

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

% ***Reserved on: 05.10.2021***

Pronounced on: 15.11.2021

+ **CRL.A. 1005/2018 & CrI.M.As.10244-10245/2021**

HARISH JOSHI Appellant

Through: Mr.Vikas, Advocate

Versus

DIRECTORATE OF REVENUE OF
INTELLIGENCE

..... Respondent

Through Mr.Satish Aggarwala, Senior
Standing Counsel with Mr.Jasneet
Jolly, Advocate

CORAM:

HON'BLE MR. JUSTICE SURESH KUMAR KAIT

JUDGMENT

1. The present appeal has been preferred against the judgment dated 01.09.2018 passed by the learned Special Judge, Delhi vide which appellant – Harish Joshi, a Canadian national, has been held guilty for the offences under Sections 21(c) and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 and order on sentence (corrected) dated 06.09.2018, vide which he has been directed to undergo rigorous imprisonment for 10 years with fine of Rs.1,00,000/- each for both the Sections. In default of payment of fine, appellant has been directed to undergo rigorous

imprisonment for further three months and also both the sentences have been directed to run concurrently. Besides, appellant has been given benefit of Section 428 Cr.P.C.

2. The brief facts giving rise to the impugned judgment and order on sentence, as noted in the impugned judgment dated 01.09.2018 are as under:-

- (i) On receipt of intelligence information on 08.09.2008 that a person would come in a Tata Indica car bearing registration No. UP-14-AK-0505 carrying narcotic drugs concealed in a suit case to handover it to another person opposite DLF Golf Course, Gurgaon at about 06.00 P.M., the team of DRI and two independent witnesses, mounted a surveillance near the designated place in an official vehicle. At about 06:30 P.M., vehicle number UP-14-AK-0505 i.e. an Indica car was spotted near the designated place of delivery, which did not stop and kept moving and was followed by the officials of the DRI in the same direction. The said Indica car stopped near an elderly person, who seemed to be waiting for it. One person alighted from the car and started speaking to the elderly person. When DRI officials tried to apprehend them, the person who had alighted from the car, escaped into a nearby lane and the elderly man got into the car, which sped away towards Delhi at a high speed. The car

could be finally intercepted and forced to stop opposite Shiv Murti, near Mahipalpur, New Delhi.

- (ii) The driver of the car introduced himself as Manoj Kumar Sharma, 40 years; the elderly person introduced himself as Harish Joshi, aged about 65 years and the third person introduced himself as Anil Mohan aged about 26 years. On being asked, the driver of the car opened the dickey and a black colour zipper stroll suitcase was found therein. On persistent questioning, the appellant admitted that the suitcase contained about 5 Kg of heroin and it was to be delivered to him. The person who had fled away from the spot was disclosed as Sanjay.
- (iii) According to DRI, notice under Section 50 of NDPS Act was served upon them, who denied requirement of presence of the Gazetted officer or Magistrate at the time of their personal search. These persons along with their vehicle were brought to the office of the DRI along with those two witnesses for the search. One black colour zipper trolley suitcase make Royal was recovered during the search. Besides, insurance and RC papers of the Indica car were also recovered from the glove box of the car. However, nothing was recovered from the person of the three apprehended persons.
- (iv) During search of the recovered brief case, it was found containing old clothes. However, since bottom of the suitcase seemed heavy, the base fabric of the suitcase

was removed and a sunmica sheet was found affixed. Upon removal of sunmica sheet, five packets wrapped in transparent tape were found placed on another sunmica sheet attached to the base of the suitcase. The five packets were marked as A, B, C, D and E and were weighed with electronic weighing scale and the gross weight was found to be 1.070 kg; 1.070 kg; 1.075 kg; 1.074 kg and 1.078 kg respectively. On opening, the packets were found to be containing yellowish granules/powder. The powder from each packet was tested with the help of UN Field Testing Kit and tested positive for the presence of Opium Alkaloids. The net weight of contents of each packet was found to be 0.964 kg; 0.970 kg; 0.974 kg; 0.976 kg. and 0.979 kg respectively and the total net weight was found to be 4.863 kg. Three representative samples were drawn from each packet and marked as A-1, A-2, A-3; B-1, B-2, B-3; C-1, C-2, C3; D-1, D-2, D-3; and E-1, E-2, E-3 respectively. Thereafter, the seized material was sealed after affixing seal of DRI and Panchnama was prepared and signatures of two witnesses and three apprehended persons, were obtained thereon. Test Form was also prepared.

