

V.S. Anandan Vs. Union of India (Narcotics Control Bureau, Mumbai) and Another

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Court : Mumbai

Decided On : Aug-01-2013

Judge : The Honourable Mrs. Justice Sadhana S. Jadhav

Appeal No. : Criminal Appeal No. 451 of 2012

Appellant : V.S. Anandan

Respondent : Union of India (Narcotics Control Bureau, Mumbai) and Another

Judgement :

1 The appellant herein is the original accused in NDPS Special Case No. 108 of 2006. The accused is convicted for offence punishable under Section 21(b) r/w 8(c) and 29 r/w 8(c) and 21(b) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as 'the N.D.P.S. Act') and is sentenced to suffer R.I. for 5 years and to pay fine of Rs. 50,000/- i.d. to suffer S.I. for 3 months vide Judgment and Order dated 28th March, 2012 by Special Judge under the N.D.P.S. Act.

2 Such of the facts, which are necessary for the decision of this appeal are as follows:

(i) The complainant Mr. Canute Menezes was working as Intelligence Officer in the Narcotics Control Bureau(NCB), Mumbai. On 25/2/2006 he received an

information that a person by name V.S. Anandan (present appellant) is travelling from Ratlam to Mumbai in sleeper coach No. S8 berth No. 59 of Awadh Express which is expected to arrive at Boriwali Station in the early hours of 26/2/2006. The informant had also given the description of the clothes worn by V.S. Anandan and it was further informed that he is carrying a substantial quantity of heroin in his blue and red colour shoulder bag having markings as Peter England at the bottom of one side of the bag. The said information was reduced into writing by Vipin Nayar and was signed by the other 3 coordinate officers at about 9 p.m. In compliance of Section 42 of the said Act, the said information was then placed before Shri A.P. Patil, the Superintendent and the Gazetted Officer who happened to be the immediate official superior. Mr. A.P. Patil then entrusted further investigation with Mr. Canute Menezes as approved by the Zonal Director.

(ii) On 26th February, 2006 in the early hours the officers of N.C.B. called upon 2 independent witnesses who were apprised about the information which was received by the N.C.B. Department. The witnesses were informed about the purpose of their being called on the railway station. At about 7. 15 a.m. Awadh Express arrived at Boriwali Railway station on platform No. 6. The raiding party acted upon the information received by them and upon verification found that it was correct information. The said person had disclosed his name as V.S. Anandan. He was informed about the information on the basis of which he was being searched. V.S. Anandan(appellant) agreed to co-operate. Upon personal search of the appellant, the officers recovered the journey ticket bearing No. 74987286 from Ratlam junction to Mumbai Central and S-8/59 handwritten on it, the journey-cum-reservation ticket booked at Tatkal seva, local train ticket, driving licence, a cell phone and Indian currency totaling to Rs. 856/-. Upon search of the red and blue colour shoulder bag, it was noticed that the inner bottom of the said bag was cut open and it revealed a ply under which the scotch taped packet was kept. The pocket was removed and kept open and it was found containing a polythene packet containing brown colour powder. The powder was tested with the help of field testing kit, which revealed positive results for presence of heroin a narcotic drug. Weight of the scotch packet was one kilogram. The officers in the presence of panchas had drawn samples of 5 grams each. The sachets were sealed and signed by both the panchas.

(iii) The statement of the accused was recorded under Section 67 of the N.D.P.S. Act. The accused had disclosed to the police that 2 years prior to the incident, he was arrested by Crime Branch, Jacob Circle for offence punishable under Section 489 of the Indian Penal Code. He was lodged at Arthur Road Jail for 6 months. While in jail, he came into contact with one Shrilankan National namely Rumi who assured him that if he agreed to transport drugs, he would be paid good remuneration and therefore, accused had agreed. The accused was then enlarged on bail. He contacted Mujahid. He came into contact with the persons involved in the racket dealing with the drugs. He came in contact with one Kumar who was resident of Chennai. Kumar had proposed to him to go to Ratlam and carry the heroin from Ratlam to Chennai. He was offered a commission of Rs. 50,000/- for every trip and therefore, he agreed. He had shown the photograph of Kumar to the officers of NCB.

(iv) After completion of investigation, charge-sheet was filed and charge was framed against the accused on 18/9/2007. The prosecution examined 7 witnesses to bring home the guilt to the accused.

