

Vinod Kumar and ors. Vs. Sh. S.K. Srivastava, Intelligence Officer (Dri)

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Court : Delhi

Decided On : Nov-17-2005

Reported in : 2006CriLJ1759; 126(2006)DLT89

Judge : J.P. Singh, J.

Acts : [Narcotic Drugs and Psychotropic Substances Act, 1985](#) - Sections 21C, 23C, 25, 29, 32A, 33, 35, 37, 42, 43, 50, 54 and 68A; Maharashtra Control of Organized Criminal Act, 1999; Code of Criminal Procedure (CrPC) - Sections 389, 432 and 433; Indian Penal Code

Appeal No. : Crl. M.B. No. 1674/2005 in Crl. A. No. 703-04/2005

Appellant : Vinod Kumar and ors.

Respondent : Sh. S.K. Srivastava, Intelligence Officer (Dri)

Advocate for Def. : Satish Aggarwal, ; Ashish Aggarwal and ; Manish Sharma,

Advocate for Pet/Ap. : Harjinder Singh, Sr. Adv.,; Yogesh Kumar Saxena,; Vandana S

Disposition : Application dismissed

Judgement :

ORDER

J.P. Singh, J.

1. This is an application under Section 389 Cr.P.C. for suspension of sentence and grant of bail. The appellant-accused persons namely Vinod Kumar and Jaspal Singh have been convicted for offence punishable under Section 29 of the [Narcotic Drugs and Psychotropic Substances Act, 1985](#) (hereinafter referred to as NDPS Act) and have been awarded 20 years RI and fine of Rs. 2 lacs each in default of payment of fine RI for 1 (one) year under Section 21(C) of the NDPS Act and 20 years of RI and fine of Rs. 2 lacs each and in default of payment of fine further RI for 1 (one) year under Section 23(C) of the NDPS Act and also RI for 10 years and fine of Rs. 1 (one) lakh each and in default of payment of fine further RI for 6 months under Section 29 of the NDPS Act.

2. I have heard Shri Harjinder Singh, Sr. Advocate, learned counsel for the applicant and Shri Ashish Aggarwal, learned counsel for the respondent-State and have gone through the impugned judgment, order on sentence and copies of the documents placed on the file.

3. Briefly the facts are that the Intelligence Officer of Directorate of Revenue Intelligence received information about transportation of narcotic drugs in two trucks bearing registration Nos. HR-29A-0705 and DL-IG-A-9499. Both the trucks were seized and taken to the office of Directorate of Revenue Intelligence. Two independent witnesses were called. Applicant Jaspal Singh @ Jassa was driving truck No. DL-1G-9499. Applicant Vinod Kumar introduced himself as owner of the truck. The applicants agreed for search of the truck in the presence of a gazetted officer. These proceedings were reduced into writing. Accordingly, the truck was searched. During the search, one spare diesel tank was found fitted into writing. On opening a special cavity was found. Small 34 packets were recovered from that cavity. Each packet was found wrapped with adhesive tapes. On removing the tapes, white cloth pouch was found. On opening the cloth pouch, heat sealed polythine packet was seen and in that packet there was brown powder emanating pungent smell. The brown powder tested as heroin.

4. 65.765 kilograms of heroin was found in his truck. The prosecution examined 17 witnesses.

5. Learned counsel for the appellant has submitted that there is non-compliance of provisions of the NDPS Act and the prosecution has failed to prove the applicants' conscious possession of the contraband. Further, the applicants were arrested on 31.1.1997 and since then they are in judicial custody i.e. for more than 8 years and 6 months and since the appeal has not been heard, the appellants are entitled to bail. It is further argued that provisions of Section 32-A of NDPS Act are ultrawires.

6. Learned counsel for the applicant has cited the case titled *Dadu @ Tulsi Das v. State of Maharashtra* reported in : 2000 CriLJ4619 . In the said judgment, the Supreme Court of India has opined that so far as Section 32-A takes away the power of the executive under Section 432 and 433 of the Code of Criminal Procedure to suspend, remit or commute the sentence, the said provisions are unconstitutional. But the powers of the court cannot be curtailed specially when there is no possibility of early disposal of the appeal. The courts have power to suspend the sentence and grant interim relief. I may say that there is no quarrel about this legal position. But the court has to see whether the case for suspension of sentence is made out, in this case.

7. The next ruling is titled *Ram Narayan v. State*, reported in [2] JCC 170, where a Single Bench of High Court of Delhi has opined while dealing with Section 37 of the NDPS Act that when on perusal of the available evidence, if there are probabilities that the petitioner may not be convicted then the court can grant bail subject to further condition of being satisfied that the petitioner is not likely to commit any offence under the said act while on bail. In that case, recovery was considered somewhat doubtful. It is apparent that in the said case the final decision of the trial court had not yet come and the Single Bench has mentioned in the concluding paragraph that the trial court is free to decide the case on the basis of evidence adduced at the trial without being prejudiced by the observations made in the bail order by the High Court.

