

Puthigodi Ali Usman @ Basheer Vellankod Vs The Intelligent Officer, Narcotic Control Cell and The State of Maharashtra

Court: Bombay High Court

Date of Decision: June 25, 2003

Acts Referred: Constitution of India, 1950 " Article 22, 22(1), 22(2)

Criminal Procedure Code, 1973 (CrPC) " Section 313, 57

Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) " Section 21, 23, 28, 35, 35(2)

Penal Code, 1860 (IPC) " Section 419, 471, 511

Hon'ble Judges: J.G. Chitre, J

Bench: Single Bench

Advocate: Y.N. Katpitia and R.B. Amrolia, for the Appellant; P.S. Thakur and A.M. Shrigarpure, Addl. P.P., for the Respondent

Final Decision: Allowed

Judgement

J.G. Chitre, J.

Heard the counsel for the parties in detail in context with evidence on record.

2. The appellant is hereby assailing correctness, propriety and legality of the judgment and order passed by Special Judge (NDPS) Greater

Mumbai in NDPS Special Case No. 644 of 1997 whereby he has convicted the present appellant for the offence punishable under provisions of

Section 21 read with Section 8(c) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as NDPS Act for

convenience) and sentenced him to undergo RI for 10 years and to pay fine of Rs. 1 lac, in default, to undergo further RI for three months. The

appellant also has been convicted for the offence punishable u/s 28 read with Section 23 and 8(c) of the NDPS Act and sentenced to undergo RI

for 10 years and to pay fine of Rs. 1 lac, in default to undergo further RI for three months. By the same judgment and order, the appellant has been

convicted for the offence punishable u/s 419 read with Section 51 of I.P.C. and has been sentenced to undergo RI for two years. He has been

further sentenced for committing an offence punishable u/s 471 of IPC and has been sentenced to undergo RI for two years. The substantive

sentence has been directed to run concurrently.

3. The prosecution case, in brief, is that between 10th July 1997 and 11th July 1997 the appellant was found wearing a pair of shoes when he was

present in the premises of airport. On account of suspicion he was accosted by prosecution witnesses Nos. 1 and 3. A query was made by

immigration officer and it was noticed that he was, as per prosecution case, attempting to travel on a forged passport which was in the name of one

Basheer Vellankode. His baggage, which was checked in, was searched. Nothing was found in it. Nothing was found on his person in the pockets

of the dress. The officers searching him suspected of the pair of shoes. It was taken off and the heels were removed and it was noticed that there

was a cavity in the heels of both the shoes and in the cavity of each shoe polythene packet containing 150 gms. heroin was stored. Those two

packets were seized, opened and the powder was collected and was packed in one big polythene bag and three sample packets containing each

of 5 gms. of heroin. Before collecting those samples the residing party had satisfied itself that the said powder was heroin by testing it by test kit

which was with the said party. A panchanama was prepared and the seizure was completed at 3.00 a.m. of the said night.

4. Thereafter the raiding party took the appellant to the Customs Office at Ballard Pier where his statement in view of provisions of Section 67 of

the NDPS Act was recorded. Thereafter enquiry was made with Al Akbar Travel Agency in Temkar Mohalla of Bhendi Bazar. Samples were

dispatched to the Deputy Chief Chemist Mumbai who after examining it certified that it was containing diacetyl morphine (heroin) which was a

banned drug in view of provisions of the NDPS Act. The appellant was taken to trial which ended in the judgment and order of conviction and

sentence as mentioned above which is the subject matter of challenge in this appeal.

5. Ms. Katpitia, counsel appearing for the appellant, submitted that the appellant was not at all to travel by that passport at all. He had

accompanied one Zainnuddin who was of his acquaintance and on account of that he had been present in the airport complex inside it when he

was caught by the members of the raiding party on false charge of possessing contraband heroin. It is his contention that he was to travel by his

passport on 13.9.1997. Ms. Katpitia reiterated the contention of the appellant that his statement was not voluntary and he did not state as the

statement indicates. On the contrary, according to him, his signature was obtained by coercion by the officers of NCB. He retracted his said

statement.

