**Manik Shekh Vs. The State**

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**Court** : Delhi

**Decided On :** Dec-24-2014

**Judge** : Sunita Gupta

**Appellant** : Manik Shekh

**Respondent** : The State

**Judgement** :

* IN THE HIGH COURT OF DELHI AT NEW DELHI Date of Decision:

24. h December, 2014 + CRL.A. 1549/2013 & Crl. MB101032014 MANIK SHEKH Through: ..... Appellant Mr Sunil Tiwari, Advocate versus THE STATE Through: ..... Respondent Ms. Ritu Gauba, Additional Public Prosecutor for the State along with SI Deepak, Police Station Narela CORAM: HON'BLE MS. JUSTICE SUNITA GUPTA

JUDGMENT
: SUNITA GUPTA, J.

1. The challenge in this appeal under Section 374 of Code of Criminal Procedure is to the judgment and order on sentence dated 24.10.2013 passed by learned Special Judge, NDPS, Rohini Courts whereby the appellantManik Shekh was convicted under Section 20 (b)(ii)(b) of NDPS Act and sentenced to undergo rigorous imprisonment for three (3) years and six(6) months and fine of Rs.60,000/-, in default to undergo simple imprisonment for six months. Benefit of

Section 428 Cr.P.C. was given to the appellant.

2. The factual matrix as has been undraped by the prosecution is that on 20.03.2012, SI Manoj Kumar received a secret information that a person would come with ganja in plastic katta and would go from Shani Temple, JJ, Colony, Bawana via dry canal towards F-Block, JJ Colony, Bawana, Delhi between 7 to 9 pm. The informer was produced before SHO and after satisfying himself, he instructed SI to proceed further. A raiding team comprising of SI Manoj Kumar, HC Chaman Prakash, Constable Naresh and Constable Surender was formed which left for the spot in a private vehicle and after reaching the spot they asked 5-6 public persons to join them, but all of them refused. Raiding team members were positioned at the stated spot at 6.55 pm. At about 7:20 pm, informer pointed out towards a person who was wearing a striped red shirt and salete pant and was carrying a white colour plastic katta on his right shoulder. He was apprehended by HC Chaman Prakash and SI Manoj Kumar near the temple and on inquiry he disclosed his identity as Manik Sheikh. SI introduced himself and police party to the accused and told about the secret information. Notice under Section 50 of NDPS Act was given and interpreted. He refused to avail this legal right. Thereafter, he was asked to search HC Chaman Prakash as accused was to be searched by that HC, but accused turned down that offer also. HC Chaman Prakash did not find anything incriminating in the personal search of the accused/appellant. Thereafter, he checked the plastic katta and took out a white polythene emanating a foul smell like ganja. HC Chaman Prakash produced that polythene to SI Manoj Kumar who found it containing ganja. It was weighing 5 kg. Two samples of 200 gms were separated, parcels were prepared and serial nos. 1 &2 were given. Remnant ganja of 4.600 kg was put in the same polythene which was again put in the same plastic katta. FSL form was filled and all these articles were sealed with the seal of MS and seal after use was handed over to HC Chaman Prakash. Rukka was handed over to constable Naresh on the basis of which FIR Ex.PW4/A was recorded by PW4-ASI Ishwar Singh. SI Manoj produced three sealed pullandas having seal of MS with FSL form having same seal along with copy of seizure memo before PW6-Inspector Abhinender Jain who affixed his seal of AJ on all the three pullandas and FSL form. He deposited all the three pullandas duly sealed along with FSL form and copy of seizure memo with MHCM

PW5-HC Rajesh. Further investigation was done by PW9-SI Kamal Singh. Accused was arrested. SI Kamal Singh sent report under Section 57 of NDPS Act with respect to the seizure and arrest of accused through SHO to PW3 ACP Harpal Singh. Both samples were sent to the FSL, which opined that the samples were of ganja. After completing investigation, charge sheet was submitted against the accused.

3. Charge under Section 20(b)(ii)(B)/61/85 of NDPS Act, 1985 was framed against the accused/appellant to which he pleaded not guilty and claimed trial.

4. In order to substantiate its case, prosecution in all examined nine (9) witnesses. The case of the accused/appellant was one of denial simplicitor. According to him, he was lifted from his house six (6) days prior to the alleged date of his arrest and was detained at Police Station Narela and later on the case property was planted upon him when he refused to fulfil their illegal demands. However, he did not prefer to lead any evidence in defence. The learned Special Judge scrutinized the evidence adduced by the prosecution and thereafter convicted the appellant and sentenced him as mentioned hereinbefore.