- (v) On 09.09.2008, appellant- Harish Joshi was served with summons under Section 67 of the NDPS Act and upon apprehension, he admitted the recovery.

- (vi) Vide order dated 19.02.2009, appellant was granted bail by this Court.
- (vii) Vide order dated 17.02.2010, Charge for the offence under Section 21(c) of NDPS Act, read with Section 29 of the Act, was framed against the appellant and other co-accused.

3. During trial, nineteen witnesses were examined by the prosecution in support of its case and statement of accused/appellant under Section 313 Cr.P.C. was recorded, wherein he denied to lead any evidence in his defence. After hearing the arguments advanced by both the sides, the learned Special Court held appellant guilty of the offences and awarded sentence, as described in Para-1 of this Judgment.

4. Being aggrieved of the impugned judgment and order on sentence, the present appeal has been preferred.

5. At the hearing, learned counsel appearing on behalf of appellant submitted that appellant was forced & threatened to write in his own hand on the papers placed before him, story of some trading/carrying narcotics contrabands and was brutally beaten up and was not even allowed to make a call to his family or the Canadian High Commission. However, the learned Special Judge has grossly erred in not considering the inconsistencies in the

story put forth by the prosecution. Moreover, search and seizure proceedings were not in accordance with the law.

6. It was submitted by learned counsel that the Panchanama was signed only by the Investigating Officer, PW-4 and was not signed by all the members of the DRI team. Besides, two panch witnesses, namely, Raj Kumar and Omvir and driver of the vehicle- Manoj Sharma, were non-existent and could not be traced and were not examined before the trial court.

7. Attention of this Court was drawn by learned counsel for appellant to the cross-examination of Devender Singh, Intelligence Officer (PW-9), to submit that prosecution had even failed to gather basic information about driver- Manoj Sharma, such like his address particulars at the time of apprehension and therefore, failed to trace him. Further attention of this Court was drawn by learned counsel to examination-in-chief of Shiv Pal (PW-13), who has not supported the story of prosecution. In his examination in chief, PW-13 has stated that the driver Sh. Manoj Sharma told him that when he stopped the car at DLF, Gurgaon, the police officials encircled the car and they were brought to an office at Lodhi Road, whereas the case of prosecution is that Car fled from the spot with the appellant Harish Joshi on

board and that it was intercepted at Shiv Murti near Mahipalpur, Delhi.

8. Attention of this Court was further drawn to the statement of Investigating Officer (PW-4) wherein he has submitted that substance recovered from all packets gave positive results for “Opium Alkaloids” whereas according to the report of the CRCL (Ex-PW-8/A), the substance found was Heroin. Pertinently, on this aspect, appellant had filed an application for retesting of the recovered substance, which was allowed by trial Court vide order dated 21.01.2011 directing that the fresh samples be drawn and sent to CRCL for retesting for the purpose of determining the presence of “Diacetyl Morphin” Being aggrieved, DRI challenged the said order vide Crl.M.C. 770/2013 and the same was dismissed by this Court vide order dated 21.08.2014. Having no option, DRI sent the samples for retesting. However, the subsequent report dated 21.01.2015 (EX. PW19/8) showed the percentage of “Diactyl Morphin” at 2.9%, 2.7%, 3%, 3.2% and 3.3% respectively.

9. Further, learned counsel for appellant drew attention of this Court to cross-examination of Ajay Sharma, Assistant Chemical Examiner (PW-19) wherein the trial court itself had raised questions with regard to purity percentage of the samples recorded differently in reports dated 22.10.2008

and 21.01.2015 and submitted that with passage of time due to moisture temperature and storage condition the diacetylmorphine (heroin) deteriorates and gets converted to monodactyl morphine and also if there are two different reports, then it is drawn from the different samples.

