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(2014) 12 DEL CK 0179

In the Delhi High Court

Case No : Criminal Appeal No. 483 of 2014

Lekan Akins — APPELLANT

Vs

The State (N.C.T of Delhi) — RESPONDENT

Date of Decision : 12-12-2014

Acts Referred:
Criminal Procedure Code, 1973 (CrPC) — Section 313
Foreigners Act, 1946 — Section 14
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 21(b), 21(c), 50, 50(1), 50(5)

Citation : (2015) 215 DLT 699

Hon'ble Judges : S. Muralidhar, J

Bench : Single Bench

Advocate : J.S. Kushwaha, Advocate for the Appellant; Rajat Katyal, APP, Advocate for the Respondent

Judgement

Dr. S. Muralidhar, J.

Introduction

1. The challenge in this appeal is to the impugned judgment dated 18th January 2014 passed by the learned Special Judge, Delhi in Session Case No. 14/11 convicting the Appellant, Lekan Akins, for the offence under Section 21(c) of the Narcotics Drugs and Psychotropic Substances Act 1985 (''NDPS Act'') and Section 14 of the Foreigners Act (''FA'') and the order on sentence dated 24th January 2014 whereby for the offence under Section 21(c) NDPS Act the Appellant had been sentenced to undergo rigorous imprisonment (''RI'') for a period of ten years and fine of Rs. 1 lakh, and in default, to undergo simple imprisonment (''SI'') for a period of two years and for the offence under Section 14 FA, he had been sentenced to undergo SI for two years along with fine of Rs. 10,000 and in default, to undergo SI six months. Both the sentences were directed to run concurrently.

The case of the prosecution

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2. The case of the prosecution is that on 29th January 2011 Sub Inspector (''SI'') Prabhanshu (PW-4) who was posted at Anti Auto Theft Squad (''AATS'') , North District, Delhi Police, was in his office situated at Daya Basti, Inder Lok. At 2.45 pm he is stated to have received secret information that one foreigner involved in the illegal trade of cocaine and charas would pass through Nangia Park and would go towards Inder Lok to supply it to someone. PW-4 transmitted the information to Inspector Shailender Tomar, (Incharge) , AATS and recorded DD entry No. 10 (Ex.PW-4/A) to the said effect.

The raid proceedings

3. On the directions of Inspector Shailender Tomar, PW-4 constituted a raiding team consisting of himself, Constable (Ct.) Manoj (PW-11) , Ct. Vivek Kumar (PW-12) , Head Constable (HC) Mahesh (PW-3) and Ct. Ashok Kumar (PW-5) . They are stated to have left the office at around 3.25 pm along with the secret informer in official vehicle driven by HC Ishwar Singh. They are stated to have travelled through Shastri Nagar metro station, Gulabi Bagh, 2 No. Chowki and reached at Nagia Park, police picket.

4. According to PW-4, they requested 4-5 passerby to join the raiding party but none of them was willing to join. Thereafter, PW-4 instructed the driver to park the vehicle about 30 meters away from the picket towards the road adjoining to the picket. They laid barricades on the road and started checking of the motorcycles coming from Nagia Park Gol Chakar towards 2 No. Chowki.

5. According to PW-4, at around 4.25 pm, they noticed the Appellant coming on a motorcycle wearing coffee colour jacket and blue jeans coming from Gol Chakkar side. The secret informer pointed out towards the Appellant. On seeing the police checking, the Appellant tried to turn his motorcycle back towards the Gol Chakkar. However, PW-4 instructed the staff to stop the Appellant and with the help of the staff members, they overpowered the Appellant. PW-11 caught hold him from behind and the Appellant tried to get himself free but PW-12 overpowered him from left side and PW-3 over powered him from the right side. According to PW-4, he called the driver of the vehicle to reach at the spot with the vehicle. The Appellant was instructed to remove the helmet. PW-4 stated that the motorcycle was of black colour and TVS make. The Appellant disclosed his name as Lekan Akins and that he was a Nigerian national.