In the case before this court, the sentence has already been awarded after trial so, in my view, this judgment is of no help to the accused persons more so because the quantity recovered from both the trucks in this case was about 135 kilograms of heroin.

8. The next ruling is titled *Ranjitsing Brahmajeetsing Sharma v. State of Maharashtra* reported in 2005 (2) JCC 689, where the Supreme Court has held that mens-rea is an important factor in the criminal law. The offence was under Maharashtra Control of Organized Criminal Act, 1999. In that case also the trial was still to proceed. This judgment also in my view, is not attracted to the facts and circumstances of this case. In the present case, the matter has been decided after recording evidence of 17 witnesses and the applicants were found to be in conscious possession of the heroin in the truck that they were (one of them as owner) driving and in fact two trucks were moving together with very large quantity of heroin.

9. In the judgment titled '*Madan Lal and Anr. v. State of Himachal Pradesh*' reported in 2003 (3) JCC 1330 cited by learned counsel for the state it has been 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, and similar is the position in terms of Section 54, where also presumption is available to be drawn from possession of illicit articles.

10. As regards the delay in trial, I may say that there are many factors for delays in disposal of the matters and unless there is clear intentional delay on the part of the prosecution, no benefit can be given to the accused and every case has to be seen on its facts, circumstances and gravity. The present appeal was filed only in September, 2005. The case, in my view, is very serious having international ramifications.

11. Another point raised by learned counsel for the applicants is that the recovery was affected after sunset and before sunrise, therefore, the case should fail on this very ground. On this point, my attention has been drawn to Section 42 of the NDPS Act, which is sub-titled as under:

Section 42 - Power of entry, search, seizure and arrest without warrant or authorization. This Section relates to seizure or freezing or forfeiture under Chapter V-A of the Act. Chapter V-A deals with forfeiture of property derived from

or used in illicit traffic. Section 68-A under this Chapter envisages that the provisions of this Chapter V-A shall apply only to the persons specified in sub-section 2. The objects and reasons of this Chapter relate to tracing, freezing and seizure of illegally acquired property to a person who has been arrested or against whom warrant or authorization of arrest has been issued for commission of offence punishable under the Act with imprisonment of 10 years or more.

12. Learned counsel for the State has drawn my attention to Section 43 of the NDPS Act which has a sub-title: Power of Seizure and Arrest in Public Place, according to which any officer of any department mentioned in Section 42 may seize in any public place. This Section does not have any time prohibition like between sunrise and sunset. I am of the view that the purpose of the law has to be advanced and the interpretation cannot be given to one or two wards here and there, when the authorities had prior information about the transportation of heroin in trucks, then it would be very inappropriate to say that they must allow the trucks to continue their vicious journey till sunrise and only then they should enter seize or search them and they cannot be stopped even on the road which is a public place or cannot be taken to the department of Revenue and Intelligence, which also is a public place, for further investigation.

13. Learned counsel for the applicant has drawn my attention to the case titled Akhtari Bi (Smt) v. State of MP. In the said case Akhtari Bi was sentenced to life imprisonment in a murder case and the appeal was pending in the High Court since 1997 and there was no likelihood of its being heard in the near future. Akhtari Bi was an old and infirm lady. She was bringing up her grandson in jail, because her daughter-in-law had expired. In the present case the appeal has been filed only in September, 2005 and the offence is under the NDPS Act. The judgment relating to an offence under Indian Penal Code and pathetic condition of the old and ailing Akhtari Bi who had a responsibility to bring up a small child in jail is not applicable to the facts of this case.

14. Learned counsel for the State has submitted that under Section 32-A of the NDPS Act, subject to the provisions of Section 33, no sentence awarded under this Act shall be suspended or remitted or commuted. Learned counsel for the

state has referred to the judgment titled 'Pawan Mehta v. State' reported in 2002 (1) JCC 34. In this judgment single bench of the High Court of Delhi has discussed section 25, 35 & 37 of the NDPS Act wherein it was opined that from the materials placed on record it could not be satisfactorily said that prima facie the accused are not guilty. In this case 7.180 kg of opium was found in the car in which the accused persons were traveling. The guilty intention was imputed to them as per the provisions of law and it was further opined that Section 50 of the NDPS Act comes into play when the personal search of the apprehended persons is affected and not the search of the premises. The learned Single Judge has relied upon the Supreme Court judgments including the judgment titled 'Dadu @ Tulsi Dass v. State of Maharashtra' & 'Abdul Rashid Ibrahim Mansoori v. State of Gujrat' reported in : 2000 CriLJ1384 to arrive at the conclusion. The Hon'ble Judge has elaborated that the legislature in its wisdom has shifted the burden of proof to the accused and that too not by the test of preponderance of probabilities but beyond reasonable doubts. In the present case 65.765 kg of heroine was recovered from the concealed place in the bodies of the trucks.

15. In the present case the applicants have already been convicted and sentenced after trial, so a prima facie finding about their not being guilty is not warranted under the law. The applicants are engaged in anti-humanity activities. They deserve no leniency.

16. Considering all the facts and circumstances, I do not find any merit in the application, the same is therefore, dismissed.

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