

Intelligence Officer Vs. P Balakrishnan @ Krishna @ Balan @ Rajan

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Court : Karnataka

Decided On : Feb-27-2017

Judge : Anand Byrareddy

Appeal No. : CRL.A 71/2009

Appellant : Intelligence Officer

Respondent : P Balakrishnan @ Krishna @ Balan @ Rajan

Advocate for Def. : Shri. B. Kumar

Judgement :

1 IN THE HIGH COURT OF KARNATAKA AT BENGALURU DATED THIS THE27H DAY OF FEBRUARY 2017 BEFORE THE HONOURABLE MR. JUSTICE ANAND BYRAREDDY CRIMINAL APPEAL NO.71 OF 2009 BETWEEN: Intelligence Officer, Narcotics Control Bureau, South Zonal Unit, Chennai. (By Shri K.N. Mohan, Special Public Prosecutor) AND:

1. P. Balakrishnan @ Krishna @ APPELLANT. Balan @ Rajan, S/o. Periaswamy Maria Pillai, Aged about 35 years, No.30, Temple Street, Medavakkam Colony, Kilpauk, Chennai-10.

2. T. Soloman, 2 S/o. T.S. Thomas, Aged about 50 years, No.41-B, North Badrakaliamman Koil Street, Tuticorin.

3. S. Raj, S/o. Shanmugavel, Aged about 43 years, No.3/30, Shivarajapuram, Tuticorin-1.
4. Sam Sundar Singh, S/o. Durairaj, Aged about 46 years, No.83, Vadakku Badrakali Amman Koil Street, Tuticorin-1.
5. R. Muniswamy @ Swamy, S/o. S. Ramaswamy, Aged about 45 years, No.57, Krishnappa Agraharam Street, Kondithoppe, Chennai-79.
6. K. Sudalaiandi, S/o. Kandaswamy, Aged about 40 years, 12th Prine Nagar, Tuticorin Post, Tamil Nadu State. 3 7. Syed Hayat Saab, S/o. Hayat Saab, Aged about 31 years, Ingalege, Janata Block Road, Lokapur P.O., Bagalkot, Lokapur.
8. Thasthagir, Aged about 51 years, No.14-17/15-a, Old Mosque Street, Thiruvidadanakodu, K.K. District.
9. Mohammed, Aged about 46 years, Mandsaur.
10. V. Pandi, S/o. Velusamy Nadar, Aged major, No.67, Panaiyur, Kulathur Post, Vilathikulam Taluk, Tuticorin District. RESPONDENTS (By Shri B. Kumar, Senior Advocate for Shri Amar Correa, Advocate for Respondents 1 to 5, R-7, 8 & 10, Appeal against Respondent No.9 is dismissed vide order dated 17.01.2011, Appeal abates as against Respondent No.6 vide order dated 16.12.2016.) ***** 4 in Spl.C.C.No.248/2002 - acquitting This Criminal Appeal is filed under Section 378(4) of the Code of Criminal Procedure, 1973 praying to grant special leave to file appeal and set aside the judgment and order of acquittal dated 18.10.2008 passed by the XXXIII Additional city Civil and Sessions Judge, and Special Judge (NDPS), Bangalore, the respondents / accused for the offence punishable under Section 8(c) punishable under Section 21 read with Sections 25, 28, 29 of the N.D.P.S. Act, 1985. This appeal having been heard and reserved on 25.1.2017 and coming on for pronouncement of orders this day, the Court delivered the following:-

JUDGMENT

This appeal is preferred against the acquittal of the accused respondents who were tried for alleged offences punishable under Section 8 (c) and 21 read with Sections 25, 28 and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the NDPS Act, for brevity).

