

**(2015) 10 DEL CK 0019**

**In the Delhi High Court**

**Case No :** Criminal Appeal 153/2012 & Crl. M.B. No. 1251 of 2014

Samuel John

APPELLANT

Vs

State of the NCT of Delhi

RESPONDENT

**Date of Decision :** 01-10-2015

**Acts Referred:**

Criminal Procedure Code, 1973 (CrPC) — Section 313  
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 42, 42(1),  
42(2), 50, 67

**Citation :** (2015) 10 AD 549 : (2015) 4 JCC 215

**Hon'ble Judges :** Indermeet Kaur, J

**Bench :** Single Bench

**Advocate :** Sitab Ali Chaudary, for the Appellant; Amish Aggarwala and Satish Aggarwala, Advocates for the Respondent

**Final Decision :** Dismissed

## Judgement

Indermeet Kaur, J—This appeal is directed against the impugned judgment and order on sentence dated 03.10.2011 and 10.10.2011 respectively wherein the appellant had been convicted under Sections 21(C) of the NDPS Act and has been sentenced to undergo RI for a period of 10 years and to pay a fine of Rs. 1 lac, in default of payment of fine to undergo RI for 3 months.

2. Nominal roll of the appellant reflects that as on date he has undergone incarceration of about 7 years and 8 months.

3. The version of the prosecution is that pursuant to a secret information received on 04.1.2008 a raiding team was constituted; the secret information was to the effect that a person of Indian origin would be reaching Delhi by a grey coloured Hyundai Santro Car bearing registration No. CH-01-Z-7919 and he would deliver some narcotic substance to an African National; this would be between 8.30 p.m. and 9.00 p.m. near Gurudwara situated at Guru Nanak Nagar, Outer Ring Road, Delhi. The secret information was reduced into writing. The raiding team comprised of R.Roy (PW-7) along with two public witnesses Sarvesh

Kumar and Manik Chopra (not examined) and the driver of the Government vehicle; all of whom reached the spot. A secret vigil was kept at the spot and at about 8.40 p.m. an African National (the appellant) was spotted opposite the above said Gurudwara and after a few minutes a grey coloured Santro Car bearing registration No. CH-01-Z-7919 reached the spot. As soon as the car reached the spot the African National opened the front door of the car and sat on the front seat next to the driver. They had a conversation. The driver thereafter picked up a bag from the rear seat of the car and handed over the same to the African National. It was at that point of time that the raiding party apprehended the appellant. There was a scuffle but the occupants were overpowered. Pursuant to the search authorization which PW-7 had with him (Ex.6/A) the vehicle was searched. The African National and the driver were then taken to the DRI office at Indraprastha Extension along with the car. A notice under Section 50 of the NDPS Act (Ex.PW-7/A) was served upon the appellant and his co-accused informing them of their right to get their search conducted either before a Gazetted Officer or a Magistrate but they declined the option. From the blue bag which had been handed over by Baldev Singh to the appellant (which was in possession of the appellant) were 11 cloth packets containing the contraband were recovered, which on checking tested positive for heroin. The packets were marked separately. The total weighment of the 11 packets revealed that the contraband weighed to be 11.264 kg and the net weight was 11.044 kg. Two representative samples of 5 grams each were drawn from each packet and separately numbered. The case property and the samples were sealed with the seal of "Directorate of Revenue Intelligence-10" and pasted with paper slips bearing the signatures of PW-7, Baldev Singh, appellant and Panch- witness. The case property was seized vide memo Ex.PW-1/A. The statement (Ex.PW-7/E) of the appellant under Section 67 of the NDPS Act was also recorded. He admitted that the contraband recovered from him was heroin. The drawn samples were deposited vide memo Ex.PW- 1/B in the valuable godown by PW-1 (B.D. Sharma) and were sent to the CRCL through Deputy Director K.K. Sood (PW-5) along with the test memos. The CRCL through its Laboratory Assistance Jaiveer Singh (PW-4) had issued the appropriate acknowledgement. PW-10 (Bhuwan Ram) had tested the samples positive for heroin. The purity of the contraband was opined to be between 55.9% to 70.6 %.

4. In the statement of the accused recorded under Section 313 Cr.P.C. his version was that he has been falsely implicated.