6. Ms. Katpitia submitted that the prosecution did not prove that the appellant was wearing those shoes. According to her, the evidence of

prosecution witnesses, the members of the raiding party is nothing but falsehood. Same is the case in respect of panch witnesses and, therefore, the

prosecution has miserably failed to establish the guilt of the appellant. In support of her contention on this point, she pointed out the following

infirmities in the prosecution case.

i) The travel manifest was not seized which could have shown the name of the appellant as the person who was to fly by the concerned flight and

the prosecution is with no explanation on this point. She submitted that had there been truth in the prosecution case, the members of the raiding

party would have seized the said travel manifest in which there could have been mentioned of the name of the appellant.

ii) She submitted that one portion of the boarding pass has not been seized by the members of the raiding party. Had he been the person travelling

by the said flight in question, the remaining portion of the boarding card could have been also seized and it could have vouch safed the prosecution

contention that the appellant was to fly by Flight No. AI 817. Absence of or the non-seizure of remaining portion of the boarding card falsifies the

prosecution case on this point.

iii) She submitted that no uplifting flight coupon has been seized by the members of the raiding party when it was the contention of the prosecution

that the appellant was to fly by the said flight AI 817. According to her, prosecution does not have any explanation whatsoever to explain this

infirmity.

iv) She pointed out that embarkation card connected with the prosecution case so far as the said flight is concerned, has been written in two hand

writings for which the prosecution has no explanation.

v) Mr. Katpitia pointed out that by inherent infirmity the said statement of the appellant as alleged by the prosecution is false. She pointed out what

when it is the case of the prosecution that by getting the information of the appellant, they made enquiry with Al Akbar, Temkar Mohalla, Bhendi

Bazar, how the said statement could embody a question which was totally based on the information which the investigating agency was to acquire

after recording the statement of the appellant. She submitted that the said question in the alleged statement of the appellant shows that the

investigating agency was knowing that the appellant was to travel by the help of said Al Akbar Travel Agency to Dhahran for getting a job where

he was promised a salary of Rs. 800 riyals. She submitted that the way in which the question has been asked, which has been embodied in the said

statement shows that the said statement has been a falsely concocted statement. In support of this argument she pointed out that the panchanama

was over at 3.00 a.m. but even then the said statement of the appellant could not be recorded till 2.00 p.m. on 13.9.1997 and there is no

explanation acceptable coming from the side of the prosecution. She submitted as to why recording of the statement of the appellant was delayed

when the investigating agency was knowing that the substance which was found in the cavity of the shoes which the appellant was possession, as

per the prosecution case, was heroin. She also pointed out that immediately the appellant was not arrested but he was arrested after 32 hours at 9

a.m. of 12.9.1997.

7. She submitted that on account of these significant infirmities, the prosecution evidence cannot be accepted and cannot be taken as basis for

conviction against the appellant and it cannot be held that the appellant was wearing those shoes in which heroin was kept in two packets in the

cavity of the shoes.

8. Ms. Katpitia submitted that unless the factum of possession of those two shoes stands proved, the appellant cannot be expected to give the

explanation and the prosecution evidence is very much insufficient to prove that the appellant was found wearing those shoes which were having

the packets of heroin in the vacities. She submitted that the prosecution should have been discarded by the trial Court.

9. She submitted further that after getting the description, information and telephone number of said Zainnuddin and after making the investigation

with Al Akbar Travel Agency, how the members of the raiding party and investigating agency could not get said Zainnuddin is a big question mark.

She in fact pointed out that when the members of the raiding party could arrest appellant as a watch was kept on him and his movements were

watched, why Zainnuddin was permitted to escape. It is her submission that the raiding party members permitted Zainnuddin to run away who

could have been the possessor of those shoes, and they made the appellant the escape goat and implicated him in this case. She submitted that all

these things should have been noted by the trial Court and as they were not taken cognizance of, the trial Court landed in error of recording

conviction and sentence against the appellant. That being against the evidence and law and as the trial Court has committed the error of

appreciation of evidence, the order of conviction and sentence be set aside and the appellant be acquitted.

10. She pointed out further that when the possession has not been proved as well as the factum of travel or attempt to travel on the part of the

appellant has not been proved, the learned trial Judge should have acquitted the appellant and should not have recorded the order of conviction on

the point of conspiracy.

11. Shri Thakur appearing for NCB and Central Government submitted very vehemently that there is oral evidence of number of witnesses against

the appellant and they are all important officers of Customs Department, therefore, this Court should dismiss the appeal by confirming the order of

conviction and sentence passed by the trial Court. He submitted that all necessary documents have been seized by the members of the raiding

party by drawing the panchanama on the spot and, therefore, also the appeal deserves to be dismissed.