5. Feeling aggrieved, present appeal has been preferred. The findings of learned Trial Court have been assailed by learned counsel for the appellant on following grounds: (i) It was incumbent on the part of prosecution to examine the independent witnesses when the search and seizure had taken place at a public place and not to rely exclusively on the official witnesses to prove the case against the accused. (ii) There is variation regarding the place from where the recovery is alleged to have been effected, as according to the witnesses, the recovery was effected at Shani Temple, though according to the site plan, the recovery was effected at Hanuman Temple. (iii) Crl. A. 1549/2013 (iv) There has been non-compliance of Section 55 of the Act. (v) There is substantial delay in sending the samples to FSL as the sample were sent after one month whereas as per the circular, it was required to be sent within 72 hours. The alleged recovered article was not tested on field testing tube. (vi) 6. Rebutting the submissions, Ms. Ritu Gauba, Additional Public Prosecutor for the State submitted that: (i) The non-examination of independent witnesses does not affect the prosecution case as

there is no absolute rule that the prosecution cannot establish the charge against the accused by placing reliance on the official witnesses as held in Kashmirilal v State of Haryana (2014) 1 SCC (Crl.) 441. (ii) Minor variation regarding the place of recovery does not affect the case of prosecution. (iii) As the contraband goods have been seized from the plastic katta carried by the accused, Section 50 has no applicability as held in Krishan Kumar v. State of Haryana, (2014) 3 SCC (Crl.) 94. (iv) There was no delay in sending sample to FSL. Even otherwise, as per report, seals were intact. (v) There was no statutory requirement to get the contraband tested by field testing tube. The contraband was tested by gas chromatography and the same was sufficient. Moreover, challenge to admissibility of test conducted by FSL is not permissible as held in Jagdish Budhroji Purohit v. State of Maharashtra, 1998 Cri. LJ4626 7. Coming to the first submission of the learned counsel for the appellant regarding non joining of independent witnesses, it has come in the testimony of witnesses that the Investigating Officer did ask 5/6 public persons to join, but no one agreed. It is a common experience that public persons are generally reluctant to join police proceedings. There is general apathy and indifference on the part of public to join such proceedings and that is attributable to the fact that nobody is willing to join such proceedings lest he may have to come to the Court umpteen numbers of times. Moreover, nobody wants to be involved in such like proceedings. In Kashmirilal (supra), one of the pleas taken by the appellant challenging the judgment of conviction was substantially the same that no independent witness was examined. Repelling the contention, the Apex Court held as follows:

9... there is no absolute command of law that the police officers cannot be cited as witnesses and their testimony should always be treated with suspicion. Ordinarily, the public at large show their disinclination to come forward to become witnesses. If the testimony of the police officer is found to reliable and trustworthy, the court can definitely act upon the same. If in the course of scrutinising the evidence the court finds the evidence of the police officer as unreliable and untrustworthy, the court may disbelieve him but it should not do so solely on the presumption that a witness from the department of police should be viewed with distrust. This is also based on that principle of quality of the evidence weighs over the quantity of evidence. These aspects have been highlighted in State of U.P. v. Anil Singh;

State, Govt. of NCT of Delhi v. Sunil and another and Ramjee Rai and others v. State of Bihar. Appreciating the evidence on record on the anvil of the aforesaid principles, we do not perceive any acceptable reason to discard the testimony of the official witnesses which is otherwise reliable and absolutely trustworthy.

8. In Ram Swaroop v. State (Govt. of NCT) of Delhi, AIR 2013 SC2068also a contention was raised that the seizure was effected from a crowded place yet the prosecution chose not to examine any independent witness and in the absence of their corroboration with independent witness, the evidence of police witness could not be given credence. Repelling the contention, it was held by the Supreme Court that it had come in evidence that no independent witness agreed to join the proceedings. Moreover, there is no absolute rule that police officers cannot be cited as witness and their depositions should be treated with suspect. A passage from State, Govt of NCT of Delhi v. Sunil, 2001 (1) SCC652 was quoted and the same reads as follows:

We feel that it is an archaic notion that actions of the police officer should be approached with initial distrust. We are aware that such a notion was lavishly entertained during the British period and policemen also knew about it. Its hangover persisted during post-independent years but it is time now to start placing at least initial trust on the actions and the documents made by the police. At any rate, the court cannot start with the presumption that the police records are untrustworthy. As a proposition of law the presumption should be the other way around. That official acts of the police have been regularly performed is a wise principle of presumption and recognized even by the legislature. Hence when a police officer gives evidence in court that a certain article was recovered by him on the strength of the statement made by the accused it is open to the court to believe the version to be correct if it is not otherwise shown to be unreliable. It is for the accused, through cross-examination of witnesses or through any other materials, to show that the evidence of the police officer is either unreliable or at least unsafe to be acted upon in a particular case. If the court has any good reason to suspect the truthfulness of such records of the police the court could certainly take into account the fact that no other independent person was present at the time of recovery. But it is not a legally approvable procedure to presume the

police action as unreliable to start with, nor to jettison such action merely for the reason that police did not collect signatures of independent persons in the documents made contemporaneous with such actions.

9. The observation made in Ramjee Rai and Others v. State of Bihar (2006) 13 SCC229was also reproduced and the same reads as follows:

It is now well settled that what is necessary for proving the prosecution case is not the quantity but quality of the evidence. The court cannot overlook the changes in the value system in the society. When an offence is committed in a village owing to land dispute, the independent witnesses may not come forward.

10. Tested in the light of aforesaid principles, there is absolutely no reason to disbelieve the testimony of police officials who stood the test of cross-examination and with whom the accused has not alleged any ill-will or grudge so as to lift him from his house and then to falsely implicate in the case.

11. As regards the second plank of submission of learned counsel for the appellant regarding non-compliance of Section 50 of the Act, by a series of judgments it is now well settled that the question of compliance or noncompliance with Section 50 of the NDPS Act is relevant only where search of a person is involved and the said section is neither applicable nor attracted where no search of a person is involved. Search and recovery from a bag, briefcase, container, etc. does not come within the ambit of Section 50 of the NDPS Act, because, Section 50 expressly speaks of search of person only.

12. In Krishan Kumar (supra), facts were substantially the same. The appellant was spotted by the police party at a bus stand holding a plastic bag in his hand and on seeing the police, he tried to conceal his presence. On suspicion, he was apprehended and notice under Section 50 of the Act was served upon him. The appellant desired to be searched in the presence of a Magistrate or a Gazetted Officer as such his search was taken in the presence of a Tehsildar. Same was challenged by the accused on the ground that Tehsildar was not a Gazetted Officer. The Honble Supreme Court referred to the earlier decisions rendered in Ajmer Singh v. State of Haryana (1994) 6 SCC569wherein this aspect was

specifically considered and dealt with. Following an earlier Constitution Bench judgment, the Court held that when search and recovery from a bag, brief case, container etc. is to be made, provisions of Section 50 of the Act are not attracted. It is so stated in the following manner:

14. The object, purpose and scope of Section 50 of the Act was the subject-matter of discussion in a number of decisions of this Court. The Constitution Bench of five Judges of this Court in State of Punjab v. Baldev Singh; (1999) 6 SCC172after exhaustive consideration of the decisions of this Court in Ali Mustaffa Abdul Rahman Moosa v. State of Kerala; (1994) 6 SCC569and Pooran Mal v. Director of Inspection (Investigation), (1974) 1 SCC345have concluded in para 57: (I) When search and seizure is to be conducted under the provisions of the Act, it is imperative for him to inform the person concerned of his right of being taken to the nearest gazetted officer or the nearest Magistrate for making search. (II) Failure to inform the accused of such right would cause prejudice to an accused. (III) That a search made by an empowered officer, on prior information, without informing the accused of such a right may not vitiate trial, but would render the recovery of the illicit article suspect and vitiate the conviction and sentence of an accused, where the conviction is solely based on the possession of the illicit article recovered from his person, during such search. (IV) The investigating agency must follow the procedure as envisaged by the statute scrupulously and failure to do so would lead to unfair trial contrary to the concept of justice. (V) That the question as to whether the safeguards provided in Section 50 of the Act have been duly observed would have to be determined by the court on the basis of the evidence at the trial and without giving an opportunity to the prosecution to establish the compliance of Section 50 of the Act would not be permissible as it would cut short a criminal trial. (VI) That the non-compliance of the procedure i.e. informing the accused of the right under sub-section (1) of Section 50 may render the recovery of contraband suspect and conviction and sentence of an accused bad and unsustainable in law. (VII) The illicit article seized from the person of an accused during search conducted without complying with the procedure under Section 50, cannot be relied upon as evidence for proving the unlawful possession of the contraband.

