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(2011) 07 DEL CK 0437

Delhi High Court

Case No: Criminal A. 275 of 1998

D.R.I.	APPELLANT
Vs	
Raj Kumar Mehta and Others	RESPONDENT

Date of Decision: July 12, 2011

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 313
- Evidence Act, 1872 - Section 25, 30
- Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) - Section 21, 23, 29, 42, 50

Citation: (2011) 6 AD 328

Hon'ble Judges: Mukta Gupta, J

Bench: Single Bench

Advocate: Satish Aggarwala, for the Appellant; Sanjiv Kumar and S.K. Santoshi, for the Respondent

Final Decision: Dismissed

Judgement

Mukta Gupta, J.
These appeals arise out of a common impugned judgment dated 12th March, 1998 acquitting the Respondents for offence punishable under Sections 21, 23 and 29 of the Narcotics Drugs and Substance Act, 1985 (in short "the Act").

2. Briefly the prosecution case is that on the basis of an intelligence that a large quantity of heroin was likely to be brought in a truck bearing Gujarat registration number at G.T. Karnal Road near Sanjay Gandhi Transport Nagar to be delivered to occupiers of the Neptune Blue Maruti Car, the officers of the Appellant constituted a raiding team and intercepted a truck bearing No. GJ-9T-5419 and one Maruti car bearing No. DL-3CD-5358 on the intervening night of 5th and 6th October, 1993. The Respondents in Criminal Appeal No. 275/1998 i.e. the Respondent No. 2, Sumer Khan was driving the

truck, the Respondent No. 1 Raj Kumar Mehta was sitting beside him whereas Respondent No. 3 Kavinder Mehta was sitting in the Maruti Car. On the preliminary checking it was discovered that three polythene bags lying above the driver"s cabin of the truck were giving pungent smell similar to that of heroin. However, due to darkness at the spot and on account of security reasons, as it was not possible to conduct a detailed examination of the goods, the truck and the car along with the occupants were escorted to DRI office at I.P. Estate, New Delhi. At the office of the Appellant, the vehicles were thoroughly searched in the presence of two independent witnesses PW2 Bedi Ram and PW6 Gopiya.

3. The three polythene bags were opened and each bag contained 20 small packets containing a powered substance. The contents of each gave positive result of heroin by the Drug Detection Test Kit. The total weight of the packets was found to be 62.37 Kgs. Out of the packets two representative samples weighing approximately 5 grams each were drawn from each of the 60 packets for chemical analysis which were given identification marks "A" and "B" in addition to the number of corresponding packets. The samples and the remaining substance were sealed with the paper slips signed by the accused, witnesses and the Seizing Officer PW1 Shri R.K. Kanwar. From the truck some documents and from the Maruti Car Indian currency worth `19,900/- were also recovered. The currency, documents along with the truck and car were seized. The three Respondents in Criminal Appeal No. 275/1998 in their statements u/s 67 of the Act admitted the recovery of heroin from the truck and the Indian currency from the Maruti Car. The samples were sent for analysis to Central Revenue Control Laboratory (CRCL) by Shri V.K. Goel, PW17, the then Assistant Director through the complainant PW1 R.K. Kanwar and vide report dated 29th October, 1993 Ex.PW15/C it was opined that each of the samples gave positive test for the presence of "Diacetylmorphine". During the investigation a search was conducted at the godown of Respondent No. 1 on 8th October, 1993 duly witnessed by two public witnesses and 108 jerricans containing Acetic Anhydride and other liquid chemicals were recovered. Representative samples were drawn from these jarricans and sent for chemical analysis. The statements of the Respondents showed that Respondent No. 2 Sumer Khan received the consignment from one Sheru Khan @ Sheru who was at that time lodged in Central Jail, Jodhpur. The statement of Sheru Khan, the Respondent in Criminal Appeal No. 276/1998 was recorded u/s 67 of the Act on 19th October, 1994 in the Central Jail, Jodhpur. The complaints filed against the Respondents Raj Kumar Mehta, Sumer Khan and Kavinder Mehta for offences punishable under Sections 21, 23, 29 and 25A of the Act and u/s 29 against Sheru Khan were tried together. After recording the statements of complainant"s witnesses and the Respondents u/s 313 Code of Criminal Procedure the learned Special Court acquitted the Respondents vide the impugned judgment dated 12th March, 1998.

