

**Yashoda vs.state**

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**Court :** Delhi

**Decided On :** Nov-30-2016

**Appellant :** Yashoda

**Respondent :** State

**Judgement :**

§~ \* IN THE HIGH COURT OF DELHI AT NEW DELHI + CRL.A. No.329/2000

Date of Decision :

30. h November, 2016 YASHODA Through Mr.M.L. Yadav, Adv. .... PETITIONER versus STATE ..... RESPONDENT Through Mr.Mukesh Kumar, APP with ASI Dinesh, PS Narcotic Cell, Crime Branch. CORAM: HON'BLE MR. JUSTICE P.S.TEJI P.S.TEJI, J1 Aggrieved by the judgment of conviction dated 26th April, 2000 convicting the appellant finding her guilty under Sections 21/ of the Narcotic Drugs & Psychotropic Substances Act, 1985 (hereinafter referred to as NDPS Act, 1985) and order on sentence dated 26th April, 2000 vide which the sentence was passed to suffer rigorous imprisonment for a period of ten years and to pay a fine of Rs.1,00,000/- for the offence punishable under Section 21 of the NDPS Act, in default of payment of fine, convict was to suffer further simple imprisonment for two years.

2. The facts in brief are that a secret information was received on the basis of which the police of Narcotic Branch, on 20th Crl.A. No.329/2000 Page 1 of 17 October, 1998 at about 9.30 a.m., apprehended the appellant Yashoda sitting

outside her house on a cot. Notice under Section 50 of the NDPS Act, 1985 was issued and on a search, 60 gram of smack was alleged to have been recovered from her possession. Out of 60 gram smack recovered, ten gram was separated as sample smack and rest fifty gram was kept in six polythenes in which the same were recovered, and they were converted into two separate parcels which were sealed with the seal of SS and CFSL form. A seizure memo was prepared in this regard; FIR No.16/1998 was registered by Police Station Narcotics, Kamla Market, Delhi and the appellant was arrested. It emerges from the record that charge under Section 21 of the NDPS Act was framed against the accused to which she pleaded not guilty and claimed trial.

3. The prosecution had examined as many as nine public witnesses namely PW1HC Bhagwat Dayal; PW2Nar Singh; PW3Lady Constable Nirmala; PW4Sukhbir Singh; PW5HC Bharat Singh; PW6SI Satbir Singh; PW7Dr.R.M. Tripathi; PW8Inspt.Mahesh Sharma & PW9Cont.Sumer Singh. The statement of the accused Yashoda was recorded under Section 313 of the Cr.P.C.

4. The appellant was held guilty by the learned Special Judge, CrI.A. No.329/2000 Page 2 of 17 Delhi and by an order dated 26th April, 2000, sentenced to undergo rigorous imprisonment for ten years and fine of rupees one lakh for the offence punishable under Section 21 of the NDPS Act, 1985.

5. The challenge to the judgment of conviction and order on sentence inter alia on the following grounds:-

"(i) The impugned order is challenged on the ground that the same is contrary to law inasmuch as the mandatory provisions have not been complied with. (ii) It is alleged that the notice under Section 50 of the NDPS Act was not duly proved to have been given to the appellant and that the same was drafted during the course of investigation after registering the FIR. (iii) It is alleged that the appellant being an illiterate lady, it was imperative for the investigating officer to have explained the contents of the alleged notice under Section 50 of NDPS Act. Therefore, the learned ASJ erred in law in concluding that the notice was duly proved to have been given to the appellant. (iv) It is further alleged that the impugned judgment is bad in law inasmuch as learned ASJ relied upon an inadmissible point to the effect

that the appellant was selling smack, however, it is a matter of record that there was not a single evidence to prove that she was selling any contraband. Crl.A. No.329/2000 Page 3 of 17 (v) The impugned judgment is also challenged on the ground that the report of the Central Forensic Science Laboratory is based on qualitative sampling and not on quantitative method, and, therefore, mere saying that Diacetylmorphine (Heroin) has been detected in the Exhibit-1, would not suggest that a case under Section 21 of the NDPS Act was made out inasmuch as possession of small quantity makes out a case for lesser offence. (vi) A challenge to the judgment passed by learned Additional Sessions Judge, is also laid on the ground that reliance was wrongly placed upon the alleged recoveries made by the police as no public witness of the locality/neighbours were asked to join the raiding party. It is further alleged that the punishment is too harsh for a lady who has four minor children to support.

