

IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 09.09.2020

+ **CRL.A. 908/2016 & CRL.M.(BAIL) 925/2019, CRL.M.
(BAIL) 394/2020 & CRL.M.(BAIL) 7482/2020**

HARISH YADAV

.....Appellant

Versus

STATE (NCT OF DELHI)

..... Respondent

Advocates who appeared in this case:

For the Appellant : Mr Jivesh Kumar Tiwari, Advocate
(DHCLSC).

For the Respondent : Mr Amit Gupta, APP for State.

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HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. The appellant has filed the present appeal impugning a judgment dated 05.05.2016, whereby he was convicted of an offence punishable under Section 21(c) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS Act). He also seeks to challenge the order on sentence dated 12.05.2016, whereby he was sentenced to rigorous imprisonment for a period of ten years with a fine of ₹1,00,000/- and in default of payment of fine to undergo simple imprisonment for a further period of six months.

2. The appellant was prosecuted pursuant to FIR No. 30/2014 under Section 21 of the NDPS Act, registered with PS Crime Branch. The Trial Court found that the prosecution has established, beyond reasonable doubt, that the Appellant was in possession of 600 grams of heroin when he was apprehended on 21.03.2014 and accordingly, convicted the appellant.

3. The prosecution had examined ten witnesses to prove the case against the appellant.

4. It is the case of the prosecution that secret information was received regarding the appellant supplying heroin in the area of Delhi and Haryana and he would be arriving at GPO, Kashmiri Gate, Delhi on 21.03.2014 between 08:30 p.m. and 09:30 p.m. Pursuant to the said information, necessary authorizations were obtained and a raiding team was constituted. The raiding team along with the secret informer, who had supplied the information, reached GPO, Kashmiri Gate, Delhi at about 08:15 p.m. Certain public persons were asked to join the proceedings, but they declined to do so. The appellant arrived there at about 08:55 p.m. He was wearing a white coloured t-shirt and blue coloured jeans and was carrying a white bag in his left hand. The secret informer, who was accompanying the raiding team, identified the appellant and thereafter, left the spot. The appellant waited in front of GPO, Kashmiri Gate for about two to three minutes and thereafter started walking away. At that stage, the officials of the raiding team apprehended the appellant. He was explained his legal right to be searched before a Gazetted Officer or a Magistrate. A notice under

Section 50 of the NDPS Act was also served on him. However, the accused opted not to avail his legal right to be searched before a Gazetted Officer or a Magistrate. The white bag carried by him was checked and one shirt and one transparent polythene bag tied with a rubber band was found. On removing the rubber band, it was found to contain a *matiala* coloured powder. The same was checked with the field testing kit and it tested positive for heroin, which weighed 600 grams. Two samples of 5 grams each were drawn and were kept in separate transparent polythene bags. Subsequently, the samples were sent for testing and the report of the Chemical Examiner confirmed that the substance recovered from the appellant was heroin. Accordingly, the appellant was arrested and thereafter, on his personal search a copy of the notice served under Section 50 of the NDPS Act which was served to him and a sum of ₹1,100/- was recovered.

5. Charges for commission of an offence under Section 21(c) of the NDPS Acts were framed against the accused, to which he pleaded not guilty. Accordingly, the matter was set down for trial.

6. The Trial Court evaluated the evidence and by a judgment dated 05.05.2016, which is impugned herein, convicted the appellant for an offence punishable under Section 21(c) of the NDPS Act.

7. Mr Tiwari, learned counsel appearing for the appellant advanced submissions, essentially, on three fronts. First, he submitted that no independent witnesses had joined the proceedings and the police officials had conjured up the case against the appellant. He

contended that in any sense, they were interested witnesses and their testimony could not be relied upon. He submitted that the appellant was allegedly apprehended at a busy spot. In addition, it was also admitted that there were commercial establishments as well as residential units nearby but despite the same, the police officials had not joined any independent witness to the proceedings. He submitted that the contention that certain public persons were asked to join the proceedings but had refused to do so, could not be accepted. Admittedly, no notice calling upon them to join the proceedings was issued.