10. Learned counsel for appellant also submitted that the trial court has failed to consider that the appellant did not have the conscious possession of the contraband, as the same was brought by Sanjay as per the prosecution, who had run away from DLF exclusive Apartments and could not be traced by the DRI, even though his records were available with Dasna Jail. It was also submitted that the DRI was not carrying testing kit and weighing scale and the accused were brought to the office of DRI to conduct fake investigation. Also, Sh. Dharam Veer Sharma (PW-2) failed to produce the custom house godown register showing deposit of the case property for safe custody.

11. Learned counsel appearing on behalf of appellant also emphasized that in the impugned judgment the learned Judge did not take into account the fact that before conducting a raid, Gurgaon police was not informed; PW-5 stated that the punch witnesses spent 14 hours in his presence and yet he could not describe their physical attribute; the CDR of mobile number

9958005243 purportedly used by Sanjay was in the name of Sunny Devnath; Sanjeev Kumar Gautam, Superintendent (PW-6) stated that he does not remember the number of the vehicle in which they were travelling and DRI was not written on the vehicle; the person who fled away from the spot did not know that they were officials of DRI; that nothing incriminating was found from the appellant (Harish Joshi) and that personal search of the accused was not done at the point of interception nor the bag was opened at the spot, which brings the case of prosecution under clouds and thereby, failed to consider that in case two views are possible, then the benefit of doubt ought to be exercised in favour of the accused. In support of aforesaid submissions, learned counsel placed reliance upon decisions of Hon'ble Supreme Court dated 21.04.2015 in Criminal Appeal No. 682/2015, titled as ***Makhan Singh Vs. State of Haryana & Tofan Singh Vs. State of Tamil Nadu 2020 SCC OnLine SC 882*** as well as various decisions of this Court dated 02.11.2011 in CrI.L.P. 441/2011, titled as ***UOI Vs. Farid***; dated 21.07.2016 in CrI.A. 1150/2014, titled as ***Jagroop Singh @ Ceeta Vs. Directorate of Revenue Intelligence***; dated 04.09.2014 in CrI.A.1416/2010, titled as ***Nnadi K. Iheanyi Vs. Narotics Control Bureau***; dated 03.12.2014 in CrI.A. 9/2014, titled as ***Ambrose Vs. Directorate of Revenue***

Intelligence; dated 05.11.2014 in Crl. L.P. 353/2012, titled as *Narotics Control Bureau Vs. Anju Tiwari & Anr.*; dated 09.04.2018, Crl. Appeal 1404/2011, titled as *Mohd. Masoom Vs. State of NCT of Delhi* and other decisions.

12. On the contrary, learned Senior Standing Counsel submitted that the judgment and conviction of appellant by the learned trial court is well reasoned and deserves to be upheld. Learned Senior Standing Counsel sailed this court through the testimonies of all the witnesses recorded before this Court to controvert the stand taken by the appellant.

13. According to learned Senior Standing Counsel, it is not necessary for all the panch witnesses to sign the Panchnama and prosecution has got examined PW- 5 and PW-6 in support of prosecution case, who were members of the raiding team. Further, the case property was produced before the court and was proved beyond reasonable doubt.

14. Learned Senior Standing Counsel also submitted that before conducting the raid, the due procedure was followed by the DRI officials and to this effect testimony of Shri Sanjay Kumar, Tax Assistant (PW-1) is on record, who had made an entry in the seal register. Similarly, Shri Dharambir Sharma (PW-2), Inspector Incharge, who had received the case

property in sealed condition alongwith deposit memo after verifying the seal on the case property and had made corresponding entry in his own hand in the valuable godown register, has also been examined before the court. Also, Shri Alkesh Rao (PW-4) Investigating Officer, DRI, who is the complainant and seizing officer, has been examined at length before the learned trial court, who has proved the entire case property, samples, material used for concealing the contraband substance in the car, conducted search and had affected the recoveries. Besides, Shri Ramesh Kumar, Senior Intelligence Officer, DRI (PW-5)and Shri Sandeep Kumar Gautam, IO, DRI (PW-6) were also examined.

