

Delhi District Court

Ajmer Singh vs . State Of Haryana (2010) 3 Scc 746, ... on 23 March, 2012

Author: Sh. Narinder Kumar

IN THE COURT OF SH. NARINDER KUMAR
SPECIAL JUDGE, NDPS (CENTRAL); DELHI

SC No. 68/2008
FIR No.69/2005
PS Narcotics Branch
U/s 21 of NDPS Act

In the matter of:-

State

Versus

Surender @ Geja
S/o Sh. Kishan Lal
R/o U-41, Budh Vihar, Phase-I,
New Delhi.

.....Accused

Date of Institution: 22.12.2005

Date of Judgment: 23.03.2012

J U D G M E N T

Surender @ Geja (accused) was sent up for trial for offences under Narcotics Drugs and Psychotropic Substances Act (hereinafter referred to as "the Act") whereas his companion Juvenile was separately challaned and his matter was referred to Juvenile Justice Board.

2. In brief, case of prosecution is that on 03.10.2005 at 5.50 am, SI B. P. Singh of PS Kamla Market received secret information that Surinder @ Geja, his wife shashi, brother in law Shunti and Prem son of Shunti, were involved in supply of smack, after getting the same from the dealers of Rajasthan and M.P. and they used to sell the same in Delhi. The secret informer further informed that on that day Surender @ Geja (accused) and his brother in law Shunti or son of his brother in law would collect smack from a dealer of Mandisor at Khanna Market, Delhi and reach his house riding motorcycle DL 8S AD 5150 (CBZ black colour) in between 7.30 am - 8.30 am and that they could be apprehended near liquor vend in the area of Budh Vihar and as such smack could be recovered from them.

SI. B.P. Singh produced the informer before Inspector Ramesh Kumar, SHO, who after satisfying himself, telephonically communicated the information to the ACP Sh Mehar Singh, who in turn gave directions for conducting raid.

Secret information was recorded by SI B.P. Singh vide DD No. 9 and its copy was sent to ACP through SHO.

SI B.P. Singh constituted a raiding party comprising himself, Ct Anand Tyagi, HC Dushyant, HC Ram Avtar, HC Ajay Vir, Ct Veer Pal and Ct Jaiveer. The party left the police station for the disclosed place, at around 6.30 am, in the company of secret informer and reached Sharab Ka Theka at Kanjhawala Road, Budh Vihar at about 7.30 am.

At about 7.55 am, two persons were seen coming riding black colour CBZ motorcycle bearing No. DLBSAD5150. The informer identified the driver as son of Sunty and his companion riding the pillion as Surrender (Accused). Accused was holding a cherry colour bag at that time. The motorcycle was stopped.

Accused and his companion were apprehended. Both of them were told that their search was to be conducted and that it was their legal right to be subjected to search in presence of Gazetted Officer or a Magistrate. Notice under section 50 of the NDPS Act was given to them. Both of them opted not to be searched in presence of Magistrate or Gazetted Officer.

The cherry colour bag recovered was opened and checked. It was found containing two black colour polythene bags kept underneath a towel. Each black colour polythene bag was found containing one transparent polythene bag. The polythene bags were opened and were found containing brown colour powdery substance. The weight of substance in polythene Mark A was found to be 2.5 kg and the weight of substance in polythene Mark B was found to be 5 kg.

Two samples, of 5 gms each were taken from polythene Mark A and turned into two separate polythene pouches, converted into two separate parcels, which were marked as A1 and A2. The remaining powder in transparent polythene Mark A was put back in the black polythene.

Similarly, two samples, of 5 grams each were taken out from polythene Mark B, turned into separate parcels and marked as B1 and B2. The remaining powder in transparent polythene Mark B was put back in the black polythene.

The two black coloured polythene bags, containing polythene Mark A and B, one in each, were kept back in the same cherry colour bag and the towel recovered from this bag was also put over the black polythene bags. The cherry colour bag was converted into a parcel and was given Mark C.

SI B.P. Singh filled up form FSL and affixed his seal of '3 APS NB DELHI' on all the four sample parcels, cloth parcel and form FSL.

SI B.P. Singh prepared the rukka and got this case registered. Along with rukka, Ct Anand Tyagi took carbon copy of seizure memo, all the parcels and Form FSL.

At the police station, Inspector Ramesh Kumar SHO, PS Narcotic Branch received five sealed parcels Mark A1, A2, B1, B2 and C bearing seals of '3 APS NB DELHI' along with form FSL and

carbon copy of seizure memo from Ct Anand Tyagi. The SHO affixed his seal of '1 SHO NBR DELHI' on all the parcels and Form FSL, and recorded DD No. 20 in this regard. He also mentioned FIR number on the seizure memo, Form FSL and all the parcels. Inspector Ramesh Kumar handed over the parcels of the case property along with the Form FSL and carbon copy of seizure memo to HC Jagdish MHC(M) who made entry in this regard at serial No. 547, in register No. 19.

Inspector Udham Singh who took over investigation, after registration of case reached the spot at about 3.00 pm and met SI B.P. Singh and other staff along with accused persons present there. SI B.P. Singh narrated the facts about the recovery of smack from the accused and his companion. Inspector Udham Singh prepared the site plan at the instance of SI B.P. Singh and interrogated both the accused persons. Accused Surender Kumar and his companion were arrested and his personal search was conducted. Inspector Udham Singh seized the motorcycle along with helmet and keys. Accused was got medically examined and thereafter taken to the police station where he was produced before the SHO.