3 The learned Counsel appearing for the appellant submits that in the present case there is non-compliance of the mandatory provisions under Section 42 and Section 50 of the N.D. P.S. Act and therefore, the appellant deserves to be acquitted.

4 P.W.1 Vipin Nair was working as I.O. in the NCB since January, 2002 to January, 2007. On 25/2/2006 at about 8.45 a.m. he alongwith J.S. Dubey and Namudri received information that one person by name V.S. Anandan will be travelling from Ratlam to Mumbai in sleeper coach No. S-8, berth No. 59 in Awadh Express train and is carrying substantial quantity of heroin in his shoulder bag. He had typed this information on one paper. He alongwith Dubey and Namudri had signed the information and placed the same before Shri A.B. Patil, Superintendent. In the cross-examination it is elicited that the informer had come near vicinity of his office. For collecting information he had to go out of office. Namudri and Dubey had also come alongwith him. He had not noted down the information on any paper.

5 P.W. 2 Dinesh Chaudhary was working as Assistant Chemical Examiner. He has received the packet in Crime No. 5 of 2006 from N.C.B. Mumbai on 27/2/2006. The sample packet was accompanied with test memo in triplicate. He opened the sample on 1st March, 2006. Sample had tested positive for morphine and heroin.

6 P.W. 3 Bhausahab More was working as Assistant Chemical Analyser. He has identified the forwarding letter alongwith the sealed envelope. According to him, he completed the analysis of the sample on 17th March, 2006 and the same was in his custody upto 24th March, 2006. He had no documents to corroborate the same. He had not reduced into writing the records of each test.

7 P.W. 4 Canute Menezes was working as Investigating Officer in N.C.B. Mumbai. According to him on 25/2/2006 at about 9.45 p.m. Superintendent A.P. Patil informed him telephonically about the information received by Dubey and Namudri. P.W. 4 was informed that a person named Anandan is travelling by Awadh Express and is carrying substantial quantity of heroin in a bag. He had taken steps for investigation. According to him, he enquired with the accused about his luggage and he was informed that the accused was carrying one red and blue colour shoulder bag which was the only luggage he was carrying. Upon personal search, he had found personal documents of the accused on his person. He had seized the packets containing one kilogram powder and after testing had arrived to the conclusion that it was heroin. He has further deposed that the officers alongwith the accused came to NCB office. They prepared search and seizure report. They had signed the same and had placed them before the Zonal Director Mrs. Alka Tyagi. He then deposited seized articles after preparing the forwarding letter at Exh. 45. The Superintendent Patil had taken the entry of these articles in property register and had acknowledged the receipt of the same. P.W. 4 had recorded the statement of the accused. He has further deposed that the accused had written his statement in his own handwriting and had signed each page of his statement. It was further countersigned by P.W. 4. He has verified the statement marked as Exh. 46. Thereafter the accused was arrested. In the course of investigation, the residential premises of the accused was searched. However, they did not find any incriminating evidence. In the course of investigation, P.W. 4 was informed by Crime Branch, Mumbai that the accused was being prosecuted

for offence punishable under Section 489 of the Indian Penal Code and was on bail.

8 In the cross-examination P.W. 4 has stated that he received the phone call from Superintendent Patil when he was at home whereas Superintendent Patil was present in the office. It is elicited in the cross-examination that when he received the phone from Superintendent Patil, other raiding party members were not present. It is admitted by him that the office of N.C.B. maintains information register. On completion of panchanama, file number is given to that information. He has further admitted that he had not telephoned the 3 personals of N.C.B. office and neither had summoned them to work as the members of the raiding party. According to him, he had not gone through the information till he proceeded for raid. Hence, he has seen the information on 2nd day in the office. He has admitted that he has not mentioned the date below the signature on the said information.

9 Learned Counsel for the appellant submits that although P.W. 4 has admitted that the office of N.C.B. maintains information register, no such register is brought on record to corroborate the fact that the information was received as disclosed by him.

10 P.W.4 has admitted that he would not be able to tell the Court as to where the shoulder bag was kept. He did not have any information about the availability of a Magistrate or a Gazetted officer in the close proximity of the railway station. He has further admitted that he had taken the personal search of the accused only to verify whether he was carrying contraband on his person.

