

Narcotics Control Bureau Vs. Ramesh Kumar

Narcotics Control Bureau Vs. Ramesh Kumar

SooperKanoon Citation : sooperkanoon.com/957286

Court : Delhi

Decided On : May-29-2013

Judge : R.V. Easwar

Appellant : Narcotics Control Bureau

Respondent : Ramesh Kumar

Advocate for Def. : Mr. Chetan Lokur

Advocate for Pet/Ap. : Mr. Satish Aggarwal

Judgement :

* IN THE HIGH COURT OF DELHI AT NEW DELHI Reserved on:9th May, 2013
Date of Decision:

29. h May, 2013 % + CRL.A. 419/1997 NARCOTICS CONTROL BUREAU
Appellant Through: Mr. Satish Aggarwal, Advocate. versus RAMESH KUMAR
Through: Respondents Mr. Chetan Lokur, Advocate. CORAM: MR. JUSTICE
R.V. EASWAR JUDGMENT R.V. EASWAR, J.: This is an appeal filed by the
Narcotics Control Bureau (NCB, for short) against the judgment dated 16.8.1997 in
sessions case No.22/1995, acquitting the respondent, Ramesh Kumar from the
charges made against him under the Narcotic Drugs and Psychotropic Substances
Act, 1985 (hereinafter shortly referred as NDPS Act).

2. The case of the prosecution is that the NCB received secret information on the
basis of which surveillance was mounted on room No.116, Hotel Janpath, New

Delhi. A search party knocked at the door of the room and the door was opened by accused Ramesh Kumar. Two public witnesses were called as panch witnesses to witness the search. After giving due notice under section 50 of the NDPS Act, a search of the accused and the room was undertaken, which resulted in the seizure of a black polythene bag containing a powdered white substance. The powder was tested with the help of the field testing kit. It showed positive for diacetyl morphine/heroin which is a banned drug under the Act. The search party drew two samples from the drug, each weighing five grams and they were kept in separate small polythene packets and sealed with a paper slip bearing the signature of the panch witnesses as also the signature of the accused and the gazetted officer and sealed by NCB. The balance contraband was packed in a cardboard box and sealed by NCB. All other formalities, such as drawing up of the panchnama were carried out on the spot. A statement from the accused Ramesh Kumar was recorded by PW5, which was written in the handwriting of the accused himself and running into 10 pages. It may be mentioned here that this statement was retracted by the accused while he was in judicial custody and a copy of the same was sent to the trial court on 14.6.1995.

3. The CRCL reported positive for the banned drug. Thereafter charges were framed against Ramesh Kumar on 21.9.1995 by the trial court for having found to be in illegal and unlawful possession of 500 gms of heroin in contravention of section 8 of the NDPS Act and thereby prima facie guilty of the offence under section 21 of the Act.

4. The prosecution examined 11 witnesses. In the statement recorded from the accused under Section 313 of the Cr.P.C., he stated that the room in the hotel was booked in the name of Ajay Karan and not in his name and that the seizure was manipulated and he was brought into the room subsequent to the seizure and falsely implicated in the case. He stated that he was tortured and coerced into giving the statement under section 67 of the Act (Ex.PW5/A) and that there was no material to connect him with the possession of the banned drug or with the occupation of the room in the hotel.

5. In support of the defence, 3 witnesses were examined. Two of them were the manager and supervisor of Hotel Janpath. The last witness was the owner of house not C-305, Vikas Puri, New Delhi which was owned by one Pradeep Kumar Soni. This house was searched after the accused made the statement in the hotel. A panchnama in respect of the search of the aforesaid house was prepared and according to the accused nothing incriminating was recovered from the house.