Reports under section 57 of the NDPS Act were sent to senior officers through SHO.

On 20.10.2005 two sample parcels Mark A & Mark B and form FSL were sent to FSL Rohini for analysis. On 05.12.2005 FSL result was received. On completion of investigation challan was filed only against Surender Geja accused.

In compliance with provisions of section 207 Cr. P.C, copies of documents relied upon by the prosecution were supplied to the accused free of cost.

Charge

3. Prima facie case having been made out against the accused. Charge was framed against the accused. Since the accused pleaded "not guilty" and claimed trial, prosecution was called upon to lead evidence.

Prosecution Evidence

4. In order to prove its case prosecution has examined following ten witnesses who are as follows: PW1 HC Hassan Raza No To prove communication of information 185/DRP. pertaining to this case to the DCP.

PW2 HC Jagdish Parsad No. Who dealt with the case property. 39/Crime, concerned MHC(M) PW3 Ct Anand Tyagi No. To prove arrested and recovery from 200/DRP accused and his companion, registration of case and delivery of the case property to the SHO.

PW4 SI B.P. Singh No. D3524, Who initially investigated the case.

Special Staff, North West District

PW5 HC Dushyant No. 1259, Another witness to arrest and recovery from accused.
West

PW6 HC Ajay Kumar No. 81 To prove the recording of FIR and other Crime DRP Line, Delhi DD entries at the police station. PW7 HC Jaiveer Singh No. 2749 To prove deposit of sealed parcels at DAP FSL on 20.10.2005.

PW8 Insp. Ramesh Kumar, Who sealed the case property at the concerned SHO police station and also to prove communication of information.

PW9 Inspector Udham Singh Who subsequently took over investigation of this case.

PW10 HC Om Prakash No. 61 To prove receipt of information Crime. pertaining to this case at the office of ACP.

Statement of accused

5. When examined under section 313 Cr. P.C accused denied all the incriminating circumstances appearing in evidence against him and claimed false implication. The plea put forward by the accused is as under: "One ASI Dashrath of Narcotics Branch is a resident of my locality in Jahangir Puri, who is on friendly terms with some of my relatives, who are hostile towards me. In February 1998, there was a theft in my house and I suspected my relatives behind it. ASI Dashrath was supporting them. I had filed complaint against my relatives and ASI Dashrath, due to which ASI Dashrath with help of his police associates implicated me in a false case of Narcotics and Drugs on 06.03.1998. After my arrest and detention, my family members including my wife, my mother in law and father in law were harassed by the police. My mother in law had filed complaints against the police officials in the High Court. I had also filed complaint against police officials to Senior Officers from Jail. I have been acquitted in that case by the High Court. Due to all these reasons, police is hostile towards me and has implicated me falsely in this case."

In defence, the accused has stepped into the witness box as his own witness (as DW1) and also examined DW2 Sh. Sher Singh. In support of his defence plea that he was forcibly taken away from his house on 03.10.2005 at about 5 am.

Arguments heard. File perused Discussion

6. Learned Addl. PP has referred to the statements of PW3, PW4 and PW5 and submitted that from their cogent testimony, it stands established that accused and his companion were nabbed by the police on 03.10.2005 near liquor vend on main Kanjhawala Road, Budh Vihar, Phase I, on the basis of secret information received against them and during search, they were found in possession of 7 1/2 kgs of smack.

While referring to the proceedings conducted during investigation, Ld. Addl PP has submitted that this is a case of due compliance with all the requisite provisions from Section 42 to 57 of the Act.

While referring to the statements of PW2, PW7, PW8 and report received from FSL, Ld. Addl.PP has contended that the case property was never allowed to be tampered with before the same reached in safe hands of the officials at FSL and as such in view of the contents of the reports issued by FSL, it stands established that mixture of diaceteylmorphine and phenobarbital was recovered from the accused on the given date time and place, and as such he is liable to be convicted for the offence proved against him.

Receipt of secret information and its communication to Senior Officers

7. Section 42 (2) of the Act provides that where an officer takes down any information in writing under sub-section (1) or records grounds for his belief under the provisions thereto, he shall within seventy two hours send a copy thereof to his immediate official superior.

In this regard, case of prosecution is based on statements of PW 4 SI B. P. Singh, PW6 HC Ajay Kumar, the Duty Officer, PW8 Inspector Ramesh Kumar, concerned SHO.

It is in the statement of SI B. P Singh that 03.10.2005 at 5.50 am, he received secret information that Surinder @ Geja, his brother in law Shunti and his son(son of Shunti), were engaged in business of smack and that on that day they would be bringing smack from Khanna Market and go towards their house via Budh Vihar, Sharab Ka Theka (Liquor vend) on their motorcycle bearing no. DL 8SAD 5150, at about 7.30 - 8.30 am. He then produced the informer before the SHO, and the SHO telephonically communicated the information to the ACP.

According to PW4, this secret information was recorded vide DD No. 9 at 6.10 am. Its copy was put up before the SHO for onward transmission to Senior Police Officers.