8. Second, he submitted that the entire case set up by the prosecution was highly improbable. He stated that it cannot be believed that the appellant had travelled all the way from Rajasthan carrying heroin in an open bag and was standing in a busy place with the contents of the bag plainly visible. He submitted that neither any bus ticket nor any mobile phone was recovered from the appellant and it is not possible to believe that a person would travel from Rajasthan to Delhi without any identification or a mobile phone with just one shirt and ₹1,100/- in his pocket.

9. Third, he submitted that the provisions of Section 50 of the NDPS Act were not complied with, inasmuch as, the appellant had not been searched in front of a Gazetted Officer or a Magistrate. He relied upon the decision of the Supreme Court in case of *Arif Khan v. State of Uttarakhand*: (2018) AIR SC 2123.

10. Mr Gupta, learned APP appearing for the State countered the aforesaid submissions. He submitted that it is well settled that absence of any public witness is not fatal for the prosecution. He submitted that the Court would examine the quality of the witnesses and their testimony and there is no reason to discard or discount the testimony of police witnesses. Next, he submitted that the provisions of Section 50 of the NDPS Act is not applicable in the facts of the present case because the contraband had not been recovered on searching the appellant but had been recovered from a bag being carried by him. In support of his contention that Section 50 of the NDPS Act is inapplicable, he relied upon the recent decision of the Supreme Court in *Than Kunwar v. State of Haryana: Crl. A. No. 2172/2011, decided on 02.03.2020*.

Evidence

11. ASI M Rani Reddy was examined as PW10. She deposed that on 21.03.2014, she was posted at Narcotic Cell, Shakarpur, Delhi. On that day, at about 07:00 p.m., one secret informer had come to her office and informed her that two persons, namely, Harish and Bhupender will supply heroin in the area of Delhi and Haryana. He stated that Harish would come to Delhi on that day, in front of GPO Kashmiri Gate between 08:30 p.m. and 09:30 p.m. to supply heroin to someone and he could be arrested if a raid is conducted. She testified that she produced the secret informer before Inspector Vivek Pathak, who made inquiries from him. She stated that ACP Zile Singh was informed and he subsequently directed her to take necessary action.

She stated that she reduced the secret information into writing and the same was recorded as DD No. 18 (Ex.PW4/A).

12. She stated that at about 07:40 p.m., a raiding team was constituted, which comprised of herself, HC Yogesh, HC Mahesh and HC Rajesh. She stated that she collected the IO Kit bag, field testing kit, electronic weighing machine from the office and made a departure entry vide DD No. 19 (Ex.PW8/A) towards the spot. She stated that the entire team of police officials along with secret informer left the office in a government vehicle bearing No. DL-1CH 9804, which was driven by ASI Raghubir. The team reached GPO Kashmiri Gate, Delhi at about 08:15 p.m. She further deposed that she requested four public persons at Pusa Road, five public persons at Hanuman Mandir and five persons at Kashmiri Gate to join the raiding party. She also informed them regarding the facts and the secret information received but they declined to join the raiding team. She directed the Driver ASI Raghubir to park the vehicle at a distance of 50 meters from GPO and to remain in the vehicle. She instructed him to reach the spot on a signal being given to him. She stated that the team took their positions in front of GPO within a radius of 10 meters at about 08:25 p.m. She testified that at about 08:55 p.m., one person wearing white colour t-shirt and blue colour jeans carrying a white bag (*thaila*) in his left hand came from ISBT side. He was pointed out by the secret informer and identified as Harish Yadav. Thereafter, the secret informer left the spot. She deposed that at about 09:00 p.m., the police officials apprehended that person (appellant herein) and on interrogation he

revealed his name as Harish Yadav. She identified the appellant in Court.

