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

+ **CRL.L.P. 660/2019 & CRL.MA. 41612/2019**

STATE (NCT OF DELHI)

..... Petitioner

Through: Ms Kusum Dhalla, APP for State.
SI Bintu Sharma, P.S. Nand Nagri.

versus

FAROOQ

..... Respondent

Through:

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER

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08.01.2020

VIBHU BAKHRU, J

1. The State has filed the present petition seeking leave to appeal against a judgment dated 29.08.2019 passed by the Additional Sessions Judge-03 (Shahdara District), Karkardooma Courts, whereby the respondent was acquitted of the charge under Section 20 of the Narcotics and Psychotropics Substances Act, 1985 (hereafter the 'NDPS Act'). The State contends that the Trial Court had erred in not appreciating the evidence on record and for taking into account minor discrepancies in the testimonies of the prosecution witnesses and acquitting the respondent (accused) on the said basis.

2. The case of the prosecution is that on 10.02.2016, ASI Devi Ram/ IO (PW3), HC Sardar Singh (PW4), and Ct. Sunil (PW2) were on patrolling duty and at about 3:30 pm, they reached Peeli Mitti Ground near TLM Hospital where they saw the accused (respondent herein) sitting by the side of the road on a white plastic sack. On smelling the odour of *ganja* coming from the bag, they intercepted the accused and information was conveyed to the SHO, who gave directions to conduct the proceedings. On interrogation, the accused disclosed his name and the IO prepared a notice under Section 50 of the NDPS Act and apprised the contents of the notice to the accused. The accused was also apprised by the IO regarding his legal right of being searched in presence of a gazetted officer or Magistrate. However, the accused neither searched the patrolling party nor exercised his right to be searched before a Gazetted Officer or Magistrate at the spot. The accused stated that he was illiterate and could only sign.

3. Thereafter, the IO searched the accused but nothing incriminating was found in his possession. When the IO opened the sack, a substance, which looked like *ganja* was found. Thereafter, the IO sent HC Sardar Singh (PW4) to PS Nand Nagari and he returned with an electronic weighing machine at the spot. The said weighing machine was not functional as it was not charged; it was made functional by stopping a TATA 407 on the spot and powering the weighing machine with the battery of that vehicle. The entire *ganja*, along with the plastic sack, were weighed and it was found to be 37 kgs. The recovered *ganja* was mixed randomly and two samples of 1 kg each were taken out and kept

in two transparent jars and the samples were wrapped in white cloth and two *pullandas* were prepared and sealed with the seal of DRS. The remaining *ganja* (i.e. 35 kgs) was sealed in a white plastic sack and the mouth of the sack was also sealed with the seal of DRS.

4. The Trial Court held that the requirement of Section 50 of the NDPS Act had not been complied to in the present case and the same was necessary. The Trial Court came to the said conclusion by observing that the original notice under Section 50 of the Act (Ex. PW-2/C), as well as the carbon copy of the original notice (Ex. PW-2/F), both bore the reply of the accused. This indicated that the notice was served after writing the reply of the accused. The fact that the notice with the reply was served upon the accused proved that the requirement under Section 50 of the NDPS Act was not complied with.

5. The Trial Court also noted that there was an inconsistency in the testimony of PW2 – HC Sunil regarding the service of the notice under Section 50 of the NDPS Act. During his cross examination by the learned APP (dated 21.08.2018), he stated that a carbon copy of the notice was served on the accused. Whereas, in his further examination in chief (dated 24.08.2018), he stated that the original notice under Section 50 of the NDPS Act was served by the IO upon the accused. Due to the apparent contradiction, he was cross examined again, wherein he admitted that the carbon copy of the notice (Ex. PW2/F) was served on the accused and not the original as stated by him during the identification of the notice. On the basis of the same, the Trial Court held that there was a doubt regarding the service of the statutory notice

in the first place.