A perusal of Ex PW10/A i.e. copy of DD No. 9 would reveal that it is dated 03.10.2005 and recorded at police station Narcotics Branch, Kamla Market Delhi. It bears the time of its recording as 6.10 am. As per its contents, secret informer met SI B. P. Singh at 5.50 am. Further, as per contents of the DD entry, the secret informer had come in person and informed the SI about the persons involved in supply of smack, after getting the same from the dealers of Rajasthan and M.P. and they used to sell the same in Delhi. The secret informer further informed that on that day Surender @ Geja (accused) and his brother in law Shunti or son of his brother in law would collect smack from a dealer from Mandisor at Khanna Market, Delhi and then reached his house riding motorcycle DL 8S AD 5150 (CBZ black colour) in between 7.30 am - 8.30 am and that they could be apprehended near liquor vend in the area of Budh Vihar and that smack could be recovered from them.

From the statement of PW8, Inspector Ramesh Kumar (the concerned SHO), it stands established that on 03.10.2005 at about 6 am, SI. B.P. Singh produced the informer before him, and that after satisfying himself, he telephonically communicated the information to the ACP Sh Mehar Singh, who in turn gave directions for conducting the raid.

PW10 HC Om Prakash has proved that Ex PW10/A was received in the office of ACP vide dairy no. 1345 dated 03.10.2005. The witness has proved endorsement at point A made by the ACP regarding

receipt of this DD entry, containing information. PW8 Inspector Ramesh Kumar has proved his signatures on this document Ex PW10/A, at point B.

From the material available on record, prosecution has fully established receipt of information and its communication to the Senior police official in compliance with provisions of Section 42(2) of the Act.

Learned defence counsel has submitted that in his cross examination PW4 SI submitted that he had stayed at the police station during night intervening 2/3.10.2005 but there was no justification for his having so stayed at the police station when his family was also keeping abode in Delhi and he was not having any specific instructions from any Senior officer to stay overnight at the police station. The contention is that as a result receipt of the information at about 5.50 am containing all material details, becomes improbable and creates doubt in the version of the prosecution.

Simply because SI BP Singh opted to stay at the police station during the night, the prosecution version regarding receipt of secret information at 5.50 am cannot be doubted, when the same stands duly established from the oral and documentary evidence.

Arrival of the accused at the disclosed place

8. It is case of prosecution that the accused came to the disclosed place riding pillion of a motorcycle being driven by his relative [] juvenile.

SI B.P. Singh constituted a raiding party comprising himself, Ct Anand Tyagi, HC Dushyant, HC Ram Avtar, HC Ajay Vir, Ct Veer Pal and Ct Jaiveer. The party left the police station for the disclosed place at around 6.30 am and in the company of secret informer reached near Sharab Ka Theka on Kanjhawala Road, Budh Vihar at about 7.30 am. At about 7.55 am, two persons were seen coming riding black colour CBZ motorcycle bearing No. DL [] BSAD [] 5150. The informer identified the driver as son of Santy his companion riding the pillion, as Surender (Accused). Accused was holding a cherry colour bag at that time. The motorcycle was stopped. Accused and his companion were apprehended. Both of them were told that their search was to be conducted and that it was their legal right to be subjected to search in presence of Gazetted Officer or a Magistrate. Notice under section 50 of the NDPS Act was then given to them.

Learned defence counsel has pointed out that according to PW4, SI B. P. Singh, informer had pointed out towards the accused from a distance of 15/20 meters but according to PW5 HC Dushyant, accused was seen from a distance of 50/100 meters when secret informer pointed out towards them. The contention raised by learned defence counsel is that the statements of two PWs are in contradiction with each other on this point and further that it is not believable that the secret informer could point out towards the accused from even a distance of 15/20 meters, while the motorcyclist was wearing a helmet, though it was without visor.

It is true that in his cross examination, PW5 HC Dushyant stated that informer had pointed out towards accused from a distance of 50/100 meters whereas PW4 SI B. P. Singh stated in his cross

examination that the informer had pointed out towards the accused from a distance of 15/20 meters but this contradiction regarding the distance from where the informer pointed towards the accused is not material when it is case of the prosecution that members of the raiding party had taken position at two places within a distance of 10-20 meters. It is at about 8 am when accused that he and his companion were seen coming. It cannot be said that secret informer would have faced any difficulty in pointing out towards the accused who was not wearing helmet.

No inquiry conducted regarding ownership of the motorcycle

9. Case of the prosecution is that the accused was riding pillion of motorcycle no. DL 8SAD5150 while it was being driven by his companion. The contention raised by learned defence counsel that no inquiry was made by the police as to the ownership of this motorcycle on the given date, time and place and absence of any inquiry in this regard creates doubt in the version of the prosecuting if the accused was actually apprehended while riding motorcycle as alleged.

In his cross examination PW4 SI B. P. Singh admitted to have not investigated in any manner as to ownership of the motorcycle. He did not conduct search of owner of the motorcycle. He even did not inquire from the accused about its ownership. It is PW9, who is alleged to have taken steps to inquire about owner of motorcycle.

It has come in the statement of PW9 Inspector Udham Singh who subsequently took over investigation this case that he had tried to trace out owner at the residential address as available in the certificate of registration. From the certificate of registration, PW9 could make inquiry regarding the owner of the motorcycle only by visiting the given address or from the accused. PW9 had no other way to trace out the owner of the motorcycle.

Even otherwise, when the accused was found sitting on the pillion of the motorcycle, it was for him to explain as to how he came to ride that motorcycle on the given date, time and place and as to from where it was collected by him or his companion. However, the accused has not come up with any explanation in this regard. In the given facts and circumstances enquiry made by PW9 can be said to be sufficient and accused cannot take any advantage from the fact that the police could not apprehend the owner of the motorcycle. Therefore, this Court does not find any merit in the contention raised by learned counsel in this regard.

