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

% *Order pronounced on 18.10.2022*

+ CRL.A. 70/2021

STEPHAN NTI

..... Appellant

Through: Mr. Sumeet Verma & Mr. Mahinder
Pratap Singh, Advs.

versus

NARCOTICS CONTROL BUREAU

..... Respondent

Through: Mr. Subhash Bansal, Sr. Standing
counsel with Mr. Raghav Bansal,
Adv.

CORAM:

HON'BLE MR. JUSTICE TALWANT SINGH

Talwant Singh, J.:

1. The appellant has filed the present appeal challenging judgment dated 18.02.2020 and order on sentence dated 26.02.2020 passed by the learned Special Judge, NDPS, New Delhi Patiala House Courts in S.C. No. 8753/2016 under Section 21(c) NDPS Act, registered at PS NCB by which the present appellant was convicted and sentenced to undergo rigorous imprisonment for a period of 10 years and a fine of Rs. 1 lakh was also imposed.

2. It has been submitted that the judgment and order on sentence are liable to be set aside on the grounds that the learned Trial Court has failed to appreciate the facts of the case in appropriate manner; learned Trial Court has erred in holding that the prosecution has been successful in establishing the guilt of the appellant beyond reasonable doubts; the learned Trial Court further failed to appreciate that the contraband at the first instance was tested

positive for *Cocain* and thereafter samples were sent to lab and the said samples tested positive for *Heroin*; the prosecution has failed to justify the deviation with reasonable explanation; swapping of sample has not been ruled out; PW-6 Vishwanath Tiwari has stated to have received secret information at around 2:00 PM in office but said witness was not present in the NCB office as he had left for raid at around 12:00 noon in another case where he was held up till 4:30 PM; the notice under Section 50 NDPS Act was not properly given; the statement made by PW-8 Manish Wahi is not voluntary; the complaint filed by complainant is false, fabricated and manipulated; the sentence awarded is harsh; there are gaping loop holes and unanswered questions in the story of prosecution.

3. Notice was issued to the NCB. Trial Court record were summoned and perused. I have heard the arguments. Brief synopsis has been filed by the appellant as well as respondent/NCB.

4. The case of the prosecution in brief is that on 31.07.2014 at about 2:05 PM, IO Vishwanath Tiwari received a secret information regarding the appellant being involved in drug trade business. The said information was reduced into writing and put before superintendent Sh. R.S. Joshi, who directed IO Ajay Dahiya to constitute a team and search authorization warrants were also issued. At the spot, landlord Kishori Lal and Manish Wahi met the NCB officials and confirmed that the appellant resides on third floor. Manish Wahi became an independent witness to join the raiding party. The door of the appellant was knocked, notice under Section 50 NDPS Act was given to accused but he declined to get himself searched before a Magistrate or a Gazetted officer. Nothing incriminating was recovered from his personal search. During search of the house, a white

transparent polythene packet was recovered from the almirah, which the appellant admitted that it belonged to him. The content of the packet tested positive for *Cocaine*, the weight of the substance was 370 grams; samples were drawn; Panchnama was prepared and the material was sealed and seized. The passport of the appellant and one black colour mobile phone were also seized. Notice under Section 67 NDPS Act was served on the accused.

4.1 After coming back to NCB office, case property was deposited and other formalities were completed. The accused, in his statement under Section 67 NDPS Act, admitted the search proceedings and informed that he had bought the said contraband from his friend Obi, but his address was not known. Rather, he shared the mobile number of Obi. The accused was arrested. The statement of independent witness Manish Wahi was also recorded under Section 67 of NDPS Act. He also placed on record the copy of rent agreement between his father and the appellant.

4.2 As per the FSL report, sample gave positive result for *Heroin*. Passport of accused was found to be forged. Other co-accused could not be traced. After completion of investigation, complaint was filed. Charges were framed, to which accused did not plead guilty and claimed trial. The prosecution examined 13 witnesses and thereafter statement of accused was recorded under Section 313 Cr.P.C. Arguments were heard and thereafter the appellant was convicted vide judgment dated 18.02.2020 under Section 21(c) of NDPS Act and the order on sentence was passed on 26.02.2020, awarding 10 years RI and fine of Rs. 1 lakh being the minimum sentence.

4.3 Role of PW-6 Vishwanath Tiwari/IO was confined only to writing the secret information and putting the same before the Superintendent R.S.

Joshi. IO sent reminders to Nodal Officer and made enquiries about the authenticity of passport. He had received the secret information on his office phone. PW-13 Ajay Kumar Dahiya went with the raiding team as directed to conduct the raid, seized the contraband, the samples were drawn and sealing proceedings were conducted. PW-12 IO Sarita Kataria was also a member of the raiding team. Sepoy Bhuvanesh Kumar had deposited the samples with Lab. PW-2 Ms. Kanchan, Assistant Chemical Examiner had received the samples. PW-3 Assistant Chemical Examiner had examined the samples, which gave positive test report for *Heroin*. PW-4 Gyanender Saxena, Chemical Examiner, had exhibited the test report and mentioned that purity of heroin was 16.8%.