6. The Trial Court further took note of the contention that the reply on the notice under Section 50 of the NDPS Act was written by the IO, even though the accused could read or write, which was apparent from the application, Ex. DW1/A, as the same was written and signed by the accused. The Trial Court took note of the statement of the accused under Section 313 of the CrPC, wherein he had stated that he had studied upto Vth class and was appearing for his Xth class examination through the National Open School. As per the accused, he was neither present at the spot and nor did he give any instructions to the IO to write any reply on his behalf on the notice under Section 50 of the NDPS Act. He also took a defence that his signatures were obtained forcefully on blank documents after lifting him from his house. To prove the same, the accused examined Manoj Kumar, Assistant Superintendent, Jail no. 11, Mandoli Jail as DW-1 to prove that the accused was admitted in Class Xth of National Institute of Open School from Mandoli Jail in the academic year 2018-2019. Sh. Manoj Kumar also produced the hall ticket which was issued in the name of the accused by the National Institute of Open Schooling as Mark A and Mark B. He also testified that the accused Farooq had written an application addressed to the Jail Superintendent (Ex. DW1/A).

7. The Trial Court perused the testimony of DW1 Sh. Manoj Kumar and the documents submitted by him (especially the application Ex. DW1/A) and concluded that it was apparent that the accused could write and read Hindi and therefore, the refusal written on the notice by the IO

on the pretext that the accused stated himself to be illiterate with only the knowledge to sign, did not inspire any confidence.

8. The Trial Court also noted that the original seizure memo contained the FIR number. The Trial Court took into account the testimonies of the first IO (PW 3 ASI Devi Ram) and second IO (PW6-Rajender Singh). Both the IOs had not deposed regarding making any change in the seizure memo. The Trial Court also noted that the seizure memo was stated to have been prepared before the FIR, yet it bore the FIR number. Further, on perusal of the seizure memo and the FIR, it seemed that both the documents had been prepared by the same person with the same pen. On the basis of the aforesaid facts and settled position of law, the Trial Court held that seizure memo appeared to have been prepared after the registration of the FIR and the said fact had put a dent in the case of the prosecution.

9. The Trial Court also noted that there could be possible manipulation in the departure entry which further weakened the case of the prosecution. The Trial Court noted that the testimony of PW1-ASI Pradeep regarding the recording of the departure entry on 10.02.2016, at 3:00 p.m., though his duty hours were from 4:00 p.m. to 12:00 midnight, was not trustworthy. This was since PW-1, ASI Pradeep, did not have any written direction from the concerned SHO in this regard. The fact that entry in the *rojnamcha* register was made at Sr. No. 12A, whereas DD produced on record was 12B, could not be overlooked.

10. The Trial Court noted that the IO, PW3, had not made any efforts

to join any public witnesses prior to the apprehension of the accused. Even post-apprehension, it did not appear that the IO/PW3 had made any genuine effort to associate them. Despite the fact that the spot was surrounded by BSES, TLM Hospital, Rajiv Gandhi Super Speciality Hospital or Janta Flats, the IO did not try to call any person from such places to associate any of them in the investigation process. As per the testimony of IO/PW3, the entire process took about four hours. Given the fact that the entire process took four hours, the IO ought to have made more efforts than just asking persons only once to join the investigation. No credible explanation was provided by the police officials regarding public witnesses not being made a party to the proceedings.

11. The Trial Court also perused the call data records (CDRs) of the police officials as on the date of the alleged incident and found that as per the said records, they were not present on the said spot and at the said time. The times and locations as found as per the CDRs did not substantiate the testimonies of the police officials. On the basis of the same, the Trial Court held that the fluctuating tower location of the mobile phones of the persons of the raiding party also negated the case of the prosecution.

12. The Trial Court also noted that the testimony of the IO/PW3, read in conjunction with the testimony of PW4, made it clear that a DD entry was required to be made before the issuance of the electronic weighing machine, which had apparently not been done in the present case. Therefore, the deposition of IO/PW3 to the effect that PW4 was sent to

the police station to procure the electronic weighing machine did not inspire confidence. In this regard, the Trial Court also noted that the testimony of the recovery witness was not trustworthy to the effect that the electronic weighing machine was made operational by connecting to the battery of TATA 407 as the same was not stated by the recovery witness in his/her statement under Section 161 of the CrPC.

