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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Reserved on: 14th January, 2022Decided on: 4th July, 2022

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CRL.A. 754/2018**HARIKALA & ORS.**

..... Appellants

Represented by: Mr. Sharad Malhotra, Adv. DHCLSC
through video conferencing.

versus

STATE

..... Respondent

Represented by: Mr. Tarang Srivastava, APP for State
with Inspector Inderpal Singh & Insp.
Niraj, PS Madhu Vihar through video
conferencing.**CORAM:****HON'BLE MS. JUSTICE MUKTA GUPTA**

1. In the present appeal, the four appellants herein, namely, Harikala, Ramkali, Dhan Sheri and Seeta challenge their conviction for offence punishable under Section 20(b)(ii)(C) NDPS Act vide the impugned judgment dated 31st March, 2018 and the order on sentence dated 3rd April, 2018 directing them to undergo rigorous imprisonment for a period of 10 years and to deposit a fine of ₹1 lakh each in default whereof to undergo further six months simple imprisonment.
2. The four appellants and the two other co-accused Man Kumari and Seeta W/o Ramesh were also charged for offence punishable under Section 29 NDPS Act for which they have all been acquitted and no leave to appeal has been filed by the State on that count.
3. Learned counsel for the appellant contends that the appellants are liable to be acquitted for non-compliance of the mandatory provision of the



NDPS Act i.e. Section 50. It is claimed that even if it was a case of chance recovery from Harikala, however the other accused were searched on suspicion of possession of drugs, thus notice under Section 50 was required to be given to them as mandated by law. There was a delay of 10 days in sending the samples to the FSL. The contraband was seized on 28th July, 2012, however the same was sent to FSL only on 7th August, 2012. HC Yad Ram/ PW-7 who took the samples from the malkhana to the FSL was also a part of the raiding team and witness to recovery of the alleged contraband from the appellants. From the testimony of SI Neeraj/ PW-8 it is evident that the chain of custody of the samples which was to be kept in safe custody has not been proved by the prosecution. SI Neeraj stated that he took the parcels from the malkhana vide RC No. 67/21/12 to the FSL CBI on 2nd August, 2012, however since the FSL did not accept the same on the said date, he returned the same to the MHCM and then again took the same back on 3rd August, 2012 and deposited the same with the FSL. This version of SI Neeraj is not fortified by the malkhana register as there is no entry of depositing back the samples on 2nd August, 2012 and again taking them to be deposited with the FSL on 7th August, 2012. Acknowledgement of case acceptance dated 7th August, 2012 records that only 4 sealed cloth parcels were received. The memo No. 1793-96 is dated 7th August, 2012 and exhibited vide Ex.PW-11/B. The prosecution having failed to show the safe custody of the alleged contraband, the appellants are entitled to be acquitted on this ground itself.

4. It is further contended that the FSL form was not sent along with the samples, as there is no mention of the FSL form in road certificate dated 7th August, 2012. There is no material on record to show that the seal was



handed-over to an independent witness. Rather the evidence shows that the investigating officer kept the seal to himself and also remained in possession of the alleged contraband. There are material contradiction between the prosecution witnesses including Ct. Avneesh/ PW-4 stating that no recovery was made from the accused persons in his presence and the said witness also does not speak about the presence of public witnesses at the spot. Thus, in view of the non-compliance of the mandatory provisions of the NDPS Act and the samples having been not kept in safe custody, the appellants are entitled to be acquitted.

5. Countering the arguments of learned counsel for the appellants, learned APP for the State submits that minor variations in the statement of the prosecution witnesses which have occurred in the testimony do not go to the root of the matter and affect the case of the prosecution. There is no material or significant contradiction between the testimonies of the witnesses. Since in the present case, recovery was made as a chance recovery on suspicion, no notice under Section 50 of the NDPS Act was required to be given as has been held by the Hon'ble Supreme Court.

6. Learned APP further contends that the samples were seized on the spot and were kept in the malkhana on the same day of seizure in proper custody. There was no possibility of tampering with the contraband. The report of the FSL clearly shows that when the samples were received they tallied with the specimen seal thereby ruling out any tampering of the samples. It is further contended that in view of the huge recovery of approximately of 4 kgs of charas from each of the appellants, it cannot be said that the appellants were falsely implicated. Version of the Police witnesses is duly corroborated by the public witnesses, hence the appeal be



dismissed.

7. Case of the prosecution in nutshell is that on 28th July, 2012 at about 5.25 PM SI Neeraj Kumar who was then working at the outpost of ISBT Anand Vihar left for patrolling duty along with HC Yad Ram, Ct. Avneesh and Ct. Navneet. When they reached near auto stand, under metro line they saw six ladies standing and talking near a TSR. On seeing the Police party they got perplexed and started hiding themselves, when SI Neeraj with the help of other officers on suspicion asked them to stop. On inquiry the six ladies gave contradictory versions and around the waist of four ladies, who are the appellants herein, something was found tied. SI Neeraj gave this information to the SHO and called lady Constable Kalpana and lady Constable Geeta at the spot. They also joined TSR drivers Shahid Ali and Deepak Kumar Gupta, public persons present on the spot during investigation. The appellants and two others were taken in the CCTV control room wherein search of the ladies was carried out by lady Constable Kalpana who had in the meantime arrived.

