

(2008) 07 DEL CK 0195

Delhi High Court

Case No: Crl Appeal No. 90 of 2005

Rehmatullah

APPELLANT

Vs

Narcotics Control Bureau

RESPONDENT

Date of Decision: July 18, 2008

Acts Referred:

- Constitution of India, 1950 - Article 20(3)
- Criminal Procedure Code, 1973 (CrPC) - Section 161, 91
- Customs Act, 1962 - Section 107, 108
- Evidence Act, 1872 - Section 24, 25, 27
- Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) - Section 21, 29, 42, 67
- Prevention of Terrorism Act, 2002 - Section 32
- Terrorist and Disruptive Activities (Prevention) Act, 1987 - Section 15

Citation: (2009) 1 RCR(Criminal) 92

Hon'ble Judges: Dr. S. Muralidhar, J

Bench: Single Bench

Advocate: H.M. Singh, for the Appellant; Satish Aggarwala, Senior Standing Counsel, for the Respondent

Final Decision: Dismissed

Judgement

S. Muralidhar, J.

These appeals are directed against the common judgment dated 1st December 2004 passed by the learned Special Judge in SC No. 45 of 2004 convicting the Appellants for the offence u/s 29 read with Section 21 of the Narcotics Drugs and Psychotropic Substances Act, 1985 ("NDPS Act") and order dated 13th December 2004 sentencing them to undergo rigorous imprisonment for ten years and to pay a fine of Rs. 1 lakh each and in default of payment of fine to undergo simple imprisonment for one year.

2. On 21st December 1999, at around 2 pm a secret information was received by the Narcotics Control Bureau ("NCB") through a source that approximately 80 kgs of heroin had been dispatched by Yakub by truck bearing No. GJ-8T 4417. Gom Singh @ Ram Singh along with the driver of the truck was to hand over the heroin to Noor Haider and Mohd. Gani. A raid team was constituted and the truck was intercepted at about 8.30 pm on the same date on National Highway No. 8 near Rajokri Chowk. One person was sitting in the cabin and another was standing near the truck with a bag. A stationary car No. DL-3SC F 4593 with the boot open was intercepted. An Afghani national was found standing near the car and another was sitting in it. The persons intercepted at the spot revealed their names as Gom Singh @ Ram Singh, Kamal Singh, Mohd. Gani and Noor Haider Siddiqui. The search of the truck and the car yielded four plastic gunny bags containing heroin-two in the cabin of the truck, one in the boot of the car and the fourth on the road near the truck. The persons were apprehended immediately and escorted to the office of the NCB and their bags were opened, searched and the contents were marked. The seizing, sealing and sampling was conducted at the NCB office. The recovered substance of heroin was stated to have been collected weighed around 77 kgs net. The truck and the car were also seized.

3. The search of the residential premises of Noor Haider Siddiqui yielded a passport and air tickets in the name of Raymond Bernard Dun. Gom Singh and Kamal Singh on interrogation revealed that the heroin had been supplied by Yakub. Upon this statement, Yakub was interrogated and in his statement u/s 67 of the NDPS Act he revealed that he had supplied heroin to Kamal Singh and Gom Singh. Yakub was then arrested. It is stated that in the subsequent statement Yakub admitted that the heroin had been supplied to him by Rehmatullah. Statements of the other accused u/s 67 NDPS Act were recorded. Each of them admitted their role and also that of the co-accused. Chemical examination of the sealed substance confirmed that it was heroin. Accordingly, the complaints were filed.

4. Twenty witnesses were examined on behalf of the prosecution. On behalf of the accused Yakub two witnesses were examined. The trial by the court by the impugned judgment and order, convicted and sentenced the appellants in the manner referred to earlier.

5. The arguments on behalf of the Appellants were advanced by Shri H.M. Singh, learned Counsel and on behalf of the Respondent NCB by Shri Satish Aggarwala, learned Senior standing counsel.