Contradiction

10. Learned defence counsel has pointed out that according to PW4, accused was seen coming on a single road which was without any mid-verge, but according to PW5 HC Dushyant, the road where they had taken position on that day, was having a divider and the raiding party had taken positions on each side of the road, and that this contradiction creates doubt in the truthfulness of the prosecution story.

It is true that according to PW4, Kanjhawla road where the proceedings were conducted was without any divider, whereas PW5 HC Dushyant stated that the road where they took position had a divider.

However, this Court does not find that the two witnesses have made contradictory statements. Whereas PW4 stated about the road "where the proceedings were conducted" and PW5 deposed "where he had taken position alongwith SI B.P. Singh, Ct. Anand Tyagi and the informer". Site plan Ex PW9/A would reveal that the accused was apprehended just at the turning of the road leading to Surya market. Point A where the accused was apprehended is at the junction. PW5 was not specifically questioned in his cross examination as to on which road there was the divider or as to whether there was a divider where the proceedings were conducted or where the accused was apprehended.

Notice under Section 50 of the Act

11. Section 50 of the Act reads as under:

"Conditions under which search of persons shall be conducted—(1) When any officer duly authorised under Section 42 is about to search any person under the provisions of Section 41, section 42 or Section 43, he shall if such person so requires, take such person without unnecessary delay to the nearest Gazetted Officer of any of the departments mentioned in section 42 or to the nearest Magistrate.

(2) If such requisition is made, the officer may detain the person until he can bring him before the Gazetted Officer or the Magistrate referred to in sub-section (1).

(3) The Gazetted officer or the Magistrate before whom any such person is brought shall, if he sees no reasonable ground for search, forthwith discharge the person but otherwise shall direct that search be made.

(4) No female shall be searched by anyone expecting a female.

(5) When an officer duly authorised under Section 42 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 possession of any narcotic drug or psychotropic substance, or controlled substance or article or document, he may, instead of taking such person to the nearest Gazetted officer or Magistrate, proceed to search the person as provided under section 100 of the Code of Criminal Procedure, 1973.

(6) After a search is conducted under sub-section (5), the officer shall record the reasons for such belief which necessitated such search and within a seventy-two hours send a copy thereof to his immediate official superior."

Learned defence counsel has referred to the cross examination of PW5 HC Dushyant where he stated that notice under Section 50 of the Act was given to the accused on which he replied about his option. The contention is that according to PW5, reply to the notice was written by the accused himself, but this is in contradiction with the statement of PW4 SI Bhupeinder Singh, who stated that

reply to the notice was written by him (PW4) and was only signed by the accused. So it has been submitted that this creates doubt if any such notice was actually served upon the accused and the accused was actually inquired about exercise of his legal right of being subjected to personal search in presence of Magistrate or Gazetted Officer.

Learned defence counsel has referred to decision in Vijaysinh Chandubha Jadeja v. State of Gujarat (2011) SCC 609 and submitted that in this judgment delivered by the Hon'ble Apex Court, police is required to take accused to the Gazetted officer or Magistrate for the purpose of transparency or authenticity regarding process of search of accused persons. But in this case no endeavor was made by the IO to take accused to nearest Magistrate or Gazetted officer, and that such this is a case of non-compliance with provisions of Section 50 of the Act, and accused is entitled to acquittal.

It is true that Hon'ble Apex Court has observed that the requirement under Section 50 of the NDPS Act is not complied with by merely informing the accused of his option to be searched either in the presence of gazetted officer or before a Magistrate and that the requirement continues even after that and it is required that the accused person is actually brought before the gazetted officer or the Magistrate. Hon'ble Apex Court also made it clear that in order to impart authenticity, transparency and creditworthiness to the entire proceedings, an endeavour should be made by the prosecuting agency to produce the suspect before the nearest Magistrate.

Section 50 of the Act provides that such person is to be taken to the nearest Gazetted officer or Magistrate, "if such person so requires". However, herein when the accused was apprised of his legal right of being subjected to search under Section 50 of the Act, he opted to be subjected to search in presence of the police officers/officials and not before the Gazetted officer or Magistrate.

Ex PW3/A notice under Section 50 of the Act bears attestation of Ct. Anand Tyagi and Ct. Dushyant. Both of them have proved their attestation while stepping in the witness box.

Even Ex PW3/A1 the reply of the accused to appended to this notice at the bottom also bears attestation of these two witnesses. It was signed by the accused as well. Presence of the two witnesses alongwith SI Brij Pal, on the given date time and place stands duly established. File reveals that even the companion of the accused was apprised of the legal right available under Section 50 of the Act but he too opted not to be subjected to search in presence of any Gazetted officer of Magistrate.

From the material available on record, this Court finds that SI B. P. Singh fully complied with the provisions of Section 50 of the Act before the accused and his companion were subjected to search.

Contradiction regarding period of stay at the spot.

12. According to PW4, SI B. P. Singh remained at the spot for about 11 hours whereas according to PW5 HC Dushyant they remained at the spot for about 2 1/2/3 hours. PW5 could not tell as to when the rukka was sent from the spot. Ld. defence counsel has submitted that this contradiction create doubt in the prosecution story.

