

IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 24.02.2020

+ **CRL.A. 191/2016**

MD. SARVAR

....Appellant

versus

STATE

.....Respondent

Advocates who appeared in this case:

For the Appellant : Mr Ajay Verma, Ms Pratiksha Tripathi and
Ms Katyayani

For the Respondent : Ms Meenakshi Chauhan, APP for State

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HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. The appellant has filed the captioned appeal, *inter alia*, impugning a judgment dated 03.09.2015 passed by the Special Judge – NPDS, Patiala House Courts, New Delhi whereby the appellant was convicted of the offence under Section 21 of the Narcotic, Drugs and Psychotropic Substances Act, 1985 (NDPS Act). The appellant also impugns an order dated 07.09.2015, whereby he was sentenced to serve rigorous imprisonment for a period of ten years and a fine of ₹1,00,000/-

and in default of payment of the said fine, to undergo simple imprisonment for a period of six months.

2. The prosecution's case, in brief, is that on 05.04.2011 at about 10:30 am, secret information was received by the Special Cell CR, New Friends Colony that one Afghan national would be coming at about 03:00 pm to deliver a consignment of drugs to a Nigerian national. A raiding team was constituted and tasked to reach the spot. On their way, the IO tried to include five-six passersby as witnesses, however, they declined to do so.

3. At about 02:40 pm, two persons were identified by the secret informer as the said Afghan and Nigerian nationals. The Afghan national, thereafter, took out a packet from his front pocket and handed over the same to the Nigerian national. At this point, both persons were apprehended. On enquiry, their names were revealed as Emeka Paul (Nigerian national) and Md. Sarvar (Afghan national). They were, thereafter, apprised of their legal rights and notices under Section 50 of the NDPS Act were served to them. Upon the search of Emeka Paul, a white coloured polythene was recovered from him, which had been handed over to him by Md. Sarvar. The said packet contained 800 grams of a cream/brown coloured powder, which tested positive for Heroin. On Md. Sarvar's search, one packet was found tied to his right leg. The said packet too contained 860 grams of a cream/brown coloured powder, which tested positive for Heroin.

4. By an order dated 08.09.2011, charges were framed against the accused. They were charged with the offence punishable under Section 21 (c) read with Section 29 of the NDPS Act. Both pleaded not guilty to the said charges and the matter was set down for trial.

Evidence

5. In order to prove its case, the prosecution examined ten witnesses.

6. ASI Rajender Kumar, SB Special Cell, SR Friends Colony, deposed as PW-1. He deposed that on 05.04.2011, he along with Insp. Satender Sangwan and other staff members had gone to the spot in front of Netaji Subhash Institute of Technology. Insp. Satender Sangwan, who was the IO in this case, had handed over the *rukka* of this case at 06:45 pm along with four *pullandas* sealed with the seal of SS, FSL to PW-1. PW-1 stated that he was directed to hand over the *rukka* to the Duty Officer, PS Special Cell, Lodhi Colony and the *pullandas* along with other documents to Insp. R.S. Sehrawat, SHO, PS Special Cell. After registration of the FIR, PW-1 collected a copy of the same along with the *rukka* and came back to his office at Special Cell, SR, New Friends Colony. PW-1 was cross-examined by the Advocate for the accused, Emeka Paul. In his cross-examination, PW-1 stated that he along with other members had left special cell ST at about 12:00 noon. The IO had briefed the members of the raiding party at about 11:0 am in the office of special cell SR. He stated that they had left for the spot in two vehicles, one official vehicle (gypsy) and one private vehicle. He

had travelled to the spot in the private vehicle along with HC Vijay Pratap, HC Ram Karan and Ct. Rajesh (who was driving the said vehicle). Insp. Satender Sangwan, SI Anand Swaroop and HC Balraj came to the spot in an official vehicle driven by Ct Satish. The official gypsy had started from the office and thereafter, he stated that he left the office in the private car. He denied that the vehicle in which he reached the spot (the private vehicle) had stopped anywhere on the way to the spot. He stated that he could not tell whether the official gypsy had stopped anywhere on the way since that had left the office much before the private vehicle in which he was travelling. He stated that in his presence, no proceedings were conducted at the spot. He denied having knowledge of what was recovered from the accused. PW-1 denied having visited the spot after registration of the FIR.

7. ASI M. Baxla, SB PS Special Cell, Lodhi Colony, deposed as PW-2. He deposed that he was working as MHC (M) PS Special Cell, Lodhi Colony at the material time. On 05.04.2011, Insp. RS Sehrawat called PW-2 to his office at about 08:00 pm and handed to him four sealed *pullandas* marked A, B, S-1 and S-2 sealed with the seal of SS and RSS; FSL Form and; carbon copy of the seizure memo. PW-2 deposited the same along with the FSL forms vide entry no. 1758. He produced register no. 19 pertaining to the year 2011 (Ex. PW-2/A). He testified that the same bears the signature of Insp. R.S. Sehrawat at point A. PW-2 further deposed that on 05.04.2011, SI Anand Swaroop had deposited the articles recovered during the personal search of Emeka Paul, which included one notice under Section 50 of the NDPS Act,

₹100 in cash, one passport and one Nokia mobile phone. On Md. Sarvar, one notice under Section 50 of the NDPS Act, ₹360 in cash and one Nokia mobile phone were recovered. The same was recorded vide sl. 1759 and a photocopy of the same is marked Ex. PW-2/B.

