

(2014) 03 DEL CK 0288

Delhi High Court

Case No: Criminal Appeal 264 of 2013

Ashraf Khan

APPELLANT

Vs

State of Delhi

RESPONDENT

Date of Decision: March 11, 2014**Acts Referred:**

- Criminal Procedure Code, 1973 (CrPC) - Section 161 313
- Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) - Section 21(c) 41 42 43 44

Citation: (2014) 2 JCC 36**Hon'ble Judges:** V.K. Jain, J**Bench:** Single Bench**Advocate:** Aishwarya Rao, for the Appellant; Feroz Khan Ghazi, APP, for the Respondent**Final Decision:** Disposed Off

Judgement

V.K. Jain, J.

On 05.05.2011, at about 8.45 am, SI Satyavan of Narcotics Cell received a secret information that a person, namely Ashraf Khan, a resident of Bareilly, who was engaged in a business of supplying heroin in Delhi, would come near Sulabh Sauchalay, Metro Station Rohini between 10.30 am to 11.30 am to supply heroin. The secret informer was produced before Inspector Vivek Pathak of the Narcotic Cell and the concerned ACP Shri Bir Singh was informed on telephone at his resident. The ACP directed a raiding party to be organized, whereupon the information was recorded by way of a DD entry and the raiding party headed by Sub-Inspector Satyavan reached near East Metro Station Rohini in a private car. On the way, they requested some passerby to join the raiding party, but no one agreed to join the said party. At about 10.30 am, the appellant Ashraf Khan came near Sulabh Sauchalay and stood waiting for someone to come. After 5-6 minutes, Ashraf Khan started moving towards the Metro Station, whereupon he was apprehended and was informed that the police team had a secret information that he was supplying heroin in Delhi and wanted to search him. He was informed that it was his legal right to be

searched in the presence of a Gazetted officer or a Magistrate and he could also search the police team and the vehicle in which the said team had come. However, the appellant declined to be searched in the presence of a Magistrate or a Gazetted officer. Thereupon, he was searched by the Sub-Inspector and 275 gram of heroin, which had kept in a polythene bag, was recovered from the right side pocket of his pant. Two samples of 5 gram each were drawn from the substance using an electronic balance for the purpose. The samples as well as residual substance were sealed with the seal of 7B PS NB Delhi after preparing separate parcels and the seal after use was given to Head Constable Om Prakash. FSL form was also filled on the spot and the aforesaid seal was also affixed on the form. The samples, residual substance as well as the FSL form were handed over to Inspector Kuldeep Singh, after reaching the office of Crime Branch. The appellant was also produced before Inspector Vivek Pathak of Narcotic Cell. The seizure reports were sent to the senior officers through Inspector Vivek Pathak. When the sample was examined in FSL, it was found to contain Diacetylmorphine, Phenobarbital, Paracetamol and Caffeine with percentage of Diacetylmorphine as 15.3. Since the appellant pleaded not guilty to the charge u/s 21(c) of NDPS Act, as many as 10 witnesses were examined by the prosecution in support of its case. No witness was examined in defence.

2. PW-10 SI Satyavan inter alia stated that on 04.05.2011, he has received a secret information at about 8.45 am that one Ashraf Khan, a resident of Bareilly, who used to supply heroin in Delhi, would come in front of a public toilet under East Rohini Metro Station to deliver heroin to someone between 10.30 am to 11.30 am. He produced the informer before Inspector Vivek Pathak who transmitted the information to ACP/N&CP Shri Bir Singh on telephone. On being instructed by the ACP to conduct a raid without delay, a raiding party consisting of himself, Head Constable Om Prakash and Constable Yogesh was organized. They reached at Rohini East Metro Station at 10.30 am. On the way, he asked some passengers at Burari Chow bus stand, and some passersby at Madhuban Chowk and also some passersby at the spot to join them, but no one agreed. Thereupon, they took position under Rohini East Metro Station and started waiting for the accused to come. At about 10.50 AM, the appellant came from the side of Rohini West Metro Station and was identified by the secret informer. After waiting for 5-6 minutes, the appellant turned back and was then apprehended. After introducing the raiding party to the appellant, he was apprised of the secret information which the police had received and was also told about his legal right to be searched before a Magistrate or a Gazetted officer. Notice u/s 50 NDPS Act Ex. PW-1/A was then served upon him and was read over to him. He, however, refused to avail the offer and as per his direction, his reply was written by the Sub-Inspector. On search of the appellant, one transparent polythene, tied at the mouth with a rubber band, was found in the right side pocket of his pant. On opening the polythene, the substance found therein was checked with the help of field testing kit and it gave positive test of heroin. On being weighed, its weight was found to be 275 grams. Two samples of 5 gram each were then drawn from the substance and their parcels were prepared. The samples as well as the residual substance were seized with the seal of 7B PS NB Delhi which after use was handed over to Head Constable Om

Prakash. All the three parcels, i.e., two samples and the residual substance as well as the FSL form and a copy of seizure memo were given to Constable Yogesh Kumar with direction to hand over the same to the SHO, Crime Branch. He further stated that on reaching the office of Narcotics Cell, the appellant was produced before Inspector Vivek Pathak and report u/s 50 of NDPS Act Ex. P/B was prepared.

