

**(2000) 08 DEL CK 0115**

**Delhi High Court**

**Case No:** Criminal Appeal No. 88 of 1999

Sher Singh Walia

APPELLANT

Vs

State NCT Delhi

RESPONDENT

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**Date of Decision:** Aug. 2, 2000

**Acts Referred:**

- Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) - Section 50, 55

**Citation:** (2000) 55 DRJ 428 : (2001) 77 ECC 684 : (2001) 1 RCR(Criminal) 819

**Hon'ble Judges:** Dalveer Bhandari, J

**Bench:** Single Bench

**Advocate:** Jitender Sethi, for the Appellant; Akshay Bipin, for the Respondent

**Final Decision:** Allowed

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### **Judgement**

Dalveer Bhundhari, J.

This appeal is directed against the judgment of the learned Special Judge, Delhi passed in Sessions Case No. 128/94. Brief facts necessary to dispose of this appeal are recapitulated as under:

2. On 9.3.1991 while, the Sub Inspector Pran Nath was on patrolling duty Along with ASI Prithvi Singh, Constable Vijender, Constable Ajay Singh at Andha Mughal Chowk he received an information that a person namely Sher Singh would go to Haryana through Bagichi Peerji Railway Station, Subzi Mandi in order to supply charas and if a raid is conducted, illegal charas can be recovered. The information was reduced into writing and a raiding party was formed. Public witnesses Rajinder Kumar Sharma and Sachchidanand were also joined in the raiding party. The raiding party informed the accused that as per their information he was carrying illegal charas for which he has to be searched.

3. According to the prosecution version, the accused was given notice u/s 50 of the NDPS Act, 1985. On search by an ACT before the S.H.O. a bag woven with plastic threads with yellow and blue linings with light cloth handle was recovered from his

possession and on checking the same, it was found that there was a polythene bag containing 4.600 Kg. charas in the shape of round sticks. Out of that 500 grams was separated as sample and that sample was wrapped in a white cloth and the same was converted into a sample parcels. Remaining charas of 4 Kg 100 grams was put in the same polythene and converted into a separate parcel with the help of a cloth. Both these parcels were sealed.

4. It is the further case of the prosecution that the CFSL form was filled in. Both these parcels and the CFSL Form were handed over to the SHO for safe custody. Thereafter, a rukka was prepared and the same was sent through a constable Vijender Kumar for registration of the case. The SHO took the case property Along with the necessary documents and deposited the same with the Malkhana Moharar. The case was registered and the accused was arrested. Charge sheet in the case was filed on 4.6.1991 in the Court of the learned Metropolitan Magistrate, Delhi and the case was Committed to the Court of Sessions on 6.7.1991. The prosecution examined 10 witnesses to prove its case. On the basis of evidence and documents on record, the trial Court found the appellant guilty of the offence and sentenced him to 10 years rigorous imprisonment and imposed a fine of Rs. 1, 00, 000/ =. The Court also directed that in default of payment of fine, the appellant to further undergo a period of six month"s imprisonment.

5. The appellant aggrieved by the order of the Special Judge has approached this Court. Mr. Jitender Sethi, The learned counsel appearing for the appellant submits that the CFSL form was never deposited with the Moharar Malkhana. Mr. Sethi submitted that in Register No. 19, there is no entry indicating that the CFSL Form was in fact deposited. He has invited my attention to Register No. 19 (Exhibit PW1/A). In entry No. 256 of the said Register, there is description of this case but it is no where mentioned that the CFSL form was in fact deposited. Mr. Sethi further submitted that the sample parcel was sent to the CFSL office on 14.3.1991 through Constable Ajay Singh but the CFSL form was not sent Along with the sample parcel. Constable Ajay Singh in his oral testimony had mentioned that he had carried the CFSL form to the CFSL office but there is no document to support this part of his statement.

6. Mr. Sethi the learned counsel for the appellant also submitted that the sample parcel were sent Along with the road certificate. The road certificate gives description of the articles sent to the CFSL office. Even the road certificate does not mention the fact of sending the CFSL form. Mr. Sethi, the learned counsel for the appellant has also invited my attention to the road certificate which is Exhibit PW1/B in which it is mentioned that one sealed parcel containing charas bearing seal of PN & GCS is being sent. In the road certificate, it was not mentioned that the CFSL form is also sent Along with the sample parcel.

7. Mr. Sethi the learned counsel for the appellant also submitted that even the DD Entry No. 11A dt. 9.3.1991 of the Police Station Pratap Nagar, Delhi, (PW 4/B) also

does not give any description of the CFSL form. .