6. The first submission is that the conviction of the Appellants is essentially based on the statements of the accused recorded u/s 67 NDPS Act. The accused Yakub is stated to have made two statements. One dated 22nd December 1999 at Jodhpur and other dated 23rd December 1999 at the NCB office in New Delhi. The accused Rehmatullah was arrested on 30th May 2000 on the basis of the statement of Yakub which was recorded at Delhi on 23rd December 1999 while he was in judicial transit

remand. He did not name Rehamatullah when he made the first statement at Jodhpur. It is submitted that the first complaint/charge sheet by the NCB was filed on 18th March 2000 against Gom Singh, Kamal Singh and Mohd. Gani (subsequently declared as proclaimed offender), Noor Haider Siddiqui and Yakub. Therefore, with the filing of this complaint, the enquiry had come to an end. A statement of an accused could be recorded only "during the course" of the enquiry by an officer and not after the filing of a complaint/chargesheet. It is submitted that therefore, the statement of Rehmatullah u/s 67 NDPS Act recorded by PW-18 Mr. Suresh Trivedi, Intelligence Officer, NCB, Jodhpur, Rajasthan on 30th May 2000 had to be discarded since it was not during the course of an enquiry. The complaint against Rehmatullah was filed subsequently on 26th August 2000.

7. Learned Counsel for the accused further submitted that in the statement of Yakub recorded by PW-18 Mr. Suresh Trivedi on 23rd December 1999 he did not name Rehmatullah at all. It was only thereafter, when he was brought to the NCB office at Delhi, that he named Rehmatullah. That statement was made under duress and coercion and in fact instead of producing him before the learned Magistrate in Delhi after having obtained transit order from the Magistrate at Jodhpur, he had been brought to the NCB office, Delhi. He further submitted that the alleged service of notice u/s 67 NDPS Act upon Rehmatullah on 30th May 2000 by PW-18 Mr. Suresh Trivedi, his appearance and recording of his statement on that date were highly doubtful. The case of the prosecution is that notice was served at BSF Camp, Barmer and that the statement was recorded at the BSF Camp, Barmer indicating that no notice was actually served and that in any event it cannot be regarded as voluntary.

8. It is further submitted that in the first statement made by Yakub before PW-18 Mr. Suresh Trivedi on 22nd December 1999, he did not admit of his involvement and therefore, that statement was not inculpatory in nature. He was brought to Delhi in handcuffs. He in fact named three persons Ganpat, Sadia and Ariya as suppliers. No action was taken against those persons to verify the truth of the statements. It is further submitted that the accused Rehmatullah retracted the statement made u/s 67 NDPS Act. Both the accused Yakub and Rehmatullah retracted their respective statements when appearing in Court and these factors show that the statements u/s 67 NDPS Act were neither voluntary nor truthful.

9. It is submitted that the statements u/s 67 NDPS Act were not truthful and reliable. They contained contradictions in the material aspects including the description of the consignment recovered, and the names of the persons who had allegedly supplied the consignment. While Yakub in the second statement is alleged to have named Rehmatullah as supplier, Rehmatullah in his statement u/s 67 NDPS Act made on 30th May 2000 only spoke about loading of the consignment in the truck without referring any date, month or year. It is further submitted that statements of the co-accused cannot be considered to be a substantive evidence but only corroborative piece of evidence. It is submitted that the cross-examination of the

PW-9 and PW-18 would reveal that the statements were neither voluntary nor truthful. It is then submitted that the case involving these accused has been dealt with in just two paragraphs of the impugned judgment of the learned trial court and that therefore, the conviction and sentence of the Appellants should be set aside.

10. On behalf of the Respondent NCB, it is pointed out that the statement u/s 67 NDPS Act is admissible as evidence. This stands on a different footing from a statement made by an accused in a case involving IPC offences. The statements contain some minor contradictions which do not affect their truthfulness or voluntariness. There is no basis for the contending that the statements were made under duress and coercion and the cross-examination of either PW-9 or PW-18 did not support the case of the accused in this regard. The medical examination of Rehmatullah in the Govt. District Hospital, Barmer did not reveal any injuries.

