

IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 27.01.2020

+ **CRL. A. 30/2020**

STATE OF NCT OF DELHI

..... Appellant

versus

PALGIRI SIDDIQUE AND ANR.

..... Respondents

Advocates who appeared in this case:

For the Appellant : Ms Meenakshi Chauhan, APP for State.
SI Sanjeev Kumar, Special Cell/SR.
For the Respondent: Mr S.S. Das, Advocate for R-1.

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HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. The State has filed the present appeal impugning the judgment dated 16.02.2017, whereby the Additional Sessions Judge-04, Patiala House Courts had acquitted the respondent of the charges under Section 21(c)/29 of the Narcotics and Psychotropics Substances Act, 1985 (NDPS Act). The State contends that the Trial Court had erred in not appreciating that there were only minor contradictions in the testimonies of the material witnesses, which could be overlooked. Further, the Trial Court had failed to appreciate that there was no requirement to have public witnesses corroborate the case of the prosecution.

The prosecution's case

2. The case of the prosecution is that on 22.06.2012, Inspector Devender Singh, Special Cell, SR was present at his office at New Friends Colony when he received information from a secret informer that one Afghani national, namely Dawood, staying at a hotel in Daryaganj or Jama Masjid would come at about 2:30 pm to Millennium Park, near Sarai Kale Khan, and would deliver heroin to someone. This information was recorded vide DD No. 6 at 10:35 am in Roznamcha, Special Cell, SR by Inspector Devender Singh. Inspector Devender Singh communicated the same to ACP/NDR through telephone who directed him to take the necessary action. As per directions of the ACP, a raiding party was formed consisting of SI Mohd Mobin, ASI Mahipal Singh, HC Balraj Singh, HC Ajay Kumar, Ct Rajesh Kumar and Ct. Satish Kumar. Inspector, Devender Singh, along with the raiding party went to the spot at 01:10 p.m. in two private vehicles.

3. After reaching the bus stand of Sarai Kale Khan, Inspector Devender Singh stopped the vehicle and asked 5-6 passersby to join the raiding party. However, they were not agreeable to join the proceedings and went away without giving their names or addresses. The same exercise was also conducted at Millennium Park, however, no one joined the raiding party.

4. On 22.06.2012, at about 2.40 pm, two boys came and stood near the corner of the parking. One of the boys was tall, fair complexioned and looked like an Afgani. The height of the other boy was short. The short heighted boy had a big jute bag in his hand. As per the secret

informer, the said persons had come to supply heroin. After ten minutes, another person, tall, fair and bearded, who looked like an Afghani, also came there with a bag on his back. As per the secret informer, that person had come to supply heroin and his name was Dawood. The person who came in last (Dawood) took out two packets and gave one each to the boys. The short heighted boy kept the said packet in his jute bag, whereas, the tall boy kept the packet in his hand. Inspector Devender Singh signaled to the members of the raiding party and apprehended the said three persons. Thereafter, Inspector Devender (PW2) introduced himself and the raiding party and enquired the name of the three persons. The said three persons disclosed their names and places of residence. Inspector Devender Singh informed them that he had information regarding illegal trade of heroin and therefore their search would be conducted. He also served individual notices under Section 50 of the NDPS Act and made them understand their legal rights to be searched before a Gazetted officer/ Magistrate and that they also had a right to search the raiding party.

5. Inspector Devender Singh, thereafter, requested the ACP/NDR to come to the spot and he reached at about 3.30.pm. The search of the three persons was conducted before the ACP. The respondent and his jute bag were searched and a polythene packet containing a cream coloured substance was found. On checking and weighing the same, it was found to be 1000 grams of heroin. Thereafter, the other accused persons were also searched and the packet recovered from Sikander Owaish (which he had in his right hand) was found to contain 1010 grams of heroin. The search of the accused Mohd Dawood, yielded two

transparent polythene packets. These were found in his light brown coloured backpack bearing the label Puma. The said polythene packets contained 1020 grams and 2232 grams of heroin. The FSL form was filled regarding all the recoveries and seal of DSN was affixed on it. The seal was handed over to HC Ajay Kumar. All the recovered heroin parcels and sample parcels were seized and seizure memos were prepared.