12. According to Shri Thakur, there is no ground for disbelieving the evidence of the prosecution witnesses. It is his submission that the defects

pointed out by the counsel appearing for the appellant are not cognizable. Shri Thakur submitted that the delay which has been pointed out by

counsel for the appellant is explainable by itself because the members of the raiding party were entitled to have the sleep after pursuit of daily

routine business of human beings and, therefore, they could have gone for sleeping and thereafter for following the routine course of life hence on

account of that, they might have been late in producing the appellant in the Customs Office at Ballard Pier. Shri Thakur submitted that on account

of the same grounds, his statement in view of Section 67 of the NDPS Act could have been recorded late. According to Shri Thakur, there is

nothing much to doubt the credibility of the evidence of members of the raiding party and the said statement which has been given voluntarily by the

appellant.

13. Shri Thakur submitted that the investigating agency wanted to get satisfied by testing the information which was given by the appellant.

Because, in view of the statement recorded in view of Section 67 of NDPS Act they visited the office of Al Akbar Travel Agency and after

satisfying themselves, they decided to arrest the appellant and, therefore, there was delay of 32 hours in arresting the appellant. He submitted that it

does not amount to any infirmity in the prosecution case. He submitted that on these grounds the prosecution evidence which is sound cannot be

discarded.

14. Shri Thakur submitted that Zainnuddin must not have been present at all at the airport but for misguiding the investigating agency the appellant

might have told the name of said Zainnuddin and, therefore, non-tracing of Zainnuddin cannot be a plea for acquittal. At the same time, Shri Thakur

submitted that the investigating agency made the search for Zainnuddin by corresponding with the concerned authority in Kerala but he could not

be found and, therefore, there is no substance in the criticism which has been levelled by the appellant's side on the prosecution evidence.

15. Shri Thakur submitted that as soon as the possession of those shoes has been established by the prosecution, a presumption can be drawn that

the appellant was possessing narcotic drug to his knowledge keeping in view the provisions of Sections 54 and 35 of NDPS Act. Once the factum

of possession has been proved, it becomes the duty of the appellant to explain as to how he came in possession of the said narcotic drug.

According to Shri Thakur, he attempted to do it by giving a statement which was all the way voluntary. Shri Thakur submitted that the judgment

and order which has been passed by the trial Court is well justified and therefore this appeal be dismissed. Shri Shringarpure, A.P.P. adopted the

argument which has been advanced by Shri Thakur for the prosecution.

16. Section 54 of the NDPS Act speaks of presumption from possession of illicit article. It indicates that:

54. In trials under this Act, it may be presumed, unless and until the contrary is proved, that the accused has committed an offence under this Act

in respect of

(a) any narcotic drug or psychotropic substance or controlled substance,

(b) any opium poppy, cannabis plant or coca plant growing on any land which he has cultivated;

(c) any apparatus specially designed or any group of utensils specially adopted for the manufacture of any narcotic drug or psychotropic substance

or controlled substance; or

(d) any materials which have undergone any process towards the manufacture of a narcotic drug or psychotropic substance or controlled

substance, or any residue left of the materials from which any narcotic drug or psychotropic substance or controlled substance has been

manufactured, for the possession of which he fails to account satisfactorily.

17. Section 35 of the NDPS Act provides that:-

(1) In any prosecution for an offence under this Act which requires a culpable mental state of the accused, the Court shall presume the existence of

such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an

offence in that prosecution.

Explanation.-- In this section "culpable mental state" includes intention, motive, knowledge or a fact and belief in, or reason to believe, a fact.

(2) For the purpose of this section, a fact is said to be proved only when the Court believes it to exist beyond a reasonable doubt and not merely

when its existence is established by a preponderance of probability.

18. Thus, the evidence will have to be appreciated keeping in view these two sections of NDPS Act. It is to be noted that in view of Sub-section

(2) of Section 35 the prosecution is obliged to prove the guilt of the accused in NDPS cases also beyond reasonable doubt and, therefore, the

submission of Shri Thakur that when the officers of Customs Department are deposing to against the accused, a credence be given to their

evidence will have to be rejected as not sound in law. The evidence of those witnesses who happened to be the officers of Customs Department

will have to be appreciated by the test of truth like other witnesses, may be citizens or gullible villagers.