13. Even in Kashmiri Lal (supra), a plea regarding non-compliance of Section 50 of the Act was taken. Relying upon Ajmer Singh (supra), Madan Lal v. State of HP, (2003) 7 SCC465and State of HP v. Pawan Kumar, (2005) 4 SCC350 it was held that seizure had taken place from tool box of the scooter, hence Section 50 does not apply.

14. In the instant case, seizure had taken place from the plastic katta carried by the accused on his shoulder. Therefore, Section 50 of the Act does not apply.

15. Even otherwise, it has come on record that after the accused was apprehended, he was informed about the secret information and was made aware of his legal rights. He was told that the police officials were having information of ganja which could be recovered from him and for that reason his search was required to be conducted and the search could be conducted before a Gazetted Officer or a Magistrate and before his search he could take the search of the police party. The notice under Section 50 of the Act, Ex. PW1/A was prepared and served upon the appellant. However, he refused both the offers and the reply of the appellant was written by PW2 SI Manoj as the appellant was found to be illiterate. Thereafter, the appellant was also offered to take search of HC Chaman Prakash as search of the appellant was to be taken by HC Chaman Prakash, but the appellant even refused to take search of HC Chaman Prakash. Under the circumstances, there is no non-compliance of Section 50 of the Act.

16. Coming to the next limb of the argument regarding non-compliance of Section 55 of the Act, this Section reads as under:

S.55. Police to take charge of articles seized and delivered.An officer-in-charge of a police station shall take charge of and keep in safe custody, pending the orders of the Magistrate, all articles seized under this Act within the local area of that police station and which may be delivered to him, and shall allow any officer who may accompany such articles to the police station or who may be deputed for the purpose, to affix his seal to such articles or to take samples of and from them and all samples so taken shall also be sealed with a seal of the officer-incharge of the police station.

17. It is clear on a bare reading of the above Section that it requires the officer-in-charge of a police station to take charge and keep in safe custody the articles seized under the Act which may be delivered to him, permit the officer delivering such articles to take sample of or seal the articles so delivered and himself seal such articles with his seal. From the tone and tenor of these provisions particularly the expression "which may be delivered to him" it is evident that delivery of the articles seized under the Act to the S.H.O. is not a mandatory requirement non-compliance whereof by the seizing officer may be fatal to the case. In case the seized articles are produced before the officer-in-charge of the police station, he is no doubt bound to act in the manner as provided by Section 55 (supra). The noncompliance, however, is directory and not mandatory.

18. Of late the question whether provisions of Section 55 of the NDPS Act are mandatory or not has been examined by the Hon'ble Supreme Court and this Court in a few cases and the provisions of Section 55 have been held directory.

19. In Gurbax Singh v. State of Haryana , (2001) 3 SCC28 the Apex Court held as follows:

9. The learned Counsel for the Appellant next contended that from the evidence it is apparent that the IO has not followed the procedure prescribed under Sections 52, 55 and 57 of the NDPS Act. May be that the IO had no knowledge about the operation of the NDPS Act on the date of the incident as he recorded the FIR under Section 9/1/78 of the Opium Act. In our view, there is much substance in this submission. It is true that provisions of Sections 52 and 57 are directory. Violation of these provisions would not ipso facto violate the trial or conviction. However, IO cannot totally ignore these provisions and such failure will have a bearing on appreciation of evidence regarding arrest of the accused or seizure of the article...

20. In Fredrick George v. State of H.P., 2002 Cri.L.J.

4600, this Court held as under:

29. On a bare reading of the abovesaid provisions it is clear that these are enabling provisions and give an option to the officer making the seizure under the Act to deposit the recovered contraband etc. with the officer-in-charge of the police station. The section does not contain any mandate to the officer making the seizure to deposit the seized contraband etc. with the officer-in-charge though in the event of the officer seizing the articles producing the same before the officer-in-charge of the police station, it directs him to take charge of the articles so produced, affix his seal to such articles or to take samples thereof and seal them too, and put him in safe custody. Thus, the provisions are directory and not mandatory, intended to reinforce the link evidence regarding safe custody of the case property.

21. In T. Paul v. State of West Bengal (1993) 3 Crimes 660 also, it was held that the provisions of Section 55 are merely directory in nature.

22. What can be culled out from the aforesaid decisions is that the provisions contained in Section 55 of the Act are directory and mere noncompliance thereof would not vitiate trial. The defence is required to show that failure of justice has resulted due to such non-compliance.