3. PW-1 Constable Yogesh has corroborated the deposition of PW-10 SI Satyavan with respect to the police team reaching the spot, requesting some passerby and some passengers at the bus stand to join the raiding party and such persons refusing to join the police team. He also corroborated the deposition of PW-8 with respect to serving notice u/s 50 of the NDPS Act on the appellant and recovery of 275 gram of heroin from him. He also stated that all the three parcels along with the FSL form, Rukka and a carbon copy of the seizure memo were taken by him to Crime Branch, where the Rukka was handed over to duty officer, whereas the case property along with the seizure memo and FSL form was produced before Inspector Kuldeep Singh who affixed his seal of KSY on all the parcels and FLS form, besides putting FIR number on the parcels. He further stated that at 3.50 PM, SHO called the MHC (M) Head Constable Jag Narain with register No. 19 and the case property was deposited in malkhana, making entry in the register.

PW-4 Head Constable Om Prakash is the third member of the raiding party which went to the aforesaid spot on 04.05.2011. He also corroborated the deposition of PW-1 Constable Yogesh and PW-10 SI Satyavan. He inter alia stated that the seal after use was handed over to him.

4. PW-2 Head Constable Jagnarain was working as MHC (M) in Police Station Crime Branch on 04.05.2011. He inter alia stated that on the aforesaid date, SHO Inspector Kuldeep Singh deposited three parcels sealed with the seal of 7B PS NB Delhi along with FSL form bearing the same seal and a copy of the seizure memo with him. He made entries in this regard in Register No. 19. A copy of the said entry made in the register is Ex. PW2/A. He further stated that on 10.05.2011, the sample parcel along with FSL form was sent to FSL through Head Constable Charan Singh and an entry in this regard was made in Register No. 19, a copy of which is Ex. PW-2/B. The copy of the Road Certificate is Ex. PW-2/C, whereas the copy of the receipt is Ex. PW-2/D.

PW-3 Head Constable Charan Singh stated that on 10.05.2011, he collected a parcel sealed with the seal of 7B PS NB Delhi and KSY along with FSL form from MHCM Head Constable Jag Narayan and deposited the same with FSL Rohini with seals intact on it.

PW6--ACP Bir Singh stated that on 4.5.2011 at about 9 am, Inspector Vivek Pathak informed him telephonically that a secret information had been received that one Ashraf Khan who supplies narcotics would be coming to a place near Rohini Metro Station for supply of heroin to someone and thereupon he directed Inspector Vivek Pathak to take immediate legal action. He also stated that a copy of DD No. 10 Ex. PW6/A was proved before him on the same day and was duly signed by him. According to him, two reports

u/s 57 of the NDPS Act were received by him on the next date regarding seizure and arrest of the appellant and the same are Ex. PW6/B and PW6/C. The witness also produced the copy of the entries made in the register no. 19 on 4.5.2011 and 5.5.2011 which are Ex. PW6/D (colly).

PW7--Inspector Vivek Pathak, inter alia, stated that on 4.5.2011, SI Satyavan had come to him with an informer and informed that person Ashraf Khan, a resident of Bareilly would be coming to Metro Station, Rohini East and that the aforesaid person was engaged in supply of heroin in Delhi. He confirmed that the aforesaid information was transmitted by him to ACP--Mr. Bir Singh. According to him, a copy of DD No. 10 was also forwarded by him to the ACP on the same day. He further stated that on 5.5.2011, SI Satyavan produced the report u/s 57 of NDPS Act and arrest of the appellant--Ashraf Khan, which are Ex. PW6/B and PW6/C respectively. He also identified his own signatures on the copy of DD No. 10 Ex. PW6/A.

PW8 - Inspector Kuldeep Singh stated that on 4.5.2011, Constable Yogesh brought to him three parcels and one FSL form. All the parcels as well as the FSL Form had been sealed with the seal 7B PS NB Delhi. According to the witness, he put FIR number on the parcels, FSL Form and copy of seizure memo and also put his seal KSY on the parcels as well as on the FSL Form. According to him, he called HC--Jag Narain-MHC(M) along with Register no. 19 and handed over the case property as well as the documents to him.