6. Thereafter, investigation was conducted and on the basis of the material placed on record, charges were framed against all the three accused persons for committing offences punishable under Section 21(c) read with Section 29 of the NDPS Act. The accused persons pleaded not guilty and the case was set down for trial. To prove its case, the prosecution had examined twelve witnesses.

Trial Court Judgment

7. On the basis of the evidence on record, the Trial Court held that there was non-compliance of Section 42(2) of the NDPS Act. PW2 and other members of the raiding party had deposed with reference to the fact that the secret information was reduced to writing vide DD No. 6 (Ex. PW2/A) and the same was forwarded to ACP NDR. It was also deposed that the ACP was called on spot since there was a language problem. However, ACP NDR, who was examined as PW8, did not depose regarding receiving of any secret information from PW2, either orally or in writing. He did not even depose to the effect that he was called on spot by PW2 due to any language problem or that the search and seizure of the contraband was done in his presence. The Court held

that since, the testimony of PW8, the immediate senior official of PW2, was totally silent regarding the receipt of any such information from him, it could safely be concluded that the copy of Ex. PW2/A was not sent to him in compliance with Section 42 (2) of the NDPS Act. The Trial Court held that it was well settled that compliance with Section 42 of the NDPS Act is mandatory and a conjoint reading of the testimonies of PW2 and PW8 established that Section 42(2) of the NDPS Act was not complied.

8. The Trial Court also held that there was non-compliance of Section 42(1) of the NDPS Act. On perusing the secret information which was recorded vide DD No. 6 dated 22.06.2012 (Ex. PW2/A), the Trial Court noted that the said information merely recorded that an Afghan national named Dawood, who was staying in some hotel of Darya Ganj, would come to the Millennium Park at around 2.30 pm and would supply heroin to some contact. The said information did not record any particular location at the Millennium Park where he would be present. However, PW2 deposed that when they reached Millennium Park, they took position at parking no.1. He also stated in his cross examination that the secret informer had told him that the accused Dawood would come at parking no.1 of the Millennium Park. However, the said information was not recorded in DD no 6. On the basis of the same, the Trial Court held that there was a non-compliance of Section 42(1) of the NDPS Act as well.

9. On the basis of the non-compliance of Section 42 of the NDPS Act, lack of independent witnesses and inconsistencies in the deposition

of the formal witnesses, the Trial Court acquitted the respondents of the offence under Section 20 of the NDPS Act.

Evidence

10. Before proceeding further, it is important to examine the testimonies of the relevant witnesses with reference to compliance of Section 42 of the NDPS Act.

11. SI Daler Singh No. D 2074, Special Cell deposed as DW1. He proved and brought on record the Special Report under Section 57 of the NDPS Act (Ex. PW1/A). He stated that on 23.06.2012, at about 10:30 am, a special report under Section 57 of the NDPS Act regarding the search and seizure of contraband was received by the office of ACP vide Diary No. 1640. The said report was put up before ACP NDR Sh. Manish Chandra and on that day, he was looking after the work of ACP SR, and had put his initial on it at Point A. He also brought the relevant diary register and the said entry was exhibited as Ex. PW 1/B.