13. The Trial Court noted that there were further contradictions in the testimonies of the prosecution witnesses with reference to the plastic sack of white colour which had been recovered from the accused. The variation in the testimonies of the witnesses regarding the identity of the plastic sack weakened the case of the prosecution. There were further contradictions in the testimonies regarding the time and manner of the deposit of the sealed exhibits and personal search articles. The Trial Court also concluded that there was no coherence in the testimony of the witnesses about the procedure followed after the apprehension of the accused with the contraband.

14. The Trial Court also held that the deposit of the FSL form and carbon copy of the seizure memo was highly doubtful, since it was not mentioned in the register nor in the Road Certificate. The testimony of PW8 regarding the deposit of the FSL form could not be relied upon in absence of the mention of the same in the relevant entry in the register, as recorded by PW8 himself. The seal was allegedly handed over to HC Sardar Singh, but no handing over/taking over memo of seal was prepared. All the aforesaid facts created a possibility of tampering with the case property which could not be ruled out.

15. On the basis of the aforesaid inconsistencies, the Trial Court held that the prosecution had been unable to establish its case beyond reasonable doubt and acquitted the respondent under Section 20 of the NDPS Act.

Reasons and Conclusion

16. Given the evidence obtaining in this case, there is no doubt that the prosecution had failed to establish that the respondent had committed the offence beyond reasonable doubt. The Trial Court had analysed the evidence and had found that there were various reasons to doubt the case set up by the prosecution. First of all, there was a serious doubt whether the members of the patrolling team were present at the spot, as alleged. According to the prosecution, ASI Devi Ram (who deposed as PW 3), H.C. Sardar Singh (who deposed as PW 4) and Ct Sunil (who deposed as PW 2) had left the Police Station for patrolling. PW1, ASI Pradeep, had testified to the said effect. He affirmed that he had made an entry to the said effect (DD No.12-A). It is important to note that PW 1 did not testify to the aforesaid effect. He was initially examined in chief which was conducted on 01.08.2018. He was thereafter cross-examined and his evidence was concluded. However, he was recalled for further examination-in-chief nine months later at the instance of the prosecution which was recorded on 06.06.2019. He now testified that he was posted as Duty Officer on 10.02.2016 and he had recorded DD no. 12-A regarding the departure of ASI Devi Ram, H.C. Sardar Singh and Constable Sunil from the police station for patrolling. He also produced the original register containing the said entry which

indicated that the DD Entry was lodged at 3.00 p.m. However, in his examination-in-chief which was recorded on 01.08.2018, he had deposed that he was acting as a duty officer on 10.02.2016 from 4.00 p.m. to 12.00 midnight. Contrary to his earlier statement, he now stated that the duty officer who was on duty prior to his duty had left before time and he was assigned to act as a Duty Officer. In his initial examination-in-chief recorded on 01.08.2018, he had made no such statement on the contrary and he had unequivocally affirmed that his duty, as a Duty Officer was from 4.00 p.m. to 12.00 midnight. Thus, it is difficult to accept that he was acting as a Duty Officer prior to 4.00 p.m. on that date, that is, on 10.02.2016. Curiously, a copy of the DD No.12-A has been exhibited as Ex. PW 1/D. This clearly raised serious doubt as to whether the police officials had left the Police Station for patrolling as stated by the prosecution.

17. This is also material because the call records of the patrolling party do not reflect that they were at the spot at the material time.