23. Moreover, in the instant case, the provisions of this Section have been complied with as it has come in the deposition of PW6 Insp. Abhinender Jain, who was working as SHO that SI Manoj returned to the Police Station at 10.25 pm and produced before him three sealed pulandas having seal of MS with FSL Form having the same seal alongwith copy of seizure memo. Thereupon, he affixed his seal of AJ on all the three pulandas and FSL Form and also put FIR number on the same after verifying it from the duty officer. Thereafter, he went to MHC(M) and deposited all the three pulandas alongwith FSL Form having seals of MS and AJ alongwith copy of seizure memo and also put his initials in Register No.19 and made DD No.51A Ex.PW6/A regarding deposit of case property in the Malkhana. PW5 HC Rajesh was working as MHC(M) at Police Station Narela on 20.03.2012 and has corroborated the testimony of SHO Insp. Abhinender Jain by deposing that Insp. Abhinender Jain deposited two samples and one remnant contraband pullanda duly sealed with the seals of MS and AJ with him and he made entry in

the Register No.19 at serial number 136/12 and proved entry Ex.PW5/A. On 20.04.2012, the sample pulanda duly sealed alongwith FSL Form were sent to FSL, Rohini through PW7 Constable Narain vide RC No.56/21/12. As per the FSL report, two parcels sealed with the seals of MS and AJ were received. Under the circumstances, it cannot be said that there is non-compliance of Section 55 of the Act.

24. As regards variations in the testimony of the witnesses regarding apprehension of the appellant at Shani Temple and the spot showed in the site plan as Hanuman Temple, the same are in the near vicinity, as such, it is a very minor variation which does not affect the substratum of the case.

25. The next limb of argument that there was delay in sending the samples to FSL, although it was required to be sent within 72 hours as per the circular, no such circular has been placed on record by learned counsel for appellant. Moreover, the FSL result reflects that the samples were received by the Chemical Examiner in sealed condition and they were intact. That leaves no room for doubt about the material seized from the accused and examined by the Chemical Examiner being the same.

26. The evidence of PW1 Constable Naresh Kumar and PW2-SI Manoj reveals that from the smell of the contraband recovered from the possession of accused, it could be gathered that it was ganja. Their version is corroborated by recital of road certificate Ex. PW5/B. The examination report given by Shri Amar Pal Singh, Assistant Director (Chemistry), Forensic Science laboratory would show that two sample which were analyzed by the Chemical Analyser were found to contain greenish brown vegetative flowering and fruiting top material weighing 195 gm and greenish brown vegetative flowering and fruiting top material weighing 194 gm. On Physical, Microscopic, Chemical & TLC examination, Exhibits 1 & 2 were found to be ganja (cannabis) which fall within the definition provided by Section 2(iii)(b) of the NDPS Act.

27. Learned Additional Public Prosecutor for the State relied upon Raju Mohan Rao Rathor vs. State of Maharashtra, 2008 Crl. L.J1131in which case also, the accused was found in possession of ganja. A plea was taken that the seizure of

greenish leaves cannot be made punishable in view of the definition of ganja as used in NDPS Act. By referring to the definition of ganja as provided in Section 2(iii) (b) of NDPS Act, it was observed that:

It is true that definition of the word "ganja" imply the flowering tops. However, the definition by itself does not exclude the green leaves when they are accompanied by the flowering tops or fruiting tops of cannabis plant. A bare reading of the above definition would make it manifest that the seeds and the leaves are excluded from the operation of the definition of word "ganja" only when the same are not accompanied by the flowering tops or the fruiting tops. The report of the C.A. reveals that greenish flowering tops and pieces of greenish leaves, seeds and stalks were noticed at the time of analysis. Thus, when the leaves and seeds were accompanied by the fruiting tops then it will have to be said that the seized stock was of ganja.

28. In the instant case also as per the report of Chemical Examiner, the recovered article was found to be ganja. There was no challenge to the report of the Chemical Examiner. Under the circumstances, the challenge on the ground that the ganja was not tested on field tube is untenable.

29. No other plea was urged during the course of arguments. The order of conviction was passed by learned Trial Court by a well-reasoned order and the same does not suffer from any infirmity. As such, the appeal is devoid of any merit and the same is hereby dismissed. All pending applications stand disposed of. A copy of this order be sent to the Superintendent, Tihar Jail for information. Trial Court record be sent back along with the copy of the judgment. (SUNITA GUPTA) JUDGE DECEMBER24 2014 rd/rs