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

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Reserved on: 16th December, 2021

Decided on: 24th August, 2022

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CRL.A. 1087/2017

CRL.M.B. 368/2020

CRL.M.A. 18040/2021

CHIDI BERR NWAYOGA @ JAMES

..... Appellant

Represented by: Mr. Anuj Kapoor, Advocate.

versus

STATE

..... Respondent

Represented by: Mr. Amit Gupta, APP for State with
ASI Om Prakash, PS Narcotics Cell,
Crime Branch.

CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA

1. Aggrieved by the judgment dated 10th August 2017 whereby the appellant was convicted for offences punishable under Section 21(c) of the NDPS Act and Section 14 of the Foreigners Act and the order on sentence dated 23rd August, 2017 whereby he was directed to undergo rigorous imprisonment for a period of 10 years and to pay a fine of ₹1 lakh, in default whereof to undergo simple imprisonment for 3 months for offence punishable under Section 21(c) of the NDPS Act and to pay a fine of ₹5000/- in default whereof to undergo simple imprisonment for 1 month

under Section 14 of the Foreigners Act, the appellant prefers the present appeal. Along with the appellant, one Abdul Khaliq was also tried, however, he was convicted only for offence punishable under Section 14 of the Foreigners Act and acquitted for offence punishable under Sections 21(c) read with 29 of the NDPS Act.

2. Learned counsel for the appellant contends that on the same evidence, the co-accused of the appellant namely Abdul Khaliq who was charged for offences punishable under Section 21(c) read with 29 of the NDPS Act has been acquitted with the specific finding that since no recovery was made from him, the conspiracy was not established. The said finding itself demolishes the entire case of the prosecution. However, by the same impugned judgment, the appellant against whom the same evidence was placed on record by the prosecution has been convicted for offences punishable under Section 21(c) NDPS Act and Section of 14 Foreigners Act. Despite specific finding that there was no evidence of any previous nexus between the appellant and the co-accused, Abdul Khaliq such as by mobile details etc., merely on the evidence of the Police officer that the contraband was handed-over to the appellant by Abdul Khaliq, the appellant has been convicted. Version of the members of the raiding team cannot be relied as the investigation was carried out by an officer who was subordinate to the members of the raiding team from the same police station, contrary to the decision of the Constitution Bench of Hon'ble Supreme Court reported as (2020) 10 SCC 120 Mukesh Singh Vs. State. There is no independent corroboration to the version of the Police officers and thus, the Court has to be very circumspect while solely relying upon the said version of the police officers. Reliance is placed on the decision reported as (2018) 17 SCC 627

Mohan Lal Vs. State of Punjab. From the two accused, no mobile phone, no watch etc. were recovered, however, still, according to the prosecution case, the two accused reached the spot at the exact time for which information was received. No investigation was carried out to find out from whom Abdul Khaliq allegedly procured the Heroin and to whom, the appellant was to allegedly supply the Heroin. Except the alleged recovery, there is no incriminating evidence against the appellant. The police officers made no efforts to join independent witnesses at the time of raid. No passerby was asked to join the alleged raid and no residents or shop owners from the locality were joined in the investigation despite the fact that the alleged recovery was made on a busy road with houses and shops in close vicinity. Admittedly, the raid was conducted on a secret information and thus, the police could have easily covered the incident by videography or the incident must have been corroborated in any CCTV footage, however, none was produced. Reliance is placed on the decisions reported as (2014) 143 DRJ 349 Om Prakash Vs. State; (2017) 242 DLT 311 Mohd. Javed Vs. State; (2017) 242 DLT 342 Mohd. Firoz Vs. State and (2014) 146 DRJ 629 Ram Prakash Vs. State. Section 50 of the NDPS Act has not been complied as directed by the Hon'ble Supreme Court in the decision reported as AIR 2018 SC 2123 Arif Khan Vs. State of Uttarakhand and the appellant was not produced before any Gazetted Officer or a Magistrate and none of the members of the raiding party was a Gazetted Officer.

3. Learned counsel for the appellant further contends that the sanctity of the custody of the case property and the samples is doubtful as the seal was not handed over to an independent witness as no seal handing over memo was prepared and even as per PW-2 HC Mukesh Kumar, the seal was