19. The prosecution has examined PW Ramesh Ramnathan, the Inspector of Customs Narcotic Cell as PW-1. It examined Anil Somshekhar

Menon, Immigration Officer, as witness No. 4. These officers speak about the activities of the appellant as alleged by the prosecution, accosting

him, his detention, search, preparation of panchanama. For proving the factum of panchanama the prosecution examined Behruz H. Khushrushai,

another officer of Air India Ltd. Thus, on this important aspect, in this case, prosecution is dependent on chorus of voices of these witnesses

Chorus of voices of witnesses does not make the melody. What there should be is the truth in it. Therefore, the testimony of these witnesses will

have to be tested by the test of human experience and the evidence of these witnesses will have to be tested on the anvil of truth.

20. PW-4 Ramnath Namdeo Ambre seems to be the first person who accosted the appellant as per the prosecution case. His evidence is that he

was present at NIPT office, Sahar Airport on Immigration Counter at 12.00 mid night at Departure II. He was having with him Immigration Officer

Kadam and there has been Immigration Officer Shri Rajesh Yadav. According to his evidence, in the night between 10th and 11th September at

about 11.00 pm. when Air India flight AI 817 was announced, he instructed other officers to start immigration work i.e. checking the passport and

VISA and boarding card, etc. During that work process at about 12.45 a.m. Assistant I.O. Rajesh Yadav from Counter No. A gave him a call

and when he went near, Yadav told him that he was having a passport of a person which he believed to be counter fit passport. It is the evidence

of Ramnath Ambre that the last page and the photograph on the said passport were fake. As per his evidence, the passport was in the name of

Rashid Mutthigodi and the photograph on it was of the appellant. After this, both the officers started making enquiry with the appellant who was

taken to immigration office and when they were questioning him, the customs officers PW Ramnath alongwith other customs officers came there

and PW Ramnath told him that they were suspecting him and they wanted to take the search. Thereafter two panchas were called and the customs

officer took the search of the accused during which from his shoes, in the sole cavities, two packets each weighing 150 gms. were found and those

packets were containing heroin. Those officers took the samples, took travel documents and passport and drew detailed panchanama in the

presence of panch witnesses. According to his evidence, an entry to this effect was made in the station diary of Departure II on page No. 5.

21. On this point, PW Anil Menon stated in his evidence that he attended the office at 10.00 A.M. on 11.9.1997 and learnt that seizure of

contraband heroin totalling 300 gms was effected at Sahar Airport from the shoes of the present appellant as he received a telephone call from PW

Ramesh Ramanathan, the Investigating Officer, from the airport. His evidence further indicates that at about 2.00 p.m. upon instructions from

Superintendent Mr. Sanchis he recorded the statement of the appellant in English in his hand writing after interrogating him in Malayalam which was

the mother tongue of the appellant. It is his evidence that the appellant gave the answers in Malayalam which were translated and transcribed by

him in English on his request and after completing the said statement he explained to appellant the said statement after reading it over to him and

after finding it correct, the appellant signed on it.

22. It is the evidence of PW Ramesh Ramanathan and at mid night between 10th and 11th September 1997 he was present at the airport with

Superintendent Dube and Pinehi and IOs. Issac, Sabestian and Boricha. When that was so, they started having routine check of the passengers at

Airport Module II who went to board in Air India flight No. AI 817 from Bombay to Dhahran scheduled at 2.15 A.M. It is his evidence that at

12.30 a.m. they noticed one passenger who happens to be the present appellant before immigration counter and his movements were suspicious. It

is his evidence that he was taken by Immigration Officer to Immigration Officer which was nearby and he was questioned. At that time they

introduced themselves as customs officers and told Mr. Yadav, Mr. Kadam and Mr. Ambre that they were also suspecting him and they wanted

to take his search. It has come in his evidence that those officers told him that the appellant was possessing a fake passport in the name of Basheer

when he had given his name as Puthigodi Usman.

23. It is the evidence of PW Ramesh Ramanathan that he called two panch witnesses from Air India Office by names Mr. Dalvi and Mr.

Khushrushai and by explaining the purpose of the raid they requested the panch witnesses for a seizure panchanama. The person of the appellant

was searched. Nothing was found and thereafter those shoes were taken out and from the cavities of those shoes two packets each containing 150

gms of heroin were seized under the panchanama. One big sample was prepared and three samples were prepared for sending it to Deputy

Chemical Analyser.