12. PW2, ACP Devender Singh, Special Branch Delhi, was posted as Inspector at PS Special Cell on 22.06.2012. He deposed that on that day, at about 10:25 am, a secret informer came to his office and informed him that one Afghani national named Dawood who was staying in the area of Jama Masjid was indulging in trafficking of heroin and at around 2:30 pm, he was going to supply heroin to someone at the Millennium Park. He informed about the secret information to ACP NDR on the telephone and he instructed him to do the needful. The said information was entered as DD No. 6, at about 10:35 a.m. The same

was forwarded to ACP NDR. PW2 constituted a raiding party consisting of himself, SI Mohd Mobin, ASI Mahipal Singh, HC Balraj, HC Ajay Kumar, Ct Satish and Ct Rajesh. The informer was also with them. At about 01.10 pm, they all left for the office and proceeded towards the spot in two private vehicles. This was recorded in DD No. 9. In his examination in chief, he deposed that at about 01:50 pm, they reached Millennium Park and took positions in parking no.1. In his cross examination he stated that the secret informer had told him that the accused Dawood would come at parking no.1 of Millennium Park and he had reduced the said information in writing. When he was confronted with Ex. PW2/A, he stated that though he had not written the fact that Dawood would be coming at parking no.1, it was mentioned in the *rukka*. He stated that it was incorrect that the said fact was not mentioned in the *rukka*. On being cross examined, PW2 stated that he had informed the ACP on his office landline number from his own office landline number. ACP had only telephonically instructed him to take action and no written instructions were given in this regard.

13. PW2 also deposed that he served the notices on the accused persons and he felt that they were not conversant with the local language. Therefore, he requested that ACP NDR Sh. Manishi to reach at the spot. ACP had reached the spot at about 3:30 pm and in his presence, the search of the accused persons was conducted. At that stage, MHCM produced three white coloured cloth *pullandas* on which the particulars of the case FIR were written. PW2 identified his signature and the signature of ACP Manishi Chandra. PW2 also stated that at that point of time, he was not aware of the correct name of ACP,

as he had been recently posted and therefore had written his name as Manish Prakash.

14. With reference to the language problems being faced with the accused, he deposed that the accused persons, Sikander and Dawood, being Afghanis were having a communication problem and were not able to understand or speak Hindi. The accused Palgiri Siddique being a South Indian, did not understand Hindi and therefore he had called the ACP. He also deposed that the ACP did not get any interpreter with him and also did not understand Tamil or Afghani language. However, the search and seizure proceedings had taken place in front of him. The ACP had come to the spot in a government vehicle allotted to him. He did not remember the RC number of the said vehicle but he confirmed that the ACP had come along with his driver operator.

15. On being further cross examined, he stated that he knew that the accused Palgiri was a permanent resident of Andhra Pradesh and his language was Telegu. ACP Manishi was not conversant with the Telegu language. He stated that he had called ACP Manishi to the spot as the accused persons were not aware of Hindi/English properly and none of the accused persons were able to read Hindi/ English.

16. On further examination, PW2 deposed that ACP Manishi Chandra had remained at the spot for about two hours and he had left the spot before them. He had signed on all the three seizure memos on the spot. He stated that it was wrong to suggest that ACP Manishi Chandra was never present at the spot and no proceedings were conducted before him.

17. HC Ajay, deposed as PW3. He was one of the members of the raiding party and he stated that on 22.06.2012, at about 12.15 pm, Inspector Devender Singh had called him to his room. There were six other officials present in the room. They were told to join a raiding party which was proceeding to conduct a raid at Millennium Park, Parking No.1. He also deposed that during the raid, due to language problems, Inspector Devender Singh had requested ACP Manishi Chandra to come to spot at about 3.30.pm. In the presence of the ACP, Inspector Devender Singh conducted the proceedings regarding the search and seizure of items which were in the possession of the three accused persons.

18. In his cross examination, PW3 deposed that when IO, Devender Singh, had called him to his office on the first floor, he was in the general room at the ground floor. He had not seen the informer talking with IO Devender Singh. He did not see the secret information given by the informer and he did not remember the colour of the clothes which were worn by the secret informer. He stated that ACP Manishi Chandra reached the spot in his Government gypsy and he did not remember the registration number of the same.

19. On being further examined on 03.07.2014, PW3 deposed that at 12.50 pm, he was given instructions to go with the raiding party. At about 01.10 pm, they left their office to go to Millenium Park. He had not seen any document till that time in his office.