returned to SI Sunil Jain, PW-8 after 3-4 days when again, no memo was prepared. Further, despite the fact that all the witnesses stated that the seal affixed on the case property and the samples was '3A PS NB DELHI', however when the samples were received at the FSL the seal was found as 'PS/NB/3A DELHI'. In their testimonies PW-2, PW-5 and PW-8 did not state that they affixed their signatures on the cloth pullandas nor was so stated in the seizure memo. However, when the pullandas were opened in the Court, signatures of PW-2, PW-5 and PW-8 were found. The samples were sent to the FSL after 6 days on 30th June, 2014 during which period, the seal admittedly remained with PW-2 and PW-8, both of whom were part of the raiding team. Despite clear directions of the Hon'ble Supreme Court in the decision reported as (2016) 3 SCC 379 Union of India Vs. Mohan Lal & Anr. which provided that the samples should be sent for chemical examination to the laboratory at the earliest and in any case, not later than 72 hours after their recovery, however, the samples were sent to FSL belatedly. Form FSL was not placed on record nor was the seized property produced for verification before the learned M.M. during investigation. Injury marks were found on co-accused Abdul and as per the Doctor, the said marks could be caused due to beating also, thereby, showing the possibility of alleged recovery being planted on the appellant. Copy of the DD entries were recorded on loose sheets and submitted with the charge sheet. Requirement of Section 52-A of the NDPS Act was not complied with. The fact that Abdul Khaliq handed-over the polythene to the appellant is not recorded in the report under Section 57 of the NDPS Act. The secret information was specific that an Afghani national would hand-over the heroin to Nigerian national named James. Prosecution has placed on record no material to

show that the appellant's name is James. No intimation was given to the Nigerian Embassy at the time of arrest and thus the appellant could not avail Consular access. It is thus prayed that in view of serious non-compliance of the provisions of the NDPS Act coupled with the inconsistencies in the case of the prosecution, the appellant be acquitted of the charge and be released forthwith.

4. The appellant, during the pendency of the appeal, also sent a written note to this Court dated 16th January 2020 whereby he sought discharge and deportation to his country claiming that he had to take care of a family of seven members including his old aged mother who is seriously sick and blind. It is claimed that during the imprisonment of the appellant, his father, elder brother and sister-in-law died. The mother is seriously sick and blind and the wife of the appellant is looking after her and the appellant has to take care of his own children as well as his elder brother's children and thus, his family comprises of five children who are all out of the school.

5. Countering the arguments of learned counsel for the appellant, learned APP for the State submits that on 24th June 2014, the appellant was apprehended with 1 kg. of Heroin which is a commercial quantity. Notice under Section 50 of the NDPS Act was duly given to the appellant wherein, he declined to exercise his right to be searched before a gazetted officer/Magistrate and thus, there was no need to call one of them. The special report under Section 57 of the NDPS Act regarding arrest of the accused was duly submitted to the concerned ACP and was proved vide Ex.PW-6/C. This report mentions about three pullandas and seals of '3A PS NB DELHI' and 'VSS' with the signatures of the SHO concerned. When the three pullandas were produced before the Court being Exs.P1, P2 and

P3, seals were found intact i.e. seals of 'VSS' and '3A PS NB DELHI' were found. The seal numbers are the same as mentioned in the seizure memo, malkhana register, DD No. 17 as also the special report under Section 57 and the same were received at the FSL and hence, no benefit can arise in favour of the appellant. No bias has been shown against the investigating officer except stating that the investigating officer was lower in rank than the complainant. Lack of independent witnesses is not fatal to the case of prosecution and the conviction can be based solely on the testimony of the Police witnesses if their evidence is reliable as held by the Supreme Court in the decision reported as (2020) SCC Online SC 869 Raveen Kumar Vs. State of Himachal Pradesh. Testimony of all the prosecution witnesses is reliable and despite extensive cross-examination nothing adverse has been elicited from them. Reliance is placed on the decisions reported as (2020) 10 SCC 120 Mukesh Singh Vs. State and (2020) 10 SCC 740 Rajesh Dhiman Vs. State of Himachal Pradesh. Section 50 of the NDPS Act is not applicable to the facts of the case since the recovery was made from the bag carried by the appellant and not from his personal search. Reliance is placed on the decisions reported as (2018) 18 SCC 540 Mohinder Singh Vs. State of Punjab; (2019) 10 SCC 473 State of Punjab Vs. Baljinder Singh; (2020) 5 SCC 260 Than Kunwar Vs. State of Haryana and Criminal Appeal No. 1605 of 2021 decided on 11.12.2021 Kallu Khan Vs. State of Rajasthan. There is no tampering with the contraband. As per the FSL report, the seals were found intact. Only the letters in the seals have been mentioned in a different seriatim, which fact has been ascertained by the learned Trial Court on seeing the original seals when the contraband and samples were produced before the Court. Reliance is placed on the decisions reported as (2019) 10

SCC 649 State of Rajasthan Vs. Sahi Ram and (2009) 14 SCC 387 State of Rajasthan Vs. Daul. Section 57 of the NDPS Act was duly complied with. Even otherwise non-compliance of Section 57 NDPS Act would not vitiate the case of the prosecution as held by the Constitution Bench in the decision reported as (1994) 3 SCC 299 State of Punjab Vs. Balbir Singh. Reliance is placed on the decisions reported as (2001) 6 SCC 692 Sajan Abraham Vs. State of Kerala and (2015) 6 SCC 222 Mohan Lal Vs. State of Rajasthan. There being no infirmity in the impugned judgment of conviction and order on sentence, the appeal be dismissed.