5. In his statement u/s 313 of Code of Criminal Procedure, the appellant denied the allegations against him and claimed to be innocent. According to him, he was earlier an informer of Narcotic Branch, but since he did not want to continue as an informer, he was falsely implicated in this case in order to teach him a lesson.

6. Vide the impugned judgment dated 7.12.2012, the appellant was convicted u/s 21(c) of NDPS Act and vide the impugned Order on Sentence dated 16.12.2012, he was sentenced to undergo RI for ten years and to pay a fine of Rs. 1 lac or to undergo SI for two years.

7. The impugned judgment has been assailed by the learned counsel for the appellant on the following grounds:

(i) Despite having prior information, no public witness was joined in the raiding party.

(ii) The services of some public servant could have been requisitioned for the purpose, before proceeding to the place where the appellant is alleged to have been arrested.

(iii) The notice u/s 50 of NDPS Act is defective. The alleged answer of the appellant on the notice could not have been given by the appellant and the words used seem to be the words which a police official normally use.

(iv) The acknowledgment form issued by FSL does not refer to receipt of FSL Form;

(v) There was delay in sending the samples to FSL.

8. As regards, the contention that the services of a public servant could have been requisitioned before proceeding to the spot, I find that the information was received at about 8.45 am and the police party left the office of Crime Branch at about 9.30 am since as per the information the appellant was expected to come near the metro station between 10.30 am to 11.30 am. Since the information was not received prior to 4.5.2011, it was not possible to requisition the services of a public servant for associating him in the raiding party. Since the government offices do not open before 9.30 am, it was not possible to requisition the services of a public servant to join the raiding party on 4.5.2011. Had such an attempt been made, that would certainly have delayed the departure of the raiding party from the office of Crime Branch which, in turn, would have resulted in the police team not being able to reach the spot before 10.30 am.

9. It is also contended by the learned counsel for the appellant that some official from the Metro Station could have been requested to join the police team, after the said team had reached the spot. Again, the Court has to be realistic while dealing with such a contention. No employee of Delhi Metro would have agreed to join a raiding party organized by the police without the permission of his superiors and any attempt to take permission of the superior officers would have delayed the matter. The raiding party had reached the Rohini East Metro at about 10.30 am only and as per the information, the appellant could come at any point of time between 10 am to 11.30 am. Therefore, no time was really available for requesting a senior official of the Metro Station to depute a subordinate official to join the raiding party.

As regards the failure to join the persons who were present on the spot as also the persons who were present on the way, it has come in evidence that they were requested, but no one agreed to join the police team.

10. The question whether the failure to join public witnesses before effecting the recovery of the contraband would be fatal to the prosecution or not came to be considered by this Court in CrI. A. No. 392/2010 Jai Yodhad Vs. State decided on 30.1.2014, and the following view was taken:

11. As regards public witnesses not being joined, it has come in the deposition of prosecution witnesses that a number of persons present on the bus stops on the way to the place where the appellant was apprehended as well as several members of the public present on the spot were requested to join the police team but no one agreed to be associated with them. It cannot be disputed that the public does not want to get dragged in police and criminal case and wants to avoid them, because of long drawn trials and unnecessarily harassment. Similar view was taken in Manish Vs. State, 2000 VIII AD (SC) 29 and in [Meharban Singh Vs. Bhagwant Singh](#), We can't be oblivious to the reluctance of common men to join such raiding parties organized by the police, lest they are compelled to attend Police Station and Courts umpteen times at the cost of

considerable inconvenience to them, without any commensurate benefit. Hence, no adverse inference on account of failure to join public witnesses in such raids despite genuine efforts should be drawn.

In [Ajmer Singh Vs. State of Haryana](#), it was contended that the evidence of the official witness cannot be relied upon as their testimony had not been corroborated by any independent witness. The Hon"ble Supreme Court, rejecting the contention, held as under:

16. The minimum sentence prescribed under the Act is imprisonment of 10 years and fine. In this situation, it is normally expected that there should be independent evidence to support the case of the prosecution. However, it is not an inviolable rule. Therefore, in the peculiar circumstances of this case, we are satisfied that it would be travesty of justice, if the appellant is acquitted merely because no independent witness has been produced. We cannot forget that it may not be possible to find independent witness at all places, at all times. The obligation to take public witnesses is not absolute. If after making efforts which the court considered in the circumstances of the case reasonable, the police officer is not able to get public witnesses to associate with the raid or arrest of the culprit, the arrest and the recovery made would not be necessarily vitiated. The court will have to appreciate the relevant evidence and will have to determine whether the evidence of the police officer was believable after taking due care and caution in evaluating their evidence.