20. Ct. Satish Kumar deposed as PW4 and he stated that on 28.06.2012, he was posted at Special Cell/SR as a constable. On that day, on the instructions of the IO, he had reached PS Special Cell Lodhi

Colony, and after taking the forwarding letter from ACP/NDR, he collected the four sealed samples duly sealed with the seals of DSN and RSS alongwith the FSL form.

21. HC Balraj deposed as PW5 and he deposed that on 22.06.2012, he was called by Inspector Devender Singh and other police officials. Inspector Devender Singh discussed receiving information about one Dawood and told them that the said Dawood would be coming to Millennium Park at parking no.1. He also deposed that Inspector Devender had requested the ACP NDR Sg. Manishi Chandra to reach the spot and he had arrived at about 3.30 pm. In his presence, the search of the accused persons was conducted.

22. In his cross examination, he stated that when Inspector Devender Singh had briefed them, he had not seen any written information to that effect.

23. Sh. Manishi Chandra, ACP, Special Cell was examined as PW8. He deposed that on 23.06.2012, he was posted as ACP, New Delhi Range with additional charge of the Southern Range. On that day, his reader produced an original report under Section 57 of the NDPS Act. After perusing the same, he returned it to the reader for the record. According to him, Section 57 of the NDPS Act required that a report had to be prepared in respect of the seizure of contraband during a raid. He had read the contents of the report under Section 57 of the NDPS Act (Ex. PW 1/A). He only recalled the part about recovery part in the said report, and did not remember if there was any mention with regard to the arrest of any accused person in the present case. It is important to note that he did not mention anything with reference to being present

on the spot and or the search of the accused persons taking place on the date of the alleged incident.

24. Inspector Anand Swaroop, one of the members of the raiding party, was examined as PW9 and he deposed that on 22.06.2012, he was present in the office at Special Cell, and at about 5.00 pm, he was informed by the duty officer about the present case as it was marked to him for further investigation. When he reached Millenium Park, he was handed over the relevant documents with reference to the present case and the three accused persons were produced before him.

25. It is also relevant to notice the contents of Ex PW2/A – the secret information as recorded by PW2 as DD No.6. The said DD records as under:

“At 10:35 am, it is recorded that a secret informer come to office of Spl Cell/SR and informed to me that an Afgan National namely Dawood, who is staying in some hotel of Daryaganj in Jama Masjid will come to Millenium Park at about 2.30 pm today and will supply the drugs (herein) to some of his contact. If raid conducted, they will be apprehended and huge quantity of drugs (heroin) will be recovered, this is recorded and for information please by self”

Reasons and Conclusion

26. The first and foremost question to be addressed is whether the provisions of Section 42 of the NDPS Act were complied with. According to the prosecution, the secret information had been received

at the office of Special Cell at 10:25 am. The informer had informed ACP Devender Singh (who deposed as PW-2) that an Afghan national named Dawood, who was staying in the area of Jama Masjid, would supply heroin to someone at Millennium Park at 02:30 p.m. Concededly, no written authorization had been issued to ACP Devender Singh for proceeding on the basis of the said information. However, he had deposed that he had informed ACP NDR regarding the secret information and he had telephonically instructed him to do the needful. He had also testified that he had reduced the information received in writing as DD No.6 at about 10:35 am. The same was also brought on record as Ex.PW2/A. A reading of the DD entry indicates that it was recorded that a secret informer had informed PW-2, Inspector Devender Singh, that an Afghan National, named Dawood, who is staying in a hotel at Darya Ganj Masjid would come to Millennium Park at about 02:30 p.m. and will supply drugs (heroin) to his contact. It was established during the recording of the evidence that Millennium Park is a large area and has numerous gates. The raiding party had proceeded to station themselves at parking lot of gate no.1. The secret information as reduced in Ex.PW2/A does not record the specified location – parking lot in front of gate no.1 – where Dawood was expected to come. Nonetheless the raiding party had proceeded to that location: parking lot in front of gate no.1. The obvious question that arises is whether the secret informer had disclosed the location of the place at the time of providing the alleged information. The testimony of PW2 in this regard is relevant. In his cross-examination, PW2 had testified as under:

“The secret informer had told me that accused Dawood would come at parking no. 1 of Millennium Park. I had reduced the secret information in writing which is Ex.PW2/A”.