4. Learned Counsel for the Appellant contends that the judgment of the learned Special Court is illegal and perverse as the Respondents have been acquitted for non-compliance of mandatory provisions of Section 42 (1) and (2) and Section 50 of the Act. In the facts of

the case neither Section 50 of the Act nor Section 42 was applicable. According to learned Counsel for the Appellants, Section 43 of the Act was applicable and procedure in accordance thereto has been followed. Relying on State of Haryana v. Jarnail Singh 2004 (2) JCC 1036 (SC) it is contended that in the present case Section 43 of the Act was applicable and not Section 42. It is further contended that in the light of the verdict in Karnail Singh Vs. State of Haryana, ; Narayanaswamy Ravishankar Vs. Asstt. Director, Directorate of Revenue Intelligence, and Divisional Forests Officers and Others Vs. M. Ramalinga Reddy, , compliance of Section 42 has to be seen in the light of the facts of each case and as per the evidence adduced in the present case even Section 42 of the Act had been complied with. It is thus prayed that the impugned judgment be set aside and the Respondents be convicted and sentenced for the charges framed against them.

5. Learned Counsel for the Respondent No. 2 and the Respondent in Crl. A. 276/1998 Sheru Khan fairly states that the impugned judgment in so far as it relates to the non-compliance of Section 50 of the Act is erroneous in view of the fact that recovery was allegedly made from a truck and not from the person of the Respondents. He however, contends that there is no perversity in the impugned judgment as regards Section 42 of the Act is concerned, compliance whereof is mandatory and has not been complied with. Relying on Abdul Rashid Ibrahim Mansuri Vs. State of Gujarat, it is contended that whenever a search is made from a conveyance the requirement of Section 42 is mandatory. In the present case there is no dispute that the search was conducted after sun set. It is the case of prosecution itself that at the time of interception since it was dark they took the two vehicles to the DRI office where thorough search took place. It is further stated that the decision in Abdul Rashid Ibrahim Mansuri (Supra) has been affirmed by the Constitution bench in Karnail Singh Vs. State of Haryana, and thus, this being the legal position the appeal needs to be dismissed on this short ground itself.

6. It is further urged that it is the duty of the prosecution to prove by legal evidence that the case property and samples were properly seized and sealed. In the present case link evidence has not been proved beyond reasonable doubt by the prosecution. PW1 R.K. Kanwar, the Intelligence Officer does not say where the case property was kept, whether in the malkhana or with him. PW1 in his cross-examination admits that neither the facsimile of the seal was affixed on the panchnama nor the description of the seal was mentioned therein. PW1 says that it was sealed with the seal of DRI whereas in the panchnama it was mentioned to be sealed with the seal DRI No. 1 When the case property was produced it was sealed with the seal of DRI but no number was there. Relying on Valsala Vs. State of Kerala, it is prayed that the acquittal should not be disturbed due to paucity of reliable link evidence. Reliance is also placed on Datu Shrama v. State 1996 JCC 293, Union of India v. Bal Mukund and Ors. 2009 (2) JCC (Nar) 76, to contend that Section 55 of the Act has not been complied with in the present case.

7. Relying on Raju Premji Vs. Customs NER Shillong Unit, , it is also contended that even though the statement was recorded u/s 67 by the Officers of the DRI but the same was recorded while the Respondent Sheru Khan was in police custody and is, thus

inadmissible in evidence being hit by Section 25 of the Evidence Act.