It is true that according to PW4 SI B. P. Singh, he remained at the spot for 11 hours and PW5 HC Dushyant stated that police remained at the spot for about 2 ½ to 3 hours. But it appears that memory of PW5 HC Dushyant did not help him because of lapse of five years when his statement was recorded in cross examination. Accused and his companion were apprehended at 8 am. Rukka was despatched from the spot at 11.40 am. DD No. 19 Ex PW6/B2 establishes that Constable Anand Tyagi reached the police station with the rukka at about 12.45 pm. As per Ex PW6/B4 DD No. 21 recorded at 2 pm, SI Udham Singh, who took over investigation after registration of the case, left the police station at 2 pm. Ex PW6/B5 is copy of DD No. 26 which reveals that SI B. P. Singh accompanied by other returned to the police station at 8.10 pm. They were accompanied by the accused and his companion. This supports the statement of SI B. P. Singh that police party remained at the spot for about 11 hours.

Non-joining of public witnesses

13. Learned defence counsel has submitted that as per prosecution version information was received by SI B. P. Singh at about 5.50 am and the raiding party left the police station at about 6.30 am, but no effort was made by the SI to join any witness from the public either while leaving for the disclosed place or even at the place of arrest. Although it has been explained by the witnesses that some persons who were asked to join the party refused to join, their names and particulars were nowhere noted down, which according to Learned defence counsel, creates doubt if any such effort was actually made by the police to associate any witness from the public.

On the point of non-joining of witness from the public, in the case of Ajmer Singh vs. State of Haryana (2010) 3 SCC 746, Hon'ble Apex Court has held as under: "The submission that the evidence of the official witnesses cannot be relied upon as their testimony has not been corroborated by any independent witness cannot be accepted. It is true that a charge under the Act is serious and carries onerous consequences. The minimum sentence prescribed under the Act is imprisonment of 10 years and a fine. In this situation, it is normally expected that there should be independent evidence to support the case of the prosecution. However, it is not an inviolable rule. It may not be possible to find independent witness at all places, at all times. The obligation to take public witnesses is not absolute. If after making efforts which the court considered in the circumstances of the case reasonable, the police officer is not able to get public witnesses to associate with the raid or arrest of the culprit, the arrest and the recovery made would not be necessarily vitiated. The court will have to appreciate the relevant evidence and will have to determine whether the evidence of the police officer was believable after taking due care and caution in evaluating their evidence."

It is case of the prosecution that PW4 SI B. P. Singh on reaching the spot, at about 7.30 am, he asked four passersby to join the raiding party but all of them refused and as such he deployed members of the raiding party. This fact also finds mention in rukka Ex PW4/A. Statement of SI B. P. Singh finds corroboration from the statements of the other members of the raiding party in this regard.

Herein, this Court does not find any material contradiction on the statements of the prosecution witnesses. PW 3, PW4 and PW5 have made cogent and convincing statements regarding the manner in which the accused and his companion were apprehended and regarding the proceedings

conducted at the spot regarding the recovery. Therefore, in view of decision in Arjun Singh's case (supra) non-joining of witness from public does not adversely affect the case of prosecution.

As regards stay of the secret informer at the spot, learned defence counsel has pointed out that according to PW4 SI B. P. Singh, the secret informer left the spot 2-3 minutes after the apprehension of the accused. On the other hand, PW5 HC Dushyant stated that informer did not stay with them till the arrival of motorcycle near them, and rather he had left after pointing out. So according to PW5, secret informer left the spot after pointing out the motorcycle and did not stay with the party after the motorcycle was stopped.

Learned defence counsel has referred to the cross examination of PW4 SI B. P. Singh wherein he stated that secret informer remained with the party 3-4 minutes after apprehension of the accused. The contention is that when the informer opted to remain with the party, he cannot be termed to be a secret informer rather he was a witness and that non-joining of the informer or non-disclosure of his particulars in the given facts and circumstances, creates doubt in the version of prosecution. In support of his contention, Ld. counsel for accused has referred to decision in In Peeraswami Vs. State NCT of Delhi, 2007 (2) JCC (Narcotic) 80, wherein Hon'ble High Court observed as under :

"the secret informer was made a part of the raiding party. He was taken to the spot and he also pointed out to the appellant Peeraswami and at his pointing out the appellants were arrested. If the identity of the secret informer was not so secret and he could accompany police party up to the house and come face to face with the appellant, there is no reason why he could not have been produced in the court for deposition. The entire story of secret informer in fact is falsified from the testimony of PW14, who stated that the information was received on telephone."

It is true that according to PW4 SI B. P. Singh the secret informer left the spot 3-4 minutes after the apprehension of the accused and according to PW5 HC Dushyant the secret informer pointed out towards the accused at about 7.55 am and thereafter he left the spot. It is significant to note that PW5 HC Dushyant laid thrust on the point of time when the secret informer pointed out towards the accused. According to him, after pointing out the accused, the informer left the spot. PW5 was not questioned specifically if secret informer had stayed for some minutes even after the apprehension of the accused or not.

Had the secret informer, come in the open, even after apprehension of the accused and his companion, then it would have been a different matter. Nowhere it was suggested to any of the PWs if the secret informer and accused and his companion came face to face after their apprehension.

From the evidence available on record it stands established that the secret informer left the spot after pointing out towards the accused and his companion. Therefore, it cannot be said that the secret informer should have been associated as a witness to the recovery and the proceedings, or that his non-joining adversely affects the case of prosecution. In the given facts and circumstances, the decision referred to by learned defence counsel does not come to the aid of accused.

Sealing of case property

14. It is case of the prosecution that four parcels prepared at the spot were sealed with the seal of SI BP Singh bearing impression "3A PS NBDELHI" and after the use, seal was handed over to Ct. Dushyant.