11. The main point to be considered is whether the statements u/s 67 NDPS can be relied upon by the prosecution. The statements are required to be examined both for their voluntariness and their truthfulness. The details regarding the arrest and questioning of Yakub are available in the evidence of PW-18 Mr. Suresh Trivedi. He has spoken in detail about having received information regarding recovery of 77 kgs of heroin by the NCB at Delhi and pursuant thereto along with officers of NCB Jodhpur, he visited village Dhanua. He speaks of having issued summons by him to Yakub Khan to appear at BSF Chautan. The statement was reduced to writing on Yakub's dictation as the latter could not write or read. PW-8 proved the arrest memo and Jamatalashi memo. He states that Yakub was examined by a doctor of Government Hospital, Barmer who had certified that there were no external injuries. He moved an application before the Special Judge for transit remand. Not much has yielded from this witness in cross-examination by learned Counsel for the accused Yakub. He denied that the statement was recorded under coercion.

12. A reference was made by learned Counsel for the accused to the order dated 22nd December 1999 passed by the learned Special Judge at Jodhpur granting transit remand. The order reads as under:

P.C. remand for transit is granted upto 24.12.1999 - 11 am. Produced accused Yakub in concerned court.

13. It is true that in a statement made in Jodhpur, Yakub did not name Rehmatullah. He was named only in the second statement recorded on 23rd December 1999 at Delhi by PW-9 Mangal Dass. According to him, the practice was that the statement u/s 67 is first recorded and then an arrest is effected. The submission is that in bringing Yakub to the NCB office at Delhi, the NCB officers had violated the judicial transit remand order which required them to produce him before the court in Delhi at 11 am on 24th December 1999. It was further submitted that the statement u/s 67 NDPS Act ought not to have been recorded and that by itself would make the statement involuntary.

14. In the first place, it is noticed that Section 67 NDPS Act permits the recording of the statement made by officers of NCB, who are not police officers. Therefore, the prohibition that would apply to a statement made in police custody does not apply to this statement made before the Intelligence Officer operating under the powers vested in him by the NDPS Act. Consequent upon the statement of Rehmatullah made on 30th May 2000 before PW-18 Mr. Suresh Trivedi, Jodhpur, a separate complaint was filed in respect of him. It could not have been possible for the Officers to anticipate in December 1999 as to when Rehmatullah would be arrested and whether he would make any statement thereafter. Thus it cannot be said that no statement of Rehmatullah could have been recorded after the first chargesheet was filed. Since a separate complaint has any way been filed on 26th August 2000 as far as Rehmatullah is concerned, his statement u/s 67 NDPS Act made on 30th May 2000 was a relevant piece of evidence as far as the prosecution is concerned. Therefore there is no merit in the contention the statement of Rehmatullah made on 30th May 2000 had to be discarded.

15. The order of transit remand required the accused to be produced in Delhi by 24th December 1999 at 11am. Admittedly the accused was brought to Delhi on 23rd December 1999. Did the NCB commit any illegality in not producing him immediately before the Court? Unfortunately there is no cross-examination of the PWs, who recorded the statement, on this point. In fact, a suggestion was made to the officer concerned that no statement of Yakub was recorded by him on 23rd December 1999 which he denied. The relevant portion of the deposition of PW-9 reads as under:

It is correct that on 23.12.1999 accused Yakub Khan had come to NCB office under judicial transit remand. It is correct that the judicial transit remand of Yakub Khan was up till 11 am of 24.12.1999. I gave notice to Yakub Khan on 23.12.1999 at about 12 noon. It is correct that time of giving notice is not mentioned in the notice nor any such proceeding i.e. of giving of notice was separately prepared. My Supdt. Informed me about the identity of Yakub Khan as he was brought by officers of Jodhpur Unit. It is correct that one statement of Yakub Khan was already recorded by Mr. Trivedi at Jodhpur. I did not record in the summons/notice u/s 67 NDPS Act that I am not satisfied with the statement of Yakub Khan recorded u/s 67 of NDPS Act by Mr. Trivedi at Jodhpur, no any separate memo was prepared to this effect. Superintendent gave me the statement u/s 67 NDPS Act recorded at Jodhpur in open condition, and it was not in sealed cover. I had given the statement of Yakub Khan which was recorded by me to Superintendent. On the same day I have not taken any receipt from Supdt. Above giving of statement to him as there is no such procedure in our office. I returned the Supdt. the statement of Yakub Khan which was written at Jodhpur on the same day simultaneously. While returning the stt. to Supdt. I had verbally informed in the statement given before me name of new person has appeared. It is correct that there was difference regarding the name of supplier and the weight as mentioned by Yakub Khan in his statement at Jodhpur

and the statement which was given before me.

Vol. Yakub Khan has given clarification regarding the difference of weight and name. On the test memo which were prepared in triplicate I mentioned the crime No. as 29/99. No memo in writing was prepared at the time taking of FSL forms from Madan Singh and returning of FSL forms to Madan Singh. I took official seal from Madan Singh but no memo in writing was prepared regarding taking of seal from Madan Singh. Vol. He was present there. It is incorrect to suggest that the statement of Yakub Khan has been recorded under duress, coercion and pressure, and in fact he has made no statement to me on 23.12.1999. It is further incorrect to suggest that I had not prepared the test memo nor I fixed the official seal thereon. It is further incorrect to suggest that I am deposing falsely being an officer of NCB.

In the absence of cross-examination by learned Counsel for the defence of PW-9 on this point, little is available as evidence to suggest that the recording of the statement of Yakub at Delhi was done improperly or under duress.

16. In order to examine the contention that successive statements cannot be recorded u/s 67 NDPS Act, the provision itself requires some detailed examination. It reads as under:

Section 67 - Power to call for information, etc.

Any officer referred to in Section 42 who is authorized in this behalf by the Central Government or a State Government may, during the course of any enquiry in connection with the contravention of any provisions of this Act,--

- (a) call for information from any person for the purpose of satisfying himself whether there has been any contravention of the provisions of this Act or any rule or order made thereunder;
- (b) require any person to produce or deliver any document or thing useful or relevant to the enquiry;
- (c) examine any person acquainted with the facts and circumstances of the case.

The words "during the course of any enquiry in connection with the contravention of any provisions of this Act" indicate that the statements could be recorder at any stage of the enquiry. There is nothing in the wording of Section 67 that forbids the recording of the successive statements. The words "examine any person acquainted with the facts and circumstances of the case" in Clause (c), by no means can be interpreted as permitting only a single examination of a person. A comparison could be drawn with Section 91 of the Code of Criminal Procedure, ("CrPC") 1973 which empowers the officer-in-charge of a Police Station to require any person to produce a document or thing. Likewise, u/s 161 CrPC, the power to examine persons who may be acquainted with the facts and circumstances of the case, by no means indicates that such statements of a person can be recorded only once and not on

successive occasions.

17. A reference may be made to the judgments concerning the interpretation of Section 67 NDPS Act. In [Raj Kumar Karwal Vs. Union of India and others](#), the Supreme Court was examining whether officers of the Department of Revenue Intelligence were police officers within the meaning of Section 25 of the Evidence Act, 1872 and, therefore, whether the confessional statement recorded by such officers in the course of the investigation of a person accused of an offence under the revenue laws was admissible in evidence against him. The question was answered in the negative and it was held that such statements made to the officers of the Department of Revenue Intelligence were not hit by Section 25 of the Evidence Act.