6. PW-4 stated that he introduced the police party to the Appellant and informed him about the secret information. According to PW-4, the Appellant was informed under Section 50 NDPS Act about his legal right to be searched before any Gazetted Officer (''GO'') or any Magistrate but he refused to exercise his right. The notice under Section 50 NDPS Act which was purportedly served upon the Appellant (Ex.PW-3/A) states that "it is your legal right to be searched in the presence of a Gazetted Officer or a Magistrate". It is signed by PW-4 and two witnesses, i.e., PW-3 and PW-12. In the said notice, the Appellant is shown to have written in his own hand that "I Lekan Akins deny of any such formalities. I

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deny of my personal search in present of gazetted officer or Magistrate. I deny to make physical search of raiding party of vehicle."

7. PW-4 stated that a carbon copy of the notice was served upon the Appellant. Meanwhile, some public persons gathered there and PW-4 requested them to join the proceedings but none of them obliged. PW- 4 then conducted personal search of the Appellant and one-white colour polythene was recovered from the right pocket of his blue jeans pant. On opening the polythene, another white colour polythene containing some powder type substance was found in it. When tested with the field testing kit it was found to be Methaqualone (cocaine) . Upon weighing the said substance on the electronic scale it was found to be 100 grams including the polythene. PW-4 separated two samples of 5 grams each of the substance and kept them into two small plastic poly packs and tied the same with the rubber band and kept them in two white cloth pulandas and gave them mark ''A'' and ''B''. The remaining substance was kept in the same polythene and tied with the rubber band and kept in cloth pulanda and gave them mark ''C''. PW-4 then sealed the three pulandas with his seal of BD and he filled up the FSL form and seized by memo (Ex.PW-3/B) and affixed the same seal on it. After using the seal it was handed over to PW-5. PW-4 then prepared a rukka (Ex.PW-4/B) and handed over it to PW-12 along with the three sealed pulandas, FSL form and carbon copy of the seizure memo (Ex.PW-3/B) with directions to hand over the rukka to the Duty Officer (''DO'') and the remaining articles to Station House Officer (''SHO'') , Raj Kumar, [''PW-10''], Police Station Roop Nagar.

8. After some time, ASI Ranbir Singh (PW-6) reached at the spot as further investigation was marked to him. He prepared the site plan (Ex. PW6/A) at the instance of PW-4. The documents of the case were handed over by PW-4 to PW-6. The Appellant was interrogated and arrested. PW-6 recorded the disclosure statement of the Appellant (Ex.PW-4/C) . PW-4 also forwarded a report under Section 57 NDPS Act to PW-10.

9. In his disclosure statement, the Appellant stated that he is a citizen of Nigeria. He came to India about 10 years ago for studies, but due to poverty and greed he became carrier of drugs and other narcotics substance with his other Nigerian associates. He stated that he was also arrested and sent to jail previously. After being released from jail he went back to Nigeria and again returned to India in August 2010. He further came in contact with his Nigerian drug associates and started working as drugs carrier. He stated that on that date, i.e., 29th January 2011 at about 4.30 pm he was going to supply 100 grams of drugs white powder which is used for making drugs. He claimed that one M.C. Tyson, a Nigerian is the kingpin of this drug business in India but he did not have any idea about his address. He stated that Tyson is residing at Calcutta. He used to meet Tyson in the Vikas Puri area.

10. Two days later, i.e., 31st January 2011, during further interrogation, the passport (Ex.P1) of the Appellant was seized under seizure memo (Ex.PW-2/B) .

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11. On 4th February 2011, ASI Om Prakash (PW-8) was entrusted the investigation as regards the aspect of ownership of the motorcycle. He learnt that its owner had expired. PW-8 verified his death certificate. He collected the FSL report (Ex.PW-8/A) and filed it in the Court. After concluding the investigation, PW-8 prepared and filed the charge sheet.

12. On 15th October 2011 an order framing charges was passed by the trial Court against the Appellant for the aforementioned offences.