15. Learned Senior Standing Counsel submitted that the plea of appellant that Shri Shiv Pal, owner of M/s Shankar Tour & Travel (PW-13) has not supported the prosecution case is without any basis, as the said witness in his examination has clearly stated how the vehicle was arranged for the accused persons.

16. So far as contention of appellant that Shri Man Singh Yadav, Appraiser, DRI (PW-17) having admitted that at the time of alleged incident, Sanjay was lodged in Dasna Jail, Ghaziabad, is again without any basis as when this witness wrote to the Jail Superintendent asking whereabouts of

Sanjay, the Jail Superintendent had replied that further details of Sanjay were required only then any information could be provided and thereby appellant has failed to establish that accused Sanjay who fled from the spot and the one behind Dasna Jail were one and the same persons and for this lapse, prosecution cannot be said to have failed in proving its case.

17. Next submitted that driver of the vehicle- Manoj Sharma could not be produced before the court due to lack of details of his house number and also could not be contacted on telephone number which too was provided by PW-13 before the Court during evidence. Further submitted that, PW-13 had resiled from his statement recorded under Section 67 of the NDPS Act though he has admitted that he had put his statement under his handwriting and signatures.

18. With regard to substance recovered, learned Senior Standing Counsel submitted that the difference between the two reports is with regard to purity percentage only. The dates of both the reports are different. The first report is dated 22.10.2008, whereas the second report is dated 21.01.2015. Hence, there is gap of 6 years and 3 months. However, according to learned Senior Standing Counsel what is significant is that on both the report the substance is mentioned as “heroin” only and thereby, the objection of appellant that

there existed two different samples, is baseless.

19. In support of above submissions, learned Senior Standing Counsel relied upon decisions in *CBI Vs. Ashiq Hussain Faktoo & Ors.* 2003(3) SCC 316; *Brij Lai V. State of Haryana* 2002(1) SCC 700; *Kulwinder Singh & Anr. Vs. State of Punjab* 2015 (6) SCC 674; *State of Punjab Vs. Balwant Rai* 2005 (3) SCC 164.

20. Upon hearing rival contentions raised by both the sides at length and perusal of the testimony of witness recorded before the learned trial court, impugned judgment and order on sentence as well as decisions relied upon, this Court finds that there are material contradictions in the story put-forth by the prosecution.

21. It is pertinent to note that despite DRI officials having information of vehicle number and mounted surveillance near DLF Golf Course, when the vehicle was spotted near the designated place of delivery, why the vehicle was not stopped there and was only followed. Moreover, when the vehicle stopped in a narrow lane and DRI officials tried to apprehend the offending vehicle, the person who had alighted from the car ran away; none of the DRI officials tried to chase the accused who fled away from the spot and all the DRI officials while sitting in the vehicle chose to follow the fleeing

offending vehicle. Though the offending vehicle is said to have been chased by the DRI officials for a long time before being apprehended, but no efforts were made to catch them at red light even though the vehicle is said to have moved at slow pace. In addition, the offending vehicle took 15-20 minutes to cross the toll plaza, however, none of the DRI officials came down from their vehicle to apprehend the offending vehicle. Further, it is admitted case of the prosecution that neither they had informed Gurgaon police regarding the delivery of substance at DLF Golf Course Apartment nor even after the offending vehicle fled away from the spot. The prosecution has also admitted that the offending vehicle fled from Gurgaon to Delhi and had to cross the toll plaza, but despite having details of the vehicle i.e car number brand Indica, neither Gurgaon police nor Delhi police was informed so that the offending vehicle could be intercepted. The above noted facts create strong doubt about the story of prosecution.

22. In all, three persons were apprehended from the offending vehicle. One is appellant- Harish Joshi, second is driver- Manoj Kumar Sharma and third is co-accused Anil Mohan. During trial accused Anil Mohan expired and proceedings against him were abated on 23.12.2014 and the other person, namely, Manoj Kumar Sharma, driver of the offending vehicle,

remained untraceable and therefore, could not be examined as a witness. In addition, third accused Sanjay also could not be traced and was therefore, not charge sheeted.