18. It is the prosecution's case that the respondent was apprehended in possession of *ganja* weighing 37 kgs at Peeli Mitti Ground at about 3.30 p.m. on 10.02.2016. It was the respondent's defence that he had been falsely implicated and he had been picked up from his residence and taken to P.S. Nand Nagari. It is claimed by the respondent that he was not apprehended at the spot as claimed by the prosecution. In this context, the respondent filed an application for summoning the CDRs of the members of the patrolling party. The said application was allowed by the Trial Court by an order dated 17.09.2016. The Trial Court had

noted that this order was not complied with. It is not disputed that this order was not complied with. Initially, after the order was passed, the prosecution resisted disclosure of CDRs by contending that the said information could not be called for. Thereafter, after the Trial Court reiterated the same in the order dated 26.04.2017, the police officials filed a report dated 02.06.2017 stating that CDRs were not available beyond one year. The Trial Court records that thereafter the respondent filed an application for initiating action against the erring police officials for not complying with the orders dated 17.09.2016 and 26.04.2017. In reply to the said application, the report was filed once again reiterating that CDR was not available beyond one year. Thereafter, the Trial Court passed an order dated 18.12.2017 directing the concerned SHO to file a para-wise reply to the application which was filed on 21.12.2017 with the CDRs of all the members of the raiding party.

19. The respondent examined Vinod Kumar, Nodal Officer, MTNL who deposed as DW 2 and Pawan Singh, Alternate Nodal officer, Vodafone Idea who deposed as DW 3. DW 2, *inter alia*, produced certified copy of the call details of 10.02.2016 pertaining to the mobile of Constable Sunil (Ex. DW 2/C). He also produced the call details of Const. Sardar Singh (Ex DW- 2/F). DW 3 produced the call details of mobile no. 8586908532 and mobile No. 9711513609.

20. The Trial Court had analysed the said evidence. The call details completely discredited the prosecution's case that the patrolling party was at the spot at the relevant time. Head Constable, PW 2, Sunil

claimed that he was not carrying his mobile at the material time, however, he did not depose as to who was carrying the said mobile. This was important since the CDRs did not indicate that the said mobile was at a stationary spot during the material time. Be that as it may, the Trial Court disregarded the call detail records of H.C. Sunil for the purposes of taking a view. The relevant extract of the impugned judgment setting out the conclusion of the trial court on the analysis of the call details on the basis of the analysis of the call details is set out below:-

“12.22. The perusal of CDR of mobile no. 8586908532 for 10.02.2016 in the name of IO/ PW-3 ASI Devi Ram shows that his tower location was at Mandoli Extension, Delhi at about 2.24 pm, which changed to GTB Enclave Chowk at about 3.27 pm, which further changed to Delhi State Cancer Institute i.e. near spot at about 4.15 pm and continued till 4.29 pm. It further changed to Nand Nagri at about 4.58 pm, again to Mandoli Extension at about 5.40 pm, which again changed to ESI Dispensary, Nand Nagari at about 5.44 pm, Mandoli Extension, Delhi at about 6.04 pm; Nand Nagri at about 6.16 pm; Rajender Magar, Ghaziabad at about 7.44 pm and to Shalimar Garden Extension, Ghaziabad, at about 8.20 pm.

12.23. The tower location of mobile no. 9711513609 for 10.02.2016 in the name of Ravi Prakash Singh, which was being used by Second IO/PW-6 SI Rajender, shows that the tower location was at Janta Flat, Nand Nagri at about 6.10 pm which changed to GTB Enclave, Nand Nagri at about 6.19 pm; Nand Nagri, near post office at about 7.25 pm; ESI Dispensary, Nand Nagri at about 8.10 pm; 705 & 706 Janta Flats Nand Nagri at about 8.39 pm; ESI Dispensary Nand Nagri at about 8.40 pm & finally

changed to 705 and 706, Janta Flats, Nand Nagri, Delhi at 8.51 pm.

