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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ **CRL.L.P. 143/2017**

STATE ..... Petitioner

Through: Ms Kusum Dhalla, APP for State.
SI Ravi Saini, N. Cell, Crime Branch.

Versus

VICKY ..... Respondent

Through

CORAM:
HON'BLE MR. JUSTICE VIBHU BAKHRU

O R D E R

% 13.09.2019

VIBHU BAKHRU, J

Crl. M.A. No. 4197/2017

1. For the reasons stated in the application, the same is allowed. The delay in filing the present petition is condoned.

CRL.L.P. 143/2017

2. The State has filed the above captioned petition seeking leave to appeal against the judgment dated 21.07.2016 passed by the learned Additional Sessions Judge, Special Judge, NDPS in Sessions Case No. 180/2014, arising from FIR No. 57/2014 registered with the Crime Branch alleging an offence under Section 21 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereafter 'NDPS Act'). By

the impugned judgment, the respondent was acquitted of the offence under Section 21 of the NDPS Act.

3. It is the prosecution's case that on 17.05.2014, at about 4.20 p.m., the accused was accosted and was found to be in possession of 450 grams of *Heroin*. It is stated that the Narcotic Branch had received a secret information at about 2.00 p.m. on the same day that the accused would come near Badli Bus Stand to supply heroin to another person. In a swift action, a raiding party was constituted by the Narcotic Cell and it approached the site. It is stated that the informant had accompanied the raiding party and had identified the respondent from a distance of about 20 metres. The raiding party had then approached the respondent. It is alleged that on the search being conducted on the person of the respondent, a transparent polythene tied with a rubber band containing brown colour substance was recovered from the right side *dub* of his pant. The prosecution states that the substance was checked through field testing kit and the same was found to be *Heroin*. The respondent was arrested and after completion of the investigation, a charge sheet was filed.

4. On 30.10.2014, the learned ASJ framed charges for offence, charging the respondent of committing an offence punishable under Section 21 (C) of the NDPS Act. The respondent pleaded not guilty and the case was tried. During the trial, the prosecution examined fourteen witnesses. Thereafter, the statement of the respondent was recorded under Section 313 of the Cr.P.C. The respondent also led evidence by examining two witnesses in support of his defence. The

learned ASJ considered the testimony of various witnesses and rendered the impugned judgment, acquitting the respondent for the offence for which he was charged.

5. A plain reading of the impugned judgment indicates that the Trial Court had found that there were inconsistencies in the testimony of three principal witnesses (PW2, PW 9 and PW 10). The Court was also of the view that the provisions of Section 50 of NDPS Act had not been complied with in letter and spirit. In addition, it was noticed that no public persons had been joined at any stage of the proceedings. The Court noted that the respondent was accosted near a bus stand and the testimony of the witnesses indicated that there were persons standing on the bus stand but none of them had been requested to join the investigation proceedings. It had also been deposed that four or five persons had collected on the spot, however, even at that stage, no person from the public was joined in the proceedings. The Trial Court noted that although it is not necessary that a public person be joined in the search and seizure proceedings; however, a fair investigating mechanism requires public witnesses to be joined in proceedings. It was held that in this case, the police officials had made no request to any of the persons standing near the site to join the search proceedings.

6. Ms Kusum Dhalla, learned APP submitted that the Trial Court had grossly erred in concluding that the provisions of Section 50 of the NDPS Act had not been complied with merely because different prosecution witnesses described a gazetted officer in different terms.

PW 9 (one of the police official witness included in the search proceedings) had referred to a gazetted officer as "*Rajpatrit Adhikari*". PW 10 had referred to the gazetted officer as "*Gazetted Adhikari*" and PW 2 had stated that the raiding party had asked the accused whether he would want to be searched in the presence of a gazetted officer. She contended that the expression "*Rajpatrit Adhikari*" was the Hindi term for a gazetted officer and no inconsistency could be read in the testimony of PW 2, PW 9 and PW 10, solely on account of their description of a gazetted officer. She also contended that there was also no inconsistency or discrepancy in the testimony of various witnesses.

Reasons and Conclusion

7. Indisputably, there are some inconsistencies in the testimony of the witnesses. The case of the prosecution rested on the testimonies of three witnesses – PW 2, HC Dharmender; PW 9, Ct. Sandeep; and PW 10, SI Karamvir. These witnesses were part of the raiding party which had conducted the operation. It is stated that secret information was received by PW 10. He was informed that the respondent who was involved in supplying Heroin, in and around the area of Vijay Vihar, Rohini, would come to Badli Bus Stand, Outer Ring Road between 4.00 p.m. to 4.30 p.m. to supply Heroin. The said raiding party was headed by PW 10 and included PW2, PW 9 and driver H.C. Manoj. It is also stated that the secret informer accompanied the raiding party. The said witnesses had deposed that on the way to the spot from where respondent was apprehended, the raiding party had stopped at

three places and had requested persons who were passing by to join the proceedings. Undeniably, there are some inconsistencies in the testimony of the three witnesses in this regard. PW 2 had deposed that they first stopped outside their office, where persons from the public were requested to join the proceedings. In variance with this testimony, PW 9 had deposed that the first instance where the raiding party had stopped to request public persons to join the proceedings was located about 4 to 5 kilometres from their office.