8. ASI Bhagwat Prasad, SB, PS Special Cell, Lodhi Colony deposed as PW-3. He deposed that he was the duty officer on 05.04.2011. He registered FIR No. 23/11 under Section 21 of the NDPS Act. He deposed that the original FIR (Ex.PW3/A) bore his handwriting and signatures. In his cross examination, he deposed that his duty hours were from 04:00pm to 12 midnight on that day and that he had recorded the said FIR between 08:00 pm and 10:50 pm. He denied having made a departure or arrival entry of the raiding party in this case, on 05.04.2011.

9. HC Balraj Singh, PS Special Cell, Southern Range (New Friends Colony) deposed as PW-4. He stated that on 05.04.2011 at about 12:00 noon, Insp Satender Sangwan had constituted a raiding party consisting of him, ASI Rajender, ASI Mahipal, HC Ramkaran, Ct Satish and Ct Rajesh. PW-4 stated that he left his office in one Maruti car which was being driven by him at about 12:30 pm and one Swift vehicle, being driven by Insp Satender Sangwan. In the Maruti car being driven by PW-4, HC Ramkaran, Ct Rajesh and Ct Satish were travelling. The other members of the raiding party were in the Swift car being driven by Insp Satender Sangwan. Upon reaching the spot at about 01:30 pm, Insp Satender Sangwan requested 4-5 passerby to join the raiding party but none agreed and left the spot without disclosing their names and

addresses. Thereafter, Insp Satender Sangwan briefed the raiding party and took up positions. PW-4 was near him. He stated that at about 02:40 pm, one person deboarded a TSR and stood opposite Netaji Subhash Institute of Technology. After the accused were apprehended, a notice under Section 50 of the NDPS Act was given to Emeka Paul and Mohd. Sarwar, respectively. He stated that Md Sarwar refused to get himself searched in the presence of a Gazetted Officer or Magistrate. He refused to search the members of the raiding party. PW-4 identified Md. Sarwar's written refusal as Ex. PW4/D.

10. PW-4 further deposed that thereafter, Insp Satender Sangwan took a polythene bag from Emeka Paul's hand and checked the same. It was found containing a creamish brown colour crystal-like powder. Upon testing the same using a field-testing kit, it tested positive for Heroin. Upon a cursory search of Md. Sarwar, a khaki coloured tape was found wrapped on his right leg. The same was cut and a similar powder was found in the same. The same tested positive for Heroin using the field-testing kit. More inquiries were made from the accused and they were arrested.

11. In his cross-examination, PW-4 stated that he was driving one Maruti 800 car in which HC Ram Karan, Ct Rajesh and Ct Satish were travelling. He stated that both cars left the office simultaneously and by the same route via Dhaula Kuan, Palam flyover and then Dwarka. He stated that he along with Insp Satender Sangwan and the secret informer were standing at point B3 on the site plan (Ex. PW1/DA) and ASI Rajender, ASI Mahipal, HC Ram Karan, Ct Rajesh and Ct Satish were

standing around him. He could not recollect whether the IO had tried to join public persons in the raiding party. The contraband was fastened on the lower part of Md. Sarvar's leg by a khaki coloured adhesive tape. It was so strongly taped, that there was no chance of the packet falling down. He could not recall if at the time of removing the tape, some of the accused's hair also came off and was stuck to the tape. Thereafter, he stated that the notice under Section 50 of the NPDS Act (Ex. PW4/C) was written by Insp. Satender Sangwan and its reply was written by accused Md. Sarvar in his own handwriting. PW-4 did not know whether Md. Sarvar had studied only upto class 4 in Afghanistan and he did not know how to write English. However, PW-4 later stated that the accused wrote his reply to the notice in English. He wrote the same on his own. The accused was informed of his legal rights and he had read the notice himself and the contents of the same were not read over to him by IO Satender Sangwan. He denied that the accused does not know English and that he never read over the contents of the notice. He affirmed that in the Section 50 notice, the words 'legal right' are not mentioned, however, Satender Sangwan had informed the accused about the said legal rights. Further, PW-4 deposed that the IO had made efforts to join public witnesses at the spot. He had not gone anywhere to join public witnesses; however, he had asked persons passing by to join the proceedings. He had requested 6-7 passerby to join the raiding party. However, no person was given a written notice to join the investigation and no legal action was taken against such persons. No police official from PS Dabri or the security guards of Netaji Subhash Institute of Technology were asked to join the raiding team. He denied