11 The learned counsel for the appellant further submits that there has been non-compliance of the provisions of Section 50 of the N.D.P. S. Act. He submits that what has to be seen for compliance with the provisions of N.D.P.S Act is that the accused was searched for being in possession of the contraband on his person. According to the Counsel it is immaterial as to whether the contraband was actually found on the person of the accused. The very fact that the accused has undergone personal search would make it incumbent on the prosecution to establish that there is due compliance of Section 50 of the N.D.P.S. Act. The

learned Prosecutor appearing for the N.C. B. submits that it was not necessary to comply with the provisions of Section 50 of the N.D.P.S. Act in the present case as the raiding party had specific information that the accused was carrying the contraband in his shoulder bag and that the contraband was placed below the ply at the bottom of the bag. The learned Counsel for the appellant submits that it was impossible for one to know the exact location of the place where the contraband was concealed.

12 Counsel for the applicant submits that the prosecution has failed to establish that the appellant was conscious possession of the contraband. He has in particular submitted that the secret information also revealed the exact place where the contraband was concealed. According to the learned Counsel, no person other than proposed accused himself would know as to where the contraband was concealed in the bag and therefore, according to him the evidence is fabricated against the present appellant. It is true that conscious possession has to be determined with reference to the factual backdrop. The Apex Court in the case of **MadanLal and anr. v/s. State of Himachal Pradesh 2003 Cri. L.J. 3868** has held that -

Once possession is established the person who claims that it was not a conscious possession has to establish it, because how he came to be in possession is within his special knowledge. Section 35 of the Act gives a statutory recognition of this position because of presumption available in law.

In the present case, the accused/appellant has not denied that the said bag belonged to him or that it was foisted upon him. Since it is established that the bag belonged to the appellant is sufficient to hold that he was in conscious possession of the contents of the bag.

13 In the case of **State of Punjab v/s. Baldev Singh as well as Gurbux Singh v/s. State of Haryana 1999 SCC Cri. 1080**, it is held by the Apex Court that the language of Section 50 is implicitly clear that the search has to be in relation to a person is contrasted to search of premises, vehicles or articles.

14 P.W. 4 has stated before the Court that he does not remember whether he had mentioned in the panchanama that the accused had right to be search by a Gazetted Officer or a Magistrate. It is further elicited in the cross-examination that when P.W. 4 reached the office of N.C.B. after the raid, the articles were in his custody. He had not prepared any record about the custody of articles till he deposited them with Superintendent Shri Patil. That the warehouse is situated in the office of N.C.B. Superintendent Shri Patil was in-charge of the godown. Superintendent Shri Patil had affixed seal on forwarding letter at Exh. 45. P.W. 4 has further categorically admitted that he had not deposited the sample packets in the godown, but they were in his custody till they were deposited with the chemical analyser. In fact, it was erroneous on the part of P.W. 4 to have kept the articles in his custody.

15 The learned Counsel for the appellant submits at this stage that possibility of tampering cannot be ruled out and there is gross violation of the mandatory provisions contemplated under Sections 55 and 56 of the N.D.P.S. Act and therefore, the appellant deserves to be acquitted. The Counsel for the appellant has drawn the attention of this Court to the evidence of P.W. 6 in order to demonstrate that there has been non-compliance of the mandatory provisions of N.D. P.S. Act including Section 42 of the said Act. He has drawn attention of this Court to paragraph-15 of the cross-examination of P.W. 6 wherein P.W. 6 has specifically stated as follows -I do not remember if note of information was taken in information register. We proceeded for raid at about 01.00 a.m. in the night. According to the Counsel for the applicant the information received at 8.45 a.m. and at that time the informant could not have stated the bogi in which the accused was travelling as well as the berth number as the alleged ticket found with the appellant was unreserved ticket and berth was allotted to him by the T.C. in the train when the train departed from Ratlam. In the Judgment the Special Judge has specifically recorded a finding that it was a typographical error and in fact the information was received on 25/2/2006 at 8.45 p.m. In view of this, the objection raised by the Counsel for the appellant does not deserve any consideration and the objection is unsustainable to hold that the evidence is fabricated subsequently.

16 It is further elicited in the cross-examination that there was provision to keep samples packets with the investigating officer or seizing officer and he does not remember who had given these directions and whether they were given in writing.

