

Narcotics Control Bureau Vs. AllauddIn @ Mir @ Malik and anr.

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Court : Delhi

Decided On : Dec-16-2010

Judge : Mukta Gupta, J.

Acts : Narcotics Drugs and Psycotropic Substances Act, 1985 - Sections 29 read with 23, 21, 18, 50, 41, 42, 43, 67; Code of Criminal Procedure (CrPC) (Cr.P.C.) - Section 313; Customs Act - Section 108

Appeal No. : CRL.APPEAL No.111/1997

Appellant : Narcotics Control Bureau

Respondent : AllauddIn @ Mir @ Malik and anr.

Advocate for Def. : Mr. Sumeet Verma, Adv

Advocate for Pet/Ap. : Mr. Satish Aggarwal, Adv.

Judgement :

1. On 20th August, 1993 on a secret information that one Allauddin is likely to be found in the coffee shop of the hotel Janpath with heroin, Sarwan Singh PW2 and Dhileep Kumar PW4 both intelligence officers of the CrI. Appeal No.111/1997 Page 1 of 17 Appellant along with the team and B.N. Mishra PW4, Assistant Director went to the hotel. The officers found Respondent No.1 Allauddin sitting in the coffee shop with a rexine bag. Sarwan Singh introduced himself and other NCB officers to Allauddin and expressed his intention to search his baggage which was agreed to by the accused. Two panchas namely Amar Nath Sharma and

Sanjay Kumar, security guards of the hotel were associated with the search and for that the Respondent No.1 was taken to a room in the hotel. On search of the rexine bag, 5 packets were recovered which contained brown powder, a small quantity of which was tested with the help of the field test kit which gave positive test for narcotic drug. All the 5 packets found to be weighing 5 kgs and 500 gms collectively were marked as A to E. Two samples of 5 grams each were drawn from each of the 5 packets assigning them markings A1 and A2 to E1 and E2 respectively. All these 10 samples were transferred in a separate paper envelope with the seals of NCB. Besides the panch witnesses, the panchnama was also signed by Allauddin and his son Sirajuddin PW2, the seizing officer Sarwan Singh, and PW5 B.N. Mishra, Assistant Director. The remaining brown powder was also sealed along with the rexine bag. Respondent No.1 was served with the summon Ex. PW2/B by PW2, pursuant to which he was interrogated by PW4 at the NCB office on 21st August, 1993. During interrogation Respondent No.1 tendered his Crl. Appeal No.111/1997 Page 2 of 17 voluntary statement Ex.PW4/A written by his son Sirajuddin admitting the recovery of the contraband and also disclosing that some more drug was lying stored in a trunk in a house in the occupation of a blind man named Yamin and his wife Hamida Bano at Mata Sundri Road. The Respondent No.1 allegedly voluntarily led the officers of the NCB to the said house. Ram Narain Prasad, Uma Shankar and Sita Ram were associated as panch witnesses. On search of the house, a trunk was found in the house which was locked. On breaking the lock it was found to contain 17 cloth packets with Urdu markings and some black substance wrapped in a polythene sheet. Each of the 17 parcels was found to be containing one polythene packet containing brown powder which tested positive for heroin. The blackish substance tested positive for opium. The total weight of the heroin recovered was 16 kg and 515 gms and of the opium was 21/2 kgs. Two samples of 5 gms were drawn from each packet and thereafter the samples and the recovered articles were sealed. A panchnama Ex.PW4/B was prepared at the spot with specimen seal impressions, duly signed by the aforesaid persons. Respondent No.1 Allauddin was further interrogated by S. Shiva Prasad, Intelligence officer who recorded his statement Ex. PW6/C written by his son Sirajuddin on 21st August, 1993 confessing the recovery of contraband from the house at Mata Sundri Road and disclosing the involvement of

his associates co-accused Crl. Appeal No.111/1997 Page 3 of 17 Rafiq and Akhlaq a Pakistan national. Accused Rafiq was summoned vide summons Ex. PW1/B dated 30th September, 1993. In pursuance of the summons, accused Rafiq appeared before PW1 J.S. Solanki on 30th September, 1993 and tendered his voluntary statement Ex. PW1/C u/s 67, NDPS Act. Thereafter, he was arrested vide arrest memo Ex. PW1/D.