12.24. The call detail record and tower location of mobile no. 8586908532 of IO/ PW3 ASI Devi Ram shows that he was not stationed at particular place on 10.02.2016 during the period from 2.44 pm till 8.20 pm. It is apparent from tower location that the IO/PW3 ASI Devi Ram was moving from Mandoli Extension-GTB Enclave chowk- Delhi State Cancer Institute, Dilshad Garden-Nand Nagri-Mandoli Extension-Nand Nagri- Mandoli Extension- Nand Nagri- Rajender Nagar, Ghaziabad- Shalimar Garden Extension, Ghaziabad during the period from 2.24 pm till 8.20 pm. According to IO/PW3 ASI Devi Ram, he was using the aforementioned mobile number while he apprehended the accused at about 3.30 pm and he remained at the spot for about 4 hours for conducting the proceedings. In such factual backdrop of this case, the tower location of mobile no. 8586908532, which was being used by IO/ PW3 ASI Devi Ram on 10.02.2016, should have been of the spot only i.e. near TLM hospital. Sunder Nagri, Delhi. However, the tower location has been fluctuating from one place to another which shows that the IO/ PW3 ASI Devi Ram was not stationed at the spot for nearly 4 hours, as deposed by him in his cross-examination dated 31.10.2018.

12.25. Once the IO/PW3 ASI Devi Ram was not stationed at the spot, the presence or non-presence of other recovery witnesses at the spot is inconsequential. Be that it may, tower location of mobile no. 9868369884 in the name of Ct. Sardar Singh shows that he was also not stationed at particular place as tower location of his mobile phone was at Gandhi Nagar from 2.45 pm till 3.25 pm, which changed to Kanti Nagar Extension at 3.49 pm and then to Krishna Nagar at 4.06 pm, Shahdara at 4.29 pm, Nand Nagri at 6.21 pm, Sunder Nagri

at 6.22 pm which continued till 7.10 pm. Thereafter, tower location of his mobile phone is of Nand Nagri from 7.25 pm to 7.46 pm and is of Ashok Nagar, Delhi at about 7.49 pm.

12.26. As per HC Sardar Singh, he was member of raiding team on 10.2.2016 and had apprehended the accused at about 3.30 pm at Peeli Mitti ground, near TLM hospital and was part of investigation with IO from 3.30 pm to 8.00 pm. Pertinently, during cross-examination, PW-4 HC Sardar Singh testified that he was directed to bring electronic weighing machine from PS at about 4.00 pm; he collected the electronic weighing machine at about 4.15 pm and returned to the spot at about 4.25 pm. He stated that he did not make any separate DD entry regarding collecting of electronic weighing machine from PS. He deposed that he was using connection of MTNL when the present case was registered. He confirmed using aforesaid mobile number at the time when the accused was apprehended, had it been so, the tower location of the mobile phone used by PW-4 HC Sardar Singh would have only been of Peeli Mitti ground, near TLM Hospital. According to him, he had gone to PS at about 4.00 pm to collect the electronic weighing machine. The Police station is at Nand Nagri. At about 4.06 pm, the tower location of mobile phone of Ct. Sardar Singh is of Krishna Nagar, Delhi which changed to Shahdara, near KKD Court at about 4.29 pm and is of Nand Nagri at about 6.21 pm. Therefore, the deposition of HC Sardar Singh that he had gone to PS at about 4.00 pm and reached there at about 4.15 pm to collect the electronic weighing machine and thereafter he returned to spot at about 4.25 pm is not in tune with the tower location of the aforesaid mobile no. 9868369884 which was being used by him on the date of recovery i.e. 10.02.2016.

12.27 The fluctuating tower location of the mobile phone of aforesaid witnesses during the investigation process also negates the case of the prosecution.”

21. Ms Dhalla, learned APP appearing for the State had contended that the aforesaid conclusions were erroneous because it was not the prosecution’s case that H.C. Sardar Singh (PW 4) had remained at the spot from 3:30 p.m. onwards. She stated that his testimony indicated that he was sent back to the Police Station to procure a weighing machine and thus, the fact that the location of the mobile phone of H.C. Sardar Singh was changing during the said period does not raise any doubts as to the case of the prosecution. This contention is unmerited because H.C. Sardar Singh, in his cross-examination, had stated that he was directed to bring the weighing machine from the police station at 4.00 p.m. and he had collected it around 4.15 p.m. He stated that he had returned back to the spot at 4.25 p.m. However, an analysis of his call records also indicates that the mobile towers with which the phone was connected was changing even after 4.25 p.m.