2. The facts as stated are as follows. One P. Balakrishnan, Accused no.1 and P. Rajarathnam, Accused no.2 were said to be brothers and the former was a resident of 5 Chennai, while the latter was a resident of Mumbai. One T.Soloman, Accused no.3 , S.Raj, Accused no.4, Sam Sundar Singh, Accused no.5 , K. Sudalaiandi, Accused no.7 and V. Pandi were said to be residents of Tuticorin. R. Muniswamy, Accused No.6 was to be a servant in the house of the sister of accused no.1 and Thasthagir, Accused No.9 were said to be residents of Thiruvudankodu in Kanyakumari district. Sayed Hayat Saab, accused no.8, was said to be a resident of Lokapur. Mohammed, Accused no.10, was said to be a resident of Mandsaur. It was alleged that all the above accused had entered into a criminal conspiracy during the period September - December 1999 and in pursuance of the same and on the instructions of Accused no.1, Accused No.10 is said to have sold about 30 kgs of Heroin and had transported the said drug to Lokapur, where accused no.2 having received the consignment had secreted the same in the house of his mother-in-law pending further 6 transportation to Tuticorin via Bangalore and onwards to Srilanka, by boat. In this regard Accused no.3 and 9 are said to have arranged a lorry bearing registration No.TN-69-2967 belonging to accused No.11 - who was to receive the drug at a spot about 17 kms. ahead of Tumkur, between Sira town and Tumkur on the National Highway. The delivery was to take place on 13.12.1999. Accused nos. 4, 5 and 7 were said to have been sent to the spot to await the arrival of an Ambassador car which was to carry the drug to the spot from Lokapur. It was alleged that the said lorry did arrive as scheduled and the occupants were said to be waiting for the car to come to the designated point. It transpires that the car bearing No.KA- 23-M-3773 did arrive at about 4:30 PM. Accused No.8 was said to be at the wheel and accused no.1 and 2 were said to be the other occupants of the car. The Narcotics Squad, headed by one K.Raghavan, examined at the trial as PW-13, who had been tipped off about the contraband being transported, were said to 7 be keeping vigil at a distance. It is stated that the moment the car arrived, the squad is said to have swept in and

intercepted both the lorry and the car simultaneously. And the inmates were caught red handed and a quantity of 29.355 kilogrammes of heroin was said to have been seized. The necessary procedures of drawing up a panchanamah, drawing of samples for the purpose of forensic examination and seizure of documents pertaining to the two vehicles etc., was said to have been duly complied with. On 14.12.1999, it is claimed that on interrogation of Accused nos. 1, 2, 4 to 8, their voluntary statements were said to have been recorded. It was in this manner the entire plan of transporting the contraband to Srilanka and the role of each of the accused is said to have been discovered. The arrested accused were said to have been remanded to judicial custody. On the same day, 14.12.1999, the house of Accused no.3 was said to have been searched and he was arrested and remanded to judicial custody and later transferred to the Court below. 8 On 16.12.1999, some incriminating materials were said to have been seized from the house of the sister of accused no.1 and on the same day some other incriminating material was said to have been seized from the house of accused no.2, at Andheri West, Mumbai. Over a period of time, the remaining of the 11 accused were all arrested except accused no.2 and eventually charges were framed against them. The case said to have split up against accused no.2 . The accused are said to have pleaded not guilty and claimed to be tried. The prosecution is said to have examined 30 witnesses and had got marked 144 documents and 101 material objects. On a consideration of the evidence the court below had framed the following points for consideration : 1. Whether the prosecution proved beyond reasonable doubt that accused No.10 manufactured 9 heroin and thereby sold 29.355 kgs to accused No.1 and thereby committed the offence punishable under Section 8(c) read with Sections 21, 28 N.D.P.S. Act, 1985?.

2. Whether the prosecution further proved beyond all reasonable doubt that there was a conspiracy entered into between accused Nos.1, 3 to 11 with absconding accused No.2 during September 1999 to December 1999 at Mandsaur, Bombay, Lokapur, Bangalore, Chennai and Tuticorin to sell and thereby to purchase 29.355 kgs of heroin and after secreting it in the mother- in-laws place of accused No.2 at Lokapur and thereby transport it illegally by way of ambassador car KA-23-M-3773 till the appointed spot at Tumkur and from there through lorry TN-69-2967 to

Tuticorin via Bangalore and from it through coast it is to be exported to Srilanka and thereby the said accused have committed the offence punishable under Section 8(c) read with Section 21, 28, 29 of the N.D.P.S. Act, 1985?. 10 3. Whether the prosecution further proved beyond all reasonable doubt that accused No.11 being the owner of the lorry bearing Regn. No.TN-69-2967 and accused No.4 being the possessor of the said lorry and with the absconding accused No.2 owner / possessor of the ambassador car KA- 23-M-3773 knowingly allowed and used for the commission of the said offence and thereby committed the offence punishable under Section 8(c) read with Section 21, 28, 25 of N.D.P.S. Act, 1985?.