18. Still the twin tests of voluntariness and truthfulness will have to be satisfied. As far as the statement not being voluntary is concerned, there is no evidence to substantiate the plea of the accused that they were subjected to physical torture by the officers of the Respondent. The other circumstance relied upon is that both the accused have retracted their confessions on the ground that they were compelled to give statements earlier. In [Kanhaiyalal Vs. Union of India \(UOI\)](#), the Supreme Court was dealing with a case where, after making a statement u/s 67 NDPS Act, an application was filed by the accused for retracting the confession. However, no order was passed on that application. The Supreme Court then held (AIR, p.1052):

40. It may also be recalled that though an application was made for retracting the confession made by the appellant, neither was any order passed on the said application nor was the same proved during the trial so as to water down the evidentiary value of the said statement. On the other hand, in the absence of such evidence on record, the High Court had no option but to proceed on the basis of the confession as made by the appellant u/s 67 of the NDPS Act. Since it has been held by this Court that an officer for the purposes of Section 67 of the NDPS Act read with Section 42 thereof, is not a police officer, the bar under Sections 24 and 27 of the Evidence Act cannot be attracted and the statement made by a person directed to appear before the officer concerned may be relied upon as a confessional statement against such person. Since a conviction can be maintained solely on the basis of a confession made u/s 67 of the NDPS Act, we see no reason to interfere with the conclusion of the High Court convicting the appellant.

19. As far as the present case is concerned, although in paras 19 and 20 of the order of the trial court it is recorded that the accused sought to retract the statements which were made earlier, it is also noticed that they did not make any such retraction when they were produced before the Magistrate for the first time after the recording of such statements. In any event they did not appear to have filed any formal application retracting the confession. The observations of the Supreme Court in Kanhaiyalal would appear to squarely apply in the instant case. It has been emphasized that the retraction should be made at the earliest point in time

20. As regards the submission that a statement of an accused made while in custody cannot be relied upon, the observations of the Supreme Court in *Kanhaiyalal* appear to indicate otherwise. In para 36 of the said judgment, it was explained as under (AIR, p. 1051):

36. A parallel may be drawn between the provisions of Section 67 of the NDPS Act and Sections 107 and 108 of the Customs Act and to a large extent Section 32 of the Prevention of Terrorism Act, 2002 and Section 15 of the Terrorist and Disruptive Activities (Prevention) Act, 1987. These are all special Acts meant to deal with special situations and circumstances. While the provisions of the Prevention of Terrorism Act, 2002, and TADA Act, 1987, are much more stringent and excludes from its purview the provisions of Sections 24 to 27 of the Evidence Act with regard to confession made before a police officer, the provisions relating to statements made during inquiry under the Customs Act and under the NDPS Act are less stringent and continues to attract the provisions of the Evidence Act. In the case of both the latter enactments, initially an inquiry is contemplated during which a person may be called upon to provide any information relevant to the inquiry as to whether there has been any contravention of the provisions of the Act or any Rule or Order made thereunder. At that stage the person concerned is not an accused although he may be said to be in custody. But on the basis of the statements made by him he could be made an accused subsequently. What is important is whether the statement made by the person concerned is made during inquiry prior to his arrest or after he had been formally charged with the offence and made an accused in respect thereof. As long as such statement was made by the accused at a time when he was not under arrest, the bar under Sections 24 to 27 of the Evidence Act would not operate nor would the provisions of Article 20(3) of the Constitution be attracted. It is only after a person is placed in the position of an accused that the bar imposed under the aforesaid provision will come into play. Of course, this Court has also held in *Pon Adithan's* case (*supra*) that even if a person is placed under arrest and thereafter makes a statement which seeks to incriminate him, the bar under Article 20(3) of the Constitution would not operate against him if such statement was given voluntarily and without any threat or compulsion and if supported by corroborating evidence.