the suggestion that since nothing had happened at the spot, no persons were called to join the proceedings. He deposed that a number of people had passed by, however, none of them were asked to join the proceedings. He denied having falsely implicating the accused since they had overstayed in India beyond their term of visa. He denied the suggestion that the accused was dictated the refusal by the police personnel and that since the accused did not know English spellings well, he made many mistakes while writing his refusal. He stated that it was incorrect to suggest that the word 'Magistrate' at point 'X' in Ex. PW4/D was written later on by someone who was well conversant with English. He denied the suggestion that the accused was unaware as to what he wrote in Ex. PW4/D. He denied the suggestion that the accused was only conversant with Afghani language and not English and Hindi. He denied that the disclosure made by the accused was written by IO Anand Swaroop and not the accused and that the accused's signatures were obtained on the disclosure by force or coercion. He denied the suggestion that the signatures of the accused are in Urdu language and stated that the same are in English. PW-4 affirmed that ASI Rajender Singh left the spot for registration of the FIR at about 06:45 pm; SI Anand Swaroop reached the spot at 06:40 pm and they all remained at the spot till 11:00 pm. He further deposed that the IO gave a notice under Section 50 of the NDPS Act to both accused and accused Emeka Paul was given the said notice in the first instance. All documents were prepared by the IO on the spot were written by the IO while sitting on the footpath. He further stated that all documents were prepared in the presence of the accused.

12. ASI Ram Karan, SB Special Cell, New Friends Colony, deposed as PW-5. He deposed that on 26.04.2011, he had taken *pullandas* marked S1 and S2 from MHC (M) vide RC No. 55/21 and got the same deposited with FSL, Rohini and obtained a receipt (Ex. PW2/E) and handed over the same to MHC (M).

13. Mr Amar Pal Singh, Assistant Director (Chemistry), FSL, Rohini deposed as PW-6. He stated that on 26.04.2011, two cloth parcels were received in his office with intact seals. Ex. S1 was creamish/brownish, powdery and lumpy weighing 50.40 gms and Ex. S2 was also creamish/brownish, powdery and lumpy and weighed 49.11 gms with polythene. On examination, S1 and S2 were found to contain Diacetylmorphine (heroin) 21.15% and 21.73%, respectively. In his cross-examination, PW-6 stated that the fact that his report did not indicate that he had crushed the substance before analyzing the same.

14. SI Anand Swaroop, Special Cell, SR, New Friends Colony deposed as PW-8. He stated that on 05.04.2011 at about 06:00 pm, the duty officer informed him that Insp Satender Sangwan has apprehended two persons along with drugs and that the further investigation of the case had been marked to him. Thereafter, he stated that he reached Netaji Subash Institute of Technology at about 06:40 pm, where Insp Satender Sangwan and his staff were already present with the two accused. recounted as to how he had reached the spot and a search of the apprehended persons was conducted. During the search of accused Md Sarvar, ₹360/- cash, one mobile phone make Nokia and a notice under Section 50 of the NDPS were recovered. He stated that the

original notices under Section 50 of the NDPS Act served upon the two accused were placed by him in the case file, as Ex. P5 and Ex. P6. In his cross examination, he stated that both the accused, HC Balraj and Ct Rajesh left the spot along with him in his personal car (Maruti Zen Estilo) and the other team members came in another private car. Both vehicles reached PS Special Cell, Lodhi Colony at about 12:00 night. PW8 denied having collecting any documentary evidence such as mobile call records, joint photographs, correspondence of both the accused, rent agreement of the accused's landlord etc. He denied the suggestion that accused Md Sarvar is, in fact, one Masood s/o Abdul Khalid and that he was called into the PS by PW-8 on the pretext of an inquiry.

15. Insp Satender Sangwan, Addl. SHO PS Lajpat Nagar deposed as PW-10. He stated that on 05.04.2011 at about 10:30 am, a secret informer came to the office of Special Cell SR, NFC and gave information that one Afghani national will deliver a consignment of drugs to some Nigerian national on that day at about 06:0 pm opposite Netaji Subhash Institute of Technology, Dwarka More. Thereafter, he set up a raiding team and reached the spot. He constituted a raiding team comprising of himself, ASI Rajender, ASI Mahipal, HC Balraj, HC Ram Karan, Ct Rajesh and Ct Satish. The raiding team left the office in two private cars at about 12:30 pm. He stated that he made efforts to join 5-6 passerby to join the raiding team at Maharani Bagh, however, he was unsuccessful in doing so. He stated that at the spot also, he requested 5-6 passerby to join the raiding party, however, he was

unsuccessful in doing so. He stated that he apprised the two accused of their legal rights to the effect that they can search the police team before their search is conducted and can get themselves searched in the presence of any Gazetted officer or Magistrate. The accused refused to get themselves searched in the presence of a Gazetted officer or Magistrate. Thereafter, PW-10 prepared a notice under Section 50 of the NDPS Act which was first served on Emeka Paul, who wrote his refusal in English. Thereafter, he served the said notice on accused Md Sarwar, who wrote his refusal in English on the carbon copy of the notice. In his cross-examination, he stated that in the notice (Ex. PW4/C), it is not recorded that he had informed the accused that he has a legal right to get himself searched before a Gazetted officer or Magistrate. He stated that he had left the spot around 08:30-08:45 pm. He affirmed that he had told the accused that he had a legal right to get himself searched before a Gazetted officer or Magistrate. PW-10 affirmed that the words 'legal right' were inadvertently missed by him in the notice given by him to accused Md Sarwar.