4. Whether the prosecution further proved beyond reasonable doubt the accused No.1 after the purchase of 29.355 kgs of heroin from accused No.10 with the help of accused No.2 secreted it in the mother-in-laws house of absconding accused No.2 at Lokapur and in view of the criminal conspiracy that entered into between the accused as stated in point No.2, on 13/12/1999 the said contraband was transported in the ambassador car KA-23-M-3773 with the help of accused No.2 driven by accused No.8 to be transported in the lorry TN-69-2967 of accused No.4, 5 and 7 sent by Accused No.3 on the instructions of accused No.1 11 assisted by accused No.6 at the appointed spot 17 kms ahead of Tumkur on Tumkur-Sira NH Road and thereby further it is to be transported in the lorry TN-69-2967 to be brought by accused No.4, 5 and 7 and from that place to Tuticorin and from there with the help of accused No.3 and 9 it is to be transported through boat via sea to Srilanka and thereby committed the offence punishable under Section 8(c) read with Section 21, 28, 29 of the N.D.P.S. Act, 1985?.

5. What order?. The trial court had answered the points in the negative and had acquitted the accused. It is that which is under challenge in the present appeal. It is stated that accused no.2, who is said to be the brother of accused no.1 is said to have died pending the trial. Accused no.7 is said to have died after the judgment of acquittal. The appeal has been dismissed as against accused no.10, for non-prosecution. 12 3. The learned Special Public Prosecutor appearing on behalf of the appellants contends that one of the grounds on which the trial court has held that the charges against the accused are not proved is on the footing that Exhibit P-1, the first Information report is not in compliance with Section 42 (1) of the

NDPS Act. It is contended that in terms of the said section, PW-1 had, upon receiving the information from the informant had reduced the same into writing and had submitted the same to his superior, PW-13. Hence there was due compliance with the statutory mandate. Reliance is placed on the following authorities in this regard.

1. Gyan Chand and Another vs. State and Another (2005 Cri.L.J.

3228) 2. State of Maharashtra vs. Jayantilal Modi and Others (2010) 15 SCC1573. Ravindran alias John vs. Superintendent of Customs (2007) 6 SCC41013 4. State of Haryana vs. Jarnail Singh and others (2004) 5 SCC188It is emphasized and candidly admitted that the written information given by the informant could not be produced before the court below in view of a genuine apprehension that it may result in the very life of the informant being exposed to risk, on account of a possible retaliation by persons seeking to protect the accused. This valid justification, it is contended, has been unfairly discarded by the court below. The circumstance that the written information recorded in the first instance having been shown to his Superior Officer by the informant and the same having been produced before the court, is negated and hence the trial court had committed a grave error. It is also contended that the officials of the NCB are not required to maintain any diaries, as the Superior Officers would have information about the day to day work entrusted to the Officers and the work of surveillance would be secretly maintained in the office. In any event case files are maintained. Hence the trial court had committed an error in also holding that in the absence of maintenance of case diaries, the actual sequence of events would not be forthcoming and hence there would be scope for manipulation of the record, is a surmise that was not warranted and unfair to the prosecution as no such ill motive could be attributed to it. The trial court has erred in holding that the prosecution had failed to establish that there was a criminal conspiracy. It is contended that the prosecution has indeed demonstrated that Accused No.1 to 11 had entered into a criminal conspiracy to procure, possess, sell, transport and to export illegally to Srilanka the quantity of 29.355 kgs.of heroin, which was recovered on the Bangalore - Pune National Highway from the vehicle belonging to Accused no.2. The trial has itself noticed that accused nos.1 and 2 had used their cell phones

