Delhi High Court Eze Val Okeke @ Val Eze vs Narcotic Control Bureau on 15 December, 2004 Equivalent citations: 116 (2005) DLT 399, 2005 (79) DRJ 162, 2005 (99) ECC 152 Author: R Chopra Bench: R Chopra JUDGMENT R.C. Chopra, J. 1. The appellant, a Nigerian national, stands convicted under Section 21(c) of the Narcotics Drugs and Psychotropic Substances Act (hereinafter referred to as '' Act''only) vide orders dated 28.8.2003 and sentenced to undergo RI for 15 years and a fine of Rs 1 lac vide orders dated 15.9.2003. He has filed this appeal challenging his conviction and sentence. 2. The facts relevant for the disposal of this appeal, briefly stated, are that on 30.7.1999, the Narcotics Control Bureau (NCB) received a secret information that one Nigerian called King was having 5-6 kilograms of heroin with him for the purpose of smuggling it out of India. According to the information, he was keeping this Heroin in the back portion of House No.E-1/19, Vasant Vihar, New Delhi. The information was reduced into writing and was brought to the notice of the Senior Officers. Thereafter, raiding party was organized and a raid was conducted. Two public witnesses also were joined in the raiding party. Shri N.K. Dhaka, Intelligence Officer, NCB was the Investigating Officer and Shri C.B. Singh, Superintendent, NCB was supervising the raid When the raiding party reached the aforesaid premises, its door was found bolted from inside. Upon knocking, somebody from inside asked as to who was there upon which the Officers replied that they were from NCB. Thereafter, the door was not opened inspite of repeated knocking upon which the Officers pushed the door open with force. The Officers saw that the appellant was pouring some brownish powder from two polythene packets into a plastic bucket filled with water. On seeing them, he put both has hands into the bucket so as to mix the contents of both the packets into water. However, he was overpowered. He was informed that the raiding party had come to search the premises. Search warrants were shown to him. A notice under Section 50 of the Act was also issued to him and he was asked as to whether he wanted to be searched before a Magistrate or a Gazetted Officer. The appellant declined the offer and signed the notice. Upon information by the Officers, the Assistant Director, NCB also reached the spot and authorized the Investigating Officer to conduct the search. During the search, one packet of brown powder was found near the bucket. Two packets which were inside the bucket and were in wet condition were also taken out. With the Field Testing Kit, the contents of the three packets were tested. The result was positive for Heroin. The water mixed with heroin was also tested. It also gave positive result for Heroin. Samples of five grams each were taken out from the three packets separately. The weight of the polythene packet which was outside the bucket was found to be 1 kg. and the wet packets were found to be 550 gms. and 50 gms. each. A plastic jerican was requisitioned and the water mixed with Heroin was put therein. Its weight was found to be about 18 kgs. including the weight of the Jerican. The samples as well as contents of the packets were sealed with the seal of NCB DZU2. Personal search and house search did not yield any other incriminating recovery except some Indian currency and clothes. The passport of the appellant, however, was recovered from the drawing room along with certain documents, which were taken into possession. A Seizure

Memo was prepared. The case property was deposited with the Malkhana in charge Mr.N.S. Ahlawat, Assistant Director on the same day. Report of the search and seizure under Section 57 of the Act was given to Shri C.B. Singh, Superintendent on the said day. The statements of the witnesses were recorded and after necessary investigations, a complaint was filed against the appellant. 3. The appellant pleaded not guilty to the charge and claimed trial. In support of its case, the prosecution examined PW-1 V.B. Chaurasia, Asstt. Chemical Examiner, PW-2 Shri Mangal Dass, I.O., who had collected the results from CRCL, PW-3 Narinder Kumar, Chemical Examiner, CRCL, who had given his report Ex.PW-3/A, PW-4 Ram Singh, Intelligence Officer, PW-5 K.L. Gauba, Intelligence Officer, PW-6 M.S. Bawa, a member of the raiding party, PW-7 Sanmugam, a public witness, PW-8 C.B. Singh, Superintendent, NCB, PW-9 N.K. Dhaka, Intelligence Officer, PW-10 Jyoti Mon, another Intelligence Officer of NCB, PW-11 Madan Singh, Intelligence Officer and PW-12 N.S. Ahlawat, Asstt. Director, NCB. After close of the prosecution evidence, the appellant was examined under Section 313 Cr. PC. He denied the prosecution case and stated that nothing was recovered from him. He added that he had gone to the premises in question to meet a friend Mildred Itamere, who was residing there. When he reached there, his friend was not present but some persons in plain clothes were present in that flat. When he was enquiring from them about his friend, they disclosed to him that they were NCB Officers and had recovered some narcotics from the flat. He was taken to the office of the NCB where he was beaten, threatened and forced to sign various blank as well as semi written papers. His passport was also taken by them. He stated that he was staying in a Guest House at Paharganj and was a businessman by profession, who had come to India for business purposes. He did not lead any evidence in defense. 