27. On being cross-examined by the learned counsel appearing for the accused Palgiri, recorded two days later, he testified as under:

“The informer did not intimate me with regard to meeting of the accused persons at gate no.1 when he first passed on the secret information to me. Same is also my answer with regard to parking no.1. I do not know as to how many parkings are there in the Millennium Park. The informer was alongwith us and after reaching the park, he took us to gate no.1 parking. Before the said stage, I was not aware that the suspects were to come at gate no.1 parking.”

28. It is important to note that HC Ajay (PW-3), who was also a part of the raiding party, deposed that on 22.06.2012, at about 12:15 p.m. in the afternoon, Inspector Devender Singh called him to his room where six other officials were present and was told to join the raiding party, which was proceeding to conduct a raid at Millennium Park, Parking No.1. Thus, according to the testimony of PW-3, Inspector Devender Singh was aware that the party was to proceed to Millennium Park parking No.1 before setting out from the office to apprehend the accused. Concededly, this information as to the location where the accused were apprehended had not been reduced into writing.

29. The second aspect is with regard to the information regarding two other accused persons (Palgiri Siddiquie and Sikander Owaish). The secret information as reduced into writing does not contain any

information regarding the said two accused persons. However, PW-2 has testified that at about 02:30 pm, when they were standing at the spot, two persons (one tall person looking like Afghani and the other short in height) had come to the spot and the informer had identified them as the persons who had come to receive the supply of heroin. Thus, according to the prosecution, there was information regarding the persons who were to receive supply of drugs from the accused Mohd. Dawood. However, no such information had been reduced into writing. The prosecution has explained this by stating that the information regarding the two accused persons, who were the recipients of the said drug, was given only at the spot by the secret informer.

30. There is no material on record to establish that Ex.PW2/A (the secret information as reduced in writing) had been forwarded to ACP NDR, as claimed by PW-2. There is no endorsement on Ex.PW2/A, which indicates that the same have been received at any point of time by the said ACP. Although the concerned ACP (Sh. Manishi Chandra) has deposed as PW-8, he did not testify as to receipt of any such secret information or issuing any authorization to PW-2. He merely testified to having received the report under Section 57 of the NDPS Act. In the given circumstances, the Trial Court had concluded that provisions of Section 42 of the NDPS Act had not complied with. This Court finds no infirmity with the aforesaid conclusion.

31. The next question to be considered is whether the provisions of Section 50 of the NDPS Act have been complied with.

32. PW-2 had testified that he had introduced himself and the raiding party to the accused and had also disclosed that they had secret information that they (the accused) had handed over and received a consignment of narcotics and for that purpose, their search was required to be taken. PW-2 testified that he had informed them regarding their legal right to be searched in the presence of a Gazetted Officer or Magistrate. He also testified that he prepared notices under Section 50 of the NDPS Act and served the original of the said notices to each of the accused. The carbon copy of the notices served to the accused were exhibited as Ex.PW2/C, Ex.PW2/D and Ex.PW2/E. Although original notices have not been produced, however, PW2 had identified his signature on the carbon copy of the said notices that were exhibited. He also identified the signatures of the respective accused persons on the respective copies of the notices. However, there is no noting on the said notice that the accused had refused to exercise their right to be searched before a Gazetted Officer or a Magistrate. PW-2 in effect confirmed the same, as he testified that he felt that the accused were not conversant with the language. Thus, it is not established that the accused persons were communicated that they had the right to be searched before a Gazetted Officer or a Magistrate.

33. According to the learned counsel who appeared for the State, the requirements of Section 50 of the NDPS Act were complied with as ACP NDR Sh. Manishi was requested to reach the spot and he did so at 03:30 p.m. and the accused persons were searched in his presence.