employing Sim cards procured in Karnataka. And that accused no.4 had 15 also been in contact with them - thereby demonstrating that they were in constant contact in executing the plan of transporting the contraband. The trial court has however, negated the evidence on the ground that the cell phones are not produced before the court. The evidence which is otherwise proof of such close contact between the accused is unfairly negated. Merely because the accused may have rid themselves of the instruments. It is contended that the trial court also ought not to have doubted and disbelieved the voluntary statements of the accused. There was no reason to proceed on the basis that the same were obtained under coercion. The same were recorded in terms of Section 67 of the NDPS Act. The complaint of the accused before the trial court that they were put under duress in having obtained such statements has been readily accepted by the trial court in holding that the voluntary statements could not be accepted. 16 It is contended that the conclusion of the trial court that the evidence indicated that the contraband which was to be brought and transferred to the lorry on the National Highway, as already stated, was on 12.12.1999 and not on 13.12.1999 as was demonstrated from the evidence and that this was on account of the said lorry having broken down on 12.12.1999, the event had been postponed by a day, is a surmise of the trial court and without any proof of the said lorry having broken down at all. The learned Special Public Prosecutor thus seeks that the appeal be allowed and the judgment of the trial court be set aside and the accused punished appropriately.

4. Per Contra, the learned Senior Advocate Shri B. Kumar appearing for the counsel for the respondents No.1 to 5, 7, 8 & 10 would contend that the trial court has discussed at length and assigned reasons in coming to the conclusion as to how the non-production of the original of Exhibit P-1 is fatal to 17 the case as being in violation of Section 42 of the NDPS Act, at paragraphs 21 to 28 of its judgment. It is pointed out that this is the settled position of law. Further it is also pointed out that it has been elicited from the prosecution witness, that the original document was kept in the office of the appellant and hence there was no impediment to produce the same at the relevant stage. It is further pointed out that it is not in dispute that none of the officers of the Narcotics department had denied that they had not produced a general diary or even a personal diary, indicating the

sequence of events and the movements of the respective officers in the course of their day to day duties - in relation to the present case and generally, as would be required of them. The absence of such a crucial document would also vitiate the proceedings, which is again a settled position of law. In so far as the allegation of criminal conspiracy is concerned, it is pointed out that there is no evidence to establish the conspiracy as alleged. In that, as per the complaint, the 18 conspiracy was at Manover, Mumbai, Lakshapur, Chennai, Bangalore and Tuticorn during the period September 1999 to December 1999. It is contended that the case of the prosecution was to the effect that it was accused no.10 who had originated the supply of the contraband by sending the same to Lakshapur, to the house of the mother-in-law of accused no.2. In the absence of accused no.10 having been interrogated or any statement being recorded, the accusation, it is pointed out, is a bald allegation which was never proved by producing any evidence whatsoever. Further, accused no.3 was a resident of Tuticorn. Accused no.9 was a resident of Kanyakumari. Accused nos. 3, 4, 5, 7 and 11 were all residents of Tuticorn. In the absence of any evidence that the accused no.1 had occasion to meet or contact any of these accused, it is pointed out, that it is inexplicable to allege a criminal conspiracy in so far as all the accused are concerned. 19 Besides, it is pointed out that except the alleged voluntary statements which have been retracted by the respective accused, there was no other evidence available on record as to the involvement of the accused in the commission of any alleged crime. It is pointed out that the prosecution has sought to place reliance on statements as to the several accused having possessed mobile cellular phones with SIM cards procured from several cities in India, apart from one Munna of Srilanka and one Atthabai of Pakistan sought to be linked to the crime by virtue of reference to their respective cell phones having been contacted through the phones of the accused. However, it is pointed out that it is admitted in evidence by PW-20, that no investigation was made into the whereabouts of Munna of Srilanka, Attha bai of Pakistan or Mohammed of Madhya Pradesh, accused no.10. It is on record that Accused No.10 was available as a remand prisoner, but yet his statement has not 20 been recorded and hence the same is fatal to the case of the prosecution. Further, except the reference to the phone numbers it is not the case of the prosecution that any such phones were