8. The learned counsel appearing for the State Mr. Akshay Bipin fairly conceded that there is no document on record by which it can be established that the CFSL form was either deposited with the Malkhana or it was sent from Malkhana in the CFSL office.

9. In view of this admitted position that the CFSL Form was neither deposited with the Moharar Malkhana nor was sent from Moharar Malkhana to the CFSL office, the conclusion becomes irresistible, the law seems to be consistent in cases where the CFSL form is neither deposited with the Moharar Malkhana nor sent by Moharar Malkhana to the CFSL office. In this view of the matter, the accused clearly becomes entitled to get the benefit of doubt. This safeguard is absolutely imperative otherwise there cannot be any guarantee that the samples which have been sent from the Moharar Malkhana to the CFSL for testing were the same which were recovered from the accused/appellant.

10. The learned counsel for the appellant to strengthen his submissions placed reliance on a number of judgment of this Court. He placed reliance on Pradeep Kumar v. State; 1990 C.C. C 69. In this case also the CFSL form was stated to have been filled up simultaneously with the sealing of parcels but was never deposited in the Malkhana Along with those parcels. The Court observed that this safeguard is absolutely imperative to ensure that the sample parcels sent to the CFSL office were those allegedly seized from the appellant.

11. The learned counsel for the appellant, Mr. Sethi also placed reliance on another judgment of this Court, i.e., Mool Chand v. State; 1993 (2) DL 14. In this case also though the CFSL from was filled in but was neither deposited in the Malkhana nor was sent to the CFSL Along with the samples. The counsel appearing for the State argued that non depositing of the CFSL form in Malkhana was an irregularity and not illegality, so it did not have any serious impact on the prosecution version. The Court examined the statement in the light of various decisions of the Supreme Court and came to the conclusion that the basis behind taking such a precaution is to complete material link in the prosecution evidence by eliminating the possibility of the sample being tampered with. The Court observed that, the sentence provided under the Act is very severe. The Court cannot award any punishment less than 10 year" R.I., and has to impose a minimum fine of Rs. 1,00,000/-. The Court observed that in cases where the sentence is so severe and stringent, the Court would naturally insist for the standard of proof beyond the shadow of all reasonable doubts against an accused. Suspicion, however, strong, cannot take the place of a positive proof. The Court observed that non deposit of the CFSL form in Malkhana or its being sent to the CFSL was a mere irregularity, cannot be accepted. The Court directed that the appellant is entitled to a benefit of doubt and consequently the appellant was acquitted in this case also.

12. The learned counsel for the appellant also placed reliance on another judgment of this Court, i.e., *Safiullah v. State*; 1993 JCC 33. In this case the road certificate was neither produced nor exhibited and it was not confirmed that the CSFL form was ever taken out from the Malkhana and sent Along with the sample parcels to the OFSL office. The Court observed that the prosecution failed to prove the link evidence and the possibility that the sample parcels were not tampered with, cannot be ruled out. The conviction was set aside and the accused was given the benefit of doubt.

13. The learned counsel has also placed reliance on another judgment of this Court, i.e., *Satinder Singh v. The State NCT of Delhi*; 1998 (1) JCC 8 Del. In this case also the CFSL form was prepaid but there was no deposit of the same with the Moharar Malkhana. The Court gave the appellant benefit of doubt. Though there was a clear oral evidence which supported the case of the prosecution but the court observed that "I am not inclined to place any reliance on the oral testimony of the police witness without cogent Explanation the absence of entires in the documentary evidence of this nature."

14. The learned counsel for the appellant also placed reliance on the latest judgment of this Court in *Rajan Ali v. The State*; 2000 (1) CLR 362. In this case also the CFSL form was not deposited in the Malkhana Along with the seized properly nor the same was sent to the CFSL office along with the sample parcel. The Court observed that since the prosecution has failed to produce the link evidence which was imperative to demonstrate that the samples were not tampered with. Because of this lapse of the prosecution, the conviction of the appellant was set aside and the appellant was acquitted.

15. On careful scrutiny of the aforesaid judgments, the conclusion becomes irresistible. Depositing of the CFSL form acquires significance in a case of the NDPS Act. The prosecution has to prove that the form was duly deposited with the Malkhana and the same was sent from the Malkhana to the CFSL office. In this case, the prosecution has failed to provide any documentary evidence in this respect. In cases, where the legislature has provided for such stringent punishment. The Court would be justified in insisting for standard of proof beyond the shadow of doubt against the accused. In the instant case non-deposit of the CFSL form, in the Malkhana and consequently not sending from Malkhana to the CFSL office is a vital lapse in the prosecution version and the accused is certainly entitled to the benefit of doubt. Consequently, this appeal is allowed and the appellant is set at liberty, it not required in any other case.