6. The preliminary objection of the accused raised under sections 42, 50 and 57 of the NDPS Act to the effect that the mandatory provisions of these sections were not satisfied, was rejected by the trial court. It is not necessary to reproduce these objections and the findings of the trial court in any detail since that part of the judgment of the trial court has become final and the accused has not filed any appeal against those findings. The findings of the trial court with regard to the question whether the prosecution has successfully established that the accused was in conscious possession of the banned drug when it was recovered from him are contained in paragraphs 22 onwards of the judgment. The trial court found that though the case of the prosecution was that the room had been booked in the hotel in the name of one Ajay Karan, this fact did not find mention in the panchnama or in the complaint or even in the examination-in-chief of PW1, who was one A. P. Singh, called in as a panch witness. According to the trial court there was no explanation as to why no investigation was carried out to find out the identity and whereabouts of Ajay Karan. According to the trial court, it was in evidence that the search party checked the guest register of Hotel Janpath on reaching the hotel at about 2.30 p.m. and found that room No.116 was booked in the name of Ajay Karan. The trial court noticed that the defence witnesses, namely, the manager and supervisor of Hotel Janpath had deposed that once the room is booked in the name of a guest, a guest registration card is allotted to the guest and at the time of surrendering/vacating the room, the guest has to surrender the key of the room along with the guest registration card. The trial court found from the evidence of PW11, who was Jacob Paul, gazetted officer, that no enquiry was made by the search party as to when the room was occupied or whether any snacks or food were sent to the occupant of the room. PW1 had also admitted that no waiter was examined to ascertain whether any food/snacks were sent to the room. The search party, according to the admission made by Jacob

Paul (PW11) had not lifted any finger prints from the hotel room and no opinion of any handwriting expert had been taken to identify the person who had booked the room, by making a comparison of the same with the signature and the handwriting of the accused. It was also argued before the trial court that there was no evidence brought on record to establish that Ajay Karan and the accused Ramesh were one and the same person and that no paper, file, bag or document or any other thing was recovered so as to connect the accused with the room except the sole polythene bag lying under the cot containing the contraband.

7. The trial court was of the view that having regard to the evidence of PW11, the prosecution had failed to establish that the accused who was present in the room at the relevant time, was in conscious possession of the recovered contraband. It opined that if the accused had booked the room, he would have been in possession of the guest registration card as deposed by the defence witnesses; however no such card was recovered from the accused. Moreover no luggage or any other item belonging to the accused was also recovered from the room. No fingerprints were taken from the room and no efforts were made by the prosecution to trace the whereabouts of Ajay Karan. According to the trial court, the prosecution could not establish that Ajay Karan and the accused were one and the same person. The trial court placed strong reliance on the fact that the guest register was not produced before the court, even though PW3 had gone to the hotel on 18.5.1995 where he was orally told that the same would be produced by the hotel staff at the relevant time in court. The trial court noted that the request allegedly made by PW3 to the hotel staff was only a one time oral effort and there was nothing in writing to support the claim that such a request was made. This, according to the trial court, cast a serious doubt as to whether the prosecution in fact had made any effort to retrieve this guest registration card as admittedly no such writing to the said effect was done. The trial court thereafter referred to several judgments, including the judgment of the Supreme Court wherein a distinction between mere possession and conscious possession was pointed out and it was held that unless conscious possession is shown, the accused cannot be convicted.

8. It appears that one of the points urged before the trial court was that the possibility of tampering with the samples cannot be ruled out, but this argument did not find favour with the trial court which held that the possibility of tampering with the samples was totally excluded.

9. In fine, the trial court acquitted the accused.

10. The main points urged by the learned counsel for the appellant are that: (a) the accused ought to have been convicted on the basis of his own statement made on 17.5.1995, the date of search and this aspect of the matter was overlooked by the trial court; (b) there is no finding by the trial court that the confession made on 17.5.1995 was under coercion, threat or force; (c) the retraction stated to have been made by the respondent has not been proved under section 313 of the Cr.P.C.; and (d) the presumption as to the mental state of the respondent referred to section 35 of the Act operates in this case, and has not been displaced by the respondent.

11. It was further urged on behalf of the appellant that it is wrong to show that the respondent was falsely implicated in the case, that the recovery of the narcotics is supported by the panchnama, that the respondent did not retract from the confession at the time of remand which was the first available opportunity and that the retraction in the form of a letter written by the accused from the jail does not amount to a valid retraction.