Rejecting a similar contention in [Kashmiri Lal Vs. State of Haryana](#), the Hon"ble Supreme Court inter alia observed as under:

9.it is evincible from the evidence on record that the police officials had requested the people present in the "dhaba; to be witnesses, but they declined to cooperate and, in fact, did not make themselves available. That apart, there is no absolute command of law that the police officers cannot be cited as witnesses and their testimony should always be treated with suspicion. Ordinarily, the public at large show their disinclination to come forward to become witnesses. If the testimony of the police officer is found to reliable and trustworthy, the court can definitely act upon the same. If in the course of scrutinising the evidence the court finds the evidence of the police officer as unreliable and untrustworthy, the court may disbelieve him but it should not do so solely on the presumption that a witness from the department of police should be viewed with distrust. This is also based on the principle of quality of the evidence weighs over the quantity of evidence. These aspects have been highlighted in [State of U.P. Vs. Anil Singh](#), , [State, Govt. of NCT of Delhi Vs. Sunil and Another](#), and [Ramjee Rai and Others Vs. State of Bihar](#),

Dealing with a similar contention in [Ram Swaroop Vs. State \(Govt. NCT\) of Delhi](#), , where the alleged seizure took place at a crowded place yet no independent witness could be associated with the seizure, the Apex Court inter alia observed as under:

7.We may note here with profit there is no absolute rule that police officers cannot be cited as witnesses and their depositions should be treated with suspect. In this context we may refer with profit to the dictum in [State of U.P. Vs. Anil Singh](#), wherein this Court took note of the fact that generally the public at large are reluctant to come forward to depose before the court and, therefore, the prosecution case cannot be doubted for non-examining the independent witnesses.

9. In [Ramjee Rai and Others Vs. State of Bihar](#), it has been opined as follows:-

26. It is now well settled that what is necessary for proving the prosecution case is not the quantity but quality of the evidence. The court cannot overlook the changes in the value system in the society. When an offence is committed in a village owing to land dispute, the independent witnesses may not come forward.

10. Keeping in view the aforesaid authorities, it can safely be stated that in the case at hand there is no reason to hold that non-examination of the independent witnesses affect the prosecution case and, hence, we unhesitatingly repel the submission advanced by the learned counsel for the appellant.

Therefore, no adverse inference can be drawn against the prosecution on account of the inability of the raiding party to join public witnesses. It is not as if no effort was made by them in this regard. They did make efforts at several places but no member of the public agreed to be associated with them."

11. Coming to the second contention of the learned counsel for the appellant, a perusal of the notice u/s 50 of NDPS Act would show that vide the said notice, the appellant was specifically informed that he had a legal right to be searched in the presence of a Gazetted Officer or a Magistrate. The police officer, therefore, duly complied with the requirement of Section 50 of the NDPS Act by informing him of his legal right. The case of the prosecution is that the notice was read over to the appellant, but since he is an illiterate person, he responded to the said notice verbally and his response was recorded by the police officer in his own hand.

It was not the case of the appellant either in his statement u/s 313 of Code of Criminal Procedure or during the cross examination of the witnesses that though he had been served with the notice u/s 50 of NDPS Act, the response given by him to the said notice was different from what has been recorded on the notice. The case of the appellant is that he was never apprehended from the aforesaid spot. Therefore, nothing really turns on the expression used in recording response of the appellant to the notice. I find that during the cross examination of PW10--SI Satyavan, who wrote the said reply, no suggestion was given to him that the reply given by the appellant to the notice u/s 50 of the NDPS Act was different from the reply recorded by him.

12. As regards acknowledgment not indicating the receipt of FSL Form, I find from a perusal of the report of FSL Ex. PX that not only the parcels containing the samples, but

also the FSL form was duly received by the Laboratory, it is expressly noted in the said report that one sealed parcel Mark C containing the samples tallied with the specimen seal as per forwarding letter (FSL Form). As noted earlier, according to Constable--Charan Singh, he had taken not only the parcel containing the samples, but also the FSL form to the FSL on 10.05.2011. The entry made in Register No. 19 also corroborates the deposition of Constable Charan Singh in this regard. Thus, not only the oral evidence but the documentary evidence produced by the prosecution also shows that the FSL Form duly sealed with the seals of 7B PS NB Delhi and KSY was duly sent to FSL and was received there. Hence, absence of reference to FSL form in the acknowledgement is immaterial.