2. On a complaint being filed, the Respondents were charged with a joint charge of conspiracy under Section 29 read with Sections 23, 21 and 18 of the Narcotics Drugs and Psychotropic Substances Act, 1985 (in short the Act). A separate charge under Section 21 of the Act for the recovery of 5.5 kgs of heroin and another separate charge under Section 21 and Section 18 of the Act for recovery of 16.515 kgs heroin and 2.5 kg opium were framed against Respondent No.1 Allauddin. After recording of the evidence and the statement of the accused persons under Section 313 Cr. P.C., the learned Trial Court acquitted both the Respondents. The reasons for the acquittal of the Respondents are; firstly, non-compliance of Section 50 of the Act; secondly, Respondent No.1 Allauddin in his statements Ex. PW4/A and Ex.PW6/C did not admit that the heroin or opium contained in the trunk belonged to him or that the trunk was kept by him in the quarter of Yamin and his wife Hamida Bano; thirdly, Allauddin neither in his statement Ex.PW4/A nor in his further statement Ex.PW6/C mentioned that he had any share in the profit or Crl. Appeal No.111/1997 Page 4 of 17 commission or took storage charges regarding the heroin and opium lying concealed in the said house and as per the statement Ex. PW4/A only knowledge of concealment could be attributed to him. Lastly, it was held that the Appellant failed to prove that the statements Ex.PW4/A and PW6/C made by Respondent No.1 and written by his son Sirajuddin were voluntary in nature. Impugning this judgment dated 1st August, 1996 the present appeal has been filed.

3. Learned counsel for the Appellant contends that the findings of the learned trial court acquitting the Respondents are perverse, warranting interference by this court by setting aside the impugned judgment and convicting and sentencing the Respondents for the charges framed. It is contended that the finding that Section 50 of the Act was not complied with while recovering heroin from the Respondent

No.1 is perverse and contrary to the law laid down by the Honble Supreme Court. Section 50 of the Act has an application only when personal search of the accused is conducted. The same does not apply when the recovery is from a bag or vehicle etc. Reliance is placed on State of Punjab vs. Baldev Singh, JT 1999 (4) SC 495. It is next contended that since the recovery, search and seizure of heroin is at hotel Janpath which is a public place, therefore, Section 43 of the Act is applicable and Sections 41 and 42 of the Act have no application. Reliance is placed on CrI. Appeal No.111/1997 Page 5 of 17 Narayanaswamy vs. Assistant Director, Directorate of Revenue Intelligence, AIR 2002 SC 3658, State of Haryana vs. Jarnail Singh and others, 2004 (2) JCC 1036, Ravinderan vs. Superintendent of Customs, 2007 (6) SCC 410 and Directorate of Revenue and Anr. v. Mohd. Nisar Holia, 2008 (2) SCC 370. In the alternative it is submitted that even if it is held that Section 43 of the Act is not applicable then also Section 41 (2) will apply and since the standards laid down under Section 41(2) have been complied with thus it is unnecessary to conform to the rigors of Section 42. As regards the search and seizure of heroin and opium at the house at Mata Sundri Road, it is contended that since Section 41(2) of the Act have been complied with, it is not mandatory to conform to Section 42. Reliance is placed on M.Prabhulal v. Assistant Director, Directorate of Revenue Intelligence, (2003) 8 SCC 449.

4. It is next contended by learned counsel for the Appellant that the finding that the statements tendered by Respondent No. 1 vide Ex.PW4/A and Ex. PW6/C are not voluntary in nature, is highly perverse. The recoveries at both the places have been witnessed by panch witnesses who have testified to this effect. The statements are in the handwriting of the son of Respondent No.1 and the statements also include the facts relating to the family of Allauddin which would not be in the knowledge of the officers of the Appellant. There is no reason for the officers of the Appellant to falsely CrI. Appeal No.111/1997 Page 6 of 17 implicate the Respondents and lastly there is a presumption that official acts have been preformed regularly. Relying on State of Kerala v. M.M.Mathew and Another, (1978) 4 SCC 65 it is contended that the conviction can be based solely on the testimony of the official witnesses.

5. Learned counsel for the Appellant next contends that the finding that the respondent No. 1 was not in conscious possession of the contrabands recovered from the house at Mata Sundri Road is also perverse as a huge recovery of the contraband itself raises the presumption that the Respondent No.1 was not only in possession of the contraband but he owned the same. Relying on CBI v. Ashiq Hussain and others, 2003 (1) JCC 316 it is contended that the procedure is the handmaid of justice and not the mistress of law. The procedures are intended to subserve and facilitate the cause of justice and not to govern or obstruct it. Minor deficiencies if any cannot be considered to be fatal for the prosecution.