12. The learned counsel for the respondent submitted that the onus was on the appellant to show that the statement made under section 67 of the Act was voluntary which onus has not been discharged in the present case. He submitted that there was nothing on record to connect the respondent with possession of room No.116, Hotel Janpath or with any of the articles found/recovered therefrom. In this connection he pointed out that nobody from the hotel was examined by the prosecution in an attempt to connect the respondent with the said room. He strongly supported the finding of the trial court that no investigation had been carried out to show that the identity of Ajay Karan and the present respondent Ramesh were one and the same. He pointed out that the guest register or the photograph of the person in whose name the room was booked was not shown to

the trial court or exhibited, as per the statement of PW11, nor were the fingerprints from the room lifted. With regard to the validity of the confession made under section 67, the learned counsel for the respondent submitted that the confession was made while in custody of the customs officials and therefore it could not have been voluntary and in any case it was retracted at the earliest opportunity and therefore cannot be relied upon. He also relied on the fact that no personal effects of the respondent were seized either from the hotel room or from the house in Vikas Puri, which was also searched after the search of the hotel room.

13. In his rejoinder, the learned counsel for the appellant raised a plea that the so-called retraction was not hand-written, but was typed and was smuggled into the record and therefore no credibility should be attached to the same. He pointed out that the confession made under section 67 of the Act refers to certain facts which are in the exclusive knowledge of the respondent and therefore it must be taken to be a true confession. According to the learned counsel, a mere statement retracting the earlier confession is not sufficient to exonerate the accused and that the accused ought to have entered the witness box to retract from the earlier confession, which he has not done in the present case. The allegation that the confession was obtained by coercive methods does not hold water since there is no evidence of any external injury on the body of the respondent as clarified by the report of the DDU hospital and thus the version of the accused that he was tortured into submission stands falsified.

14. In support of the rival arguments, both sides cited and relied upon several authorities which will be noticed at the appropriate juncture.

15. I have carefully considered the rival contentions in the light of the judgment of the trial court and the evidence on record. This is an appeal against acquittal. In an appeal against acquittal, it is well-settled that the jurisdiction of the appellate court is limited, as held by the Supreme Court in *M. S. Narayana Menon Vs. State of Kerala* (2006) 6 SCC 3 and *Mahadeo Laxman Sarane Vs. State of Maharashtra* (2007) 12 SCC 705. It was observed that the appellate court shall not reverse a judgment of acquittal only because another view is possible to be taken. However, if the trial court has adjudged the evidence on an incorrect premise or has taken

an irrational or perverse view of the evidence on record or has ignored relevant material or has taken note of irrelevant material, then it is well within the jurisdiction of the appellate court to reverse the judgment of acquittal. I shall therefore approach the verdict of the trial court having in mind the aforesaid well-settled principles.

16. The trial court has held that the prosecution has failed to establish that Ajay Karan and the respondent are one and the same person and that it has even failed to prove the identity of Ajay Karan. Another finding of the trial court is that the prosecution could not establish that it was the respondent who was the registered guest of Hotel Janpath, room No.116 or that it was he who paid the hotel bills. The finding is that no guest registration card was recovered from the respondent and even the guest register was not produced before the trial court. The trial court has pointed out that no effort was taken by the prosecution, except an oral request allegedly made to the hotel authorities, to produce the guest register and the photograph of the person who had booked the room in order to link the respondent with the occupation of the room. These findings have not been sought to be rebutted by the learned counsel for the appellant, but his argument is that it was for the respondent to show how he came to be in the room and how he came to open the door of the room when the search party knocked the door of the room. A perusal of the defence statement made under section 313 of the Cr.P.C. shows that the respondent has stated the he was carrying on some wool business from 1986 and it was in that connection that he had come to the room to meet Ajay Karan. The prosecution is under an obligation to prove the guilt of the accused beyond any reasonable doubt. In the present case, the evidence on record creates a reasonable doubt about the involvement of the respondent in the offence. Firstly, the room was not booked in the name of the accused. It was in the name of Ajay Karan, the identity and whereabouts of whom were not established by the prosecution. The prosecution also failed to make any attempt to show that the room was in fact booked in the name of the respondent, by producing the guest registration card or the guest register. The prosecution also did not attempt to find out who paid the bill for the room. No bearer or waiter or room service boy was examined by the prosecution in a bid to prove that the respondent was occupying the room in his own right and was even in conscious possession of the prohibited

article. The presumption under section 54 of the Act that the accused has committed an offence under the NDPS Act because he was found in possession of the offending articles, which he failed to account for satisfactorily, is a rebuttable presumption. In order to invoke the presumption it must first be proved that the offending articles were recovered from his possession. Possession means conscious possession of the accused. Once that is shown, then the presumption gets triggered and it is thereafter for the accused to prove the contrary.