The Appellant''s statement under Section 313 Cr PC

13. The prosecution examined twelve witnesses. When the incriminating evidence was put to the Appellant under Section 313 Cr PC, he denied the evidence. He claimed that the police had taken his signatures on blank papers and thereafter fabricated the disclosure statement (Ex.PW-4/C) . He claimed that Ex.PW-2/A and Ex.PW-2/B,i.e., memo of disclosure statement leading and the memo for the seizure of his passport, were fabricated documents. The seizure memo of the motorcycle (Ex.PW-3/F) was also stated to be a false document. The Appellant claimed that no carbon copy of the Section 50 notice was recovered from him. When asked if he had anything else to say, the Appellant stated that he had been lifted from his house and taken to PS Roop Nagar where one K.D. Khan was already present. The police released Khan and framed the Appellant in the present case. The motorcycle belonged to K.D. Khan but was planted on the Appellant along with the alleged contraband.

The judgment of the trial Court

14. The trial Court on analysing the evidence, concluded that the prosecution had proved the case against the Appellant beyond reasonable doubt. The trial Court came to the following conclusions:

(i) There was no cross-examination of PW-4 to the effect that DD entries (Ex.PW-4/A and Ex.PW-4/D) were incorrect. Consequently, there was no merit in the submission that the said entries had not been proved.

(ii) Merely because the name of PW-11 was not mentioned in DD No. 11 (Ex.PW-4/D) it could not be said that he was not a member of the raiding party as his presence was spoken to by PWs-3, 4, 5 and 12.

(iii) There was no merit in the contention that carbon copy of the notice under Section 50 NDPS Act was not served upon the Appellant. This was spoken to by PWs 3, 4, 5, 11 and 12;

(iv) A reading of the testimonies of PWs 4 and 10 established that FSL form along with pulandas were deposited with MHC (M) of PS Roop Nagar. Further, Ct. Ansar Khan (PW-7) had proved that he had taken the sealed pulandas with the FSL form along with the road certificate from the MHC (M) and deposited them at the FSL, Rohini;

(v) Although the report under Section 57 NDPS Act was not exhibited, PWs 4 and

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6 had confirmed that the report was submitted to the SHO to be forwarded to the ACP.

(vi) Nothing turned on the failure by the prosecution to establish the ownership of the motorcycle, as the contraband was not recovered from it.

(vii) The prosecution had proved it case against the Appellant who was found in possession of 100 gm of cocaine. He was, therefore, guilty of the offence under Section 21(c) NDPS Act. The visa of the Appellant had expired on 24th January 2010 and, therefore, he was guilty under Section 14 FA. The trial Court proceeded to sentence him in the manner indicated hereinabove.

15. The Appellant has been in judicial custody throughout and his nominal roll showed that as on 1st September 2014 he had served three years and seven months of imprisonment.

Compliance with Section 50 NDPS Act

16. It was first submitted by Mr. J.S. Kushwaha, learned counsel for the Appellant, that the purpose of Section 50 NDPS Act was to ensure that the Appellant was informed of his legal right to be taken before any GO or any Magistrate for his personal search. He submitted that in the present case although notice under Section 50 NDPS Act was served stating that the Appellant had a legal right to be searched, he was not specifically informed by the prosecution that he had the right to be taken to a GO or a Magistrate. Therefore, there was failure of strict compliance with Section 50 NDPS Act. Mr. Kushwaha placed reliance on the decisions in Vijaysinh Chandubha Jadeja Vs. State of Gujarat, and Myla Venkateswarlu Vs. The State of Andhra Pradesh, .

17. Mr. Rajat Katyal, learned APP for the State, on the other hand, placed reliance on the decision in Suresh and Others Vs. State of Madhya Pradesh, to urge that in the present case there was full compliance of the requirement under Section 50 NDPS Act. Reliance was also placed on the decision in Smt. Krishna Kanwar @ Thakuraeen Vs. State of Rajasthan, where it has been observed that there is no specific form prescribed to convey the information under Section 50 NDPS and what is necessary was that the accused (suspect) should be made aware of the existence of his right to be searched in the presence of one of the officers named in Section 50 NDPS Act.