17 Upon query made by this Court, as to whether there is an contemporaneous record to demonstrate that the information was reduced into writing forthwith and was transmitted to the superior authority, the learned Counsel appearing for N.C.B. submits that it is not mandatory upon the officers of N.C.B. to maintain such records. She has placed reliance upon the Judgment of this Court in the case of **UdayKumar Abhevardhan vs. The Union of India and anr.** Reported in **2012 All M.R. (Cri) 2619**, wherein this Court had relied upon the Judgment of the Apex Court in the case **KhetSingh v/s. Union of India, (2002) 4 SCC 380**. Paragraph-15 reads thus:-

15. In KHET SINGH Versus UNION OF INDIA, reported at (2002) 4 Supreme Court Cases 380 on which the learned Special Prosecutor relied, the Court was considering the binding effect of standing instructions. The Court held:-

5. It is true that the search and seizure of contraband article is a serious aspect in the matter of investigation related to offences under the NDPS Act. The NDPS Act and the Rules framed thereunder have laid down a detailed procedure and guidelines as to the manner in which search and seizure are to be effected. If there is any violation of these guidelines, the courts would take a serious view and the benefit would be extended to the accused. The offences under the NDPS Act are grave in nature and minimum punishment prescribed under the statute is incarceration for a long period. As the possession of any narcotic drug or psychotropic substance by itself is made punishable under the Act, the seizure of the article from the appellant is of vital importance.

10. The instructions issued by the Narcotics Control Bureau, New Delhi are to be followed by the officer-in-charge of the investigation of the crimes coming within the purview of the NDPS Act, even though these instructions do not have the force of law. They are intended to guide the officers and to see that a fair procedure is adopted by the officer-in-charge of the investigation. It is true that when a contraband article is seized during investigation or search, a seizure mahazar

should be prepared at the spot in accordance with law. There may, however, be circumstances in which it would not have been possible for the officer to prepare the mahazar at the spot, as it may be a chance recovery and the officer may not have the facility to prepare a seizure mahazar at the spot itself. If the seizure is effected at the place where there are no witnesses and there is no facility for weighing the contraband article or other requisite facilities are lacking, the officer can prepare the seizure mahazar at a later stage as and when the facilities are available, provided there are justifiable and reasonable grounds to do so. In that event, where the seizure mahazar is prepared at a later stage, the officer should indicate his reasons as to why he had not prepared the mahazar at the spot of recovery. If there is any inordinate delay in preparing the seizure mahazar, that may give an opportunity to tamper with the contraband article allegedly seized from the accused. There may also be allegations that the article seized was by itself substituted and some other items were planted to falsely implicate the accused. To avoid these suspicious circumstances and to have a fair procedure in respect of search and seizure, it is always desirable to prepare the seizure mahazar at the spot itself from where the contraband articles were taken into custody.

This Court had held that

Since there are guidelines to be followed, deviation from those guidelines cannot affect the prosecution, at least so long as it is not shown that the departure caused any prejudice to the accused. In view of this, the contentions based on the manner of recording the information and it's being sent to the official superior have to be rejected.

18 In the present case, it is apparent on the face of the record that in the course of investigation the confessional statement of the accused was recorded under Section 67 of the N.D. P.S. Act. The said statement is in the hand writing of the accused and therefore, it cannot be said that he was coerced to give the confession before the N.C.B. Officers. The history narrated by the accused/appellant would indicate that earlier he was arrested for offence punishable under Section 489 (c) and had met some persons while he was in jail

and at their instance, only to earn money, he had entered into the trafficking of the drugs. This Court cannot be oblivious of this aspect.

19 Learned Counsel for the appellant has only made submissions in respect of the lacuna in the course of investigation and seeks acquittal on account of non-compliance with the provisions of the N.D.P.S. Act. At this juncture reliance can be placed on the judgment of the Apex Court in the case of **Ram Swaroop v/s. State (Govt. NCT) of Delhi AIR 2013 SC 2068**, wherein the Hon'ble Apex Court has held that observations of safeguards provided under Section 50 of the N.D.P.S Act is not required when the seizure of contraband is from the bags and not from person of the accused.