8. In addition, PW 2 had deposed that PW 10 kept sitting in the vehicle while he asked public persons to join the proceedings. In variance to this testimony, PW 9 and PW 10 had deposed that PW 10 had got down from the vehicle to persuade public persons to join the proceedings.

9. Notwithstanding these inconsistencies, it is also apparent that there no serious effort was made by any member of the raiding party to include any public person. This is evident from the fact that the raiding party could provide no information even as to the names of the persons to whom such request was made. One of the spots, where the raiding party is stated to have asked the persons passing by, was a red light crossing, which was at a considerable distance from the spot to where the raiding party was proceeding. The respondent was apprehended ten to twelve steps from a bus stop. It is also admitted that there were other persons at the bus stop, however, none of the persons at the bus stop were asked to join the proceedings.

10. It is stated that some of the persons passing by had collected when the respondent was being searched. According to the prosecution, they were asked to join the proceedings but had declined; however, none of the witnesses could provide any clue as to the identity of even one such person. Apparently, the raiding party did not even note down the name of any of the persons who had collected at the spot and who according to them had declined.

11. In view of the above, this Court finds no reason to interfere with the conclusion of the Trial Court that the raiding party made no efforts to include any witness from the public. Although, failure to include a public witness may not be fatal to the case of the prosecution, however, it does expose the case of the prosecution to stricter scrutiny regarding the procedure being followed.

12. The Trial Court had held that the provisions of Section 50 of the NDPS Act had not been complied with. The Court was of the view that the meaning of the word '*Rajpatrit Adhikari*/gazetted officer' had not been explained to the respondent. It is clear from the testimony of PW 2, PW 9 and PW 10 that different terms were used to describe gazetted officer. Whereas, PW 2 had claimed that an offer was made to the respondent to conduct his search in the presence of a gazetted officer or a Magistrate, PW 9 had claimed that the respondent was given option to have his search conducted in the presence of a "*Rajpatrit Adhikari*". The respondent had claimed that he was illiterate and notice under Section 50 of the NDPS Act, which was allegedly served on him, was admittedly required to be explained to him. The

use of such different terms describing a gazetted officer does create a doubt whether the notice under Section 50 of the NDPS Act had been properly explained to the respondent.

13. It is also important to note that although it is stated that the said notice was served on the respondent, the original notice was not recovered from the respondent. According to the prosecution witnesses, the original notice continued to remain with the raiding party and the respondent's reply to the same had been recorded on the original notice (Ex. PW 2/A). Clearly, if the notice had been served on the respondent, the original of the same would have been recovered from his person.

14. According to the prosecution, a carbon copy of the notice was served to the respondent, however, the search memo and the entry in the *Malkhana* Register indicate that a photocopy of the notice had been recovered and deposited with the *Malkhana*. The Trial Court had noted that no explanation with regard to the said discrepancy was provided.

15. The Supreme Court, in the case of ***Arif Khan v. State of Uttarakhand*** : ***AIR 2018 SC 2123***, had observed that the compliance to provisions of Section 50 of the NDPS Act is mandatory and the search in terms of the said provisions was required to be conducted before a gazetted officer or a Magistrate.

16. In view of the above, the conclusion that the provisions of Section 50 of the NDPS Act had not been followed cannot be

interfered with.

17. In addition to the above, there is also a serious inconsistency regarding the samples of the contraband drawn by the raiding party. According to PW 9, two samples had been drawn and along with the *Pannies* (the plastic sheets in which they were wrapped), both the samples weighed five grams each. The said samples were marked A and B respectively. According to the prosecution, the sample marked A was sent to FSL, however, the sample examined by them weighed 6.27 grams. Thus, there is a material difference in the quantity of the sample as stated to have been drawn by the raiding party and the sample as examined by the FSL.

18. In addition to the discrepancy in the weight of the sample as mentioned above, there is yet another aspect which casts a doubt as to the case set up by the prosecution. According to the witnesses, the brown substance found on the respondent was tested by drawing a small quantity of the same and putting it to a field test. It was deposed that on the chemical being applied to the substance, it had changed colour. It is important to note that none of the witnesses in question (PW 2, PW 9 and PW 10) could testify as to what was the change in colour that led them to believe that the substance in question was *Heroin*. Curiously, the quantity of the substance on which the test was conducted was also not available as according to the prosecution, the same was thrown away. This also creates a serious doubt as to the case set up by the prosecution.

19. In ***Ghurey Lal v. State of Uttar Pradesh*** : ***(2008) 10 SCC 450***, the Supreme Court had observed as under:-

> "69. The following principles emerge from the cases above:
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> 1. The appellate court may review the evidence in appeals against acquittal under Sections 378 and 386 of the Criminal Procedure Code, 1973. Its power of reviewing evidence is wide and the appellate court can reappreciate the entire evidence on record. It can review the trial court's conclusion with respect to both facts and law.
> 2. The accused is presumed innocent until proven guilty. The accused possessed this presumption when he was before the trial court. The trial court's acquittal bolsters the presumption that he is innocent. 3. Due or proper weight and consideration must be given to the trial court's decision. This is especially true when a witness' credibility is at issue. It is not enough for the High Court to take a different view of the evidence. There must also be substantial and compelling reasons for holding that the trial court was wrong."

20. In the present case, this Court is unable to find any substantial or compelling reason for overruling the decision of the Trial Court to acquit the respondent.

21. In view of the above, the present petition is dismissed.

VIBHU BAKHRU, J

SEPTEMBER 13, 2019/pkv