

(2012) 04 DEL CK 0493**Delhi High Court****Case No:** Criminal A. 714 of 2011 and Criminal M.B. 984 of 2011

Ganesh

APPELLANT

Vs

State NCT of Delhi

RESPONDENT

Date of Decision: April 19, 2012**Acts Referred:**

- Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) - Section 21, 50, 57

Hon'ble Judges: Mukta Gupta, J**Bench:** Single Bench**Advocate:** Sanjeev Kumar, for the Appellant; Mukesh Gupta, APP for State with S.I. Paramjeet Singh, Narcotics Cell, for the Respondent**Final Decision:** Dismissed**Judgement**

Hon"ble Ms. Justice Mukta Gupta

1. The present appeal is directed against the judgment dated 20th April, 2011 passed by the learned Additional Sessions Judge/Special Judge, NDPS whereby the Appellant was convicted for the offence punishable u/s 21 (b) Narcotics Drugs and Psychotropic Substances Act (in short "NDPS Act"). Vide order on sentence dated 18th May, 2011 the Appellant was sentenced to undergo Rigorous Imprisonment for three years and to pay a fine of Rs. 20,000/- and in default of payment of fine to further undergo Simple Imprisonment for nine months. Briefly the facts of the prosecution case are that on 18th December, 2008 at about 2.45 P.M. 400 grams of Heroin consisting 32.4 grams of diacetylmorphine was recovered from the possession of the Appellant in front of M/s Mysore Travels, Lal Quila, Delhi. The appellant was arrested by the police officials of the narcotics branch and the contraband was seized, samples were drawn and after the investigation, charge sheet was filed. After recording the statement of prosecution witnesses and the Appellant learned Special Judge convicted the Appellant for the offence punishable u/s 21(b) NDPS Act and sentenced him as mentioned above.

2. Learned Counsel for the Appellant contends that the impugned judgment is bad in law. The findings of the learned Special Judge are based upon conjectures and surmises as the learned Special Judge has ignored the material contradictions and serious infirmities in the prosecution case. The learned Special Judge did not consider the fact that the testimony of PW2 is contrary to the testimony of PW7. The learned Special Judge did not consider the fact that PW8 Sanjeev Kumar in his cross-examination has stated that on the date of incident he was posted at PS Narcotics Branch and was called by ASI Paramjeet whereafter a raiding party was constituted and HC Jagdish shared the information with them whereas PW2 has stated that PW7 ASI Paramjeet Singh did not share the secret information on the first occasion. It is stated that this contradiction clearly casts a doubt about the secret information itself. The second investigation officer was taken to the spot by ASI Suresh, who was deliberately has not made a witness. PW7 ASI Paramjeet stated that he filled the FSL form and affixed his seal on the same but PW8 in his cross-examination has stated that the seizure memo and the FSL form were in his handwriting. There are discrepancies in the testimony of prosecution witnesses despite which the learned Special Judge has sustained conviction of the Appellant and the same has resulted in causing serious miscarriage of justice.

3. Per contra, learned APP for the State contends that the testimony of the prosecution witnesses and the exhibits clearly establish the case against the Appellant. There are no contradictions in the testimony of the witnesses. PW2 and PW8 have clearly proved the recovery. The procedure as contemplated under the NDPS Act has been completely adhered to. Furthermore, the CFSL report confirms that 8.1 per cent diacetylmorphine was found in the contraband.

4. I have heard Learned Counsel for the parties and perused the record.

5. PW2 HC Jagdish has stated that on 18th December, 2008 he was posted at PS Narcotic Branch. On that day, he was present in the police station when ASI Paramjeet Singh told him and Constable Sanjeev about the secret information that one person namely Ganesh, resident of Palam would be coming in between 2:30 -3:30 p.m. in front of Mysore Travels near the area of Lal Quila for delivery of smack. The investigating officer formed a raiding party and left the police station at 2:00 p.m. along with the secret informer in the official vehicle which was driven by ASI Suresh. Investigating officer was having field testing kit and electronic weighing scale. They reached in front of Mysore Travels at about 2:30 p.m. The vehicle was parked at a distance of 25-30 mtrs. from Mysore Travels. On the way investigating officer asked 5-6 passers-by to join the raiding party but no one agreed. Investigating officer again briefed the raiding party and everybody took their positions to the north of Mysore Travels. At about 2:30 p.m. one person with blue colour jersey was seen coming from the side of Lal Quila to whom the secret informer pointed out to be Ganesh, the Appellant herein. The accused person came in front of Mysore Travels and when he was about to go investigating officer with the help of