20 In the case of **State (Govt. of NCT) of Delhi v/s. Sunil and anr. 2001** the Apex Court has held that

21. We feel that it is an archaic notion that actions of the police officer should be approached with initial distrust. We are aware that such a notion was lavishly entertained during the British period and policemen also knew about it. Its hangover persisted during post-independent years but it is time now to start placing at least initial trust on the actions and the documents made by the police. At any rate, the court cannot start with the presumption that the police records are untrustworthy. As a proposition of law the presumption should be the other way around. That official acts of the police have been regularly performed is a wise principle of presumption and recognised even by the legislature. Hence when a police officer gives evidence in court that a certain article was recovered by him on the strength of the statement made by the accused it is open to the court to believe the version to be correct if it is not otherwise shown to be unreliable. It is for the accused, through cross-examination of witnesses or through any other materials, to show that the evidence of the police officer is either unreliable or at least unsafe to be acted upon in a particular case. If the court has any good reason to suspect the truthfulness of such records of the police the court could certainly take into account the fact that no other independent person was present at the time of recovery. But it is not a legally approvable procedure to presume the police action as unreliable to start with, nor to jettison such action merely for the

reason that police did not collect signatures of independent persons in the documents made contemporaneous with such actions.

21 In the present case, implicit reliance can be placed upon the confessional statement of the accused. Three statements of the accused were recorded on different dates and they are at Exh. 46, 51 and 56. The statement at Exh. 46 would reveal as to how he has come into the contact with Dharmender Singh @ Rajkumar @ Ramkumar and the remuneration which he has to receive by carrying heroin from Ratlam to Chennai. The statement was recorded after search and seizure was over and he was taken to the office. The learned Counsel for the appellant submits that the statement at Exh. 46 was obtained under coercion and threats. However, the record does not support the contention of the accused regarding threats or coercion. The accused/appellant has retracted from the statement at Exh. 58 dated 3rd March, 2006. His statement at Exh. 56 is dated 28th March, 2006, whereby he has confirmed the contents of the statement at Exh. 46. Third statement is recorded when the accused was in judicial custody and after he had retracted from one of the statement. The statement at Exh. 56 clearly indicates that he had identified the photograph of Dharmendra @ Rajkumar @ Ramkumar as the person who had handed over the heroin at Ratlam. It is true that the statement of the accused needs to be corroborated. In the present case, there is substantive evidence as well as documentary evidence to indicate that the statement of the accused recorded under Section 67 of the N.D. P.S. Act is corroborated.

22 The disclosure statement of the accused has led to further investigation. It is established that the accomplice had given a cheque of Rs. 90,000/- to Kumar in the name of Dharmender Singh. He had given the account of various entries in the passbook as well as the entry of Rs. 90,000/-. The said facts are admitted by the accused in answer to question Nos. 73 and 74 under Section 313 of the Code of Criminal Procedure and hence, this Court is of the opinion that the statement of the accused recorded under Section 67 of the N.D.P.S. Act is corroborated by the documentary evidence as well as substantive evidence.

23 Hence, this Court finds no reason to interfere with the conviction of the appellant. However, taking into consideration overall view of the matter, this Court is of the opinion that the sentence awarded to the appellant needs to be modified. The appellant was in jail as an under-trial prisoner for more than 3 years after his arrest and therefore, was granted bail. The incident is of 26th February, 2006. The appellant was enlarged on bail in the year 2009 and was taken into custody on 28th March, 2012. Hence, the appellant has almost undergone substantive sentence of 4 years 7 months. Since the case is of the year 2006 and the appellant was enlarged on bail in 2009 and the trial was prolonged for a period of 3 years, the appellant had to go through the process for 7 years. Hence, it would be in the fitness of the circumstances to sentence him to the period already undergone. He is therefore, sentenced to the period already undergone.

24 The learned Counsel for the applicant submits that since the applicant was in jail, the applicant cannot arrange to pay the fine amount. Hence, the sentence of fine be modified. The Counsel for the applicant has placed reliance on the Judgment of the Apex Court in the case of **E. Micheal Raj. Vs. Intelligence Officer, N.C.B. AIR 2008 SC 1720**, wherein the sentence of fine is of Rs. 20,000/- . Hence, the appellant is sentenced to pay fine of Rs. 20,000/- i.d. to suffer R.I. for one month. Hence, following order is passed:

ORDER

- (i) The appeal is partly allowed.
- (ii) The conviction of the appellant is upheld. However, substantive sentence of the appellant is modified. The appellant is convicted for the period already undergone.
- (iii) Sentence of fine is modified. The appellant to pay fine of Rs. 20,000/- i.d. to suffer R.I. for one month.
- (iv) The appellant be released forthwith if not required in any other case.
- (v) The office to communicate the order to the Superintendent of Jail, in which the appellant is lodged.

(vi) Writ of the order be issued.

25 The Criminal Appeal is disposed of accordingly.

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