17. Arguments were addressed by both the sides on the question whether the seized article was found in the possession of the respondent. According to the learned counsel for the appellant, conscious possession by the respondent has been fully established. When the search party knocked at the door of the room, it was the respondent who opened the door. The plastic bag containing the contraband was found under the cot and thus it was recovered from the respondent. The room was in the occupation of the respondent and therefore the plastic bag containing the contraband can be stated to be in his conscious possession. So ran the logic of the argument. The question is whether the fact that the accused was found in the room can connect him to the possession of the contraband. That would have been possible, in my opinion, only if it was established that the room was in the possession of the accused. There is no evidence to show that the room was in the possession of the respondent; the evidence only shows that he was found in the room when the search party entered it. The respondent can be said to have been in possession of the room and consequently in conscious possession of the contraband, only if the room was registered/booked in his name. Admittedly, there is no evidence to show that the room was booked in the name of the respondent. On the contrary, the evidence shows that the room was booked in the name of Ajay Karan. In fact, it was the case of the prosecution that the room was booked in the name of Ajay Karan and there was no attempt to show, by producing the guest register or the guest registration card, that the room was booked in the name of the respondent.

18. In the statement made by the accused under section 313 of the Cr.P.C., he has stated that he was dealing in second grade woollens from Ludhiana and that in the course of the dealings he was given `2.5 lakhs by somebody to make

purchases. He could not make the purchases and also failed to return the money. He received a telephone call from the buyer from abroad who stated that he was sending his representative to India and the matter could be settled. Accordingly, one Ajay Karan came to Delhi in May 1995 and telephoned to him (the accused) twice or thrice from Delhi at which the accused agreed to meet him. Ajay Karan called the accused on 16.5.1995 and asked him to meet him at room No.116, Hotel Janpath, New Delhi. The accused Ramesh Kumar came by train from Punjab, was received by a relative who dropped him in Patiala House Courts where the accused had to ascertain the date of an earlier case pending against him. In the meantime he had sent a message to the hotel that he would be coming there only after completing the work at the Patiala House Courts. Thereafter, he was picked up by the NCB officials from Patiala House Courts and taken to Hotel Janpath where he was asked to sign certain blank papers. This was the statement given by Ramesh Kumar, the accused, under section 313. He denied that he was in possession of the hotel room and stated that either Ajay Karan had implicated him at the instance of someone known to him or he himself might be a wrong man on whom the NCB officers foisted the case. He denied the room was ever in his possession or occupation. He also stated that the statement which he gave in writing at Hotel Janpath was torn off at the NCB office where he was made to write a dictated statement.

19. In Mohd. Alam Khan Vs. Narcotics Control Bureau and Anr. JT 199.(2) S.C. 636, it was held by a three judge bench of the Supreme Court that in order to invoke section 66 of the NDPS Act, the prosecution should establish that the accused was the owner and in actual possession of the premises and since the prosecution has failed to establish the ownership of the flat as belonging to the accused, there can be no conviction under the said Act. In that case the agreement executed by the accused purporting to be an agreement signed by both the accused and the contractor/builder was recovered in the course of the search and on the basis of the agreement it was contended by the NCB that the accused was the owner of the premises from which the contraband articles were recovered. The Supreme Court held that the prosecution should have produced independent evidence to establish that the accused was the owner of the flat in question or by producing documents from the concerned office of the registrar or

by examining the neighbours. Since there was no evidence to show that the flat belonged to the accused, the Supreme Court held that it cannot be concluded that the recovery was made from the flat belonging to the accused. The case before me is a fortiori. No documentary evidence was produced by the prosecution to show that the accused was in lawful possession of the room so that the contraband could be connected to him as being in his conscious possession.

