handed over the black polythene to Naseem from which the contraband was recovered. Merely because Tahejul was not apprehended with the contraband, it cannot be said that Tahejul had not committed the offence punishable under Section 21 (c) of the NDPS Act. However, the issue is when a charge for offence punishable under Section 29 NDPS Act is framed against the accused whether he can be convicted for offence punishable under Section 21(c) of the NDPS Act.

16. In the decision of the Supreme Court reported as (2003) 11 SCC 534 Sohan Lal Vs. State of Punjab, it has been held:-

“7. Section 211 of the Code of Criminal Procedure requires that the charge against the accused be precisely stated. Sub-section (4) of Section 211 of the Code of Criminal Procedure specifically requires that the law and section of the law against which the offence is said to have been committed shall be mentioned in the charge. The learned counsel for the respondent State, relying on Section 464 of the Code of Criminal Procedure, urged that failure to specify Section 109 in the charge-sheet against Sohan Lal was a mere irregularity which would not vitiate the trial without proof of prejudice to the accused. We cannot agree. The learned counsel for the accused is fully justified in his submission that failure to frame a charge with regard to the substantive offence of Section 109 IPC has certainly

prejudiced the accused in the trial court. The accused Sohan Lal @ Sohan Singh was called upon to face trial only for the charge under Section 304-B IPC. Neither a charge under Section 302 IPC nor under Section 109 IPC, was levelled against him in the charge-sheet. In the absence of a charge being framed against the accused Sohan Lal under Section 302 or 109 IPC, it would certainly cause prejudice to him, if he is convicted under either of these offences at the end of the trial. In our view, it was not permissible for the trial court to convict the first accused Sohan Lal for the offence under Section 302 read with Section 109 IPC. His conviction under Section 302 read with Section 109 IPC is, therefore, illegal and is liable to be set aside. The High Court erred in upholding the conviction of Sohan Lal @ Sohan Singh under Section 302 read with Section 109 IPC and dismissing his appeal.”

17. As noted above charge for offence punishable under Section 29 NDPS Act was framed against Tahejul. No charge for offence punishable under Section 21 NDPS Act was framed against him, thus in the absence of charge under Section 21 NDPS Act having been framed, Tahejul would be seriously prejudiced by conviction for offence punishable under Section 21 NDPS Act as he had no opportunity to lead defence qua the said charge.

18. It is the case of the prosecution that after recovery of the contraband weighing 520 grams, two samples of 5 gm each were kept in two separate cloth parcels marked as Mark A and B and the remaining heroine was kept in a pullanda Mark C. All the three parcels were sealed with the seal of 3 APS NB Delhi at the spot and also with the seal of the concerned Inspector Padam Singh Rana i.e. PSR before being deposited in the malkhana.

19. Even as per the statement of HC Jag Narayan (PW-6) on 30th May, 2013 at 3:10 PM Insp. Padam Singh Rana SHO called him in the office

along with register No.19 and handed over 3 pullandas marked A, B and C and FSL Form duly sealed with the seal of 3APS NB Delhi and PSR and carbon copy of the seizure memo. He deposed that he made an entry in register No.19 at serial No.1757 in his own handwriting and exhibited the photocopy after showing the original to the learned Trial Court. However when the three parcels were produced in Court and identified by HC Yogesh, parcel containing A which was sent to the FSL had both the signatures of the SHO and SI Sunil Jain besides signatures of the witnesses HC Yogesh and Ct.Kheta Ram and one broken seal of PSR only was also available. In parcel B the cloth parcel bore the signatures of SHO and SI Sunil Jain and the two witnesses and both the seals. Parcel C when produced in Court noted bore the particulars of case, signatures of the SHO, signatures of Sunil Jain and the signatures of two witnesses namely HC Yogesh and Ct.Kheta Ram and the two seals being affixed thereon. Even case of Insp.Padam Singh Rana -5 was that pullandas A, B and C were sealed with the seal of 3APS NB Delhi which was also affixed on the FSL form and thereafter he countersealed the pullandas with his seal PSR and that the three pullandas, seizure memo, FSL form bore the signatures of SI Sunil Jain, Insp.Padam Singh Rana and the two witnesses i.e. HC Yogesh and Ct.Kheta Ram. Even in the deposition of SI Sunil Kumar, there is no reference that when parcel A was produced in the Court it bore the two seals.

20. The prosecution thus having not proved that the parcel A containing the sample contraband which was kept in the malkhana with the two seals but when produced in the Court, only one broken seal was found which creates a a doubt as to whether the contraband was kept safely and securely

and was not tampered with.

21. It is the consistent case of both SI Sunil Jain and Insp. Vivek Pathak that information was received at 8:00 AM from secret informer and at 8:30 AM when DD No.6 was recorded permission from the ACP had been taken for conducting raid telephonically at his office however ASI Om Prakash Reader to the ACP clearly stated that the ACP reached the office around 10:00 AM which casts a doubt as to whether permission as sought from the ACP or not.

22. In view of the serious infirmities in the case of the prosecution, as noted above this Court deems it fit to grant benefit of doubt to the appellants. Consequently, the impugned judgment of conviction and order on sentence qua the appellants is set aside.

23. Appeals are disposed of. Appellants are directed to be released forthwith if not required in any other case.

24. Copy of this order be sent to Superintendent Central Jail Tihar for updation of the Jail record and intimation to the appellants.

25. TCR be returned.

(MUKTA GUPTA)
JUDGE

APRIL 22, 2019
vj/mamta