18. The law concerning the nature of right under Section 50 NDPS Act has been interpreted time and again by the Supreme Court. In State of Punjab Vs. Baldev Singh, etc. etc., the Constitution Bench of the Supreme Court held that when an empowered officer or a duly authorized officer acting on prior information was about to search a person it was imperative for him to inform the suspect of "his legal right" under Section 50(1) NDPS Act of being taken to the nearest GO or the nearest Magistrate for making the search. However, such information may not necessarily be in writing. It was further held that failure to inform the person concerned of the above right might render the recovery of contraband suspect

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and the conviction and sentence of an accused "bad and unsustainable in law."

19. After the decision in State of Punjab v. Baldev Singh the Parliament introduced sub-sections (5) and (6) of Section 50 NDPS Act by Act 9 of 2001. These were to deal with a situation where an officer would not be able to take a person to be searched to the nearest GO or Magistrate without "the possibility of the person to be searched parting substance of any narcotic drug or psychotropic substance". It was further stipulated that if a search was to be conducted in such a situation, the officer shall record the reasons for such belief which necessitated such search and within 72 hours send a copy thereof to his immediate official superior.

20. In Karnail Singh Vs. State of Haryana, the Constitution Bench of the Supreme Court clarified that by the insertion of sub-sections (5) and (6) in Section 50 NDPS Act it could not be said that the safeguards spelt out in Baldev Singh had been taken away. Rather "certain flexibility in the procedural norms were adopted only to balance an urgent situation."

21. Thereafter another issue that arose was whether it was sufficient for the prosecution to demonstrate ''substantial compliance'' with the requirement of Section 50 of NDPS Act. In Joseph Fernandez Vs. State of Goa, the Division Bench of the Supreme Court held that if the searching officer informed the suspect that "if you wish you may be searched in the presence of a gazetted officer or a Magistrate" there was substantial compliance with the requirement of Section 50 of NDPS Act. Later in Prabha Shankar Dubey Vs. State of Madhya Pradesh, the question was posed to the accused whether he would like to be searched by the police officer or to be searched by a GO or by a Magistrate. That was held to be ''substantial compliance'' of Section 50 of NDPS Act. In Krishna Kanwar (Smt.) @ Thakuraeen v. State of Rajasthan (supra) it was stated that what was necessary was that the suspect should be made aware of the existence of his right to be searched in the presence of the one of the officers named in Section 50 of NDPS Act. Since there was lack of clarity on the question of ''substantial compliance'' with the requirement of Section 50 of NDPS Act, the issue was again considered by the Constitution Bench of the Supreme Court in Vijaysinh Chandubha Jadeja (supra) . In its judgment dated 29th October 2010 the Court held that the decision in Joseph Fernandez and Prabha Shankar Dubey had ignored the dictum laid down in Baldev Singh and therefore, there was no question of introducing the concept of ''substantial compliance''. There had to be strict compliance with the requirement of Section 50 NDPS Act. The Supreme Court emphasised the mandatory nature of the provision. It was clarified that merely informing the suspect that he has the legal right to be searched by a GO or by a Magistrate is not in compliance with the requirement of Section 50(1) of NDPS Act. It was clarified that the question whether or not the procedure prescribed in Section 50 NDPS Act was followed, was a matter for trial. It would neither be possible nor feasible to lay down any absolute formula in that behalf.

22. Towards the end of the judgment in Vijaysinh Chandubha Jadeja the

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Constitution Bench observed as under:

"We also feel that though Section 50 gives an option to the empowered officer to take such person (suspect) either before the nearest gazetted officer or the Magistrate but in order to impart authenticity, transparency and credit worthiness to the entire proceedings, in the first instance, an endeavour should be to produce the suspect before the nearest Magistrate, who enjoys more confidence of the common man compared to any other officer. It would not only add legitimacy to the search proceedings, it may verify strengthen the prosecution as well."