6. Apart from challenging the judgment of conviction, learned counsel for the appellants further submitted that in the nominal roll filed by the Deputy Superintendent, Central Jail, Tihar, on 31st January, 2013, it was mentioned that as on 4th April, 2002, the appellant had undergone sentence of three years, four months and four days. It further reflects that four weeks interim bail was granted to the appellant by the order dated 16th March, 2001 passed by this Court and that the appellant surrendered in time.

7. Per contra, arguments advanced by learned Additional Crl.A. No.329/2000 Page 4 of 17 Public Prosecutor for the State is that the appellant was rightly held guilty under Sections 21/ of the Narcotic Drugs and Psychotropic Substances Act, 1985. It is submitted that on a secret information received by the police, the search was effected through a lady constable after serving the notice under Section 50 of the NDPS Act giving her option to give search either before a Gazetted Officer or a Magistrate which the appellant declined and that 60 gram of smack was recovered from her possession.

8. Upon hearing the rival contentions of the parties at length, evidence led is being examined. (I) PW1HC Bhagwat Dayal in his testimony deposed that while working

as MHC(M) at Narcotics Branch, he received two sealed parcels mark A & B, both sealed with the seal of MCS & SS and a form of CFSL on which seals of MCS & SS were affixed. The said witness sent the sample for chemical analysis. (II) PW2Nar Singh happened to be SO to ACP, where the report under Section 57 of the Act was received. (III) PW3Lady Constable Nirmala was a member of the raiding party. This witness in her statement deposed that she conducted the search and recovered six packets of polythene containing smack from the possession of the accused. She had also deposed in her testimony that ASI Satbir Singh had asked five passers by to CrI.A. No.329/2000 Page 5 of 17 join the raiding party but they all refused and went away without giving their name and address. It was further recorded in her testimony that thereafter SI Prem Chan briefed the raiding party and at about 9.30 a.m, the accused/appellant was apprehended apprising her secret information and a notice under section 50 of the NDPS Act was given to her. She also deposed that it was explained to the accused that she would be required to be searched and if she wanted, she could be searched before a Gazetted Officer or a Magistrate, to which the accused declined the offer of the IO. It is also in the testimony of PW3that the said notice was signed by her at point A and the thumb impression of the accused was obtained at point B of the notice. This witness further deposed that, thereafter, the investigating officer told the accused that she was required to be searched by Lady Ct. Nirmala and if she wanted, she could be searched before a Gazetted Officer or a Magistrate but the accused declined this offer. This witness further deposed that on search of the accused, a thelli of brown colour was recovered from her possession which contained six packets of polythene and when opened, found containing smack of brown colour powder. This witness further deposed that the contents of all the six polythenes were taken out and were weighed which were found to be 60 gram and out of this, ten gram smack CrI.A. No.329/2000 Page 6 of 17 was taken out as sample which was further kept in a polythene and converted into a cloth parcel and was given mark A while the remaining smack and the empty polythene packets were sealed in a separate cloth parcel which was marked B and sealed with the seal of SS. Form CFSL was also filled and a seal of SS was affixed on it. (IV) PW4Sukhbir Singh in his statement stated that on 30th October, 1998, while he was posted as duty officer at PS Narcotic Branch, he