24. Thus, so far as examination-in-chief of these witnesses is concerned, it is simple and accommodating each other. But the examination-in-chief is

not to be taken as it is, because it is liable to be exposed, shattered by cross-examination. Therefore, equal importance has also to be given to

cross-examination. By the powerful weapon of cross-examination, a witness can be exposed to be a liar. The evidence which has been given by

the witness in examination-in-chief and cross-examination has to be assessed as a whole and it has to be decided whether his evidence is to be

accepted or not. It has to be tested on the anvil of the truth and human experience and thereafter a conclusion has to be drawn whether the witness

has stated the truth or a falsehood.

25. PW Ramesh Ramanathan has stated in his cross-examination on this point that Flight No. 817 Bombay Dhahran was having its flight manifest

but it was not collected. He also stated in his cross-examination that it is true that every passenger has to produce his air ticket at the air line

counter where boarding card is to be given to him after taking flight uplifted coupon from the ticket. He further admitted that Air ticket Article 7

does not bear flight uplifted coupon. He further admitted that the investigating agency did not record the statement of any person in staff who

collected flight uplifted coupon of air ticket, Article No. 7. It is his evidence further that at the airport, only upto certain area public is allowed.

Thereafter after the checked in counter, only the passengers are allowed. Ms. Katpitia has submitted the travel manifest has not been seized and

the remaining portion of the boarding card also has not been seized for the reasons best known to the prosecution. She further submitted that the

uplifted coupon was not seized. By pointing out these things, she submitted that from all these defects it will have to be concluded that the evidence

of Ramesh Ramanathan is nothing but a falsehood. In fact, the appellant was not a traveller by Air India flight AI No. 817. However, as contended

by the present appellant, he had gone to the Airport with Zainnuddin and Zainnuddin was permitted to escape goat. On this point Shri Thakur

submitted that there was no need of attaching that travel manifest because it was not necessary to do so. The occult testimony of PW Ramesh

Ramanathan, PW Ambre and panch witness Khushrushai itself is sufficient to prove the fact that the appellant was wearing those two shoes which

were having heroin in the cavities. This Court cannot agree with Mr. Thakur on this point because the evidence will have to be appreciated keeping

in view the existence of these documents which were very important for the investigating agency to seize them for proving the guilt of the appellant

in this case. The witness may tell the lie but document do not. Therefore, in some case, the importance has to be given to documents which are un-

inherently conspicuous for the scrutiny, examination or appreciation of evidence. When it is the case of the prosecution that the appellant was the

traveler of that flight and he was travelling by the said fake passport, when a portion of boarding card was seized under the panchanama, why

remaining portion of the said boarding card was not seized and why the statements of the concerned staff members of Air India Counter were not

recorded. The prosecution has no answer at all on this point.

26. When the appellant was travelling by the said flight as per the prosecution case, why the travel manifest was not seized. When the boarding

card was given to the appellant, as per the prosecution case, his name must have been included in the travel manifest which happens to be the

important document giving the idea of the passengers who are travelling by the said flight. Had the prosecution witnesses been telling truth, travel

manifest would have been seized so also the remaining portion of the boarding card. Non-seizure of these two documents cause a serious doubt

about the credibility of the witnesses from whose mouth the prosecution is adducing the evidence in support of its case for proving the guilt of the

appellant.

27. The uplift coupon has not also been seized. That would have been another piece of the evidence giving guarantee to the contention of the

prosecution. That would have given the details of the baggage which the appellant was likely to carry by that flight. The travel manifest, the said

uplift coupon would have given the exact idea as to whether the appellant was to travel by that flight or whether the said Zainnuddin was to travel.

But the prosecution has not seized those documents. Therefore, the criticism of suppressing those documents with ulterior motive cannot be

ignored.

28. When as per the evidence of PW Ramesh Ramanathan he himself and his colleagues were keeping a watch on the activities of the appellant

why they did not accost him earlier and permitted him to be accosted by the Immigration Officer only. Had they been prompt, they could have

caught said Zainnuddin about whom the appellant has made the mention in his statement, alleged to have been recorded by the investigating agency

in view of Section 67 of the NDPS Act, and in the examination u/s 313 of the Code of Criminal Procedure, 1973 (hereinafter referred to as

Code" for convenience).