8. Mr. Sunil Mehta, learned Counsel for Respondent No. 1 and 3 in Criminal Appeal No. 275 of 1998 has filed the written submissions. He contends that PW2 Bedi Ram and PW6 Gopiya who are the independent witnesses have turned hostile. PW1 R.K. Kanwar and PW17 V.K. Goel have contradicted each other. The recovery allegedly made from the godown is also not proved and no case punishable u/s 25A read with Section 9A of the Act is made out against Respondent No. 1. It is further contended that the prosecution has not proved the relevant notification. PW18 R.P. Sharma, did not support the case of the prosecution and he was declared hostile. It is next contended that PW5 H.S. Swami and PW1 R.K. Kanwar did not depose that search of the Godown No. B-25, Libaspur was conducted and that the recovery was effected in their presence. Moreover, the ownership of the go-down in the name of the accused R.K. Mehta has also not been proved by any evidence. It is further stated that the key of the alleged Godown was neither produced in the Trial Court nor any memo showing that the key was handed by the accused has been produced. The accused was not present at the time of opening of the said Godown and no documentary evidence has been produced to prove the ownership and possession of the said Godown vesting in the accused. As held in State of Punjab v. Balbir Singh 2004 (8) SCC 902, compliance of Section 42 of the NDPS Act is mandatory and the same having not been complied with in the present case, the Respondents are entitled to acquittal and the impugned judgment is not required to be disturbed.

9. I have heard learned Counsel for the parties and perused the records. Admittedly the learned Special Court has erred in holding that the requirement of Section 50 of the NDPS Act in the facts of the present case was mandatory in nature and thus, the Respondents were liable to be acquitted on that count. The recoveries have allegedly taken place from the truck and the godown and not from the person of the accused. Thus Section 50 of the Act was not applicable and the non-compliance thereof not fatal.

10. As regards the compliance of Section 42 of the Act is concerned, the facts of the present case are that on 1st Jaunary, 1994, PW1 Shri R.K. Kanwar received the information that some quantity of heroine was being transported through truck No. GJ-9T-5419 and was to be transferred to one Maruti Car bearing registration No. DL-3CD-5358. The team intercepted the vehicles at G.T. Karnal Road near Sanjay Gandhi Transport on the intervening night of 5-6th October, 1993. Though it was a national highway however the vehicle was not a public conveyance. In the team there were two Assistant Directors namely V.K. Goel and G.K. Thapa along with 7-8 Intelligence Officer at the time of interception. The person who was driving the truck disclosed his identity as Sumer Khan, that is, Respondent No. 2 and the other occupant of the truck revealed his identity as Raj Kumar Mehta, that is, Respondent No. 1. The truck was being followed by the said Maruti Car and in the Maruti Car there was only one occupant, that is, Respondent No. 3 Kavinder Mehta who disclosed himself to be the nephew of Respondent No. 1. The main crux of the arguments of learned Counsel for the Appellant is that though the vehicle intercepted was not a public conveyance, however

since it was intercepted in transit, Section 43 of the Act was applicable. However, learned Counsel for the Respondent contends that Section 43 has no application and Section 42 would apply in the present case as the vehicle is a conveyance in question and it was admittedly searched after sun set, because the case of prosecution is that due to darkness they had taken it to the D.R.I. office. However, this argument of learned Counsel for the Appellant holds no water for the reason that firstly the vehicle intercepted was a conveyance and not a public conveyance which is not included in public place in terms of Section 43 and the vehicle when intercepted was not in transit. The only witness of the prosecution who has deposed about the interception of the vehicle is PW17 Shri V.K. Goel who has stated that the vehicle was intercepted after it stopped. The relevant portion of his testimony is:

I was working as Asstt. Director in Head Quarter D.R.I. from June, 1990 till July, 1994. I was over-all In charge of the operation of this case. We had intelligence regarding smuggling of Herion from Pakistan border. The operation was controlled by one Sheru of Rajasthan who was receiving Herion from Pakistan, and the same was brought to Delhi and was to be given to Raj Kumar Mehta. The surveillance was kept at number of places, such as Jaisalmer, Jodhpur and Delhi. When the intelligence was developed to the specific intelligence, the Surveillance was kept in Delhi in the first week of October 1993. The surveillance was also kept on the activities of Raj Kumar Mehta who is present in the Court today (correctly identified) and it was ascertained that one Truck having Gujrat Registration Number which according to intelligence had brought about 60 KG of Herion in Delhi. Accordingly, before interception surveillance was kept near Sanjay Transport Nagar on G.T. Karnal Road, where it was found that one of the Maruti car which belong to Raj Kumar Mehta was also cited at the spot. The truck along with Maruti car were followed to Industrial Area, Samaypur Badli, where the truck stopped. The truck as well as the Maruti car were intercepted by the officers of the D.R.I. and one of the officer found that some powder which was smelling like of herion was kept at the top of the truck i.e. on the top of driver cabin. At the time of interception there were number of officers, including one of my colleague Rajiv Thapar, Asstt. Director the then, and some other Intelligence Officer namely Amlesh Chaudhary, R.S. Kanwar, S.K. Sharma, MBC Babu etc. I was also one of the member of the raiding team.

In cross-examination, PW17 Shri V.K. Goel has admitted that intelligence gathered was not recorded anywhere. He volunteered that the senior officers were informed orally about the intelligence. It is admitted that the information gathered was also regarding the specific place where the said truck was parked. Moreover PW1 Shri R.K. Kanwar, the other witness has admitted that he was called to the spot from his residence and he reached there around 10:15 to 10:30 P.M. When he reached there, the truck and the car were already parked.

11. Since the truck intercepted was neither a public conveyance nor was it intercepted in transit, Section 43 of the Act has no application. Section 42 of the Act which has application to the facts of the case has not been complied with as is evident from the

testimony of PW-17 reproduced above. The reliance of the learned Counsel for the Appellant on the decisions in Jarnail Singh (supra) is wholly misconceived. The said was a case which related to interception of a tanker moving on a public highway and the moving tanker was stopped and searched while checking vehicles at nakabandi. Similarly, in the case of Karnail Singh (supra) there was no previous information and the truck was intercepted on suspicion. In. State, NCT of Delhi Vs. Malvinder Singh, , again the information was received when the officers were on patrolling duty.

12. The law on the point is very clear that when recovery is to be made from a conveyance, not a public conveyance, though on public road Section 42 of the Act is applicable. In Abdul Rasheed Ibrahim (supra) where recovery of the contraband was from an autorikshaw intercepted on a main road wherein four gunny bags were recovered, their Lordships held:

In this case PW 2 admitted that he proceeded to the spot only on getting the information that somebody was trying to transport narcotic substance. When he was asked in cross-examination whether he had taken down the information in writing he had answered in the negative. Nor did he even apprise his superior officer of any such information either then or later, much less sending of copy of the information to the superior officer. However, learned Counsel for the Respondent - State of Gujarat - contended that the action was taken by him not u/s 42 of the Act but it was u/s 43 as per which he was not obliged to take down the information. We are unable to appreciate the argument because, in this case, PW-2 admitted that he proceeded on getting prior information from a constable and the information was precisely one falling within the purview of Section 42(1) of the Act. Hence PW 2 cannot wriggle out of the conditions stipulated in the said Sub-section. We, therefore, unhesitatingly hold that there was non-compliance with Section 42 of the Act

13. In the case of Abdul Rasheed (supra), it was held that admittedly it was a case of prior information and thus the Intercepting Officer could not wriggle out of the conditions stipulated in the Sub-section contending that action taken by him was not u/s 42 of the Act but u/s 43 and thus he was not obliged to take down the information. The decision in Abdul Rasheed (supra) has been approved by the Constitution Bench in Karnail Singh (supra) wherein it was held that there was no conflict between Abdul Rasheed and Sajan Abrahim and both the cases related to different fact situations. In Karnail Singh it was held that:

11. A careful examination of the facts in Abdul Rashid and Sajan Abraham shows that the decisions revolved on the facts and do not really lay down different prepositions of law. In Abdul Rashid, there was total non-compliance with the provision of Section 42. The police officer neither took down the information as required u/s 42(1) nor informed his immediate official superior, as required by Section 42(2). It is in that context this Court expressed the view that it was imperative that the police officer should take down the information and forthwith send a copy thereof to his immediate superior officer and the action of the police

officer on the basis of the unrecorded information would become suspect though the trial, may not be vitiated on that score alone. On the other hand, in Sajan Abraham, the facts were different. In that case, it was very difficult, if not impossible for the Sub-Inspector of police to record in writing the information given by PW-3 and send a copy thereof forthwith to his official superior, as the information was given to him when he was on patrol duty while he was moving in a jeep and unless he acted on the information immediately, the accused would have escaped. The Sub-Inspector of Police therefore acted, without recording the information into writing, but however, sent a copy of the FIR along with other records regarding arrest of the accused immediately to his superior officer. It is in these circumstances that this Court held that the omission to record in writing the information received was not a violation of Section 42

14. Since the precedent of the larger bench of the Constitution Bench will prevail thus in the facts of the present case it is imperative to hold that the compliance Section 42 of the Act was mandatory. Since there is total non-compliance of Section 42 of the Act which is a mandatory provision, I do not find any infirmity in the impugned order on this count. Thus, the Respondents are entitled to be acquitted for offences under Sections 21, 23 and 25A of the Act.

15. Coming to the recovery of controlled substance from the go-down, it is to be seen that this controlled substance was in a closed place. No intimation was sent to the senior officers regarding this information as well and the evidence in this regard is absolutely silent. Hence the recovery from the go-down is hit by non-compliance of Section 42 of the Act. There is yet another ground to disbelieve this contraband to be in possession of Respondent No. 1 Raj Kumar Mehta. Neither the go-down was in the name of Raj Kumar Mehta nor he supplied the keys thereof nor the search was conducted in his presence nor any documentary evidence proving ownership or possession of the accused of the go-down was available. The facts proved only lead to the conclusion that the Respondent No. 1 Raj Kumar Mehta at best had knowledge of the controlled substance being kept at the place but from the facts the conscious possession thereof cannot be attributed to him.

16. Respondent Sheru Khan in Criminal Appeal No. 276/1998 has been charged for offence punishable u/s 21 of the Act for allegedly importing. There is no recovery from his possession or at his instance of any contraband. To prove the charge, the prosecution has relied on his statement recorded u/s 67 of the Act. No doubt, a statement u/s 67 of the Act would be admissible however, in the present case, the statement of Sheru Khan was recorded by Shri S.S. Jain in presence of PW-14 Jagan Nath Sharma, Jailor, while Sheru Khan was lodged in the jail at Jodhpur. Thus, this statement being hit by Section 25 of the Evidence Act is inadmissible in evidence. The prosecution is thus left with the statements of co-accused Raj Kumar Mehta and Sumer Khan recorded u/s 67 of the Act. Undoubtedly, a statement of a co-accused made to an officer other than a police officer u/s 67 of the Act is admissible. However, how much value can be attached to such a statement is a matter of consideration. Whether a person can be convicted solely on the statement of the co-accused is an issue to be decided in the facts of the present case. No

provision has been shown by the Ld. Counsel for the Appellant to demonstrate that the statement of co-accused is a substantive evidence and conviction can be based solely thereon. Learned Counsel for the Appellant places reliance on Prabhu Lal v. The Assistant Director, Directorate of Revenue Intelligence JT 2003 (Suppl.2) SC 459. However, the said decision did not relate to a criminal trial but to an adjudication proceedings where the standard required is preponderance of probabilities and not proof beyond reasonable doubt. The provision under which statement of a co-accused is admissible is Section 30 of the Evidence Act. The law in this regard is well-settled. A conviction cannot be based solely on the confessional statement of a co-accused because a statement of co-accused u/s 30 can be used only to lend assurance to other evidence against a co-accused, that is, it is one more circumstance in the basket of circumstances of the prosecution.

17. Thus, in view of the discussion above, I do not find that the impugned judgment is either perverse or illegal which warrants interference. The appeals are accordingly dismissed.