23. The Supreme Court in Myla Venkateswarlu v. State of Andhra Pradesh (supra) followed the decision in Vijaysinh Chandubha Jadeja and held that the searching officer asking the suspects "whether they wanted any other gazetted officer for their search and seizure in addition to him" was not sufficient compliance of Section 50 NDPS Act since there was "no clear communication to the accused that they had a right to be searched in the presence of a gazetted officer or a Magistrate." Likewise in Suresh v. State of Madhya Pradesh it was held that the question by the police officer to suspect "whether they would offer their personal search to me or to Gazetted officer" did not satisfy the requirement of Section 50 NDPS Act.

24. Section 50(1) of NDPS Act confers on the suspect the right to be taken before the nearest GO or the Magistrate for his search. Under Section 50(5) NDPS Act an exception is made in urgent cases where the officer duly authorized has reason to believe that "it is not possible to take the person to be searched to the nearest Gazetted Officer or Magistrate without the possibility of the person to be searched parting with the possession of any narcotic or psychotropic drug." There is merit in the contention of learned counsel for the Appellant that a proper compliance with the mandatory requirement of Section 50(1) NDPS Act would be to ask the suspect if "he wishes to be taken before the GO or before the Magistrate to be searched in their presence." In the case on hand, the Appellant was stopped while he was riding his motorcycle near Nagia Park, in the heart of Delhi, at around 4.30 pm. While he was served with the written notice stating that he had a legal right to be searched in the presence of a GO or a Magistrate, he was not specifically asked whether he wished to be taken to the nearest GO or the Magistrate to be searched in their presence. To recall the observations of the Supreme Court in the last paragraph of the decision in Vijasinh Chandubha Jadeja, although there is an option given to the officer to take such person (suspect) either before the nearest GO or the Magistrate, but "in order to impart authenticity, transparency and credit-worthiness to the entire proceedings, in the first instance, an endeavour should be to produce the suspect before the nearest Magistrate, who enjoys more confidence of the common man compared to any other officer." In the present case, the Appellant could without much difficulty have been taken before the nearest Magistrate. It is possible that if the Appellant had been told that this option was available, he may have exercised that choice.

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25. The law laid down by the Supreme Court in aforesaid decisions are unambiguous about what is mandatorily to be conveyed to the suspect in terms of the requirement of Section 50(1) NDPS Act. However, the extracted portion of the decision of the Supreme in Vijaysinh Chandubha Jadeja v. State of Gujarat, which requires "an endeavour" to be made to "produce the suspect before the nearest Magistrate" is in the nature of an obiter dictum. It is therefore not possible to hold that the failure to inform the Appellant in the present case of his right to be taken before the Magistrate is an illegality which would affect the question of the guilt of the Appellant.

Failure to associate independent witnesses

26. The next question to be considered is whether the failure to associate public witnesses in the present case has been satisfactorily explained by the prosecution and whether the failure to do so has vitiated the case of the prosecution.

27. PW-4 in his evidence stated that he asked 4-5 passersby to join the raiding but none of them agreed to join. According to him, even at the spot, when he requested the members of the public they refused. The site plan (Ex.PW-6/A) , which is rudimentary, shows that there was a divider on the road towards the 2 No. Chowki from the roundabout at Nagia Park, Shakti Nagar and that the barricade was placed on the road towards the chowki. PW-3 in his cross-examination stated that "there was huge traffic and number of persons and vehicles were crossing the barricades and there were number of motorcycles passing through the barricades at the relevant time and it was the evening time." Despite this, even according to PW-3, the names of the persons who refused to join the proceedings were not noted down. This apart, the area was a residential colony and yet no attempt was made to require anyone from the nearby area to join the proceedings. In order that the Court can be assured that a sincere effort was made, the raiding officer ought to note down the name and address of those who were asked but declined to join the proceedings.