6. Heard learned counsels for the parties.

7. Case of the prosecution in brief is that on 24th June, 2014, a secret information was received in the office of the Narcotics Cell, Shakarpur, Delhi Police that one Afghan national who supplies Heroin to Nigerian nationals in bulk quantities would be coming at about 4.00 to 4.30 PM and would supply Heroin to a Nigerian national namely James near Devli Mor, M.B. Road, New Delhi. The information was duly conveyed to the Inspector and ACP, Narcotics Cell and on their directions, SI Sunil Jain constituted a raiding party along with the electronic weighing kit and the field testing kit. On reaching Devli Mor, SI Sunil Jain asked four passersby to join the raid, however, none agreed, without disclosing their names and addresses. The vehicle was sent away with the driver HC Rajesh to reach near after the signal is received and the team took the position. At about 4.20 pm, the secret informer who was standing beside them at a distance of 5-7 yards pointed out towards a Nigerian coming from the side of Devli Village towards Devli Mor. As per the secret informer, the said person was James. After 5-7 minutes, the secret informer pointed towards one middle

aged Afghan person wearing T Shirt and Pant. He was carrying yellow colour transparent polythene. He met the Nigerian national and both shook hands. Thereafter, the Afghan national handed over the yellow colour polythene to the Nigerian national and the said Nigerian national took the said polythene and started walking, whereafter, he was intercepted and Section 50 notice was given to the appellant. Witnesses to the said Section 50 notice were HC Mukesh and HC Mahesh. On the refusal of the appellant to be searched before a gazetted officer/Magistrate, the polythene was checked, from which 1 kg heroine was recovered. Two samples of 5 gms. were kept in separate packets and marked as A and B. Remaining material was marked as Mark C. Thereafter the case property and samples were sealed with the seal '3A PS NB DELHI' and the seal after use was handed over to HC Mukesh Kumar. SI Sunil Jain also prepared the seizure memo. Though Abdul was searched by SI Sunil Jain, however, nothing incriminating was recovered from him. On the basis of the rukka, FIR was registered.

8. During the course of trial, prosecution examined 14 witnesses who all supported the case of the prosecution.

9. As per the impugned judgment, since no recovery was made from Abdul Khaliq and his statement under Section 67 of the NDPS Act is not admissible in terms of the decision of the Hon'ble Supreme Court reported as (2021) 4 SCC 1 Tofan Singh Vs. State of Tamil Nadu, which was the only evidence available with the prosecution, Abdul Khaliq was acquitted. It cannot be held that acquittal of co-accused Abdul Khaliq warranted acquittal of the appellant as well. The main reason for acquittal of Abdul Khaliq was that there was no recovery of any contraband at his instance whereas the

appellant was apprehended along with the contraband delivered to him by Abdul Khaliq. Be that as it may, in the absence of any leave to appeal by the State against the acquittal of Abdul Khaliq, this Court is not required to deal with the role of Abdul Khaliq, moreso, because, the appellant has not been convicted for offence punishable under Section 29 of the NDPS Act but for possessing commercial quantity i.e. 1 kg of Heroin, an offence punishable under Section 21(c) of the NDPS Act.

10. As regards the discrepancy in the seals is concerned, it may be noted that as per the depositions of PW-2, PW-5 and PW-8, seal of '3A PS NB DELHI' was affixed. Even the seizure memos and the malkhana register mentions that the seal of '3A PS NB DELHI' and 'VSS' and the signatures of the SHO were affixed. Further when the samples were opened in the Court the same were found affixed with the seal of '3A PS NB DELHI' and 'VSS'. As per the FSL report, seal with the same alphabets was found affixed, however a different chronology i.e. 'PS NB 3A DELHI' has been mentioned. Thus, it cannot be held that when the samples reached the FSL, a different seal was found affixed.

11. Undoubtedly, the investigating officer was junior to SI Sunil Jain who was member of the raiding party, however the same itself does not show that any prejudice has been caused to the appellant nor prejudice has been pleaded on this count before the learned Trial Court including in cross-examination of the witnesses as well. In Mukesh Singh (supra) the Constitution Bench held that investigation by an officer who himself is informant/ complainant in the case is not barred under NDPS Act or Cr.P.C. and it would be for the accused to show if there was any bias or prejudice caused to him due to the investigation conducted by the complainant. In the

present case the grievance of the appellant is that the investigating officer was junior to SI Sunil Jain who was the main member of the raiding party, however despite extensive cross-examination of the investigating officer and SI Sunil Jain nothing has been elicited to show that there was any bias or prejudice caused to the appellant.