Learned Defence counsel has pointed out that in his cross examination PW5 HC Dushyant could tell exactly as to when he had returned the seal, handed over to him, to SI B. P. Singh. As per prosecution version, parcels were sent to laboratory on 20.10.2005. The contention raised by defence counsel is that in view of statement PW HC Dushyant regarding return of seal, possibility of tampering with the case property cannot be ruled out.

While appearing in Court as PW4 SI B. P. Singh categorically stated that after use, he had handed over the seal used by him in sealing the case property at the spot, to PW5 HC Dushyant. This fact finds corroboration from the statement of PW5 HC Dushyant. In his cross examination, PW5 HC Dushyant initially stated that the seal was returned by him two days after the occurrence but in the same breath stated that he had returned the seal after despatch of parcel. He could not tell if he had returned the seal after 5 days or 15 days or thereafter. It is significant to note that the Sub-Inspector B. P. Singh was not cross examined as to on which date or when the seal was returned to him by HC Dushyant.

Case pertains to the year 2005. Cross examination of HC Dushyant was recorded on 28.07.2010. A police official has to deal with number of cases pertaining different recoveries or occurrences. After a period of five years, if PW5 HC Dushyant could not tell as to when he had returned the seal to the Sub-Inspector, no adverse inference can be drawn against the prosecution.

It is case of prosecution that SI B.P. Singh filled up form FSL and affixed his seal of '3 APS NB DELHI' on all the four sample parcels, cloth parcels and form FSL.

SI B.P. Singh prepared rukka and handed over the same to Ct Anand Tyagi. The same constable also took along carbon copy of seizure memo, all the parcels along with Form FSL.

On the same day, Inspector Ramesh Kumar SHO, PS Narcotic Branch on received of five sealed parcels Mark A₁, A₂, B₁, B₂ and C bearing seals of '3 APS NB DELHI' along with form FSL and carbon copy of seizure memo from aforesaid Ct Anand Tyagi. Inspector Ramesh Kumar affixed his seal of '1 SHO NBR DELHI' on all the parcels and Form FSL and recorded DD No. 20 in this regard. He also mentioned FIR number on the seizure memo, Form FSL and all the parcels. Inspector Ramesh Kumar handed over the parcels of the case property along with the Form FSL and carbon copy of seizure memo to HC Jagdish MHC(M) who made entry in this regard at serial No. 547 in register No. 19. In this regard case of the prosecution stands proved from the statements of PW2 HC Jagdish Prasad, PW3 Ct. Anand Tyagi, PW4 SI B. P. Singh, PW6 HC Ajay Kumar and PW8 Inspector Ramesh Kumar. Oral testimony of these witnesses find support from the documentary evidence in the form of rukka Ex PW4/A, Copy of entry no. 547 ExPW2/A and Ex PW2/B made in register no. 19 and corresponding and copy of DD No. 20 Ex PW6/B3. Therefore, when PW5 HC Dushyant

could not tell about return of seal to SI B. P. Singh, same does not create doubt in prosecution story.

Property shown to Media

15. Learned defence counsel has referred to Ex PW8/D□ i.e. photocopy of DD No. 37 dated 05.10.2005 and pointed out that as per its contents on 05.10.2005 at 5.30 pm, the case property was taken out of the maalkhana in presence of Inspector and shown to the media. The contention raised by learned defence counsel is that had this case property been taken out of the maalkhana on 05.10.2005 vide DD No. 37, the corresponding entry should have been made in register no. 19 maintained by the MHC(M), but, a perusal of statement of PW2, the concerned MHC(M) would reveal that he nowhere stated about taking the case property out of maalkhana on 05.10.2005, and as such possibility of tampering with the case property on 05.10.2005 cannot be ruled out.

It is true that as per DD No. 37 Ex PW8/D□ case property was shown to media and the media people videographed the same but it is noteworthy that herein the sample parcels were not taken out of the maalkhana for being videographed by the media.

In such like cases of serious charge of recovery of contraband, police should avoid videography or photography of the case property, by the media, even inside the maalkhana or police station.

Publication of such news in print or electronic media need not always be accompanied by photographs of the case property. Publication of suchlike news may be in the interest of public, but publication of photographs of the case property is not at all required to give a strength to the news items. After all, media is not to convince the public at large by depicting the supporting evidence, in the form of photographs. A news item in media, even without photograph, would be suffice to bring the matter to the notice of general public or to highlight such an unlawful activity.

However, in this case firstly the sample parcels were not allowed to be taken out of the maalkhana on 05.10.2005. Therefore, no adverse inference can be drawn against the prosecution even if the case property was allowed to be videographed at the police station. Had no entry been made even in daily diary register, it would have been a different matter. In such a situation, it could be said that such an act on the part of police was concealed from the Court. However, herein PW8 Inspector Ramesh Kumar candidly admitted in his cross examination that this DD No. 37 was recorded in the daily diary register at his direction. A perusal of statement of PW2 HC Jagdish Prasad would reveal that this witness was not subjected to any cross examination regarding videography of case property by the media on 05.10.2005. Had he been subjected to cross examination in this regard, he would have explained the things as to under what circumstances no entry was made in register no. 19 on 05.10.2005. The fact remains that he was not cross examined in this regard. Therefore, no adverse inference can be drawn on account of non□making of any entry in register no. 19 to the effect that the case property was allowed to be got videographed or shown to the media people on 05.10.2005. When specific entry was made in the daily diary register.