23. According to appellant, to prevent himself from physical violence at the hands of DRI officials, he had written his confessional statement under Section 67 of the NDPS Act due to force and coercion, from which he had retracted at the first available opportunity. Even during recording of his statement under Section 313 Cr.P.C., appellant denied of all the charges levelled against him and submitted that there was some discussion between the Guard of the society and other persons standing there and thereafter, he was pushed inside the car, which was rushed to Delhi through toll plaza without even paying the toll.

24. Relevantly, the Hon'ble Supreme Court, while answering to a reference with regard to the evidentiary value of statement recorded under Section 67 of NDPS Act, in ***Tofan Singh (Supra)***, have held as under:-

“158. We answer the reference by stating:

(i) That the officers who are invested with powers under section 53 of the NDPS Act are “police officers” within the meaning of section 25 of the Evidence Act, as a result of which any confessional statement made to them would be barred under the provisions of section 25 of the Evidence Act, and

cannot be taken into account in order to convict an accused under the NDPS Act.

(ii) That a statement recorded under section 67 of the NDPS Act cannot be used as a confessional statement in the trial of an offence under the NDPS Act.”

25. Moreover, as per prosecution's own version, the personal search of appellant accused was not conducted at the spot but at the DRI office, though notice under Section 50 of the Act was purportedly served at the spot. Also, the recovery is said to have been made from the dicky of the car, which was opened by the driver and nothing incriminating was recovered during personal search of appellant. In a catena of decisions, it has been reiterated by the Hon'ble Supreme Court that right of an accused to have a personal search under Section 50 of the Act, is sacrosanct and infeasible and it cannot be disregarded by the prosecution. As to whether the provisions of law were followed by prosecution or not, have to be governed on the basis of evidence led before the trial court. In the present case, it has not been disputed that personal search of appellant was conducted at the DRI office in the absence of any Magistrate and Gazetted officer and nothing incriminating was recovered from his person. Moreover,

it is the case of prosecution that the appellant had boarded the offending vehicle at DLF Golf Course Apartment and the bag was already in the dickey thereof and so, the plea of appellant having no knowledge of bag carrying the contraband cannot be negated.

26. Further, the Panchanama prepared at the spot bore signatures of Investigating Officer only and did not bear signatures of any of the panch witnesses. On this aspect, a Coordinate Bench of this Court in ***Jagroop Singh @ Ceeta Vs. Directorate of Revenue Intelligence*** 2016 SCC OnLine Del 4075 has observed as under:-

“10. The most glaring feature of the instant case is that the raiding party comprised of PW-3 (R. Roy); Kamal Sharma, Intelligence Officer, Yogesh Chaudhary, Intelligence Officer, Ajay Bhasin (SDA) and one or two other staff members. Various documents including Panchnama (Ex.PW-3/D) prepared at the spot, however, do not bear signatures of any other member of the raiding team. None of them was cited as a witness. The complainant did not deem it fit to examine any other member of the raiding team to corroborate his version. Adverse inference is to be drawn against the investigating agency for withholding material witnesses. No plausible explanation has been offered as to why signatures of the other members of the raiding team were not taken on various documents

purportedly executed in their presence.”

27. Moreover, during the course of trial, prosecution has not been able to bring two panch witnesses namely Raj Kumar and Omvir to the witness box. Even the Investigating Officer (PW-4) in his cross examination has admitted of not having verified the residential details and other particulars of the aforesaid two panch witnesses nor did he remember their physical appearance. Another Coordinate Bench of this Court in ***Ambrose Vs. Directorate of Revenue Intelligence*** 2014 SCC OnLine Del 6849 while allowing an appeal filed against the conviction of appellant therein, had observed as under:-

“31. It is surprising that the trial Court overlooked the fact the reports of the IO himself in the case showed that addresses of the two panch witnesses were non-existent. This is very different from the situation where the addresses are correct but the panch witnesses are not available. In such a scenario, it is understandable that after repeated attempts, the DRI was unable to ascertain the whereabouts of such witnesses. However, when the address is shown to be non-existent, then questions arise as to the genuineness of the entire exercise involving the panch witnesses. It must be remembered that the addresses of the panch witnesses are recorded in the panchnama proceeding and notices are

served upon them for recording their statements under Section 67 NDPS Act. It is possible that, as explained by Mr. Aggarwala, even during the panchnama proceeding, notices are served upon the panch witnesses and both of them appeared later in this case on 11th February 2011 for recording their statements. It is also possible, as contended by Mr. Aggarwala, that even if the DRI officials could not have insisted at that very moment that the panch witnesses should produce some identity document, it should always be possible for the DRI officials to verify the correctness of the address in the next few days.”