6. Learned counsel for the Respondent No.1 fairly states that as far as the finding of the learned trial court with regard to non-compliance of Section 50 of the Act is concerned, the same is perverse and contrary to the law laid down by the Honble Supreme Court. It is well settled that Section 50 of the Act applies only to personal search and not to baggage, conveyance etc. It is however contended that even if Section 50 is not required to be complied with Crl. Appeal No.111/1997 Page 7 of 17 in the present case as regards the recovery from Room No.26 of Hotel Janpath and from inside the trunk lying in the house at Mata Sundri Road, the compliance of Section 42 of the Act is mandatory. Relying on State of Punjab v. Balbir Singh, 1994 (3) SCC 299 it is stated that the appeal is liable to be dismissed on account of non-compliance of Sec. 42 of the Act. The admitted case of the prosecution is that they had received secret information in terms of Section 42 of the Act. It was mandatory for the officer to reduce the same into writing under Section 42 (1) and under sub-Section (2) to send the copy of this writing to his immediate superior. Admittedly, in the present case PW2 is the searching, seizing and sealing officer. It has not been proved on record that this secret information was reduced into writing. Even if admitting that the senior officer of PW2, that is, PW5 Mr. B.N. Mishra, Assistant Director was present that at best can entail the intimation by PW2 to the senior officer thus complying with Section 42(2) but Section 42(1) which is also mandatory has not been complied with in the facts of the present case. Reliance is placed on Abdul Rashid Ibrahim Mansuri v. State of Gujarat, 2000 (1) Apex Decision (S.C.) 321 and Beckodan Abdul v. State of Kerala, 2002 (3) SCALE 564. Reliance by the Appellant on M.Prabhulal (supra) is misconceived as the Honble Supreme Court was dealing with the violation of Section 42(2) only,

Section 42(1) having been complied with. Admittedly, in Crl. Appeal No.111/1997 Page 8 of 17 the present case neither PW2 nor PW4 is a Gazetted Officer, whereas in M. Prabhulal the searching, seizing and sealing officer was a Gazetted Officer himself. The learned trial court rightly held that Ex. PW4/A and Ex. PW6/C neither stated that the trunk belonged to Allauddin nor that the trunk was kept by him at that place. It was also not stated that he had any share or commission or profit or storage or entitlement to storage charges. The Respondent No. 1 can at best be attributed knowledge of concealment of the contraband and the same will not invest in him the conscious possession or ownership thereof. As regards the last finding, it is stated that the prosecution witnesses have admitted in their cross examination that Sirajuddin s/o Allauddin was taken from hotel Janpath by the NCB officers and detained there throughout the night and thus the alleged voluntary statements of Allauddin Ex. PW4/A and Ex. PW6/C written in the handwriting of his son cannot be said to be voluntary. Thus, there is no infirmity in the impugned judgment and the learned trial court rightly acquitted the Respondent No.1.

7. Learned counsel for the Appellant in relation to Respondent No. 2 contends that as per the statement of co-accused Allauddin, the contraband recovered from the trunk at Mata Sundri Road was kept by Rafiq, the Respondent No.2. Though Rafiq in his statement under Section 67 of the Act does not admit the same but the statements of co-accused Allauddin Crl. Appeal No.111/1997 Page 9 of 17 Ex. PW4/A and Ex. PW6/C are sufficient to prove the complicity of Respondent No.2 for the conspiracy and recoveries made at Mata Sundri Road. Reliance is placed on Ramesh Chandra v. State of West Bengal, AIR 1970 SC 940 to contend that a person does not become an accused till a complaint is filed against him notwithstanding his prior arrest. Relying on Naresh J. Sukhwani v. UOI, 1996 (83) ELT 258 (SC) it is contended that the statements recorded before custom officials under Section 108 of the Customs Act can be used as substantive evidence if it inculcates not only the other person but also the maker of the statement.