seized from the possession of the accused when the lorry and car were intercepted, as stated above. There is no explanation as to the existence or otherwise of such phones. It is further contended that the transcript produced by the prosecution at Exhibit 125, only indicates the incoming and outgoing calls pertaining to four cell phones. The latest entry in the said transcript was of October 1999, whereas the incident is as on 12.12.1999. Further, the said document was not admissible in evidence, in the absence of an endorsement by the person who was maintaining the computer server from which such information had been retrieved. This was a mandatory requirement of law, in terms of Section 65 B of the Evidence Act. Exhibit P-124 & 126 which are similar documents suffer from the same infirmity. 21 It is also pointed out that the evidence tendered through PW-17, PW- 24 and PW-29 to establish that accused No.1 had stayed at Hotel Kazana on 12.12.1999 and had shifted to Hotel Swagath that night or that accused nos.5 and 7 had stayed at Hotel Srilekha at Hosur, when the lorry in which they were travelling is said to have broken down, and the accused who is said to have stayed at Hotel Samrat, Chitradurga, is on the basis of a photocopy of the Check -in Register of the respective hotels. Secondly, the admission by PW-17 that he was not present when accused No.1 is said to have checked -in and further the identification of the accused by reference to a photograph was not satisfactory evidence of the allegations as held by the trial court. It is contended that in so far as the confessional statements said to have been made by the accused, is concerned, the accused have withdrawn the statements at the earliest opportunity when they were produced before the Special Court 22 and had complained of ill-treatment and having been compelled to write statements as dictated by the officers. It is in this background that the trial court had concluded that the accused had been kept in illegal confinement by the concerned officers in the Central Excise office at Tumkur, before being produced before the court. It is incidentally pointed out that according to the Forensic Science Laboratory report of the alleged sample of the contraband that was sent for analysis, indicated that the percentage of the drug Diacetylmorphine alleged in the contraband was certainly of an "intermediate quantity" as contemplated under the NDPS Act and therefore the alleged offence was not punishable with a minimum sentence. All the accused have been in prison and have suffered judicial remand of almost nine years. It is

also pointed out that the statement to the effect that the accused were given an option to be searched before a Gazetted Officer of the Department, namely, PW-20, by itself would vitiate any alleged consent given by the accused as laid down by the Apex court in the case of Myla Venkateshwarlu v. State of Andhra Pradesh , (2012) 5 SCC226 For all the above reasons it is contended that the trial court was justified in acquitting the accused.

5. In the light of the above contentions and on a close examination of the record it is seen that the respondents were originally accused nos.1, 3 to 5 , 8, 9 & 11. According to the appellant, PW-1, an Intelligence Officer of the Narcotics Bureau was in his office at 9:00 PM on 11.12.1999, a Saturday, which in itself is unusual, when he had received information, in writing, from a person, whose identity is not disclosed. The said information was in turn said to have been reduced to writing by him and thereafter forwarded to his immediate superior, a Superintendent, examined at the trial as PW-20. The said document so forwarded is marked as Exhibit P-1. It is stated in evidence by PW-1 that the information received by 24 him in writing was kept in a sealed cover in the office of the NCB. It is also stated that it was not in his custody. Further, that there were other officers present in the office at that point of time (PW-2, 4 and 16). The emphasis on the circumstance that normally, the office of the NCB is closed on Saturdays and Sundays and the unusual presence of the officers on that Saturday not being explained or disclosed is indeed curious. Thus the contention as to the document at Exhibit P-1 being a false and concocted document cannot be ruled out. More importantly, the original information said to have been received in writing by PW-1 is not brought on record. The explanation offered that it would have placed the informant in a vulnerable position, is not acceptable. There was no impediment in taking the court into confidence and requesting that the identity of the informant be screened. The non-production of the said crucial document would add to the suspicion created about the receipt of any information as stated. There is no way to ascertain whether Exhibit P-1 is a true reproduction of the original 25 information, especially when PW-1 has stated that Exhibit P-1 is a translated version of the original. The employment of expressions such as "narcotic drug", "mount surveillance" and "intercept heroin a narcotic drug", therein is especially suspicious. This is a serious lacuna on which ground alone the prosecution has