16. Ms N Flavia S Hangam, wife of Emeka Paul, deposed as DW-1. She stated that she works at a call centre in Delhi and has been residing in Delhi for the last ten years. She stated that Emeka Paul was engaged in the business of exporting clothes and jewelry from India to Nigeria. On 05.04.2011, at about 10:30 am, four men came to their residence and told them that they had come to check their passports. One of the persons introduced himself as Anand Swaroop. She stated that the said officials took her husband on the pretext of passport verification. At the

police station, she was told that her husband was engaged in the drugs business and had been arrested in a drugs case. She stated that her husband told her that the police officials had demanded \$10,000/- from him.

17. The appellant deposed as DW-2. He stated that his real name is Masood and the police had taken his original passport from his pocket at the time of his apprehension. He stated that he was picked up from a park in front a metro station in Saket on 05.04.2011 at about 05:00 pm when he was taking a walk with his wife and children. He stated that he had come to India in November, 2010 to get his wife treated for certain psychiatric issues and her treatment was being done at Apollo Hospital. On the said date, the police officials told him to show them his passport. He stated that since his visa had expired, the police officials told him to accompany them to the police station. He stated that at the police station, he was made to sign certain blank and written documents. On him making certain inquiries, the police officials beat him with a wooden object and also slapped him various times. In his cross-examination, he denied all the questions that were put to him. He denied living in India under the name Mohd Sarvar. He denied being involved in the drugs business.

18. In his statement under Section 313 of the CrPC, the appellant stated that he was picked up by the police in front of a metro station near Saket on 05.04.2011 at about 05:00 pm when he was taking a walk in the park with his family. He had come to India in the month of November, 2010 to get his wife treated for certain ailments. He told the

police officials that his name is Masood. Thereafter, the police officials examined his passport and since his visa had expired, told him to accompany them to the police station. Thereafter, he was taken to an office where he saw three-four more Afghani nationals detained. He denied that any notice under Section 50 of the NDPS Act was served on him. The police officials had beaten him and forced him to copy some sentences from another piece of paper. He denied having the ability to write English and stated that he could only write Pushto, Farsi and Urdu.

Discussions and Conclusion

19. The learned counsel appearing for the appellant had sought to assail the impugned judgment on the sole ground that the provisions of Section 50 of the NDPS Act were not complied with. He rested the appellant's case on the judgment of the Supreme Court in ***Arif Khan @ Agha Khan v. State of Uttarakhand: (2018) 18 SCC 380***. On the strength of the said decision, he contended that since the appellant was not searched in the presence of a Magistrate or a Gazetted Officer, the search fell afoul of the mandatory provisions of Section 50 of the NDPS Act and therefore, any conviction on the basis of the said search could not be sustained. He submitted that the appellant was required to be acquitted.

20. The aforesaid contention is unmerited. This Court in ***Innocent Uzoma v. State: CRL.A. 139/2017, decided on 14.01.2020***, had considered the aforesaid issue and after referring to the decision of the Constitution Bench of the Supreme Court in ***Vijaysinh Chandubha***

Jadeja v. State of Gujarat: (2011) 1 SCC 609, held that it was not essential that a suspect be searched before a Magistrate or a Gazetted Officer if he, after being informed of his rights to be so searched, declines to be searched before a Magistrate or a Gazetted Officer. Thus, merely because the appellant in this case was not searched before a Magistrate or a Gazetted Officer would not render the search to be illegal. The decision in **Arif Khan** (*supra*) turned on its own facts.

21. However, it is essential that the appellant ought to be informed that he has a right to be searched before a Gazetted Officer or a Magistrate. In **State of Punjab v. Baldev Singh: 1999 (6) SCC 172**, the Constitution Bench of the Supreme Court had, *inter alia*, held that “*when an empowered officer or a duly authorised officer acting on prior information is about to search a person, it is imperative for him to inform the person concerned of his right under sub-section (1) of Section 50 of being taken to the nearest gazetted officer or the nearest Magistrate for making the search. However, such information may not necessarily be in writing.*”

22. In the present case, the prosecution has relied upon the notice under Section 50 of the NDPS Act (Ex.PW4/C) allegedly served on the appellant. The said notice is set out below:-

“NOTICE U/s 50 NDPS Act

You Mr Mohd. Sarwar s/o Abdul Khalid R/o Lohawala, Ara Tehri, Kandhar, Afghanistan, are here by informed that we have an information that you have drugs in your possession (heroine) & you can search the police party

before your search and you can get searched before Magistrate or GO.”

23. It is apparent from the plain reading of the said notice that the appellant was not informed that he has a legal right to be searched before a Magistrate or a Gazetted Officer. Informing the appellant that he could search the police party or could be searched before a Magistrate or a Gazetted Officer, cannot be construed as informing the appellant that he had a legal right to be searched before a Magistrate or a Gazetted Officer.