recorded the FIR on the basis of rukka and DD entries. (V) PW5HC Bharat Singh deposed that he accompanied the raiding team and when they reached the spot, ASI Satbir Singh requested five public persons to join the raiding party who were passersby on the road but nobody joined them. This witness further deposed that SI Prem Chand briefed the members of the raiding party and posted them at different places. This witness further deposed that thereafter at about 11 a.m., he was called by ASI Satbir Singh from the place where he was posted and one rukka, two sealed parcels, CFSL form and a copy of the seizure memo were handed over to him. This witness thereafter sealed parcels and CFSL form with seizure memo and carried it from the spot to the SHO for safe custody. (VI) PW6SI Satbir Singh in his statement deposed that while CrI.A. No.329/2000 Page 7 of 17 posted at PS Narcotic Branch on 30th October, 1998, he received information that one lady Yashoda, resident of G-100, Punjabi Colony, Narela, was a drug peddler and was selling smack in front of her house. On receiving this information, this witness informed the SHO and constituted the raiding party, conducted the raid and got recovery of 60 grams smack which was effected through lady Ct.Nirmala. Thereafter, investigation in this regard was conducted by him. (VII) PW7Dr. R.M. Tripathi in his statement stated that the parcel containing sample was marked to him for the purpose of chemical analysis. He deposed in his statement that there was one matchbox containing brown coloured powder and on chemical examination/analysis, it was found to contain Diacetylmorphine. Detailed report in this regard was submitted by this witness which was Exh.PW6G bearing his signature at point A. (VIII) PW8Insp.Mahesh Sharma, Special Cell, Lodhi Road, in his statement deposed that on 30th October, 1998, while he was posted as SHO, Narcotic Branch, Kamla Market, at about 12.15 p.m., HC Bharat Singh handed over to him two pullandas marked A & B from CFSL which were having seals of SS and a copy of seizure memo. He further deposed that he affixed the seal of MCS on both parcels and CFSL form; kept them in his safe custody and then CrI.A. No.329/2000 Page 8 of 17 handed over the same to HC Bhagat Dayal, MHCM for safe custody. He also deposed that so long as the same remained in his custody, nobody tampered with it. He further deposed that thereafter the accused was produced before him and he verified the facts from the accused and his statement was recorded by the investigating officer. (IX) PW9Cont.Sumer

Singh in his statement stated that he was posted as Constable at PS Narcotic Branch and on that day, he had received one pullanda, CFSL form having seal of SS and MCS from HC Bhagat Dayal, vide RC No.

for depositing the same to the CFSL, Chandigarh and that he had taken the same to Chandigarh and deposited the same in CFSL office on the same day. This witness also in his statement deposed that so long as the same remained with him, nobody had tampered with them.

9. As per the testimony of PW6 Satbir Singh, on the date of incident, on receipt of information that the appellant who was a drug peddler, was selling smack in front of her house, he organised a raiding party after making entry vide DD No. PW4A. A raid was conducted and the accused was apprehended in front of her house while sitting on a cot. A notice under Section 50 of the NDPC Act, 1972 Exh. PW3A was served upon her and thereafter on her search, one pouch was recovered which was found CrI.A. No.329/2000 Page 9 of 17 containing six small pouches having smack. On weighing, it was found to be 60 grams. After preparing a separate sample packet, remaining smack was seized vide memo PW3B. Rukka Exh. PW6B was prepared and case was got registered. PW6SI Satbir Singh prepared site plan PW6C. Search of the appellant was taken vide PW6D. She was arrested vide memo Exh. PW3C and a report under Section 57 of the NDPS Act Exh. PW6F was prepared by him. He identified the pouch recovered from the appellant Exh. P1 six small pouch Exh. P21 to 6 and recovered smack which was exhibited as Exh. P3 10. The testimony of PW6 has duly been corroborated by other raiding party members i.e. SI Prem Chand; PW5HC Bharat Singh; Const. Krishan Kumar; PW9Cont. Sumser Singh; Cont. Harpal, Cont. Roshan Lal; and PW3Lady Cont. Nirmala. All these witnesses in a same breath have stated that raid was conducted in which the appellant was apprehended with the contraband i.e. smack. They have also stated in the same line that the proceedings were conducted by the investigating officer and the in-charge of raiding team at the spot and that recovery of smack, its seizure, search of appellant, notice under Section 50 of NDPS Act were served upon the appellant and the other proceedings were effected.