22. More importantly, there is no explanation as to why the location of the phone of ASI Devi Ram (PW 3) was also changing during the aforesaid period. According to the prosecution, he was at the spot 3.30 p.m. onwards. In view of the above, this Court finds no infirmity in the conclusion of the Trial Court in acquitting the respondent. The testimony of PW 1 with regard to the DD entry relating to the movement of the patrolling party and the call details records pertaining to the said raiding party clearly raised serious doubts as to the prosecution’s case

that the police officials who were on patrolling duty had apprehended the respondent at the stated time from Peeli Mitti Ground. In view of these doubts, the respondent could not be convicted for the offences for which he was charged, nonetheless, the Trial Court had also noticed that there were material discrepancies in the testimony of witnesses regarding the description of the plastic sack from which the *Ganja* was allegedly recovered. The Trial Court also found that the entry made in Register No. 19 (Ex. PW 7/A) also did not mention deposit of any FSL Forms or the carbon copy of the seizure memos. This too raised doubts as to the prosecution's case and possibility of tampering of the case property.

23. It is also relevant to note that the Trial Court had also noticed that the provisions of Section 50 of the NDPS Act were not complied with. However, this conclusion may not be sustainable since according to the prosecution, the recovery was a chance recovery.

24. In ***State of Punjab v. Baldev Singh: 1999 (6) SCC 172***, the Supreme Court held as hereunder:

“25. The questions considered above arise frequently before the trial courts. Therefore we find it necessary to set out our conclusions which are as follows:

(1) If a police officer without any prior information as contemplated under the provisions of the NDPS Act makes a search or arrests a person in the normal course of investigation into an offence or suspected offences as provided under the provisions of CrPC and when such search is completed at that stage Section 50 of the NDPS Act would not be attracted and the question of complying with the requirements

thereunder would not arise. If during such search or arrest there is a chance recovery of any narcotic drug or psychotropic substance then the police officer, who is not empowered, should inform the empowered officer who should thereafter proceed in accordance with the provisions of the NDPS Act. If he happens to be an empowered officer also, then from that stage onwards, he should carry out the investigation in accordance with the other provisions of the NDPS Act...”

25. In ***State of Himachal Pradesh v. Sunil Kumar: 2014 (4) SCC 780***, the Supreme Court held as under:

“20. We are not in agreement with the view of the High Court that since the police officers had a positive suspicion that Sunil Kumar was carrying some contraband, therefore, it could be said or assumed that they had reason to believe or prior information that he was carrying charas or some other narcotic substance and so, before his personal or body search was conducted, the provisions of Section 50 of the Act ought to have been complied with. The recovery of charas on the body or personal search of Sunil Kumar was clearly a chance recovery and, in view of *Baldev Singh [State of Punjab v. Baldev Singh, (1999) 6 SCC 172 : 1999 SCC (Cri) 1080]*, it was not necessary for the police officers to comply with the provisions of Section 50 of the Act.”

26. However, it is not necessary for this Court to examine this aspect because even if the Trial Court’s decision regarding non-compliance of Section 50 of the NDPS Act is completely ignored, it would not affect the conclusion of the case. Given the evidence led in this case, there is little doubt that the prosecution has failed to establish its case beyond

reasonable doubt.

27. In view of the above, this Court finds no reason to interfere with the impugned judgment.

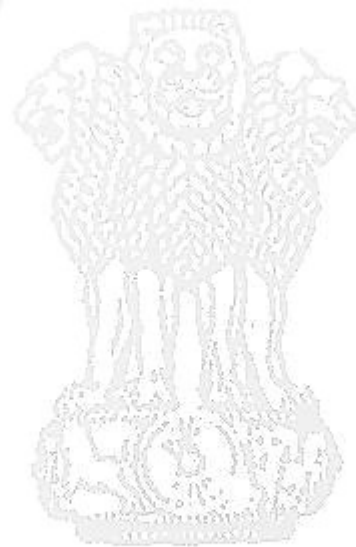
28. The petition seeking leave to appeal is, accordingly, dismissed.

29. The pending application is also disposed of.

JANUARY 08, 2020

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VIBHU BAKHRU, J



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