24. In ***Ashok Kumar Sharma v. State of Rajasthan: (2013) 2 SCC 67***, the Supreme Court had held as under:

“7. We are in this case concerned only with the question whether PW 1, the officer who had conducted the search on the person of the appellant had followed the procedure laid down under Section 50 of the NDPS Act. On this question, there were conflicts of views by different Benches of this Court and the matter was referred to a five-Judge Bench. This Court in *Vijaysinh Chandubha Jadeja* [(2011) 1 SCC 609 : (2011) 1 SCC (Cri) 497] answered the question, stating that it is imperative on the part of the officer to apprise the person intended to be searched of his right under Section 50 of the NDPS Act, to be searched before a gazetted officer or a Magistrate. This Court also held that it is mandatory on the part of the authorised officer to make the accused aware of the existence of his right to be searched before a gazetted officer or a Magistrate, if so required by him and this mandatory provision requires strict compliance. The suspect may or may not choose to exercise the right provided to him under the said provision, but so far as the officer is concerned, an obligation is cast on him

under Section 50 of the NDPS Act to apprise the person of his right to be searched before a gazetted officer or a Magistrate. The question, as to whether this procedure has been complied with or not, in this case the deposition of PW 1 assumes importance, which reads as follows:

“He was apprised while telling the reason of being searched that he could be searched before any Magistrate or any gazetted officer if he wished. He gave his consent in written and said that I have faith on you, you can search me. Fard regarding apprising and consent is Ext. P-3 on which I put my signature from A to B and the accused put his signature from C to D. E to F is the endorsement of the consent of the accused and G to H is signature, which has been written by the accused.”

The above statement of PW 1 would clearly indicate that he had only informed the accused that he could be searched before any Magistrate or a gazetted officer if he so wished. The fact that the accused person has a right under Section 50 of the NDPS Act to be searched before a gazetted officer or a Magistrate was not made known to him. We are of the view that there is an obligation on the part of the empowered officer to inform the accused or the suspect of the existence of such a right to be searched before a gazetted officer or a Magistrate, if so required by him. Only if the suspect does not choose to exercise the right in spite of apprising him of his right, the empowered officer could conduct the search on the body of the person.

8. We may, in this connection, also examine the general maxim *ignorantia juris non excusat* and whether in such a situation the accused could take a defence that he was unaware of the procedure laid down in Section 50 of the NDPS Act. Ignorance does not normally afford any defence under the criminal law, since a person is presumed to know the law. Undisputedly ignorance of law often in

reality exists, though as a general proposition, it is true, that knowledge of law must be imputed to every person. But it must be too much to impute knowledge in certain situations, for example, we cannot expect a rustic villager, totally illiterate, a poor man on the street, to be aware of the various laws laid down in this country, leave aside the NDPS Act. We notice that this fact is also within the knowledge of the legislature, possibly for that reason the legislature in its wisdom imposed an obligation on the authorised officer acting under Section 50 of the NDPS Act to inform the suspect of his right under Section 50 to be searched in the presence of a gazetted officer or a Magistrate warranting strict compliance with that procedure.”

25. In the present case, although SI Satender Sangwan (PW10) had testified that he had informed the accused persons (including the appellant) about their legal right to be searched in the presence of a Magistrate or a Gazetted Officer; in the notice (Ex.PW4/C) under Section 50 of the NDPS Act allegedly served by him, it was not recorded that the accused had a legal right to get himself searched. He had sought to explain the same by stating that he had inadvertently missed out the word “legal right” in the notice under Section 50 of the NDPS Act. This Court does not find the said testimony to be credible. The prosecution cannot be now permitted to add to the notice under Section 50 of the NDPS Act by claiming that there was an inadvertent error. It is also relevant to note that this explanation was provided by PW10 during the cross-examination. This Court is unable to concur with the decision of the Trial Court in accepting this testimony.

26. Failure to inform the accused of their legal right to be searched before a Magistrate or a Gazetted Officer, falls foul of the mandatory provisions of Section 50 of the NDPS Act. Thus, the appellant is liable to be acquitted.

27. This Court also finds that the conviction of the appellant cannot be sustained on the evidence obtaining in this case. There are several inconsistencies in the testimonies of the witnesses, which raises doubts as to the case set up by the prosecution.

28. ASI Rajender Kumar – who had testified as PW1 – had deposed that he along with raiding team had left the Special Cell at 12:00 noon. He had stated that the IO had briefed the members of the raiding team at about 11:00 am at the office of the Special Cell, SR. He testified that they had left the spot in two vehicles, one of which was the official vehicle (that is, Gypsy) and the other was a private vehicle. He deposed that he had travelled to the spot in a private vehicle along with HC Vijay Pratap and HC Ram Karan and the said vehicle was being driven by Ct. Rajesh. He stated that Inspector Satender Sangwan, SI Anand Swaroop and HC Balraj came to the spot in the official vehicle, that is, a Gypsy which was driven by Ct. Satish. He stated that the official Gypsy had started from the Special Cell first and they had followed in a private car. Thus, according to PW1, the raiding team consisted of him, HC Vijay Pratap, HC Ram Karan, Ct. Rajesh, Inspector Satender Sangwan, SI Anand Swaroop, HC Balraj and Ct. Satish. The raiding team had travelled in two vehicles, one of which was driven by Ct. Satish.

29. HC Balraj (who was one of the members of the raiding team deposed as PW4) stated that Inspector Satender Sangwan had constituted the raiding party consisting of him, ASI Rajender, ASI Mahipal, HC Ram Karan, Ct. Satish and Ct. Rajesh. Thus, according to him, SI Anand Swaroop was not a part of the raiding team and he did not accompany the said team when they left PS Special Cell, SR on the day in question (05.04.2011). Further, according to him, ASI Mahipal was a member of the raiding party. However, according to the testimony of PW1, ASI Mahipal was not a part of the raiding party.