28. Mr. Katyal is right in his submission that there a number of decisions of the Supreme Court and this Court which have held that mere non-association of the public witnesses will not vitiate the case of the prosecution. In State, Govt. of NCT of Delhi Vs. Sunil and Another, the Supreme Court held that the evidence of recoveries was not tainted only because independent witnesses were not associated. In Ajmer Singh Vs. State of Haryana, it was held that "it is not always possible to find independent witnesses at all the places at all the times." In Ram Swaroop Vs. State (Govt. NCT) of Delhi, , the Supreme Court held that there was no reason to hold that non-examination of the independent witness affects the prosecution case, when the police witnesses are "absolutely" trustworthy. The decisions of this Court in Naushad Alam v. State 2014 SCC Online Del 1352, Ashraf Khan v. State of Delhi 2014 SCC Online Del 1081 and Jai Yodhad Vs. State , Sunday Emegha Vs. State, , and Rattan @ Ratan Singh Vs. State (Govt. of Nct of Delhi), have followed the above decisions of the Supreme

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Court.

29. In NDPS cases investigated by the police, it is noticed that there is an increasing trend to routinely claim that they asked certain passersby to join the proceedings but they declined and went away without disclosing their names. Unless it is shown to the Court that some sincere effort was in fact made by the raiding party of the police to associate public witnesses, the Court should be slow to readily accept such an explanation. There can be no hard and fast rule as regards the evidence in this regard and it will naturally vary from case to case. In the present case the Court the explanation given by the police is that they asked four or five passersby to join the investigation but all of them refused. The names and addresses of such passersby were not noted. Also, no attempt is shown to have been made to ask any of the residents in the locality to join the proceedings. However, in light of the overwhelming number of decisions of the Supreme Court on the issue, the failure to associate independent witnesses in the apprehension and search of the Appellant and the subsequent seizure of the contraband cannot be viewed as having vitiated the case of the prosecution.

Failure to deposit seals in the malkhana

30. Mr. Kushwaha, the learned counsel for the Appellant, pointed out that the seals used in the preparation of the samples were not deposited in the malkhana. They are stated to have been handed over by PW 4 to PW-5. It was submitted that inasmuch as PW-5 is another police officer, there was no guarantee that the said seals could not be used again and again. In reply, it is pointed out by Mr. Katyal, that there was no requirement in law that the seals should be deposited in the malkhana after their use. He submitted that it was only a practice, on certain occasions, to hand over the seals to some independent witness. However, it was not a mandatory requirement under the Punjab Police Rules, 1934 which apply to Delhi. Mr. Katyal also referred to the decision of the Full Bench of the Punjab and Haryana (P&H) High Court in Piara Singh Vs. State of Punjab, wherein it was observed that "there is high authority for the proposition that the success or failure of criminal prosecution should not turn wholly on the technicality of the handing over or non-handing over of the investigative seal or the production or the non-production only of a witness with regard thereto."

31. In Piara Singh v. State of Punjab the Full Bench of the P&H High Court held that the whole argument was premised on the suspicion and assumption that "responsible police officers would tamper with the seals and forge and fabricate evidence with regard to the case property." Further, there was no guarantee that the non-official to whom such a seal is entrusted would be "one of unimpeachable integrity far above a responsible police official amenable to administrative discipline." Thirdly, it was held that there is no guarantee that the seal so entrusted to a third person cannot be duplicated. Lastly, it was held that the police officers were to be entrusted with a plethora of official seals there was no guarantee or possibility that all of them would be beyond duplication and substantially and materially different from each other.

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32. While there may be no statutory rule requiring the seals used to be handed over to an independent witness, such a practice would lend assurance to the Court that the investigating agency ensured that the samples were not capable of being tampered. One way to deal with this situation would be to require the seals after use to be deposited in the malkhana and to be removed therefrom every time a team proceeds on a raid. The seals are stated to be part of the kit issued to every IO. There would obviously be entries made in some register when such kits are issued. The production of such records would lend assurance to the Court that issue and use of seals is regulated and recorded, thereby minimising the chances for tampering of the samples. In light of the evidence in the present case which shows that the samples were received in the FSL with the seals intact, and in light of the decision in Piara Singh this Court is not persuaded to hold that the prosecution case is vitiated.