29. The prosecution evidence is not infirm on this point alone. It is infirm on other counts also. As per the prosecution evidence itself, the

completion of panchanama was at 3.00 a.m. of the night between 10th of September and 11th of September 1997. Though Shri Thakur has

submitted that those persons might have gone for taking the sleep, for resting themselves, the prosecution cannot get itself exonerated so easily,

because the tone of the evidence of PW Ramanathan, PW Ambre and PW Khushrushai indicated that those persons were on duty there for entire

night. It has come in the evidence of PW Ambre that other flights of foreign air companies were to go after 12.45 a.m. in the said night. That means

that all these officers were on duty during the said night. When that was so, how they could go to sleep at earlier time which was not scheduled

one. Apart from that, when they started work of drawing the panchanama at 12.45 a.m. naturally keeping in view the human behaviour they could

have also started interrogating the appellant after 3.00 a.m. Because, at that time the important work of drawing the panchanama was over, by test

kit the members of the raiding party knew that the powder which was found was heroin. When that was so, why they did not start interrogating the

appellant there and there only. In ordinary course of human behaviour said officers would have started interrogating the said person immediately

when he was caught, and panchanama was drawn and he was at demolished mood, at least, in a debilitated stance on account of his apprehension

by those customs officers. That would have been the proper time to catch him in vulnerable state of mind or in a repentative mood. Therefore, in all

probabilities the members of the raiding party should have thought it proper to put some questions to him putting the said aspect of possessing the

narcotic drug as per their case and for the purpose of knowing as to who supplied the said powder to him? For what purpose he was having the

said powder in the soles of boots? Who was accompanying him? Who sponsored his expenditure? Where he was to give those shoes? What was

the further link behind the said transaction? But very amazingly the members of the raiding party left him (it is not clear as to where he was left) and

decided to interrogate him at 1.00 p.m. on next date i.e. 11.9.1997. In between where these officers were, which is big question which has not

been answered by the prosecution. In between where the appellant was is another mystery. No explanation is coming forth and this assumes

importance when appellant was not arrested for two hours after accosting him and starting the panchanama of seizure of those shoes. Section 57 of

the Code provides that no police officer shall detain in custody a person arrested without warrant for a longer period than under all the

circumstances of the case is reasonable, and such period shall not, in the absence of a special order of a Magistrate u/s 167, exceed twenty-four

hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate's Court. Article 22 Sub-article (1) of the

Constitution of India declares that no person who is arrested shall be detained in custody without being informed, as soon as may be, of the

grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice. Sub-article (2) declares

that every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty-four hours of

such arrest excluding the time necessary for the journey from the place of arrest to the court of the magistrate and no such person shall be detained

in custody beyond the said period without the authority of a magistrate. Therefore the prosecution was under the obligation to explain this delay of

32 hours. The prosecution was under duty to explain as to why the appellant was not immediately arrested when seizure of powder was started or

at least when it was completed because by that time the said powder was tested by test kit and they formed an opinion that it was heroin. As soon

as they formed the opinion that it was heroin, a narcotic drug, they should have arrested the appellant and they should not have detained him

without arrest. Though the prosecution did not give the explanation, nor Shri Thakur submitted anything on this, including its delay, the reason is

obvious that the investigating agency did not want the present appellant to be produced before the nearest Magistrate within the period of 24 hours

from 12.45 a.m. of the night of 12.9.1997 or within 24 hours from 3.00 a.m. of the said night. Because they wanted to manoeuvre the things.

30. This attitude of the investigating agency has been again depicted by a question which has been put to the present appellant in his alleged

statement on which the prosecution is very much harping. At page No. 96 internal page No. 7 of the said alleged statement, a question was asked

to him :

Did not you know that you had a confirmed ticket in your name to Riyadh via Sanaa on 14.9.97 and that you were given a job with a salary of

600 riyals per month?

Ans. I was aware of this developments on enquiry with Al-Akbar Travels.

Q. Then why did you try to travel on a forged passport?

Ans. I decided to travel on the forged passport, as Zainnuddin promised me a better job with a salary of 800 riyals per month in Saudi Arabia.