32. No serious attempt in this case was made by the DRI, despite knowing that the address was non-existent, to ascertain the correct present address of the panch witnesses and secure their presence at the trial.

33. The Court is unable to agree with the approach of the trial Court in not drawing adverse inference against the DRI. In a situation where the panch witnesses are unable to be produced, because their addresses are non-existent, it is not sufficient for the DRI to simply drop the panch witnesses and avoid the consequence of an adverse inference being drawn.”

28. The prosecution has also failed to bring driver of the offending vehicle-Manoj Kumar, to the witness box. Further, another prosecution

witness PW-9, who had recorded statement under Section 67 of driver Manoj Kumar, also suffers from procedural lapse on the part of prosecution, as the address and the other particulars details, which were purportedly penned by driver Manoj Kumar, were not verified.

29. Even prosecution witness Satish Kumar (PW-14), Security Officer at DLF, Phase-5, DLF exclusive floors, Gurgaon in his cross examination has stated that Mr. Mohinder Lal who was the Police Commissioner of Gurgaon, had visited DLF Exclusive Floors on 08.09.2008 at about 6:30 PM and at that point of time, supervisor at the main gate had informed him that those officials (DRI) had taken away the resident of Flat no.7/1, Ground Floor, DLF Exclusive floors.

30. On the aspect of relevance of testimony of independent witnesses, the Hon'ble Supreme Court in ***Makhan Singh Vs. State of Haryana*** (2015) 12 SCC 247, while allowing an appeal against the judgment and conviction of accused (under the NDPS Act) upheld by the High Court of Punjab and Haryana, has observed as under:-

“10. For recording the conviction, the Sessions Court as well as the High Court mainly relied on the testimony of official witnesses who made the recovery i.e. H.C. Suraj Mal, PW 2 and Inspector Raghubir Singh, PW 6, and found

*them sufficiently strengthening the recovery of the possession from the appellant. In our considered view, the manner in which the alleged recovery has been made does not inspire confidence and undue credence has been given to the testimony of official witnesses, who are generally interested in securing the conviction. In peculiar circumstances of the case, it may not be possible to find out independent witnesses at all places at all times. Independent witnesses who live in the same village or nearby villages of the accused are at times afraid to come and depose in favour of the prosecution. Though it is well settled that a conviction can be based solely on the testimony of official witnesses, condition precedent is that the evidence of such official witnesses must inspire confidence. **In the present case, it is not as if independent witnesses were not available. Independent witness PW 1 and another independent witness examined as DW 2 have spoken in one voice that the accused person was taken from his residence. In such circumstances, in our view, the High Court ought not to have overlooked the testimony of independent witnesses, especially when it casts doubt on the recovery and the genuineness of the prosecution version.***

31. Also, prosecution witness, Investigating Officer (PW-4) in his cross-examination stated that when officer of DRI tried to intercept and apprehend

the car, accused Sanjay who got down from the car, ran away. Further on this aspect, prosecution witness PW-17 in his examination-in-chief stated, that during the course of recording of statement of accused Anil Mohan (since deceased) had admitted that one Sanjay was lodged with him in Dasna Jail, Ghaziabad in 2007. Pertinently, the Jail Superintendent had sought further details of Sanjay for providing any information, which were never provided to the Jail Superintendent nor the said accused Anil Mohan (since deceased) was taken to Dasna Jail for identification of accused Sanjay on the basis of record available with the Jail authorities. Moreover, prosecution failed to place and prove call detail record of mobile number purportedly used by accused Sanjay before the learned trial court.