Delay in sending samples

33. The next question is about the delay in sending the samples to the FSL. In Daya Nand Vs. State of Haryana, there was a delay of one month seven days in the sample being sent to the laboratory for chemical analysis. There was no link evidence to show that the samples were kept in safe custody. It was held that the possibility of tampering with the sample cannot be ruled out. In the present case the seizure took place on 29th January 2011. The samples were not sent to the FSL till 1st March 2011. The FSL report (Ex.PW-8/A) states that the said parcel was duly received in the office of FSL on 3rd March 2011. There was, therefore, a delay of 34 days in sending the samples.

34. Mr. Katyal has referred to the evidence of PWs-3, 4, 11 and 12 to show that there was no tampering with the sample. This by itself does not offer a satisfactory explanation for the delay in sending the samples to the FSL. However, there was no question put to the said PWs in their cross-examination on this aspect. The Appellant has also not been able to show the prejudice caused as a result of the delay. The report of the FSL is clear that when the samples were received, the seals were intact. Consequently, this Court is unable to conclude that the delay in sending the samples was fatal to the case of the prosecution.

Ownership of motorcycle

35. Lastly, it was submitted that no attempt was made to investigate the ownership of the motorcycle stated to have been used by the Appellant. PW-8, who investigated this aspect, first met the son of the original owner but did not record his statement. PW-8 stated that the son produced the photocopies of the death certificate of his father and certain other documents. PW-8 had not verified the death certificate from the office of Municipal Corporation. He also did not verify the receipt of shamshan ghat. The son disclosed that his father during his life time sold his motorcycle to someone about whom he was not aware. No further enquiry appears to have been undertaken by PW-8 to ascertain how the

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motorcycle ended up with the Appellant. However, as suggested by Mr. Katyal, it is possible that no formal documentation was executed while transferring the motorcycle.

36. Learned counsel for the Appellant relied upon the decision of the Division Bench of the Himachal Pradesh High Court in Bruce Claridge Vs. State of H.P., . In that case the contraband was found from a bag which was kept on the rear seat of the car which was driven by a foreigner lady while another person, i.e., the accused was found sitting on the rear seat of the car. The lady was not made as accused. No attempt was made to establish who the owner of the car was. It was held that the prosecution did not prove that the accused was in conscious possession of bag. The facts of the above case are different from the facts on hand. Here the recovery of the contraband was effected from the Appellant himself.

Intermediate quantity

37. The quantity of contraband recovered from the Appellant was shown to weigh 100 gram together with polythene bag. Therefore, the weight of the contraband was itself less than 100 gm of cocaine. This renders the weight of the heroin seized less than the commercial quantity for cocaine in terms of the NDPS Act. As per the table, small quantity of cocaine is 2 gm and commercial quantity is 100gm and above. The quantity of cocaine recovered, i.e. less than 100gm, makes it an intermediate quantity in terms of Section 21(b) punishable with imprisonment which may extend to ten years and fine which may extend to Rs. 1 lakh.

38. As already noticed, the Appellant has already undergone three years seven months of imprisonment. As far as his conviction under Section 14 of the FA is concerned, it has been proved that his visa had expired in 2010 itself. Therefore, his conviction under Section 14 of FA is confirmed. He has already served out the substantive sentence and the default sentence for that offence.

39. The conviction of the Appellant is modified to one under Section 21(b) of NDPS Act since he was carrying intermediate quantity of contraband and the substantive sentence is modified to four years of RI imprisonment and fine of Rs. 10,000 and in default, to undergo SI imprisonment for one month.

40. The appeal is disposed of in the above terms. The steps for deportation of the Appellant through the Foreigner Regional Registration Office will be initiated forthwith.

41. A certified copy of this judgment along with the trial Court record be delivered forthwith. A certified copy of this judgment also be delivered forthwith to the Superintendent, Tihar Jail for communicating it to the Appellant.

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