13. The learned counsel for the appellant has pointed out that in Column No. 6 of the Arrest Memo Ex. PW-4/A, the date of arrest is noted as 04.04.2011, whereas the case of the prosecution is that the appellant was arrested on 04.05.2011. The aforesaid discrepancy, in my view, is only an inadvertent error in writing the date of arrest. The date below the signature of the Investigating Officer is given as 04.05.2011 and this is not the case of the appellant that he was arrested on 04.04.2011 or even on a date earlier than 04.05.2011. She has also pointed out that in the statement of Head Constable Om Prakash u/s 161 of Cr.P.C., the date of FIR was initially written as 04.04.2011 which was later changed to 04.05.2011. Again, this is a clerical error since the FIR was registered on 04.05.2011 and not on 04.04.2011.

14. Section 52(3) of the NDPS Act inter alia provides that every person arrested and article seized under sub-section (2) of Section 41, Section 42, Section 43 or Section 44 shall be forwarded without unnecessary delay to the officer in-charge of the nearest police station. In the present case, the evidence produced by the prosecution clearly shows that immediately after seizure, the samples as well as the case property of FSL form were produced before the officer in-charge of the Crime Branch. The appellant was also produced before the aforesaid officer when he was brought back to the police station from the spot where he was arrested. Thus, there is due compliance with the requirement of Section 52 of the Act.

15. Section 57 of the Act provides that whenever any person makes any arrest or seizure, he shall within 48 hours after search and arrest, make a full report of all the particulars of such arrest or seizure to his immediate official superior. Though the provisions of Section 57 of the Act are directory in nature and not mandatory, there has been due compliance of the said provision in the case before this Court. Ex. PW-9/C is the special report submitted by ASI Davinder Singh on 05.05.2011 itself. In the said report, he reported arrest of the appellant Ashraf Khan. The report was forwarded by the concerned Inspector of Narcotics Cell to the concerned ACP on the same date. Ex. PW-6/B is the another special report u/s 57 of the Act reporting seizure of 275 grams of heroin from the appellant. The report is dated 05.05.2011 and not only was it forwarded by the Inspector Narcotics Cell it was also seen by ACP of the said cell on the very same date. Thus, there was full compliance with the requirement of Section 57 of the Act with respect to arrest of

the appellant as well as the seizure of heroin from him.

Though the provisions of Section 42 of the Act did not apply to the seizure of the contraband in this case, the recovery having been effected from a public place, the information received by SI Satyavan was duly entered by him. Vide DD No. 10 of Police Station Narcotics Cell Shakarpur on the same date and the same is Ex. PW-6/A. It was endorsed by Inspector Vivek Pathak to the concerned ACP and also had seen on the same date. Both, the Inspector who forwarded the report as well as the ACP have been examined and their oral deposition finds ample corroboration from the aforesaid DD. In fact, the receipt of DD No. 10 was also entered in a register maintained in the office of the ACP and a copy of the relevant entry recorded in the register is Ex. PW-6/D.

16. Coming to the alleged delay in sending the sample to FSL, the purpose behind insisting upon a prompt dispatch of the sample to the laboratory is to eliminate any reasonable possibility of the sample being tampered with before it reaches the laboratory. However, in the present case, the prosecution has proved, by producing every possible link evidence that there was absolutely no possibility of the sample having been tampered with before it reached the laboratory. The prosecution has examined the police official who took the sample as well as the FSL Form duly sealed with the seal of 7B PS NB Delhi to the Inspector in-charge of Crime Branch. It has also examined the Inspector who received the said samples and put his own seal KSY on this. The prosecution has also examined the MHC (M) to whom the sample was given by the Inspector. The Constable who took the sealed sample to the FSL along with FSL Form has also been examined. The prosecution having produced evidence which would eliminate any reasonable possibility of this sample being tampered with before it reached FSL, the time lag between seizure and the date on which the sample was sent to the laboratory becomes insignificant, particularly when the sample was sent just after six days of the seizure. For the reasons stated hereinabove, I find no ground to interfere with the conviction of the appellant u/s 21(c) of the NDPS Act, quantify of heroin recovered from him being a commercial quantity. Since the minimum prescribed sentence has been awarded to the appellant, there is no scope in its reduction. However, in the facts and circumstances of the case, it is directed that in the event of failure to pay the fine, the appellant shall undergo SI for three months as against two years awarded by the Trial Court.

The appeal stands disposed of accordingly.

One copy of this order be sent to the concerned Jail Superintendent for information and necessary action.

LCR be sent back along with the copy of this judgment.