11. All the above witnesses were cross-examined at length but CrI.A. No.329/2000 Page 10 of 17 the defence had failed to put any dent to their testimony. They

remained unshaken with regard to conducting of raid and apprehension of the appellant with the contraband. They have also stated in a single voice that smack weighing 60 grams was recovered from the appellant; serving of notice under Section 50 of the NDPS Act upon her and with regard to the proceedings conducted at the spot.

12. Contention of the learned counsel for the appellant that there was no proper service of notice under Section 50 of the NDPS Act upon the appellant, is without any basis inasmuch as notice under Section 50 of the NDPS Act Exh.PW3A shows that after apprehension of the appellant, she was offered to get herself searched in the presence of a gazetted officer of a magistrate before conducting her search. Endorsement Exh.PW6A on the said notice Exh.PW3A shows that the appellant herself chose not to be searched before any gazetted officer or a magistrate. She also chose to be searched through any female. Thumb impression of the appellant is appearing at Point `B on endorsement Exh.PW6A. This clearly proves that the contents of notice under Section 50 of the NDPS Act were duly explained to the appellant before conducting her search and thus there is mandatory compliance of Section 50 of the NDPS Act by the police before conducting search CrI.A. No.329/2000 Page 11 of 17 of the appellant.

13. The testimony of the raiding party members has also been duly corroborated by CFSL report Exh.PW6G which shows that when the sealed sample was opened and examined, the same was identified as diacetylmorphine (heroin). The report ExhPW6G duly proves the case of the prosecution that the recovered substance from the appellant was a contraband i.e. smack.

14. The discussion made above shows that the testimony made by the police officials including the raiding party members is trustworthy and their testimony coupled with CFSL report Exh.PW6G brings the case of prosecution within the four corners of the alleged commission of offence which culminated into the conviction of the appellant. This court is of the considered opinion that the prosecution has successfully proven the guilt of the appellant.

15. As a result, no error or illegality is found in the view taken by the Trial Court and the judgment of conviction dated 26th April, 2000 and the same is upheld.

16. A prayer is made by learned counsel for the appellant to the effect that a lenient view may be taken in terms of sentence awarded to the appellant keeping in view the fact that the appellant is facing trial since 1999 and that almost seventeen years have been CrI.A. No.329/2000 Page 12 of 17 elapsed. Learned counsel for the appellant has further submitted that the appellant was awarded punishment under the Narcotic Drugs & Psychotropic Substances Act, 1985 which was amended in the year 2001 and in view of the amended Act, the punishments for the offences under the Act, have been reduced. Likewise, the sentence in the present case may also be reduced.

17. In the judgment passed by the High Court of Rajasthan, it was held as under:-

"When a legislation is brought into existence, it is for the benefit of the people and the Court should give such interpretation which is not only beneficial to the person who takes benefit out of it should also be in consonance with the Statement of Objects and Reasons given in the Amending provisions. The Statement of Objects and Reasons appended to the Bill is as follows: it but Statement of Objects and Reasons:-

"Amendment Act 9 of 2001:-

"The Narcotic Drugs and Psychotropic Substances Act, 1985 provides deterrent punishment for various offences relating to illicit trafficking in narcotic drugs and psychotropic substances. Most of the offences invite uniform punishment of minimum ten years rigorous imprisonment which may extend upto twenty years. While the Act envisages severe punishments for drug traffickers, it envisages reformatory approach towards addicts. In view of the general delay in trial, it has been found that the addicts prefer not to invoke the provisions of the Act. The strict bail provisions under the Act add to their misery. Therefore, it is proposed to rationalise the sentence structure so as to ensure that while drug traffickers who traffic in significant quantities of drugs are punished with CrI.A. No.329/2000 Page 13 of 17 deterrent sentences, the addicts and those who commit less serious offences are sentenced to less severe punishment. This requires rationalisation of the sentence structure, provided under the Act. It is also proposed to restrict the application of strict bail provisions to those offenders who indulge in serious