4. Learned Special Judge after considering the evidence on record and the submissions made by learned counsel for the parties held that the prosecution had succeeded in proving that on 30.7.1999 at E-1/19, Vasant Vihar, New Delhi, 19.300 kgs. of Heroin was recovered from the appellant. Accordingly, the learned Trial Judge convicted the appellant and sentenced him under Section 21(c) of the Act. Learned counsel for the appellant assails the impugned conviction and sentence of the appellant mainly on the ground that the prosecution has failed to establish on record that the appellant had any connection with the premises in question from where the contraband was allegedly recovered. It is argued that the evidence on record shows that the premises were under the tenancy of Mildred Itamere and there is nothing to show that the appellant was also residing with her. It is also argued that no respectable resident of the locality was joined and only two Chowkidars were joined in the raiding party one of whom was not produced even and the other did not support the prosecution case. It is submitted that the entire story of the prosecution in regard to the breaking open of the door and recovery of the contraband from the appellant is false and the contradictions in the statements of the PWs clearly show that the appellant has been falsely implicated in this case. It is submitted that Section 55 of the Act has not been complied with and the prosecution has failed to prove on record that the samples or the contraband allegedly recovered from

the appellant was deposited in the Malkhana or was not tampered with before it reached CRCL. Learned counsel for the respondent on the other hand has argued that the prosecution has succeeded in proving its case against the appellant beyond reasonable doubt and as such, there are no grounds for interfering with the impugned conviction and sentence of the appellant. It is submitted that Section 55 of the Act was not applicable. It is submitted that only Sections 52 and 53 of the Act were applicable, which were duly complied with and PW-12 N.S. Ahlawat, Assistant Director was Malkhana in charge and fully empowered to keep the seized property in his custody. According to learned counsel, the recovery of the passport of the appellant from the premises in question shows that he was also living there and at the time the raiding party entered the premises, after breaking open the door, the appellant was trying to dispose of the Heroin after coming to know that NCB officials had come for a raid. 5. I have heard learned counsel for the appellant and learned counsel for the State. I have gone through the impugned judgment and the evidence on record. The first and foremost contention of the learned counsel for the appellant is that the prosecution has not succeeded in proving on record that the appellant had any connection with premises No.EA-1/19, First Floor, Vasant Vihar, New Delhi or any contraband was recovered from his possession while he was in those premises. After examining the prosecution case and the evidence on record, this Court finds no explanation forthcoming from prosecution as to why the Investigators had not recorded the statement of the landlord of the premises or any neighbour to establish that the appellant used to live in those premises. The hire agreement Ex.PW-9/D-1 and D-2 which were brought on record at the instance of the appellant show that one Ms. Mildred Itamere was the tenant in the said premises. This document, therefore, shows that the appellant was neither a tenant nor an occupant of the premises in question and as such, possibility cannot be ruled out that at the time of the incident, the appellant had come to the premises in question merely to meet Ms. Mildred Itamere as suggested by the defense. Had the landlord or some neighbour been examined by the prosecution, it could have been proved that the appellant was a tenant in the premises or was living there but it has not been done. PWs-8 and 9 did not make enquiry even from the neighbours which shows that no effort was made to connect the appellant with the premises from where the contraband was allegedly recovered. 6. The prosecution case has not been supported by the public witness PW-7 Shanmugam. It is true that he was declared hostile but that does not provide any strength to the prosecution which was under an obligation to prove beyond reasonable doubt that the heroin in question was recovered from the appellant as alleged. It is to be noted here itself that the Investigating Officer had made no attempt whatsoever to join any respectable witness of the locality in the raiding party. PW-7 Shanmugam as well as one Ravi Tiwari, who was not produced in the Trial Court, were only watchmen of the area and as such, were not respectable residents of the locality. The Investigating Officer had sufficient time and opportunity to go to the other residents of the building or the neighbouring houses and make request to them for joining the raiding party. In “State of West Bengal Vs. Babu Chakravarty.” the Supreme Court while examining