failed. The trial court has rightly held that there is a patent violation of Section 42 of the NDPS Act. The case of the prosecution being distorted is also evident from the fact that it is demonstrated that the lorry in which accused nos.4, 5 & 6 were said to have come from Tuticorin to Tumkur had unexpectedly broken down at Hosur, outside Bangalore and it is seen that Accused no.4 is said to have telephoned accused no.1 at Bangalore, on 11.12.1999, that the lorry can proceed further only on 13.12.1999. Therefore the meeting on the highway to receive the contraband was postponed from 12.12.1999 to the next day. This unexpected circumstance was apparently the reason that the 26 original information has been suppressed, as the subsequent events could not be explained with reference to the same. It is also seen that there is no denial by the prosecution that all the officers of the NCB, who had tendered evidence, have admitted before the court that they had neither maintained a general diary or any personal diary as regards their day to day functioning . This is again a lapse which would seriously affect the case of the prosecution in demonstrating that the sequence of events and the conduct of the officers concerned in bringing the accused to book had proceeded in the manner claimed. This is a circumstance squarely covered by the decision of the Apex court in the case of Directorate of Enforcement v. Deepak Mahajan, (1994) SCC (Cri) 785, which has laid down that all officers of Enforcement and the NCB must also maintain a diary as required of Police officers. Apart from the above on an overall consideration of the evidence, the theory of criminal conspiracy by the accused, who 27 were from several towns and cities is not established with any degree of certainty. Except reliance placed on record of telephonic calls said to have taken place between them, there is little else that can be called as being incriminating evidence. Even that record, as rightly contended by the respondents, does not squarely implicate the accused. It is also a fact that no phones are recovered from any of the accused to establish that they had in fact used the same. The record produced also did not establish that the phone or the SIM card was procured in the name of the accused. The transcript of the phone call records also could not be marked in evidence in the absence of compliance with Section 65 B of the Evidence Act, 1872, as held by the Apex Court in PV Anwar v. PK Basheer, (2014) 10 SCC473 Further, to establish the theory of criminal conspiracy, it was necessary for the prosecution to establish the link and

active participation of all persons concerned. In other words, it is alleged that one Munna of Srilanka was the person who is said to have arranged the sale of the contraband in 28 question through one Nandu. There is also reference to one Athabai of Pakistan. But it is admitted by PW-20 that no investigation was made into the whereabouts of Athabai. Nor is there any claim of having investigated Munna. Further, in so far as the so called confessional statements are concerned, each of the accused are said to have made certain statements - which are characterised as voluntary statements. However, all the accused have, at the earliest opportunity, when produced before the Special court for remand, complained about ill-treatment and as to how they were made to write statements as dictated by the officers of the NCB. This retraction has led the trial court to rightly conclude that the accused had been kept under illegal confinement and that the statements attributed to them could not be accepted. It is also on record that the accused were given an option to be searched before a Gazetted officer, but he was none other 29 than PW-20 himself. This would render any consent obtained as being invalid. In a similar situation the Apex court in the case of Myla Venkateshwarlu v. State of Andhra Pradesh, (2012) 5 SCC226 has held so. It is also a curiosity that though Accused no.10 a major participant in the crime according to the prosecution, though was available as a remand prisoner - no statements are recorded of the said accused. It is therefore a lacuna that would be fatal to the case of the prosecution as there is no evidence on record that the contraband was sent from Madhya Pradesh. Further, no cogent evidence has been produced to explain as to why the accused were present at Bangalore on 12.12.1999, when the contraband was to reach only on 13.12.1999. It is also to be accepted that the Chemical Examiner of the Forensic Science Laboratory has found that the percentage of Diacetylmorphine in the contraband said to have been seized was not of commercial quantity. In which event the decision of the Apex court in Micheal Raj v. Intelligence Officer, 2008 AIR30SCW2365 would apply. In the event that the same was of intermediate quantity then the minimum sentence prescribed would not be attracted. It is found that the accused had already suffered a judicial remand of almost 9 years before they were acquitted. For all of the above reasons the judgment of the trial court is affirmed and accordingly the appeal is dismissed. KS* Sd/- JUDGE