30. The inconsistencies do not end there. Whereas PW1 had deposed that they had left in two vehicles, one of which was an official Gypsy; PW4 deposed that the team had left in two private vehicles, one a Maruti Car and the other one, a swift. Whereas according to PW1, the private vehicle (in which he travelled to the spot) was driven by Ct. Rajesh and the said vehicle included HC Vijay Pratap and HC Ram Karan; the official car (Gypsy) was driven by Ct. Satish. PW4 (HC Balraj Singh) testified that one vehicle (Maruti) was driven by him and the other was driven by Inspector Satender Sangwan. According to him, HC Ram Karan, Ct. Rajesh and Ct. Satish were travelling in the vehicle (Maruti) driven by him, while the other members of the raiding party were in the Swift car driven by Inspector Sangwan. Such material inconsistencies cannot be overlooked. Whereas according to Inspector Satender Sangwan (PW4) and ASI Rajendra Kumar (PW1) did not travel along with him in the vehicle driven by him; as per the testimony of ASI Rajender Kumar, Inspector Satender Sangwan did not travel with him

in the same vehicle but travelled in an official car. Thus, none of these two witnesses (PW1 and PW4), who travelled in separate cars, testified that Inspector Satender Sangwan had travelled with them.

31. There is yet another material inconsistency in the testimony of PW1 and PW4. According to PW1, the part of the raiding team, which travelled in the official car left earlier and he along with the remaining team followed thereafter. However, PW4 testified that both the vehicles left simultaneously and took the same route. Satender Sangwan (PW10) also testified that the raiding team had left in two private cars at about 12:30 p.m.

32. (PW1) ASI Rajender Kumar was cross-examined and he testified that the vehicle in which he was travelling (the private vehicle) did not stop anywhere and they reached the spot at about 01:00 p.m. and when they reached the spot, the official Gypsy had already reached. As noticed above, according to PW4 and PW10, no official gypsy was used.

33. There is another aspect that requires to be considered. According to PW10 (Inspector Satender Sangwan), he stopped at a bus stop at Maharani Bagh and requested five to six passersby to join the raiding team after apprising them. However, none agreed to join the proceedings. He further deposed that on reaching the spot, he again requested four or five public persons to join the raiding team. However, they also refused. However, PW1 could not provide the name of even a single person, whom he had so requested. PW10's testimony is

inconsistent with that of PW4 inasmuch as, PW4 did not depose that any of the vehicles had stopped on the way to ask passersby to join the raiding team. Thus, it is extremely doubtful whether PW10 had contacted any passersby on his way to the spot.

34. Although it is well settled that if the testimony of the official witnesses is credible, that need not be doubted only because independent witnesses have not been included in the proceedings; however, in the present case, where there are serious inconsistencies in the testimonies of the official witnesses, the fact that independent witnesses had not been included in the proceedings, should, in the opinion of this Court, be treated as fatal to the case of the prosecution.

35. In ***Yogesh Singh v. Mahabir Singh: (2017) 11 SCC 195***, the Supreme Court had held as under:

“29. It is well settled in law that the minor discrepancies are not to be given undue emphasis and the evidence is to be considered from the point of view of trustworthiness. The test is whether the same inspires confidence in the mind of the Court. If the evidence is incredible and cannot be accepted by the test of prudence, then it may create a dent in the prosecution version. If an omission or discrepancy goes to the root of the matter and ushers in incongruities, the defence can take advantage of such inconsistencies. It needs no special emphasis to state that every omission cannot take place of a material omission and, therefore, minor contradictions, inconsistencies or insignificant embellishments do not affect the core of the prosecution case and should not be taken to be a ground to reject the prosecution evidence. The

omission should create a serious doubt about the truthfulness or creditworthiness of a witness. It is only the serious contradictions and omissions which materially affect the case of the prosecution but not every contradiction or omission. (See Rammi Vs. State of M.P., (1999) 8 SCC 649; Leela Ram Vs. State of Haryana, (1999) 9 SCC 525; Bihari Nath Goswami Vs. Shiv Kumar Singh., (2004) 9 SCC 186; Vijay Vs. State of M.P., (2010) 8 SCC 191; Sampath Kumar Vs. Inspector of Police, (2012) 4 SCC 124; Shyamal Ghosh Vs. State of W.B., (2012) 7 SCC 646 and Mritunjoy Biswas Vs. Pranab, (2013) 12 SCC 796).”

36. In ***Shyamal Ghosh v. State of West Bengal: (2012) 7 SCC 646***, the Supreme Court held that serious inconsistencies or omissions amounting to contradiction creates a serious doubt as to the credibility of the witnesses. The relevant extract of the said decision is set out below:

“68. From the above discussion, it precipitates that the discrepancies or the omissions have to be material ones and then alone, they may amount to contradiction of some serious consequence. Every omission cannot take the place of a contradiction in law and therefore, be the foundation for doubting the case of the prosecution. Minor contradictions, inconsistencies or embellishments of trivial nature which do not affect the core of the prosecution case should not be taken to be a ground to reject the prosecution evidence in its entirety. It is only when such omissions amount to a contradiction creating a serious doubt about the truthfulness or creditworthiness of the witness and other witnesses also make material improvements or contradictions before the court in order to render the evidence

unacceptable, that the courts may not be in a position to safely rely upon such evidence. Serious contradictions and omissions which materially affect the case of the prosecution have to be understood in clear contra-distinction to mere marginal variations in the statement of the witnesses. The prior may have effect in law upon the evidentiary value of the prosecution case; however, the latter would not adversely affect the case of the prosecution.