32. With regard to the discoveries made, the Investigating Officer (PW-4) in his examination-in-chief has stated that the substance recovered is “Opium Alkaloids”, however, as per the report of the CRCL (Ex.PW-8/A) the substance recovered is “Diactyl Morphin” (Heroin). The contradictory stand of prosecution was challenged by the appellant by filing an application for retesting, which was allowed and fresh samples were drawn and sent for retesting for determination of “Diactyl Morphin” (Heroin). Pertinently the relevant portion of report dated 22.10.2008 reads as under:-

REPORT: (Report is admissible under Section .293Cr.P.C.)

Each of the five samples is in the form of off white coarse and lumps. On the basis of chemical and chromatographic examinations, it is concluded that each of the five samples under reference answers positive test for Diacetyl morphine (Heroin).

The content of Diacetylmorphine (Heroin) and Gross weight of remnant samples, returned herewith as under-

LAB No. CLD	Marked as	% of DAM (Heroin)	Gross weight of remnant samples along with auto pressed plastic pouch
735(N)	A-1	49.0	3.2g
736(N)	B-1	82.5	2.8g
737(N)	C-1	55.0	3.1g
738(N)	D-1	46.5	3.9g
739(N)	E-1	42.8	3.7g

33. Further, the relevant portion of report dated 21.01.2015 reads as under:-

REPORT: (Report is admissible under Section 293 Cr.P.C. 1973)

Each of the five sample is in the form of brown colored lumps and coarse powder. On the basis of chemical and chromatographic examinations, it is concluded that each of the five samples under reference answers positive test for Diacetylmorphine (Heroin), Morphine and monoacetylmorphine.

Percentage of these substances in each sample are as below:

	Marked as	% of Diacetylmorphine (Heroine)	% of Morphine	% of 6- monoacetylmorphine	Gross wt. of sample returned in plastic pouch
	AC1	2.9	17.3	42.8	4.8
	BC1	2.7	20.1	42.0	4.5
	CC1	3.1	17.3	46.6	4.2
	DC1	3.2	17.2	43.0	4.2
	EC1	3.3	17.1	48.2	4.6

34. As per first report dated 22.10.08, the purity percentage was 49.0%,82.5%,55.9%,46.5% and 42.8% respectively, whereas as per subsequent report dated 21.01.2015, the purity percentage is 2.9%,2.7%,3.0%,3.2% and 3.3% respectively. On this aspect, the prosecution witness PW-19, had stated before the court that “*with passage of time due to moisture temperature and storage condition the diacetyl morphine (heroin) deteriorates and get converted to monoacetylmorphin*”. Further, this witness has categorically stated that if there are two different reports, one of “Diactyl Morphin” (Heroin) and the other of “Opium”, it can be safely assumed that it is drawn from the different samples. This witness has further stated that “a sample cannot give two different results of the “Diactyl Morphin” (Heroin) and “Opium” at the same time and it can be safely assumed, it is drawn from the different samples.

35. In a somewhat similar case, a Bench of this Court in ***State Vs. Patrick & Ors.*** 2014 SCC OnLine Del 4446 in an appeal preferred by the State against acquittal of the accused, while upholding the order of acquittal by the trial court, had observed and held as under: -

“10. The learned trial Court acquitted the Respondents by the impugned judgment dated 6th July 2013. The trial Court noted that there were variations in the test reports of the

Forensic Science Laboratory (FSL) of the testing of the samples. In the first instance, when the samples were tested on 23rd June 2009, the samples recovered from A-1, A-2 and A-3, namely, the parcels S-1, S-2 and S-3 were found to contain four substances, i.e., caffeine, monoacetylmorphine (MAM), acetylcodeine and diacetylmorphine (DAM). The percentages of DAM in the three samples were found to be 76.2%, 79.5% and 86% respectively.

11. During the trial, pursuant to the applications made by the accused, the samples were drawn in Court and re-examined. The samples drawn from the contraband seized from A-2 and A-3, i.e. CS-2 and CS-3 respectively were examined by Dr. Madhulika Sharma (PW-10), Director FSL, Rohini. The samples drawn from A-1, namely, CS-1 was analysed by Mr. Shri Narain (PW-13), Assistant Director, FSL, Rohini. The report prepared by PW-10, i.e., Ex. PW-10/B dated 22nd October 2010 showed that the samples CS-2 and CS-3 contained DAM of 20.15% and 22.51% respectively. The sample CS-1 tested by PW-13 on 19th September 2011, was found to be containing DAM to an extent of 19.09%.