4.4 PW-5 is R.S. Joshi, Superintendent who had received secret information from IO Vishwanath Tiwari. As per him, no entry of the secret information was made anywhere. PW-8 Manish Wahi had accompanied the NCB officials to third floor of the building, where appellant was residing. Search was conducted in his presence. Samples were drawn. His statement under Section 67 NDPS Act was recorded. During examination, he had stated that accused Stephen was their tenant at third floor and he used to stay alone. PW-9 Vikas Yadav, IO had stated that IO Ajay Dahiya had deposited the case property and he made relevant entry in the Malkhana Register. PW-10 Amit Kumar Sharma had recorded the statement of accused Stephen under Section 67 NDPS Act, who had denied the suggestion that the statement was not given voluntarily or the same was taken forcibly. PW-7 is Israr Babu, Nodal Officer Vodafone. PW-11 is Chandrashekhar another Nodal Officer.

5 The accused, in his statement under Section 313 Cr.P.C., denied all

the incriminating circumstances put to him. His case is that on 23.07.2014, he alongwith two more persons of African origin were taken to the office of NCB. Other two persons were released and he was falsely implicated in the present case. As per him, nothing was recovered from his house. The landlord was threatened to give statement against him. In defence evidence, accused examined DW-1 Vinod Kumar, Ahlmad of the Court, who exhibited file of case No. S.C. No. 8784/2016 '*NCB vs. Ezeaka Okwudili*'.

6. The main grounds of challenge to the judgement passed by the learned Special Judge on 18.02.2020 are as under:-

(i) The complainant was not in office at the time when secret information is stated to have been received. It is to be noted that file of another case No. S.C. No. 8784/2016 '*NCB vs. Ezeaka Okwudili*' was summoned by the present appellant and the Ahlmad of the concerned Court was examined as DW-1. The testimony of IO Vishwanath Tiwari in the said case shows that apparently PW-6 Vishwanath Tiwari was not in office to receive the secret information. The learned ASJ has observed that neither PW-6 nor PW-5 R.S. Joshi were confronted with this fact during their examination. The learned Special Judge has relied upon a judgment of the Hon'ble Apex Court in the matter of '*Jasdeep Kaur Chadha vs State (NCT Of Delhi)*' Crl.Appeal Nos. 1405-1406 of 2017 dated 14.08.2017 in which the scope of Section 145 of the Evidence Act has been explained. It was observed by the learned Special Judge as under:-

"The evidence of PW6 Vishwanath Tiwari in the connected case cannot be read in the present case unless and until the said witness is confronted from the said statement and the proceedings, in present case. Neither PW6 nor PW5 was confronted over the said fact in the present case, hence the

evidence of another case exhibited through DW1 Ahlmad cannot be read in evidence in present case. During arguments, Ld. Counsel submits that this fact not in knowledge of accused at the time deposition of PW5 and PW6, however on this ground the record exhibited through DW1 do not become admissible. The testimony of PW6 and PW5 could be impeached only if the said factum is put to these witnesses in their cross-examination. There is nothing in law preventing the accused to recall these witnesses u/s 311 Cr.PC to confront with the evidence of other case as exhibited by DW1, however accused not opted the said procedure therefore the exhibited documents by DW1 cannot be used to discredit the testimony of PW6 and PW5. Accused unable to prove its defence as laid.”

7. I am in agreement with the learned Addl. Sessions Judge (ASJ) that unless and until PW-6 Vishwanth Tiwari is confronted with his statement recorded in another case during his examination, no reliance can be placed on his testimony recorded in another case, which was brought on record through DW-1, Ahlmad of the said Court from where file of S.C. No. 8784/2016 was summoned. Explanation given by the learned counsel for the accused before the learned Special Judge that it was not in the knowledge of the accused at the time of cross-examining PW-5 and PW-6 that there exists another file, where a contradictory statement regarding timing, was on record in respect of PW-6 has been rightly rejected on the ground that the accused always had a right to recall a witness under Section 311 Cr.P.C. for confronting him with the evidence, which came in the knowledge of accused after the examination of witness was over. No such application was ever moved. Merely placing on record the statement of PW-6 recorded in S.C. No. 8784/2016 will not serve any purpose, unless and until PW-6 is confronted with the said statement.