5. On behalf of the appellant three witnesses were examined in defense. DW-1 was the co-accused of the appellant; he had also been apprehended along with the appellant. His version was that the appellant is innocent.

6. The defense was rejected.

7. On the basis of the aforementioned evidence collected by the prosecution oral and documentary the appellant was convicted and sentenced as aforementioned.

8. On behalf of the appellant, the first argument propounded by the learned counsel for the appellant is that the secret information (Ex.PW- 2/A) did not mention the name of the African National. Mandate of Section 42 of the NDPS Act was not complied with.

9. This Court is not in agreement with this submission. Section 42(1) and 42(2) of the NDPS Act provides that where a secret information has been received, the department must reduce it into writing and within a time frame of 72 hours must send it to the superior officer. This was accordingly done. A perusal of Ex.PW-2/A shows that the narcotic drug was to be delivered to the African National at a specified time and place. This was proved through PW-2 (Inderjit Singh Sahani). This secret information was proved to be correct when the member of the raiding party PW-7 reached the spot and apprehended this African National who had stopped the grey colour Santro Hyundai Car which was being driven by co-accused Baldev Singh. All this find mention in Ex.PW-2/A. Thus the argument of the learned counsel for the appellant that Ex.PW-2/A did not contain the details of the African National is an argument wholly without any merit and is not worthy of credit.

10. Second submission of the learned counsel for the appellant is that the notice under Section 50 of the NDPS Act (Ex.7/A) is in a typed format; there is a mention of the nature of the contraband i.e heroin. It is impossible to understand that as till the time when the notice was served upon the appellant the raiding party did not know what would be found from the search of the bag; how they knew that from the possession of the appellant heroin would be found is a question unanswered. Further in Ex.PW-7/A the address of the appellant; his name and parentage have also been typed. To support his submission that in a similar factual situation benefit of doubt had been given to the appellant, reliance has been placed upon CrI. A. 9/2014 Ambrose Vs. Directorate of Revenue Intelligence. It is submitted that in that case also where the notice under Section 50 of the NDPS Act was found to be in a typed format with the address of the appellant also having been found mentioned therein, a coordinate Bench of this Court had held that such a notice is not a true compliance of the mandate of Section 50 of the NDPS Act. It was impossible for the DRI to have known in advance (before the search of the bag) that the accused would be in possession of heroin and benefit of doubt had accrued in favour of the appellant.

11. To answer this argument, learned counsel for the State submits that it was from the search of the vehicle and not from the search of the person that this contraband was recovered. This bag was recovered from the rear seat of the Santro Car (as is evident from the testimony of PW-7) and as such service of notice under Section 50 of the NDPS was not required.

12. This submission of the learned counsel for the appellant is correct. The version of the prosecution which has been fortified by the version of PW-7 is that the contraband was lifted by Baldev Singh from the rear seat of the car and handed over to the appellant. Thus the recovery was not from the person of the

appellant but from the bag which was found in back seat of the vehicle. In this context the observations of the Apex Court reported in *Ajmer Singh Vs. State of Haryana*, (2010) CriLJ 1899 : (2010) 2 JT 185 : (2010) 2 SCALE 362 : (2010) 3 SCC 746 : (2010) 2 SCR 785 are relevant. They read as under:

"14. In *State of Himachal Pradesh Vs. Pawan Kumar*, AIR 2005 SC 2265 : (2005) CriLJ 2208 : (2005) 99 ECC 737 : (2005) 4 JT 373 : (2005) 4 SCC 350 : (2005) 1 SCR 417 : (2005) AIRSCW 2154 : (2005) 3 Supreme 321 this Court has stated:

A bag, briefcase or any such article or container, etc. can, under no circumstances, be treated as body of a human being. They are given a separate name and are identifiable as such. They cannot even remotely be treated to be part of the body or a human being. Depending upon the physical capacity of a person, he may carry any number of items like a bag, a briefcase, a suitcase, a tin box, a thaila, a jhola, a gathri, a holdall, a carton etc. of varying size, dimension or weight. However, while carrying or moving along with them, some extra effort or energy would be required. They would have to be carried either by the hand or hung on the shoulder or back or placed on the head. In common parlance it would be said that a person is carrying a particular article, specifying the manner in which it was carried like hand, shoulder, back or head, etc. Therefore, it is not possible to include these articles within the ambit of the word "person" occurring in Section 50 of the Act."