Report of FSL

16. PW7 HC Jaibir Singh deposited the sample parcel at FSL on 20.10.2005 with seals intact. It is true that in his statement PW7 HC Jaibir Singh stated that the samples which he took to FSL were bearing three seals of "3A PS/NB DELHI" and three seals of "1 SHO/ NBR DELHI" but there appears to be some typographical mistake as from the very beginning it is case of the prosecution that Inspector Ramesh Kumar had affixed only one seal of "1SHO/NBR DELHI". In this fact finds specifically mentioned in DD entry no. 20 Ex PW6/B3 . Copy of RC no. 81/21 supports this fact. Entry no. 547 made in register no. 19 also corroborates this fact. Further report Ex PX received from the FSL reveals that only one seal of "1SHO/NBR DELHI" was affixed. From the statements of prosecution witnesses it stands established that the sealed parcels reached the laboratory with seals intact and the same were not allowed to be tampered with at any stage.

In FSL report Ex PX, it finds mention that two parcels pertaining to this case were received at FSL on 20.10.2005. Dr. Madhulika Sharma, analysed the contents of the samples and on chemical and gas chromatography examination observed as under: "Exhibits A1 and B1 were found to be contain diacetylmorphine and Phenobarbital Exhibits A1 - 12.3% and 1.5% and exhibit B 3.9% & 0.4 % respectively."

Learned defence counsel has referred to report of FSL and submitted that when two samples were again got despatched to FSL, during trial. Percentage of the contraband (Diacetylmorphine) in one of the samples was found to have increased as compared to the percentage opined by the expert on analysis of the samples drawn initially, whereas analysis of second sample sent to FSL during trial, led to negative report about existence of any heroin. The contention is that this creates doubt in the version of prosecution that any contraband was actually recovered from the accused.

In support of his contention, learned defence counsel has referred to decision in Union of India vs. Farid 2011 (4) JCC (Narcotics) 213 wherein Hon'ble High Court has observed as under: "17. Upon conclusion of trial and hearing arguments from both side, learned Trial Judge has passed the impugned judgment while holding that during evidence some variation in colour in the case property and sample was highlighted. Retesting was ordered vide order dt. 23.09.09. Fresh samples were drawn. As per the latest report dt.19.11.09 the samples gave presence of diacetylmorphine with their purity 20.7, 15.4, 15.6 & 17.4% respectively which on comparison with previous report dt.09.08.07.

18. Further, in earlier report, sample A gave positive for morphine but fresh samples A gave presence of diacetylmorphine. It is not understood how the substance converted from morphine into diacetylmorphine. Generally the purity percentage goes down with the passage of time but in the instant case, surprisingly the purity percentage went high and some chemical changes occurred which leads to an inference that samples sent to the laboratory were not the true representative samples. It was observed that content of diacetylmorphine cannot increase with the passage of time but can decrease. The subsequent report of CRCL raised a legitimate doubt about the substance which was allegedly recovered from respondent. Reliance was placed by the learned Trial Court on Rahul Saini Vs. State, 2006 JCC Narcotics 134."

It was only during trial that two samples were drawn from the residue contained in parcels Mark A and B and got sent to CFSL, Hyderabad for analysis, on the application of the accused, vide order dated 22.02.2008 passed by Learned Additional Sessions Judge, Delhi. One sample parcel so prepared in Court was marked as CSA and other as CSB.

Relevant portion of report dated 31.07.2008, submitted by Deputy Director of CFSL, Hyderabad, on analysis of contents of samples CSA and CSB reads as under: "After chemical & chromatographic analysis of exhibits CSA & CSB the following results are obtained:

1. Diamorphic (heroin) was detected in Exhibit CSA while the same could not be detected in Exhibit CSB.
2. The quantity of heroin in CSA was estimated as 20.19%"

As per para 29 of the judgment in Farid's case (supra), the contents of letter dated 09.09.2011 issued from the Director (Revenue Laboratories), CRCL to Sh. R. K. Sharma, Addl. Director General (Directorate of Revenue Intelligence, Delhi) were reproduced therein. The observations of the Director read as under: "1. There are no guidelines of CRCL functions for second test in respect of the narcotics drugs.

2. (a) Illicit seized NDPS materials of natural, semi-synthetic in origin i.e. Opium, Charas, Ganja and Heroin etc non-homogeneous in nature, hence, if re-sampled, sample variation in contents of active substances can occur.

(b) If re-sampling is done after a gap of considerable duration, the great variation in percentage of active content may occur, which could be due to the following reasons:

- (i) Improper storage (Deterioration due to effect of light, variation in temperature and humidity etc.)
- (ii) Natural products are prone to get infected with bacterial and fungal micro-organism, which may cause a change in chemical composition, thereby it may decompose, partly or fully."

In view of the above observations, Ld. Addl. PP has rightly pointed out that upto 22.02.2008, the case property having already been opened several times during trial for the purpose of exhibition while witnesses were under examination, due to any of the aforesaid circumstance, including moisture, possibility of diacetylmorphine having got accumulated at one place cannot be ruled out and as such accused cannot take any advantage of increase in the percentage of heroin detected in CSA, on expiry of period of about three years after the recovery. In case of Union of India vs. Farid (supra), the samples were initially drawn on 02.06.2007 and subsequently drawn vide order dated 23.09.2009. Facts of the case do not reveal as to whether the parcels containing the residue had been produced in Court and opened repeatedly during the trial or not, but herein the parcels containing the residue had already been opened during the trial. In the given circumstance with due respect, the decision in Union of India vs Farid's case is distinguishable on facts.