the provisions of the Act and the quality of evidence required for conviction of an accused there under clearly observed in Para 28 of the judgment that in a case where mandatory provisions are not complied with and where independent mazhar witnesses are not examined, the accused would be entitled to acquittal. In the present case also, firstly the quality of public witnesses allegedly joined in raiding party was not up to the mark and secondly out of two witnesses one was not produced at all and the other who was examined in the Court did not support the prosecution case and rather supported the defense by saying that when the door of the premises was opened, two persons from inside had run away. He also stated that appellant came there later. This creates a serious lacuna in the prosecution case and mases it very difficult for the Court to hold that there is no infirmity in the prosecution case. The prosecution allegation that on knocking the appellant had not opened the door and as such, the door was pushed open and the latch got broken and fell down is not supported by production of the broken latch of the door or any photograph to show that the door was broken open. It is also not explained as to why the factum of breaking open the door was not mentioned in Report Ex.PW-9/A regarding search of premises. According to the prosecution, PW-12 N.S. Ahlawat, who had received the secret information and had deputed the Intelligence Officers to carry out the raid, had reached the premises in question subsequently after he was informed that the contraband had been recovered but according to PW-4 K.L. Gauba, Intelligence Officer, N.S. Ahlawat had gone with the raiding party to the premises in question. This contradiction shows that either PW-4 was not a member of the raiding party and has been falsely introduced to support the prosecution case or PW-12 was with them from the very beginning. The absence of entries in the log book of the official vehicle used by the raiding party also casts a shadow of doubt on the prosecution case inasmuch as the log books are meant for recording of the movement of the vehicles and if no entries are found there, it becomes doubtful as to whether the vehicle was actually used or not as represented by the prosecution. Therefore, in view of the absence of any effort on the part of the Investigating Officer to collect proper evidence to link the appellant with the premises in question, the refusal of PW-7, the only public witness to support the prosecution case, non-production of Ravi Tiwari, non-production of any neighbour or locality witness, the absence of the landlord to support the prosecution case and the contradictions found in the statements of official witnesses, this Court has no hesitation in holding that the prosecution has failed to prove beyond reasonable doubt that the appellant was apprehended in the manner alleged or heroin was recovered from his possession. The prosecution was under a further duty to prove satisfactorily and beyond reasonable doubt that the article allegedly recovered from the appellant was properly sealed, preserved and thereafter sent to CRCL for analysis and there was no tampering with the recovered article till the time it was taken up for Chemical analysis. In this case, the prosecution has miserably failed to prove on record that the article allegedly recovered from the appellant was properly sealed, properly preserved and then sent to the CRCL for analysis in the same condition and none had tampered with it before it was examined by the Chemi-

cal Examiner. The first and foremost reason for holding so is that the seal with which the recovered article and samples were sealed at the spot was not handed over to any public witness after the sealing process was over and instead it was handed over to an official witness PW-8 only. This was highly improper. There is no explanation as to why the seal was not handed over to a public witness when he was available to ensure that the recovered article was not tampered with during the period it remained with the Investigating Officer or with the authorized Officer under Section 53 of the Act. Not only this, PW-8 C.B. Singh, Superintendent, NCB to whom this seal was handed over after alleged recovery of the article in question stated that he handed back this seal to PW-12 N.S. Ahlawat, Assistant Director