69. Another settled rule of appreciation of evidence as already indicated is that the court should not draw any conclusion by picking up an isolated portion from the testimony of a witness without adverting to the statement as a whole. Sometimes it may be feasible that admission of a fact or circumstance by the witness is only to clarify his statement or what has been placed on record. Where it is a genuine attempt on the part of a witness to bring correct facts by clarification on record, such statement must be seen in a different light to a situation where the contradiction is of such a nature that it impairs his evidence in its entirety.”

37. In the present case, the testimony of PW1 raises serious doubts as to the case of the prosecution. In his cross-examination, he stated that he had not seen the accused; he could not exactly tell the positions where the Investigating Officer or the other members of the raiding team were standing; in his presence, no proceedings were conducted at the spot; and he could not tell what was recovered from the accused. He also testified that he had not visited the spot after registration of the FIR.

38. This testimony would not be damaging to the case of the prosecution, if the spot where PW1 was deployed was far away or was not visible from the spot where the accused were allegedly apprehended. But, this is not the case as discernable from the testimony of other witnesses. PW4, in his cross-examination, stated that ASI Rajender (PW1), ASI Mahipal, HC Ram Karan, Ct. Rajesh and Ct. Satish were standing around him. Although he could not tell their exact positions. PW4 also deposed that immediately after the accused persons were accosted, Inspector Satender Sangwan introduced himself and introduced “*other members of the raiding party to the accused persons*”.

39. Thus, all members of the raiding party would have left their positions immediately on the accused being accosted. According to PW4, the entire proceedings took place at the spot; the accused were told of their rights and handed over the notice under Section 50 of the NDPS Act; they wrote their refusal for being searched before a Magistrate/Gazetted Officer (Ex.PW4/C and Ex.PW4/D); thereafter, Inspector Sangwan had taken a polythene bag (*panni*), which the accused Emeka Paul was holding in his right hand and had checked the same; he weighed the same in an electronic weighing machine and the same was found to weigh around 800 grams. He had drawn sample of 50 grams and put it into a transparent polythene pouch, which was converted into a cloth *pullanda*; the polythene containing the remaining Heroin was converted into another *pullanda*; both *pullandas* were sealed; Inspector Sangwan had searched the appellant and found a

khakhi coloured tape around the right leg below the knee; the tape was cut with the help of a blade and a polythene bag was found concealed inside the same; the polythene bag was cut from one side and the substance inside it was checked with the field testing kit that gave a positive result for heroin; the same was weighed on an electronic machine and the weight was found to be 860 grams; a sample of 50 grams was taken out and put into a small transparent polythene pouch, which was converted into a *pullanda*; the cut on the polythene was covered with a tape and thereafter, the polythene, along with tape, was removed from the leg of the appellant and converted into a *pullanda*; both *pullandas* were sealed with the seal of SS; Inspector Satender Sangwan had filled the form of FSL in duplicate; the property recovered from the possession of the accused was taken into possession by separate seizure memos; and Inspector Sangwan had prepared *tehrir*, which was handed over to ASI Rajender Singh.

40. However, according to ASI Rajender Singh, he was not aware of the aforesaid proceedings. This raises serious doubts whether any of the said proceedings had, in fact, taken place at the spot as claimed by the prosecution.

41. PW10 (Inspector Satender Sangwan) had testified that at 10:30 am on 05.04.2011, he had received an information from a secret informer that one Afgani National would deliver the consignment of drugs to some Nigerian National at about 06:00 p.m. opposite Netaji Subhash Technology Institute, Dwarka Mod. However, PW4 had deposed that Inspector Satender Sangwan had constituted a raiding

team and told them that one Afgani person would come during the day at about 02:30 p.m near Dwarka Mod, opposite Netaji Subhash Technology Institute, to supply the heroin to some Nigerian National and they had left their office at about 12:30 p.m. in two separate cars. PW1 had stated that they had left the Special Cell at about 12:00 Noon. The inconsistencies in their statements as to whether they had left at 12:00 noon or 12:30 p.m. may not be material. However, it does raise a question as to why Inspector Satender Sangwan had left the office at that time when, according to his information, the Afgani National would come to the spot at about 6:00 p.m. This is also inconsistent with the testimony of PW4 that Inspector Sangwan had informed them that the Afgani National would come to deliver heroin at the spot at about 02:30 p.m.