As regards the observations in the literature reproduced in para 30 of the judgment in Farid's case, the same pertained to question of possible change in the heroin content which used to arise while giving testimony in Courts in Sri Lanka. In Para 30 there is no observation pertaining to possible change in heroin content of a sample drawn during trial after the parcel containing the residue has been opened several times.

As noticed above, initially two samples of 5 grams each were taken from the polythene Mark A and two samples of 5 grams each were drawn from the polythene Mark B. These were Marked as A1, A2 and B1, B2. A perusal of FSL report Ex PX would reveal that samples Marked A1 and B1 were sent for analysis. The other two samples A2 and B2 remained in the maalkhana. The accused never applied for despatch of any of the remaining two samples A2 and B2 to FSL for analysis, for the reasons best known to him.

In view of the above discussion, this Court find no merit in the contention of learned defence counsel that prosecution case is not free from doubt in view of the subsequent report dated 31.07.2008.

Compliance with provisions of Section 57 of the Act

17. In this case prosecution has proved due compliance with provisions of Section 57 of the Act. Information regarding arrest of the accused and his companion and recovery from them was communicated to the SHO and the SHO in turn communicated the same to ACP. Prosecution has duly proved on record documents Ex PW4/G and Ex PW9/C. In the course of arguments, no argument has been advanced by learned defence counsel that this is a case of non-compliance with provisions of Section 57 of the Act.

Defence plea

18. As noticed above accused has come up with the plea that he has been falsely implicated because of previous enmity after having been picked up from his house in the early hours of 03.10.2005.

While appearing in the witness as his own witness as DW1, the accused stated that he was picked up from his house in presence of and in the company of his wife, elder daughter and nephew. However, he has not examined anyone of them to led corroboration to his defence plea in this regard.

He has examined DW2 Sher Singh who was staying during those days as a tenant in a room on the first floor of the same house, to prove that he, his wife, daughter and a boy were forcibly taken away by 4 persons in a car. However, DW2 nowhere stated that on that date at 5 am accused and his family members were taken away by the police. He is alleged to have approached those 4 persons after having come down from the first floor. So he could say as to who those 4 persons were. However there is nothing in his statement that any of those 4 persons included PW3, PW4 and PW5.

Accused has not proved that any complaint by him about his false implication. None of his family members filed any complaint with any authority that they were forcibly taken away or misbehaved.

So accused has failed to substantiate his defence plea. Conclusion

19. In view of the above discussion, this Court finds that prosecution has fully established its case against the accused (Surender Geja) accused that on 03.10.2005, at about 8 am, he kept in his possession heroin in violation of provisions of Section 21 of Narcotics Drugs and Psychotropic Substance Act. Having regard to the percentage of diacetylmorphine i.e. 12.3% in the contents of sample A1 and 3.9% in the contents of sample B1, as per report Ex PX and the quantity of heroin which so comes, in view of decision in Basheer vs. State of Kerala (2004) 3 SCC 609 this Court holds him guilty of the offence under Section 21(c) of Narcotics Drugs and Psychotropic Substance Act. He is convicted accordingly.

Let convict be heard on the point of sentence on 24.03.2012.

Announced in Open Court
on 23.03.2012

(Narinder Kumar)
Special Judge(Central)
Delhi.

IN THE COURT OF SH. NARINDER KUMAR
SPECIAL JUDGE, NDPS (CENTRAL); DELHI

SC No. 68/2008
FIR No.69/2005
PS Narcotics Branch
U/s 21 of NDPS Act

In the matter of:-

State

Versus

Surender @ Geja
S/o Sh. Kishan Lal
R/o U-41, Budh Vihar, Phase-I,
New Delhi.

.....Accused

ORDER ON SENTENCE

24.03.2012

Present: Surender Geja convict in JC, with counsel Sh. S. S. Dass.

Heard on the point of sentence. Counsel for Convict submits that the accused is not previous convict and that leniency be shown on the point of sentence.

Section 21 (c) of the Act provides rigorous imprisonment for term which may extend to 20 years, and shall also be liable for fine which shall not be less than 1 lac rupees but which may extend to 2 lac rupees. The minimum punishment prescribed under this Section is rigorous imprisonment for term which shall not be less than 10 years and fine which shall not be less than Rs. 1 lac.

Having regard to the commercial quantity of the contraband recovered from the convict, all the facts and circumstances of the case including that the accused is not a previous convict, and has remained in custody during trial for a period of about three years and four months and 15 days, this Court deems it a fit case to sentence the convict to undergo Rigorous Imprisonment for a period of ten years and to pay fine of Rupees one lac.

Accordingly, convict Surender is hereby sentenced to undergo Rigorous Imprisonment for a period of ten years and to pay fine of Rupees One lac or in default of payment of fine, the defaulter shall undergo further Rigorous Imprisonment for nine months, for the offence under Section 21

(c) of Narcotics Drugs and Psychotropic Substances Act.

The period of imprisonment already undergone during investigation, inquiry and trial to be set off against the period of sentence awarded vide this judgment.

Case property be disposed of in accordance with law on expiry of period for Appeal/Revision, if none is preferred or subject to decision thereof.

File be consigned to record room.

Announced in Open Court
on 24.03.2012

(Narinder Kumar)
Special Judge (NDPS) Delhi.