The story of the appellant likely to fetch salary of Rs. 800 riyals per month could not have been known to investigating agency of this case before

completion of the said statement. When that was so, how PW Menon could ask the question to the appellant making the mention of such a job or

promise to get such a job? In fact as per the prosecution case after recording the statement of the appellant they went to Al Akbar Travels and

made the investigation and during that investigation they learnt about all these things and for proving that a witness was examined who was the staff

member of Al Akbar Travels. This sort of maneuvering was to be done. They wanted to record the statement of the appellant in view of Section

67 in the nature of confession and therefore, they prolonged his arrest so as to have longer time i.e. 24 hours and to avoid the duty of producing

the appellant before the nearest magistrate during 24 hours at least from 3.00 a.m. on the night of 12.9.1997.

31. Another maneuvering was to be done and that was the attempt to take a confession from the appellant under the garb of recording the

statement in view of Section 67 of the NDPS Act. Thus, the trend is increasing to record a confession under the garb of recording the statement

u/s 67 of the NDPS Act and then go on contending that the appellant has admitted so many things which are sufficient to prove the guilt. On

internal page No. 2 of the said statement a question has been asked to the appellant:-

Que. ""Today our officers and the investigation offices at NIPT, Sahar, Mod-II, departure intercepted you at the Investigating counter, while you

were to board on Air India flight No. AI 817 bound for Daharan and seized 300 gms. of Heroin concealed in the shoes worn by you. What you

have to say.

In all probabilities this question is compelling the accused to give his confession. The tenor of the question is also compulsive. What a poor person

after being detained by such custom officers would say. Under the garb of recording a statement in view of Section 67 of the NDPS Act entire

story has been recorded in the statement which has affirmed the prosecution case from letter A to Z. This is sheer abuse of the power and when it

has been done for the purpose of avoiding the fetters of Article 22 and Section 57 of the Code, it assumes tremendous adverse effect on the

credence of the prosecution case and credibility of such witnesses who are prone to collect the evidence against the accused by throttling the

important provisions of law and the Constitution guaranteeing the fundamental right of liberty to a citizen. The Supreme Court has condemned such

things in its judgment in State of Punjab v. Balbir Singh wherein the Supreme Court has held that the evidence which has been collected by the

investigating agency by following the procedure inconsistent with law should not be believed for basing a conviction. Here they have not acted in

consistent with the provisions of Section 57 of the Code but have attempted to avoid the obligation of Article 22 of the Constitution of India.

Therefore, what counsel Thakur for the prosecution urges that the evidence of such officers should be believed because they are important officers

of the concerned department, has to be dismissed.

32. Thus, though the prosecution witnesses Nos. 1, 2, 3 and 4 have spoken in the chorus, their evidence has to be discarded keeping in view the

observations of the Supreme Court in State of Punjab Vs. Baldev Singh, etc. etc., and if that is discarded, it will have to be concluded that the

prosecution has failed to prove the factum that those shoes were on the person or in possession of the present appellant and when that is so, the

appellant is not expected to give any explanation about the possession of heroin.

33. Further important points which need to be mentioned in this case which would be supporting the conclusion drawn by this Court in the above

appeal is that no serious attempts have been made to trace out the said Zainnuddin though his description was given as per prosecution case and

his contact telephone number was also given. Only a letter was sent to the concerned authority in Kerala who wrote back by saying that no such

person was found. A simple correspondence by a simple letter and nothing further than that. The investigating officer should have made search of

said Zainnuddin by visiting Noor Guest House in Dongri, the residential address which was available to them. No further investigation has been

done for out bursting the said link and chain. Had that been done, the real culprits would have been brought to book and they would not have been

required to waste the time in catching the flies. The lack of sincere attempt on this, also compels drawing of an adverse inference against the

credibility of those officers though coming in chorus and apparently in verbal harmony. The trial Judge has lost sight of this important aspect of the

matter and, therefore, did not appreciate the evidence in proper spirit. Finally, he landed in the error of recording the order of conviction and

sentence against the appellant. Thus, the order which is inconsistent with true spirit of the evidence and inherent circumstances depicted by the

prosecution case itself, has to be set aside. Thus, the order impugned in this appeal is set aside and the appeal is allowed. The appellant stands

acquitted. He be released, if not required for any enquiry, proceeding, trial. He be also not released if he happens to be undergoing sentence for

any other offence. Operative part of this order be sent to the Superintendent of Yerawada Jail where the appellant is languishing and undergoing

the sentence as submitted by Ms. Katpitia, his Advocate. No interference in the order in respect of the disposal of the property.

34. Parties to act on ordinary copy of the order duly authenticated by the Private Secretary of this Court.