(emphasis supplied)

21. A reference was made to the evidence of DWs 1 and 2 who were examined by accused Yakub in support of the plea that he was removed from his residence forcibly and beaten by the officers. However no complaint appears to have been recorded at their instance in this regard . Medical evidence was also not produced in support of such allegation. In this context, the following observations of the Supreme Court in *M. Prabhulal v. Assistant Director, DRI* JT 2003 (Supp) 2 SC 459 are relevant:

The confessional statements recorded by such officers are admissible in evidence..... Further it is also to be borne in mind that the appellants did not make any complaint before the Magistrate before whom they were produced or any torture or harassment..... The statements cannot be held to be involuntary. The statements were voluntarily made and can, thus, be made the basis of appellants' conviction.

22. In view of the categorical pronouncement of the Supreme Court in regard to the admissibility of the statements u/s 67 NDPS Act, it cannot be said that the statements recorded in the instant case were not made voluntarily and are therefore inadmissible in evidence.

23. The other point made is regarding the truthfulness of the statements. It is submitted that the failure by Yakub to name Rehmatullah in his first statement on 22nd December, 1999 and the failure by the Respondent to question Ganpat, Sadia and Ariya, the persons named in that statement, shows that the statement cannot be truthful. As pointed out by the Respondent, the subsequent statement dated 23rd December, 1999 explains that Yakub had omitted to name Rehmatullah out of fear and that reasons for this could possibly be explained only by Yakub himself. A perusal of the two statements does inculcate both the accused. Yakub has admitted that what was recovered from Gom Singh had in fact been sent by him. On their part, Rehmatullah and Gom Singh had both stated that the contraband had been sent by Yakub. The contradiction as to the exact quantity and the omission by Rehmatullah to specifically state that he supplied the contraband to Yakub or that the truck number was a different in the statement given by Rehmatullah are not material discrepancies. Rehmatullah, in fact, named Yakub. He states that after Yakub was arrested he had gone away to Gujarat and that he knew that the NCB Officers were looking for him. He states that he evaded arrest for about 90 days under the mistaken impression that after that period that accused could not be arrested. It is not possible, therefore, to come to the conclusion either that the statements of the accused were not voluntary or truthful.

24. In [A.K. Mehaboob and P.K. Naushad Vs. Intelligence Officer, Narcotics Control Bureau](#), the Supreme Court upheld the conviction of the accused since the statement was found to be truthful. In [Francis Stanly @ Stalin Vs. Intelligence Officer, Narcotic Control Bureau, Thiruvananthapuram](#), it was emphasized that the statement made u/s 67 NDPS Act "must be subject to closer scrutiny than a confession made to private citizens or officials who do not have investigating powers under the Act." There is also force in the contention of the Respondent that unlike the Indian Penal Code, the statement of a co-accused u/s 67 NDPS Act is not inadmissible. This was explained by this Court in Yudhister Kumar v. State II (1992) CCR 1122 in the context of a similar provision in Section 108 of the Customs Act which has been approved by the Supreme Court in Naresh J. Sukhwani v. Union of India 1992 (83) ELT 258 (SC) in the following words:

4. It must be remembered that the statement made before the Customs officials is not a statement recorded u/s 161 of the Criminal Procedure Code, 1973. Therefore, it is a material piece of evidence collected by Customs officials u/s 108 of the Customs Act. That material incriminates the petitioner inculcating him in the contravention of the provisions of the Customs Act. The material can certainly be used to connect the petitioner in the contravention inasmuch as Mr. Dudani's statement clearly inculcates not only himself but also the petitioner. It can, therefore, be used as substantive evidence connecting the petitioner with the contravention by exporting foreign currency out of India.

25. It is accordingly held that there is no merit in the contention on behalf of the accused that the statements made by each of them were neither voluntary nor truthful and, therefore, could not have been relied upon for convicting them. This Court finds no reason to differ with the conclusion arrived at by the trial court in regard to the guilt of the two accused for the offences u/s 29 read with 21 NDPS Act. No other point was urged by the learned Counsel for the accused. This Court does not find any merit in either of these appeals and they are dismissed as such.