42. SI Anand Swaroop (PW8) had testified that on 05.04.2011, he was posted at Special Cell SR New Friends Colony and he was informed at about 06:00 p.m. that Inspector Satender Sangwan had apprehended two persons along with drugs and further investigation of this case had been marked to him. He claimed that he immediately left the Special Cell and reached the spot in front of Netaji Subhash Technology Institute at 06:40 p.m. He stated that Inspector Satender Sangwan along with staff and the accused was present there. He, thereafter, arrested the accused including the appellant and also conducted their personal search. During the personal search of the accused Emeka Paul, ₹100/- in cash, one passport, one mobile phone of make Nokia and a notice under Section 50 of the NDPS Act were

recovered and during the personal search of the appellant; ₹360/- in cash, one mobile phone of make Nokia and a notice under Section 50 of the NDPS Act were recovered. He stated that in the meanwhile, ASI Rajender Kumar also reached the spot after registration of the FIR and handed over to him a copy of the FIR and *rukka*. After completion of the investigation at the spot, they along with the accused left the spot at about 11:30 p.m. and the accused were produced before Inspector R.S. Sehrawat, SHO, PS Special Cell, Lodhi Colony. In his cross-examination, he stated that ASI Rajender Kumar had left the spot in his presence at about 06:45 p.m. for registration of the case, while other members of the raiding team remained at the spot with him. He stated that both the accused, HC Balraj and Ct. Rajesh had left the spot along with him in his personal car (Maruti Zen Estilo) while the other team members came in another vehicle (private car). He stated that both the vehicles reached PS Special Cell at about 12:00 a.m. (night). This testimony indicates yet another inconsistency in the testimonies of the official witnesses. According to PW1, PW4 and PW10, the raiding team had come in two vehicles. As noticed above, there are discrepancies as to the members of the raiding team as well as whether one of the two vehicles, was an official vehicle or both were private vehicles. There is also inconsistency in the testimonies of the witnesses whether the two vehicles had left simultaneously. However, there is no inconsistency as to the fact that there were two vehicles. It is obvious that two vehicles would be required, considering that the raiding team consisted of seven persons and the said team was also accompanied by the informer. Thus, eight persons would require two vehicles.

According to PW8, he came to the spot at about 06:40 pm in his own private vehicle. Thus, there ought to have been at least three vehicles at the spot. But, according to PW8, there were only two vehicles including his own private vehicle. In his cross-examination, PW8 had testified that except for ASI Rajender Kumar, who had left for registration of the FIR, remaining persons of the raiding team remained at the spot with him.

43. There is no explanation as to what had happened to the third vehicle. According to PW10, he had left the spot after PW8 had arrived. However, this is contrary to the above noted testimony of PW10.

44. In view of the above material inconsistencies, the prosecution has failed to establish beyond reasonable doubt that the appellant was guilty of the offence under Section 21(c) of the NDPS Act.

45. It is also material to note that the accused were apprehended from a busy spot and there were permanent establishments in the immediate vicinity. It is also admitted that there was a residential house about 100-200 meters of the spot. However, the police officials had taken no serious steps to join any independent witnesses in the proceedings. Curiously, none of the official members had noted down the registration number of the TSRs in which the accused had come to the spot. There is no credible explanation for not noting down the registration number of the TSRs. The entire raiding team was there at the spot along with the informer to apprehend the accused and one would assume that they were keeping a watchful eye. In such circumstances, not noting down

the number of the TSRs clearly raises a doubt as to whether the raiding team was, in fact, at the position as claimed by them.

46. It is relevant to note that two witnesses were examined for the defence – Ms N. Flavia S. Hangam (wife of Emeka Paul) deposed as DW1 and the appellant deposed as DW2. Ms Hangam deposed that on 05.04.2011 at about 10:30 am, they were visited by four police officials including Anand Swaroop. She stated that she had seen him in the locality of Dwarka, as he was a resident of the said locality. She stated that the police officials had taken her husband for passport verification and she had accompanied her husband to the PS. She stated that she was asked to leave from there and her husband would be permitted to leave after an hour. She stated that her husband did not come home the entire night and consequently, she went to the police station next morning, where she was informed that her husband has been arrested in a drug case. Similarly, the appellant also deposed that he was intercepted in the park and he was picked up from the park in front of a metro station, while he was walking with his wife and children. He stated that he was taken to the office where there were three or four more Afgani Nationals. He claimed that the police officials had brought certain blank documents and asked him to sign the same. On his resisting signing the same, he was beaten and under threat and coercion, he signed certain blank documents and also wrote few lines, which the police officials had told him to copy from another piece of paper.

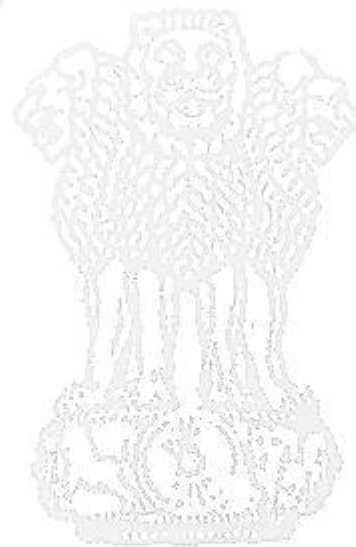
47. In view of the evidence obtaining in this case, this Court is of the view that the prosecution has failed to establish, beyond reasonable

doubt, that the appellant was guilty of the offence for which he was charged.

48. The appeal is, accordingly, allowed. The appellant is acquitted of the offence for which he was convicted. He is directed to be released forthwith, provided that he is not required in any other case.

FEBRUARY 24, 2020
RK

VIBHU BAKHRU, J



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