8. It is the case of the prosecution that from the belt of Harikala 12 packets wrapped in a brown colour tape were found. After removing the tape, 48 small packets in white colour polythenes containing some black colour substance was found. The said substance was found to be charas. Charas recovered from Harikala weighed 4 kgs, 900 grams and thus two samples of 100 grams each were taken and the remaining 4 kgs 700 grams charas was converted into a pullandah. In the meantime, other accused, namely, Ramkali, Dhan Sheri, Seeta, Man Kumari and Seeta W/o Ramesh were given notice under Section 50 of the NDPS Act and their search was also conducted. From the search of Ramkali 32 packets containing charas



weighing 4 kgs 900 grams in total was recovered. Samples were drawn from the said charas also. Thereafter, from Dhan Sheri 40 packets of charas weighing 4 kgs 100 grams were recovered and from the possession of Seeta W/o Man Bahadur 3 kgs 600 grams charas was recovered out of which also samples were drawn. Nothing incriminating was recovered from the possession of Man Kumari W/o Ramesh and Seeta W/o Ramesh.

9. According to the prosecution site plan was prepared, all the six accused were arrested and reports under Section 57 NDPS Act prepared and sent to the senior officers. The prosecution examined 14 witnesses who supported the case of the prosecution.

10. One of the main grounds urged by learned counsel for the appellant is that the prosecution having failed to complete the chain of custody of the sample parcels and having not examined relevant witnesses in this regard, the link evidence being incomplete, the appellants are entitled to be acquitted on this ground itself.

11. Ct. Subhash Chand (PW-8) deposed that on 2nd August, 2012 he was posted at the outpost Anand Vihar ISBT and on the said date he took parcels S1 to S8 from the MHCM Madhu Vihar on instructions from SI Neeraj vide RC No. 67/21/12 to FSL CBI. However, the said office refused to take the parcels. He returned the parcels to the MHCM and also stated that the case property was not tampered while it remained in his custody. Thereafter, the other witness who took the samples and deposited the same on 7th August, 2012 is HC Yad Ram/ PW-7, a member of the raiding party who deposed that on 7th August, 2012 on the instructions of ASI Raj Pal he took sealed exhibits of this case vide RC No. 72/21 for depositing the same in FSL Rohini. After depositing the same at FSL he handed-over the receipt to the



MHCM. He further deposed that till the samples remained with him no one tampered with the same.

12. Prosecution examined two witnesses, namely, Ct. Sandeep and HC Satbir Singh who were posted as MHCM at the relevant time. Ct. Sandeep/ PW-10 stated that on 28th July, 2012 he was posted as Munshi at malkhana, as the regular MHCM was on leave. Insp. Om Prakash Pawar called him to his office along with register No. 19 and handed-over 8 small parcels marked S1 to S8 duly sealed with the seal of KN and OPP and four big parcels marked A B C & D duly sealed with the seal of KN and OPP. He also handed-over the FSL form having the same seal and copy of seizure memo to him. This witness does not depose that from the malkhana samples were taken on 2nd August, 2012 and deposited back on the same day and were thus kept back in the malkhana. There is no corresponding entry to this effect also in the register No.19. Further, HC Satbir Singh/ PW-11 who was working as MCH(M) stated that on 7th August, 2012 he has handed-over four sealed parcels along with four sample seals vide RC No. 72/21/12 for depositing the same at FSL Rohini who accordingly deposited the same there in proper condition. This witness who was MCH(M) at the relevant time does not state that the samples were re-deposited in the malkhana on 2nd August, 2012 and thereafter released on 7th August, 2012 to HC Yad Ram to be deposited in the FSL. Further, the original register also do not show any such entry of re-deposit of the parcels on 2nd August, 2012 or the withdrawal thereof on 7th August, 2012.

13. From the facts as noted above, it is evident that the prosecution has not been able to prove the chain of custody of the samples of the contraband allegedly recovered from 2nd August, 2012 to 7th August, 2012, thereby



creating a doubt in respect of the link evidence. Hence the appellants are entitled to be granted benefit of doubt. Consequently, the impugned judgment of conviction dated 31st March, 2018 and order on sentence dated 3rd April, 2018 are set aside. The appellants are acquitted of the charges punishable under Section 20(b)(ii)(C) NDPS Act.

14. Appeal is accordingly disposed of.

15. Superintendent Tihar Jail is directed to release the appellants forthwith if not required in any other case.

16. Copy of this order be uploaded on the website of this Court and be also sent to the Superintendent Tihar Jail for updation of records.

(MUKTA GUPTA)
JUDGE

JULY 04, 2022
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