on the same day. If the seized article as well as seal remained with PW-12 only from the time of seizure till the time samples were sent to CRCL for analysis, there is no guarantee that the samples were not tampered with during that period. Furthermore, the prosecution was under an obligation to establish on record as to who had taken the samples of the contraband from PW-12 and taken those to CRCL and also prove that he had not tampered with the samples during that period. The person, who had taken the samples to CRCL was not examined before the Court. In the testimony of PW-8 C.B. Singh Superintendent, NCB, it was also brought out that the seized article could be taken out of the packets without disturbing the seals. It shows that the sealing was not proper and as such possibility of tampering with the samples was there. No Malkhana registers have been produced nor the entries therein proved before the Court to show as to at what time and on what date the article and samples allegedly recovered from the appellant were deposited in the Malkhana and on what date and time and by whom samples were taken out for taking the same to CRCL for analysis. At the top of all this, it has come in the testimony of PW-3, the Chemical Examiner that the samples which were analyzed by him were of white colour powder whereas the prosecution case is that the powder recovered from the appellant was of brown colour. 7 It has also come in the testimony of PW-3 Narinder Kumar, Chemical Examiner, CRCL that had the sample been of brown powder, the report would have been different. This statement of PW-3, therefore, makes it very difficult for the Court to hold that the article which was recovered from the appellant was the same which was examined by the Chemical Examiner. It also shows that there may be tampering of the article allegedly recovered from the appellant before it reached CRCL for analysis. In the case of Valhalla Vs. State of Kerala''reported in 1993 Supreme Court Cases (Crl) Page-1028, the Supreme Court while dealing with a contention as to whether the article seized was sent to the Chemical Examiner observed that the evidence adduced in the case was wholly insufficient to conclude that what was seized from the appellant was sent to the Chemical Examiner and though it was purely a question of fact but was an important link. In view of the doubt in regard to the proper custody and sending of the sample of the article for analysis, the accused was given benefit of doubt and acquitted. In the case of''State of Rajasthan Vs. Daulat Ram'', the Apex Court while dealing with an offence under Opium Act held that it was the duty of the prosecution to prove that while in their custody the sample was

not tampered with before reaching the public analyst. This Court also in the case of"'Subhash Chand Mishra Vs. State" reported in 2002 (2) JCC Page-1379 relying upon several judgments of this Court came to the conclusion that the prosecution is under an obligation to prove that the sample delivered to CFSL was in the same condition and there was no possibility of tempering with it. 8. In view of several doubts in the prosecution case in regard to the connection of the appellant with the premises in question, recovery of heroin from him, the possibility of tampering with the recovered article during the period it remained with the investigating agency, the non-production of a public witness and non-joining of neighbours, this Court is not in a position to hold that the prosecution has succeeded in establishing its case against the appellant beyond reasonable doubt. The Act lays down stringent punishments for the offences committed there under and as such casts a heavy duty upon the Courts to ensure that there remains no possibility of an innocent getting convicted. The officers concerned with the investigations of offences under the Act must produce best and unimpeachable evidence to satisfy the Courts that the accused is guilty because no chance can be taken with the liberty of a person. No doubt that drug trafficking is a serious matter but the investigations into such offences also have to be serious and not perfunctory. 9. There is no violation of Section 55 of the Act for the reason that PW-12 N.S. Ahlawat was an authorized Officer under Section 53 of the Act and as such, competent to keep the seized articles in his possession. This, however, did not absolve the prosecution of its duty to establish that so long the seized articles remained with him, neither he nor anybody else tampered with articles and samples reached the Chemical Examiner in the same condition in which they were at the time of sealing. 10. In the result, this Court is of the considered view that the prosecution has not succeeded in proving it case against the appellant beyond reasonable doubt. The appeal, therefore, is allowed. The impugned conviction and sentence of the appellant is set aside and he is ordered to be released , if not required in any other case.