13. She further testified that she informed the accused (Harish Yadav) regarding the secret information received by her and the possibility of recovering heroin from him. He was also informed of his legal right to be searched in presence of a Gazetted Officer or a Magistrate and was also told that they could be called at the spot for his search to be conducted in their presence. She stated that he opted not to avail his legal rights. She also stated that she prepared a notice under Section 50 of the NDPS Act (Ex.PW6/A) and gave a carbon copy of the same to the accused. He accepted the same and affixed his signatures on the original, which was identified by her. She stated that the accused went through the notice and thereafter, he wrote his response on the notice (Ex.PW6/B). She stated that in the meanwhile, seven to eight persons had collected at the spot. She also requested them to join the proceedings but they did not. She stated that the bag carried by the accused was checked and it was found containing *Saleti* colour shirt and one transparent polythene tied with rubber band. She removed the rubber band and found that the polythene bag contained *matiala* colour powder. The powder was tested on the field testing kit and found to be heroin. On weighing the same, it was found that the powder weighed 600 grams. She stated that she took out two samples of five grams each and kept them in two separate transparent polythenes tied with a rubber band and the same were kept in cloth parcels marked A and B. The remaining heroin was kept in the same

transparent polythene in which it was kept earlier and the same was kept back in the white colour bag carried by the accused. The said bag was then kept in a cloth parcel, which was sealed and marked as C. She stated that she prepared the FSL Form at the spot. She stated that the case property was taken into possession through seizure memo (Ex.PW6/C) and she identified her signatures on the same. She also testified that the seal was given to HC Yogesh and thereafter, HC Yogesh prepared the *tehrir* on her directions (Ex.PW10/A). The original *tehrir* was handed over to HC Mahesh with the direction to hand it over to the duty officer for registration of an FIR. She deposed that she handed over the three sealed parcels marked as A, B and C as well as the FSL Form along with carbon copy of the seizure memo to HC Mahesh with the direction to hand over the same to the SHO. She stated that HC Mahesh left the spot at about 12:15 a.m. in the Government vehicle which was driven by ASI Raghubir. Subsequently, at about 03:30 a.m., SI Sunil Jain came to the spot in the same vehicle. She also deposed that she produced the accused and the documents, which were prepared by her before SI Sunil Jain and apprised him of the facts of the case. SI Sunil Jain prepared a site plan at her instance (Ex.PW7/B). She identified her signatures on the same. The statements of HC Yogesh were recorded on the spot and the accused (appellant herein) was arrested by SI Sunil Jain at about 05:15 a.m. vide arrest memo, Ex.PW6/D. The IO then conducted the personal search of the accused and a carbon copy of the notice under Section 50 of the NDPS Act and an amount of ₹1,100/- were recovered from him. The personal search memo (Ex.PW6/E) was

prepared by the IO. Subsequently, the accused was interrogated and his disclosure statement (Ex.PW6/F) was recorded.

14. PW10 in her cross-examination deposed that she did not ask persons from the residential and commercial complexes which were near to the office of the Narcotic Cell at Shakarpur to join the proceeding. She also deposed that she did not call the pujari or any other person from the Hanuman Mandir, which was near to the spot to join the proceedings. She stated that no notice was given to public persons who had refused to join the investigation because they did not furnish their name and address.

15. HC Yogesh was examined as PW6. His testimony is consistent with the testimony of ASI Rani Reddy (PW10). He also testified that ASI Rani Reddy had requested four persons from Pusta Road, Five persons from Hanuman Mandir and five persons at the GPO Kashmiri Gate to join the proceedings and had informed them about the facts and the secret information, but they had declined to join the proceedings.

16. HC Sanjiv Kumar was examined as PW1. He testified that on 22.03.2014, he was posted at PS Crime Branch as Duty Officer. He stated that at about 01:15 a.m. HC Mahesh had come to the PS along with the original *rukka* sent by SI Rani and he had got the FIR in question registered (Ex.PW1/A).