12. On the issue as to why the second set of samples recovered from A-2 and A-3, CS-2 and CS-3 were found to contain only MAM and DAM and not caffeine and acetylcodeine, PW-10 was recalled by the prosecution for further examination. In her cross-examination upon being

recalled, PW-10 admitted that caffeine was a stable substance and its percentage would remain the same in a sample over a passage of time. She explained that the fact that acetylcodeine was found in very small traces in CS-2 and CS-3 when compared to the first set of samples, i.e., S-2 and S-3 could be explained by the presence of dilutents. There was a possibility that the sample drawn for the second time had been diluted.

13. The learned trial Court also noted that while the first set of samples were found to be of off-white colour, the second set of samples were of brown colour. Consequently, it was concluded that the decrease in the purity percentage and difference in colour raised serious doubts whether the samples sent to FSL for the first time had been in fact recovered from the accused persons. This could not be explained away only due to passage of time.

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XXXXX

22. In the present case, the Court finds that the experts examined for the prosecution do not offer a convincing scientific explanation for the marked variations in the DAM percentages in the samples tested on second occasion and that the benefit of the doubt created as regards the proper preservation of the samples, and whether the samples initially

tested and subsequently tested were from the same source, should go to the accused.”

36. In the considered opinion of this Court, while passing the impugned judgment, the learned trial court has failed to notice the discrepancies, which have been noted by this Court in the preceding paragraphs. The Hon’ble Supreme Court in **Noor Aga Vs. State of Punjab** (2008) 16 SCC 417 has observed as under:-

“58. Sections 35 and 54 of the Act, no doubt, raise presumptions with regard to the culpable mental state on the part of the accused as also place the burden of proof in this behalf on the accused; but a bare perusal of the said provision would clearly show that presumption would operate in the trial of the accused only in the event the circumstances contained therein are fully satisfied. An initial burden exists upon the prosecution and only when it stands satisfied, would the legal burden shift. Even then, the standard of proof required for the accused to prove his innocence is not as high as that of the prosecution. Whereas the standard of proof required to prove the guilt of the accused on the prosecution is “beyond all reasonable doubt” but it is “preponderance of probability” on the accused. If the prosecution fails to prove the foundational facts so as to attract the rigours of Section 35 of the Act, the

actus reus which is possession of contraband by the accused cannot be said to have been established.”

37. It is a settled law that an accused is presumed to be innocent unless proven guilty and to prove the guilt, the prosecution is required to substantiate its case by showing that the due procedures prescribed under the NDPS Act have been followed, coupled with the assistance of material witnesses. However, in the present case, prosecution has not made any efforts to trace out the co-accused Sanjay, who had purportedly brought the substance for delivery to the appellant. The prosecution has even failed to examine the panch witnesses namely, Raj Kumar and Ombir, who would have proved the arrest and recovery. The Panchnama prepared at the spot did not bear signatures of any of the panch witnesses. In addition, the manner in which the offending vehicle was traced, apprehended and recovery was made, also casts a doubt upon the credibility of prosecution case. Further, Satish Kumar (PW-14), Security Officer at DLF Exclusive Apartments, has not also supported the prosecution case. Also, prosecution has failed to substantiate as to how two reports obtained from CRCL had different analysis and as to why opinion of PW-19 with regard to two different reports, one of “Diactyl Morphin” (Heroin) and the other for

“Opium” being drawn from two different samples, be not accepted.

38. In view of the afore-noted narration, this Court finds that prosecution has immensely failed to prove its case beyond reasonable doubt, therefore, it is a fit case to grant benefit of doubt to appellant/accused.

39. In the light of above, the present appeal is allowed. The impugned judgment dated 01.09.2018 and order on sentence (corrected) dated 06.09.2018 are hereby set aside. Accordingly, appellant is acquitted of offences alleged in the present case. Since the appellant is on bail, surety bonds, stand accordingly discharged.

40. A copy of this judgment be sent to the concerned Jail Superintendent forthwith for information.

(SURESH KUMAR KAIT)
JUDGE

NOVEMBER 15, 2021

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