raiding party overpowered him and disclosed the identity of raiding party. The investigating officer thereafter informed the accused about his right to get his search conducted before a Magistrate/Gazetted Officer and served a notice u/s 50, NDPS Act upon him. The offer of search before the Magistrate/Gazetted Officer was declined by the accused and his reply was written by the investigating officer on the notice. This witness has further stated that some persons had gathered at the spot and the investigating officer requested the said persons to witness the police proceedings but no one agreed. Investigating officer thereafter took the search and one transparent polythene containing matiala colour powder was recovered from the left side beneath the jersey. The investigating officer tested the same and it was found to be heroine. Investigating officer weighed the contraband along with the polythene and its weight came out to be 400 gms. Investigating Officer thereafter separated two samples of 5 gm each and then prepared three parcels of the remaining heroin and sample heroin, affixed his seal 8BPS NB Delhi and also filled in form FSL with impressions of the same seal. This witness has stated that the seal after use was handed over to him. Thereafter other documents were filled. At about 6:45 p.m. SI Vivek Pathak came in the official vehicle which was driven by ASI Suresh. ASI Paramjeet Singh handed over the custody of the accused and all the documents prepared by him to SI Vivek Pathak. At the instance of ASI Paramjeet Singh, site plan was prepared and accused was arrested. This witness in his cross-examination has stated that he was present in the office of duty officer when secret informer came to the police station and Const. Sanjeev was in another room. Investigating officer had called him in his room at about 1:45 p.m. and Constable Santee was also present.

6. PW3 SI Vivek Pathak has deposed that on 18th December, 2008 he was present in the narcotic branch when investigation of the present case was assigned to him by the orders of SHO and at about 6:45 p.m. he reached the spot in front of Mysore Travels, Red Fort where ASI Paramjeet along with staff and accused Ganesh was present. ASI Paramjeet handed over the custody of the accused and the documents prepared by him. This witness has stated that he inspected the spot and prepared the site plan at the instance of ASI Paramjeet Singh. At about 9:30 p.m. they left the spot and reached the police station. The contraband recovered was deposited in Malkhana and a report u/s 57 NDPS Act was given to the SHO for forwarding the same to the ACP Narcotics.

7. PW6 Insp. M.L. Sharma has deposed that on the date of incident he was posted at SHO PS Narcotic Branch and on that day at about 1:15 p.m. ASI Paramjeet Singh along with a secret informer came to his office and informed him that one Ganesh, resident of Palam who sells smack would come between 2:30 and 3:30 p.m near Mysore Travels opposite Red Fort on that day for delivery of smack. He has stated that he verified the facts, satisfied himself and shared the information with the ACP, who directed that raid be immediately conducted and accordingly he directed ASI Paramjeet to conduct the raid. It is further stated that in his presence ASI Paramjeet reduced the information into writing vide DD No. 18A at 1:30 p.m. Thereafter ASI

Parmjeet constituted a raiding party comprising himself, HC Jagdish and Constable Sanjeev.

8. PW7 Paramjeet Singh has also reiterated the facts stated by PW2, PW3 and PW6 in regard to receiving of secret information and conducting the raid. This witness has corroborated the fact that notice u/s 50 was served upon the Appellant and he was apprised of his right to get his search conducted in presence of a Magistrate/Gazetted Officer which the Appellant refused. Further, in the testimony of the witness he has stated that after conducting the raid SI Vivek reached the spot and he handed over the documents prepared by him and the Appellant herein to him. Despite, being cross-examined at length by the defence, nothing material could be elicited from his testimony. PW8 HC Sanjeev Kumar has also deposed on similar lines and corroborated the testimony of PW2, PW3 and PW7. The common question put to all the witnesses in their cross-examination is in regard to one lady, namely Kheru Nisha. It is put to the witnesses that at the behest of this lady the Appellant has been falsely implicated in the present case. This suggestion has been denied by all the witnesses.

9. In his defence the Appellant has examined three witnesses including himself. DW2 Rajiv Kumar, the Manager of Mysore Travels has stated that on the date of incident, the Appellant was working with Mysore Travels in December, 2008 he received a phone call for booking a vehicle at 4.30 PM. He sent the Appellant and Sunil to those clients for setting the rates and collecting advance. At about 7.00 PM Sunil came and told that 3-4 persons forcibly took the Appellant away. But in his cross-examination despite stating that a muster roll and attendance register of all the employees is maintained he could not produce any employment record pertaining to himself or Sunil or the Appellant. Appellant has examined himself as DW1 and deposed that in the year 2006 he had given a loan of Rs. 35,000/- to one Sheron and when he demanded his money back she came with a police officer and threatened him that if he again approaches her for the money he will be falsely implicated in the present case. The witness/Appellant could not produce any other document in this regard to prove the same.

10. The contradictions pointed out by the Learned Counsel for the Appellant are not material contradictions and do not dent the prosecution case. The testimony of the prosecution witnesses in regard to the incident is clear and cogent. The raid conducted is proved and necessary compliance of the relevant provisions has been made. The recovery of the contraband is clearly established. Thus, keeping in view the facts and circumstances of the present case, the prosecution has clearly established its case against the Appellant beyond reasonable doubt. I find no merit in the present appeal. The appeal and application are accordingly dismissed. Trial Court record be sent back.