offences. distinguishing 12. This Statement of Objects & Reasons itself is beneficial for the interest of the accused who are languished in jail for a considerable time on account of being minimum ten years punishment in contraband drugs and are denied right of bail as against those who are indulged in large scale quantity of drugs trafficking. This Amendment provides rationalization in the matter of grant of bail as well as in the matter of awarding sentence by drugs & psychotropic substances in three categories viz; (i) small, (ii) commercial and (iii) in between small & commercial. If the legislation is silent on a particular issue which is apparently in the present case about applicability of the Amending Act' In case where sentence has been passed prior to Amendment and no appeal has been filed after the Amendment, then the Court should give that the interpretation which is in furtherance of intention of the legislature given under its preamble or Statement of Objects & Reasons. the narcotic [Prema alias Prem Singh Vs. State of Rajasthan in S.B. CrI.J.

Appeal No.738/2001 Dt.19.07.2007].

18. This Court on similar facts and circumstances, has held as under:-

"It is a fundamental right of every person that he should not be subjected to greater penalty than what the law prescribes, and no ex post facto legislation is permissible for escalating the severity of any subsequent legislation would downgrade the harshness of the the punishment. But if CrI.A. No.329/2000 Page 14 of 17 sentence for the same offence, it would be a salutary principle for administration of criminal justice to suggest that the said legislative benevolence can be extended to the accused who awaits judicial verdict regarding sentence."

[Sultan Vs. State 2004 (73) DRJ460 19. India is a party to three United Nations Drug Conventions and to give effect to the treaties, NDPS1985 enacted in order to provide adequate penalties for drug trafficking, strengthen enforcement powers, implement international conventions to which India was a party and enforce controls over the contraband. NDPS Amendment Act 1989 came into effect to combat drug trafficking which was influenced by the signing of 1988 Convention by India. After this amendment, people caught with small amounts of drugs faced long prison sentences and hefty fines. The said amendment of 1989 was criticized

for harsh and disproportionate sentencing structure and a momentum for reform was created. By way of amended Act of 2001, scale of sentencing and fine was reduced depending upon the substance and quantity found. It basically provides for determining the amount of drugs involved in an offence while sentencing an accused. It also provides for deterrent punishment for the drug traffickers while a reformatory approach towards addicts has been adopted. Therefore, three different quantity of drugs have been involved i.e. small, Crl.A. No.329/2000 Page 15 of 17 commercial or intermediate while sentencing. The legislature was wise enough to provide different punishments for possessing small or commercial quantity of drugs. The amended Act of 2001 is a beneficial legislation which provides for lesser punishment in case of drug addicts who are found with the lesser quantity of prohibited substance as compared to the drug traffickers who are found having commercial quantity of contraband which attracts harsh punishment and hefty fines.

20. In the present case, the appellant has already undergone about three years and four months incarceration for possession of 60 grams of smack. The peculiar circumstances of the present case are that the appellant was arrested on 20th October, 1998 and as per the sentence awarded to her, she would have completed ten years in the 2008 if she remained confined in jail for the said period. Keeping in view the judgment in the case of Sultan (supra) and the beneficial provisions of the amended NDPS Act of 2001, the sentence awarded to the appellant is reduced to the period already undergone with fine of Rs.50,000/-. In default of payment of fine, the appellant shall undergo simple imprisonment of one year.

21. The appellant is directed to pay the fine within a period of one month else surrender before the trial court concerned. Crl.A. No.329/2000 Page 16 of 17 22. With the above modification in the sentence of imprisonment, the present appeal is disposed of. NOVEMBER30 2016 aa (P.S.TEJI) JUDGE Crl.A. No.329/2000 Page 17 of 17