17. Inspector Manjeet Tomar was examined as PW5. He stated that on 22.03.2014, he was posted at PS Crime Branch as the SHO. He

testified that on that date at about 01:20 a.m., HC Harish had come to him and handed over three parcels marked A, B and C along with FSL Form duly sealed with the seal of RR and had also handed over the carbon copy of the seizure memo. He stated that he had affixed his seal of MT on the three parcels marked A, B and C and had also affixed his seal on the FSL Form. He stated that he had produced the case property before HC Jag Narain who had made an entry in Register No. 19 and thereafter, he had also affixed his signatures on the said Register. He also testified that he had recorded DD No. 3 to the aforesaid effect and the same was also brought in evidence as Ex.PW5/A. PW5 also identified his signatures on the photocopy of the Register No. 19 (Ex.PW3/A).

18. HC Jag Narain was examined as PW3 and his testimony is consistent with that of PW5. He stated that he deposited the articles in *malkhana* and had made entry at Serial No. 1952 in Register No. 19. He stated that on 27.03.2014, he had handed over the *pullanda* marked as A in sealed condition along with FSL Form/Forwarding letter to HC Mukesh Kumar by RC No. 88/21/14 for depositing the same at FSL, Rohini. He also brought the photocopy of the RC in evidence as Ex.PW3/C. He further testified that on 29.04.2014, Ct. Anne Vergus had deposited a *pullanda* sealed with the seal of FSL and the same was deposited in the *malkhana*. He further testified that the case property was not tampered with.

19. The evidence obtained in this case clearly establishes that all procedures were duly followed and the provisions of NDPS Act were

duly complied with.

20. The evidence led by the prosecution was put to the appellant and his statement under Section 313 of Cr.PC was recorded. His response to the said evidence was either that he did not know or it was incorrect. He further stated that the case set up against him was false and all the prosecution witnesses that were examined were interested and false witnesses. He stated that he was innocent and had been falsely implicated in the present case. In addition, he stated that nothing was recovered from his possession and all proceedings were conducted in the police station. He also alleged that the case property was planted upon him by the police officials and they had obtained his signatures on blank papers.

21. The appellant also examined himself in his defence as DW1. He testified that he was arrested at Jhajhar, Haryana. He stated that one person Bhupender who was his friend and known to him since 2013 had to give him ₹50,000/- and had asked him to accompany him to Jhajhar where his maternal uncle was running a gas agency. He stated that he came to Jhajhar with Bhupender and Bhupender's maternal uncle came and met them at Jhajhar bus stand in a Maruti Alto. He stated that they reached Jhajhar at about 06:30-7:30 p.m. He stated that on the way their vehicle was stopped by four persons in civil dress. These persons asked them to get down from the car. He stated that thereafter the four persons searched him and Bhupender and two mobiles were recovered from Bhupender. He stated that thereafter they were asked to sit in an Indigo car along with persons in the civil

dress and they were brought to Delhi. He stated that they were taken to PS Shakarpur, Laxmi Nagar and he and Bhupender were kept in separate rooms. He alleged that IO Sunil Jain had told him that, if he wanted to be released, he would have to pay ₹5 lacs. He stated that Bhupender was released as he paid the money as demanded but he had been implicated in the case.

22. The appellant was cross-examined. In his cross-examination, he conceded that he had no document to show that he had lent ₹50,000/- to Bhupender in December, 2013 as claimed by him. He also could not recollect the car number in which he, along with Bhupender and his maternal uncle were travelling to Jhajhar. He also did not remember the registration number of the Indigo car in which he was allegedly brought from Jhajhar to Delhi. He denied the suggestion that he had deposed falsely.

Reasons and Conclusion

23. The evidence led by the prosecution clearly establishes the case against the appellant and there is little room for entertaining any doubts regarding the same.