13. Thus this argument of the learned counsel for the appellant is also without any merit.

14. The third argument propounded by the learned counsel for the appellant is that after public witnesses had joined the raiding party (as is evident from the version of PW-7 who had stated that Sarvesh Kumar and Manik Chopra had joined the panchnama proceedings) there is no explanation as to why they were not examined. This also throws doubt on the veracity of the version of the prosecution.

15. In this context this Court notes that summons were issued repeatedly to the two public witnesses at their addresses which were on record but the same was not served as the said witnesses were reported to be not residing at those addresses. It is a matter of common knowledge that public witnesses are unwilling to join investigation proceedings / raid proceedings. The Trial Court had made all efforts to summon the said public witnesses but had not managed to do so for the reason they were not living at their last known addresses; in these circumstances no adverse inference can be drawn against the prosecution for the non-examination of the said witnesses.

16. In this context the observation of the Apex Court in *Gian Chand and Others Vs. State of Haryana*, AIR 2013 SC 3395 : (2013) CriLJ 4058 : (2013) 4 JCC 137 : (2013) 10 JT 515 : (2013) 3 RCR(Criminal) 916 : (2013) 9 SCALE 544 : (2013) 14 SCC 420 qua non-joining of public witnesses is relevant and the said extract reads herein as under:

"27. In Appabhai and Another Vs. State of Gujarat, AIR 1988 SC 696 : (1988) CriLJ 848 : (1988) 1 Crimes 606 : (1988) 1 JT 249 : (1988) 1 SCALE 228 : (1988) 2 UJ 27 , this Court dealt with the issue of non-examining the independent witnesses and held as under:

The prosecution case cannot be thrown out or doubted on that ground alone. Experience reminds us that civilized people are generally insensitive when a crime is committed even in their presence. They withdraw both from the victim and the vigilante. They keep themselves away from the Court unless it is inevitable. They think that crime like civil dispute is between two individuals or parties and they should not involve themselves. This kind of apathy of the general public is indeed unfortunate, but it is there everywhere whether -in village life, towns or cities. One cannot ignore this handicap with which the investigating agency has to discharge its duties.

28. The principle of law laid down hereinabove is fully applicable to the facts of the present case. Therefore, mere non-joining of an independent witness where the evidence of the prosecution witnesses may be found to be cogent, convincing, creditworthy and reliable, cannot cast doubt on the version forwarded by the prosecution if there seems to be no reason on record to falsely implicate the Appellants."

17. The statement of the appellant recorded under Section 67 of the NPDS Act (Ex.PW-7/E) was used as a corroborative piece of evidence; it was retracted; but it was much later i.e. 6-7 days after the statement was given and it was rightly held to be under legal advice as it was retracted on the date when the first remand of the appellant was taken and he had already engaged a lawyer by that time.

18. The defense of the appellant in his statement under Section 313 Cr.P.C that he was forced to sign these papers and statement was also recorded under threat and coercion was also rightly rejected as this bald plea was unsupported by any evidence.

19. DW-1 was the co-accused. He had pleaded guilty and wanted to give a clean chit to the appellant. He had deposed that the appellant was innocent but the fact that the appellant was present at the spot i.e. on 04.1.2008 at that time when the Santro Car of DW-1 was apprehended however stands admitted. His narration that a Nigerian (appellant) had only stopped him to take directions is belied not only from the secret information (E.PW-2/A) received by the department much in advance to the actual raid (which had made a clear reference to an African national) but also from the fact that PW-7 had deposed that he had seen the Nigerian sitting in the vehicle and (this was an eye-witness account of PW-7) that from the rear seat Baldev Singh (DW-1) had handed over a bag containing the contraband to the appellant.

20. In this background, the defense of the appellant was rightly rejected.

21. The impugned judgment on no count calls for any interference.

22. The percentage of the contraband which was detected by the CRCL was a commercial quantity. The appellant is guilty of the offence under Section 21(C) of the NDPS Act i.e. for the recovery of a commercial quantity of heroin. The minimum sentence of 10 years and the minimum fine of Rs. 1 lac which is the sentence which had been awarded to him calls for no interference. Appeal is without any merit. Dismissed.