8. I am also in agreement with the conclusion arrived at by the learned Special Judge.

9. The second ground of challenge to the main judgment is that there is a gap of quantity and substance recovered and the substance tested. There are two different narcotics substances. The learned Sessions Judge while dealing with this aspect has discussed about the chain of custody and has reached to a reasoned conclusion that no infirmity has been found regarding deposit of the sample in the Malkhana and taking it out from the Malkhana. It has been observed that at the time of recovery of contraband it was tested positive for *Cocain*. The sample was sent to FSL. No material has been brought on record during cross-examination of witness to the effect that chain of custody was not maintained while samples being sent to FSL, no tampering has been proved. So the report Ex.PW-3/8 giving positive result for *heroin*, where tampering is not proved has been rightly accepted. The learned Special Judge has rightly observed that the accused cannot get any benefit only on the ground that in the initially preliminary tests the contraband had tested positive for *Cocain* and after detailed examination at the FSL, it was found to be *heroin*.

10. The recovered contents, at the time of recovery were weighed and it was considered to be weighing about 370 grams. The case of the prosecution is that 370 grams of substance was recovered and it was weighed at the time of recovery. Two samples were drawn of 5 grams each and thereafter the material was sealed and seized. The contention of the appellant is that since the substance was found to contain only 16.8% *heroin*, so the entire weight of contraband is not to be taken into consideration. Rather the weight, as per the percentage is to be taken into consideration. Learned Special Judge has

discussed this question in detail. He relied upon the notification No. SO 2194/(E) dated 18.11.2009 and in my opinion he has reached to the right conclusion that it is the weight of the entire recovered psychotropic narcotics substance, which is to be taken into consideration when the question is to be decided as to whether the recovered substance falls in small, intermediate or the commercial category. Para 31 of the judgment deals with this aspect, which is reproduced hereunder:-

“31. When we read the observations made by hon'ble Supreme court in Harjit Singh's case (supra), the judgments by hon'ble Delhi High court mentioned above and the observations made by hon'ble Supreme court in paragraph 10 and 11 of Hira Singh's case (supra), the position which emerges is that for the seizure prior to insertion of Note 4 to the notification vide SO 2941 (E) dated 18.11.2009, judgment in E. Michael Raj's case would apply. For subsequent seizures Note 4 would be applicable and weight of the entire mixture will have to be taken into account to decide whether the narcotic or psychotropic substance falls within small category or commercial category. Therefore, the entire weight of the contraband has to be taken into consideration and not only the percentage.”

11. The above conclusion has been arrived at by the learned Special Judge as per the prevailing circumstances, i.e., where the matter has already been discussed in ***Harjit Singh vs. State of Punjab (2011) 4 SCC 441*** and consistent view of this Court has been taken into consideration.

12. As far as testimony of PW-6 is concerned, it has also been argued that Section 145 of the Evidence Act will not apply. Section 145 of the Evidence Act is reproduced hereunder:-

“145. Cross-examination as to previous statements in writing.—A witness may be cross-examined as to previous

*statements made by him in writing or reduced into writing, and relevant to matters in question, without such writing being shown to him, or being proved; but, if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him.*¹¹⁴⁵. Cross-examination as to previous statements in writing.—A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question, without such writing being shown to him, or being proved; but, if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him."

13. The contention of the appellant is that the applicable provision is Section 11 of the Evidence Act. I am in respectful disagreement with the learned counsel for the appellant. The factual matrix of the case is that the defence raised is that the complainant PW-6 Vishwanath Tiwari was not in office at the relevant time as he was busy in investigation in another matter and his statement recorded in other case has been brought on record vide DW-1, Ahlmad of the concerned Court. At the time of cross-examination, in terms of Section 145 of the Evidence Act, the said statement ought to have been put to PW-6; the said statement ought to have been shown to him and his response ought to have been taken on record. No such steps were taken in the present case as has been observed by the learned Special Judge. Even if the accused had gained the knowledge about the other case, where PW-6 is stated to be busy, on a later date but he could have moved an application under Section 311 Cr.P.C., which was not done; hence, no reliance can be placed upon the statement which is although on record but not proved as per law.

14. In my view the public witnesses have supported the case of the prosecution. There is a recovery of 370 grams of *Heroin* from the room of the appellant, which was initially tested as *Cocain* but the detailed examination/testing proved it to be the *Heroin*. It is a reasoned judgment, where all aspects of the case have been duly dealt with by the learned Special Judge. The substance recovered from appellant being *heroin* and weighing around 370 grams, puts the case in the category of ‘Commercial Quantity. Chain of custody from the time of recovery till the sample was tested, has been duly maintained and proved. Nothing has been brought on record to point out any gaps in the said chain of custody. The accused has not proved that he was not residing in the room from where the recovery was made, the entire weight of the recovered substance is to be considered, so the quantity recovered falls in the category of ‘Commercial’, same was recovered from the Almirah in the room, which was in the occupation of the present appellant. Learned Special Judge has rightly observed that there is presumption under Section 35 and 54 of NDPS Act of culpable mental state and conscious possession in favour of prosecution and nothing has been brought on record to rebut the said presumption by the appellant.

15. In view of the above, the appeal is without any merit and the same is hereby dismissed.

TALWANT SINGH, J

OCTOBER 18, 2022/mr

[Click here to check corrigendum, if any](#)