24. The contention that the testimony of the official witnesses ought to be rejected because no public witnesses were joined in the proceedings, is unpersuasive. Although it is expedient that public witnesses ought to be included in the proceedings as independent witnesses, but absence of such witnesses is not necessarily fatal to the case of the prosecution. In ***Kalp Nath Rai v. State: (1998) AIR SC 201***,

the Supreme Court had observed as under:

“There can be no legal proposition that evidence of police officers, unless supported by independent witnesses, is unworthy of acceptance. Non-examination of independent witness or even presence of such witness during the raid would cast an added duty on the court to adopt greater care while scrutinizing the evidence of the police officers. If the evidence of the police officer is found acceptable, it would be an erroneous proposition that court must reject the prosecution version solely on the ground that no independent witness was examined.”

25. In the present case, the testimony of the official witness is consistent and this Court finds no reason to disbelieve the same.

26. The testimony of the appellant is difficult to accept as it is bereft of any particulars. It is also relevant to mention that no complaint was made by any of the family members of the appellant alleging that he had been picked up from Jhajhar. The maternal uncle of Bhupender whose name was stated to be Kheta Ram also did not make any complaint regarding his nephew Bhupender and the appellant being whisked away from Jhajhar. In the given circumstances, this Court finds that the appellant's testimony does not raise any doubts as to the prosecution's case.

27. The learned counsel had contended that the case set up by the prosecution is improbable because it is unbelievable that the appellant would have travelled to Delhi without any mobile phone and any

identification but carrying only one bag containing heroin that was plainly visible to the public.

28. While it is correct that it would be unusual for anyone to travel without any identification, however, lack of any identification or a mobile phone in the possession of the appellant, is not sufficient to raise any reasonable doubts as to the case set up by the prosecution.

29. The contention that the provisions of Section 50 of the NDPS Act had not been complied with, is also unmerited. As noticed above, PW10 and PW6 had testified that the appellant was duly informed of his rights to be searched in presence of a Gazetted Officer or a Magistrate. He was also informed that they could be called at the spot and as search could be conducted in their presence. However, he had declined to be searched before them. He was served with a notice under Section 50 of the NDPS Act (a carbon copy which was also recovered from his possession). He had noted down his response on the said notice clearly stating that he had received a notice under Section 50 of the NDPS Act and had read and understood the contents thereof. He had understood that he had legal rights to be searched before a Gazetted Officer or a Magistrate but he did not want his search to be conducted in their presence. He also stated that he did not wish to search any of the police official or their car.

30. It is not necessary that the person suspected be searched in presence of a Magistrate or a Gazetted Officer notwithstanding that he declines the same after being made aware of his rights in this regard.

(See: *Innocent Uzoma v. State: Crl. A. 139/2017, decided on 14.01.2020*).

31. In these circumstances, there is no reason to believe that the provisions of Section 50 of NDPS Act were not complied with. The contention that provisions of Section 50 of the NDPS Act are not required to be followed where the recovery is made from a bag carried by the accused in his hand, is unpersuasive. In *State of Rajasthan v. Parmanand & Anr.:(2014) 5 SCC 345*, the Supreme Court had observed as under:

“15. Thus, if merely a bag carried by a person is searched without there being any search of his person, Section 50 of the NDPS Act will have no application. But if the bag carried by him is searched and his person is also searched, Section 50 of the NDPS Act will have application. In this case, Respondent 1 Parmanand’s bag was searched. From the bag, opium was recovered. His personal search was also carried out. Personal search of Respondent 2 Surajmal was also conducted. Therefore, in the light of the judgments of this Court mentioned in the preceding paragraphs, Section 50 of the NDPS Act will have application.”

32. It appears that the aforesaid decision was not brought to the notice of the Supreme Court in *Than Kunwar (supra)*. However, it is not necessary to examine this issue in any detail because in the facts of this case, the provisions of Section 50 of the NDPS Act have, in fact, been duly complied with.

33. The appeal is unmerited and is, accordingly, dismissed. All pending applications are also disposed of.

VIBHU BAKHRU, J

SEPTEMBER 09, 2020

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