12. As noted above, efforts were made to join the independent witnesses but none offered to cooperate and hence it cannot be said that in the absence of independent public witnesses being not associated, the evidence of the Police witnesses be discarded. Since no independent witness could be associated with the raid and recovery, the seal after use could not have been handed over to the independent person. Dealing with the need to associate independent witnesses, Hon'ble Supreme Court in the decision reported as 2020 SCC Online SC 869 Raveen Kumar Vs. State of Himachal Pradesh held that it would be gain said that lack of independent witnesses are not fatal to the prosecution case, however, such an omission casts an added duty on Courts to adopt a greater degree of care while scrutinising the testimonies of the police officers, which if found reliable can form the basis of a successful conviction.

13. Contention of learned counsel that since no videography was shot nor any CCTV footage collected, the case of the prosecution be disbelieved deserves to be rejected. In case the Police officers had parked their cars or made arrangements for videography in advance there was a likelihood of the appellant and the co-accused coming to know about the proposed raid and thus the likelihood that they would not have gone ahead with the transaction at that place cannot be ruled out thereby making the entire action of the raiding team futile.

14. Contention of learned counsel for the appellant is that FSL form was not placed on record. However, FSL form is the document with which the sample seals are tallied by the FSL. In the present case also, FSL tallied the seals with the sample seals on the form FSL and noted that the seals are intact. Further, the seal numbers are duly mentioned in the three contemporaneous documents i.e. Ex.7/A DD No.17 dated 24th June, 2015, Ex.PW-3/A the malkhana register and Ex.PW-6/B the special report under Section 57 of the NDPS Act.

15. As regards DD entries are concerned, the same are recorded in a running register maintained in the Police Station and copies thereof are placed on record. Since the DD entries are recorded in the running register, the same are then noted on the loose sheets and placed on the record of the Trial Court and at the time of exhibiting the same the originals are brought and produced before the Court to prove the said documents. As is noted in the testimony, the originals were duly brought by PW-4 ASI Ajit Singh, based whereon the DD entries 16 and 18 were exhibited as Ex.PW-4/C and PW-4/D and the originals were seen and returned by the Trial Court.

16. Notice under Section 50 NDPS Act Ex.PW-2/A reveals that the appellant was duly informed that there was an information regarding supply of heroin and there was a possibility of recovery of heroine from his possession and therefore his search is required to be conducted. It was informed that before his search is conducted, it was his legal right that if he so wishes, his search could be conducted in the presence of a Gazetted Officer or a Magistrate who can be called at the spot and that it was his legal right to take the search of the members of the raiding party and the Government vehicle. The appellant also signed the copy of notice

acknowledging his response to the notice under Section 50 NDPS Act. Thus necessary compliance under Section 50 NDPS Act was also carried out, even though the recovery was from a polythene bag in the left hand of the appellant. Hon'ble Supreme Court in the decision reported as (2018) 9 SCC 708 S.K.Raju Vs. State of West Bengal following the law laid down in (1999) 3 SCC 977 State of Punjab Vs. Baldev Singh reiterated that compliance under Section 50 of the NDPS Act is required if search of the person is taken and not of any bag, article or container etc. being carried by him.

17. Further reliance of the appellant on the decision in Union of India Vs. Mohan Lal & Anr. is misconceived. In the said decision the Hon'ble Supreme Court gave directions that no sooner the seizure of any narcotic drug or psychotropic substance is affected, the same shall be forwarded to the officer in-charge of the nearest Police station or the officer empowered under Section 53 of the NDPS Act who would then approach the Magistrate with an application under Section 52-A(2) of the NDPS Act and the sampling shall be done under the supervision of the Magistrate, as discussed in the said decision. The decision in Union of India Vs. Mohan Lal & Anr. was rendered on 28th January, 2016 whereas recovery in the present case was affected on 24th June, 2014. The decision of the Supreme Court in Union of India Vs. Mohan Lal & Anr. cannot be applied retrospectively and any sampling done prior to the decision, contrary to the procedure laid in the said decision cannot vitiate the trial.

18. In view of the discussion aforesaid this Court finds no error in the impugned judgment of conviction and order on sentence.

19. Appeal and applications are accordingly dismissed.

20. Copy of the judgment be uploaded on the website of this Court and be also conveyed to the Superintendent Jail by the Registry for updation of record and for supplying a copy to the appellant.

(MUKTA GUPTA)
JUDGE

AUGUST 24, 2022

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