34. First of all, this is not in conformity with the decision of the Constitution Bench of the Supreme Court in ***Vijaysinh Chandubha Jadeja v. State of Gujarat: (2011) 1 SCC 609***, which requires that insofar as it is possible, the suspect must be searched in the presence of a Magistrate. The relevant extract of the said decision is set out below:-

“32. We also feel that though Section 50 gives an option to the empowered officer to take such person (suspect) either before the nearest gazetted officer or the Magistrate but in order to impart authenticity, transparency and creditworthiness to the entire proceedings, in the first instance, an endeavour should be to produce the suspect before the nearest Magistrate, who enjoys more confidence of the common man compared to any other officer. It would not only add legitimacy to the search proceedings, it may verily strengthen the prosecution as well.

35. Secondly, there are several reasons to seriously doubt whether the search was conducted in presence of ACP Manishi Chandra. First, because Inspector Manishi Chandra did not depose that the search had been conducted in his presence. Although he was examined as a witness by the prosecution and deposed as PW-8, he did not mention about the accused being searched in his presence. Second, although PW-2 has testified as to the signatures of PW-8 appearing on the seizure memo, PW-8's name had been mentioned as Sh. Manish Prakash and not Manishi Chandra. PW-2 had also testified that although the signatures appearing on the seizure memo are that of ACP Manishi Chandra, he had incorrectly noted down his name as he was not aware of the correct

name of the ACP, who had recently assumed the said post. The seizure memo appears to be in same handwriting and PW-2 had deposed that he had written down the name of Sh. Manishi Chandra as Manish Prakash. Plainly, if an incorrect name had been written, prior to PW-8 signing the seizure memo, he would have corrected his name. There is no reason for him to sign against an incorrect name. This obviously raises a doubt as to whether any seizure was affected in the presence of PW-8.

36. Thus, this Court is of the view that the prosecution has failed to establish beyond any reasonable doubt that the provisions of Section 50 of the NDPS Act were complied with.

37. The next important aspect is that no independent witnesses had been joined in the investigation. It is stated that a few passersby had been requested to join the proceedings but they had declined. This Court finds it difficult to countenance the casual approach of the raiding party in attempting to include independent witnesses, if at all any such attempt was made. According to the prosecution, the secret information had been received at 10:25 am and had been reduced in writing by 10:35 a.m. According to PW-2, he had informed ACP NDR and had received instructions to proceed. Thus, there were nearly four hours available with PW-2 to include any independent witnesses. However, government officials or any persons who were permanently resident or located in the area were contacted to join the raiding team or the proceedings thereafter. Not including independent witnesses in the proceedings is not fatal to the case set up by the prosecution, if the

testimony of the police officials is reliable; however, the Supreme Court as well as this Court has, in several cases, underscored the importance of joining public witness and it is now well settled that insofar as possible, independent witnesses should be included in the proceedings in order to establish transparency and to obviate any challenge on that ground.

38. In the present case, the Trial Court had noticed that there were several discrepancies in the testimonies of the members of the raiding party.

39. As noticed above, the testimony of PW-2 that he was not aware that the suspects would be coming to gate no.1 of the Millennium Park prior to the secret informer taking the raiding party at the spot is contrary to the testimony of PW-3, who testified that he was informed at 12:15 pm in the afternoon to join the raiding party which was proceeding to conduct the raid at Millennium Park Parking No.1.

40. Although it is stated that during the search, mobile phones were recovered from the accused but the call details were not produced to establish that any of the accused persons were in touch with each other prior to seizure. The only inference that can be drawn is that the call records did not indicate that any of the accused persons were in touch with each other.

41. In view of the above, this Court is of the considered view that the decision of the Trial Court to acquit the respondents ought not to be

interfered with and it is not necessary to examine other aspects considered by the Trial Court.

42. The appeal is unmerited and is, accordingly, dismissed.

VIBHU BAKHRU, J

JANUARY 27, 2020
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