8. Learned counsel for the Respondent No.2 contends that the Respondent No.2 is sought to be involved in the second recovery merely on the basis of the statement of Respondent No.1, however, the statement of the co-accused can

only bind the maker of the statement. Reliance is placed on Union of India v. Bal Mukund & Ors., 2009 (2)Crimes 171(SC) wherein the decision rendered in Naresh J.Sukhwani (supra) was distinguished. Relying on Shiva Karam Payaswami Tewari v. State of Maharashtra, JT 2009 (1) SC 625 it is contended that an extra judicial confession given by a co-accused cannot be proved by merely exhibiting the same. The person before whom confession is made should state what was stated by the person making the confession. The statement of Respondent No.2 under Section 67 of the Act is exculpatory. Crl. Appeal No.111/1997 Page 10 of 17 Moreover, the statements of the co-accused recorded are without any warning, with no time given for reflection and by detaining the person at night and then extracting the same. Thus the statements Ex.PW4/A and Ex. PW6/C cannot be said to be voluntary in nature. Relying on Ganpat v. State of Haryana & Ors., 2010 (4) Crimes 217 (SC) it is contended that the findings of the learned trial court are well reasoned and thus this Court will not interfere in the same even if two views are possible.

9. Conscious of the limitation in an appeal against acquittal and in terms of the parameters laid down by the Honble Supreme Court in Ganpat (supra), the facts in the present case are required to be examined. In the said report culling out the law the Honble Supreme Court held:

"The following principles have to be kept in mind by the appellate court while dealing with appeals, particularly, against an order of acquittal:

- (i) There is no limitation on the part of the appellate court to review the evidence upon which the order of acquittal is founded and to come to its own conclusion.
- (ii) The appellate court can also review the trial courts conclusion with respect to both facts and law.
- (iii) While dealing with the appeal preferred by the State, it is the duty of the appellate court to marshal the entire evidence on record and by giving cogent and adequate reasons may set aside the judgment of acquittal.

(iv) An order of acquittal is to be interfered with only when there are "compelling and substantial reasons" for doing so. If the order CrI. Appeal No.111/1997 Page 11 of 17 is "clearly unreasonable", it is a compelling reason for interference.

(v) When the trial court has ignored the evidence or misread the material evidence or has ignored material documents like dying declaration/report of ballistic experts, etc. the appellate court is competent to reverse the decision of the trial court depending on the materials placed. [Vide Madal Lal vs. State of J&K, (1997) 7 SCC 677, Ghurey Lal vs. State of U.P., (2008) 10 SCC 450, Chandra Mohan Tiwari vs. State of M.P., (1992) 2 SCC 105, Jaswant Singh vs. State of Haryana, (2000) 4 SCC 484].

10. The finding of the learned trial court as regards the recovery from Respondent No.1 at Hotel Janpath being in violation of Section 50 of the Act is perverse. The law on the point is well-settled. It is only in cases of personal search that Section 50 of the Act is required to be complied with. In State of Punjab v. Baldev Singh, 1999 (6) SCC 172, it was laid down that Section 50 of the Act has no application to the search of baggage, conveyance etc.

11. Coming to the contention raised by the learned counsel for the Respondent No.1 that even if Section 50 of the Act was not required to be complied with, it was mandatory on the part of the Appellant to have complied with Section 42(1) of the Act as admittedly there was a secret information which was not reduced in writing in violation of the mandate of Section 42(1) of the Act. In Abdul Rashid Ibrahim Mansuri (supra) the CrI. Appeal No.111/1997 Page 12 of 17 Honble Supreme Court held that the requirement of Section 42 (1) is two- fold firstly, that he should have taken down the information in writing and, secondly, that he should have sent forthwith the copy thereof to his superior officials. I find merit in the contention of learned counsel for the Appellant that the present case falls under Section 43 of the Act and not under Section 42 as the Explanation to Section 43 includes a hotel in the expression public place and thus there is no requirement of compliance of Section 42 of the Act. In Directorate of Revenue (Supra) the Honble Supreme Court considered whether a room in a hotel would be a public place or not. It was held that though a hotel is a public place however a room occupied by a guest in a

hotel cannot be said to be a public place. This interpretation was resorted to, striking a balance between the enforcement of law and the protection of valuable human right of the accused, that is, the right to privacy. In the present case the Respondent No. 1 Allaudin was in possession of the contraband in a rexine bag while sitting in the hotel lobby. It is only after intimating to the Respondent No. 1 that there was an information about the contraband in his possession and he is required to be searched that he was taken to a separate room in a hotel. This of course was done so that no inconvenience is caused to the other people sitting in that public place. The recovery of heroin in the facts of the case can only be stated to be from a Crl. Appeal No.111/1997 Page 13 of 17 public place and thus the mandatory requirement of Section 43 and not Section 42 of the Act has to be complied with.

12. As regards the next issue of recovery from the house at Mata Sundri Road and the contraband not being in the conscious possession of the Respondent No. 1, I find no perversity in the impugned judgment. As per the two statements of Respondent No.1 Ex. PW4/A and Ex. PW6/C at best knowledge of concealment of the contraband can be attributed to him. These statements do not speak about any share or profit or commission or storage charges in the said contraband. Moreover, the Respondent No.1 has not even stated that this contraband was kept by him at the house at Mata Sundri Road. The Honble Supreme Court in Raosaheb Balu Killedar v. State of Maharashtra, 1995 CrLJ 2632 held that that the recovery of country made revolver and cartridge pursuant to the disclosure statement by the accused though attribute knowledge of the concealment of revolver and the cartridge at the particular place but the same does not attribute a conscious possession thereof.

13. I also do not find any perversity in the finding of the learned trial court that the statements of the Respondent No.1 Ex.PW4/A and Ex.PW6/C cannot be said to be voluntary. PW5 in his cross examination has admitted that the Respondent No.1 and his son were taken from hotel Janpath to the office of Crl. Appeal No.111/1997 Page 14 of 17 NCB and interrogated resulting in the statement of Shiraz whereafter he was let off on the next morning. It would also be relevant to note a fact from Ex. PW 4/C which demonstrates that the Respondent No. 1 along

with his son was taken to the NCB office from Janpath hotel on 20th August, 1993 itself. The question put to Respondent No. 1 by PW4 was "why did you come to hotel Janpath today evening?" In view of the evidence on record that the Respondent No.1 and his son were taken to NCB Office from Hotel Janpath, the story of the prosecution that summons were served on the Respondent No.1 to appear on 21st August, 1993 before PW4 and in compliance of the summons, Respondent No.1 along with his son came to the office of NCB on 21st August, 1993 and tendered his voluntary statements Ex. PW4/A and further statement Ex.PW6/C written in the handwriting of his son Swaran Singh is negated. PW4 in his cross examination has admitted that the Respondent No.1 was not even warned that his statement can be used against him or other persons nor was the provision of Sec. 67 of the Act read over and explained to him. Indubitably, there is a presumption under Section 114 of the Evidence Act that official acts are performed regularly but this presumption is rebuttable and when the facts demonstrate otherwise and due compliances to the procedural safeguards are not met then the statement cannot be said to be voluntary in nature.

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14. From the testimony of PW2 Sarwan Singh, Inspector, Customs and Central Excise, the searching, seizing and sealing officer, PW3 Amar Nath Sharma and PW5 B.N. Mishra, Assistant Director, NCB, the recovery of 5.5 Kgs of heroin from the possession of Respondent No. 1 has been proved beyond reasonable doubt. The witnesses have stated about search of the rexine bag, sampling, seizing and sealing of the case property and the samples. The link evidence and the report of CRCL opining the contraband to be heroin has also been proved. In view of the aforesaid discussion the impugned judgment of the learned Trial Court acquitting the Respondent No. 1 for the charge under Section 21 of the Act relating to the recovery from the rexine bag in his possession at hotel Janpath is perverse, illegal and thus set aside. The Respondent No. 1 is held guilty of offence punishable under Section 21 of the NDPS Act and thus convicted of the said offence.

15. Qua Respondent No.2 the only evidence produced by the prosecution are the two alleged voluntary statements of Respondent No.1 Ex. PW4/A and Ex.PW6/C.

As held above these statements cannot be said to be voluntary. Moreover, the statement tendered by the Respondent No.2 Ex.PW1/C recorded after one and half month of the incident does not inculcate him. The contention of learned counsel for the Appellant is that the statements recorded before the officers of the Appellant are not statements before the police. *CrI. Appeal No.111/1997 Page 16 of 17* officers and thus they are admissible in evidence as substantive evidence and the conviction of the co-accused can be based solely on the confessional statement made by the co-accused. The confession made before the officers of the Appellant is an extra judicial confession. The law relating to the evidentiary value of the confession made by a co-accused under Section 30 of the Evidence Act, is well settled that the same may be taken into consideration to lend credence to the prosecution case. In the present case, the evidentiary value of the statement of co-accused is not required to be gone into at length because it has already been held that the statements of Respondent No.1 which incriminate the Respondent No.2 are not voluntary in nature. The same cannot be the basis of conviction of Respondent No.2. Thus the Appellant has not been able to prove the charges against Respondent No. 2 beyond reasonable doubt and the finding of the learned Trial Court is not required to be disturbed on this count.

16. The appeal is accordingly allowed. The Respondent No.1 is convicted for the offence punishable under Section 21 of the NDPS Act.

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