20. In *Madan Lal and Anr. Vs. State of Himachal Pradesh* 2003 (3) JCC 1330.a decision cited by the learned counsel for the appellant, five accused were travelling in a private vehicle from which contraband was seized. All the five accused were known to each other. It was held that they were in conscious possession of the contraband and they could not displace the presumption. This judgment is clearly inapplicable to the present case. In the cited case, all the five accused knew about the transportation of charas and each was found to have played a role in the transportation and possession with the conscious knowledge of what he was doing. That is not the factual position in the case before me. In *Jagdish Badhroji Purohit Vs. State of Maharashtra* (1998) 7 SCC 270.another decision cited on behalf of the appellant, the narcotic substance was recovered from the factory belonging to the accused who was the sole proprietor. The accused was found to be absconding and appeared after two months. He could not explain how the offending articles came to be stored in his factory. In the case before me the facts are different. Herein the hotel room was not even in the possession of the respondent. Moreover, the circumstances following which he came to the hotel room were stated by him in the statement made under section 313. Similarly, in *Bahadur Singh Vs. State of Haryana* (2010) 4 SCR 402.the poppy husk weighing 32 kilograms were packed in six packs and all of them were recovered from the premises of the accused and that too from a room which was opened by him with a key in his possession. This is an extreme case and a very clear case for the prosecution where conscious possession was clearly established. Not only were the articles found in the house of the accused, but the key of the room was also with the accused who opened the lock. These cases cited by the learned counsel for the appellant are factually different from the present case and are therefore, not applicable.

21. The contention of the learned counsel for the appellant that the respondent ought to have been convicted merely on the basis of the statement made by him under section 67 of the NDPS Act, ignoring the retraction made by him, cannot be accepted. The alleged confession was made under section 67 of the NDPS Act. Section 67 says that any officer referred to in section 42 who is authorised by the Central or State Government may, during the course of any enquiry in connection with the contravention of any provision of this Act, inter alia, examine any person acquainted with the facts and circumstances of the case. Section 42 provides for the power of entry, search, seizure and arrest without warrant or authorisation. This Section authorises any officer of the department of central excise, narcotics, customs, revenue intelligence or any other department of the Central Government, including para military forces or armed forces empowered generally or specially by the Central Government or any other officer of the revenue, drugs control, excise, police or any other department of a state government who is generally or specially authorised in this behalf, has the power to search, seize and also detain any person, if he has reason to believe that such person has committed an offence punishable under the Act. The only condition is that the officer exercising the power under section 42 should be an officer superior in rank to a peon, sepoy or constable. In the present case, the search party consisted of Mukesh Kullar, Kamal Kant and Jacob Paul. There were two panch witnesses. Mukesh Kullar was the Director, Delhi Zonal unit of the NCB, R. K. Puram. Kamal Kant was an intelligence officer of the NCB and Jacob Paul was a superintendent in the NCB. All of them are officers working for the appellant. The statement was made on 16.5.1995 by the accused Ramesh Kumar and was recorded by Pradeep Kumar, IO of the NCB. It is in the form of question and answer. This statement was retracted on 27.6.1995 by the accused Ramesh Kumar, who was in judicial custody in Central Jail No.4, Tihar by writing a letter to the Magistrate. In the retraction, the respondent has stated that he was taken by NCB officers to Janpath Hotel on 16.5.1995 who obtained his signatures on blank papers, that the security guards of the hotel who also reached the room objected to this, that they were threatened by the NCB officers and finally the NCB officers were able to pacify the security guards by stating that they will ensure that the incident is not published in the media and that these circumstances would show that the respondent was

forced to write out a confessional statement which was being retracted by the application dated 27.6.1995.

22. It has to be remembered that the statement under section 67 of the Act was made by the accused before the officers of the NCB and therefore has to be subjected to closer scrutiny than a confession made to private citizens or officials who do not have investigating powers under the Act, as was held by the Supreme Court in UOI vs. Bal Mukund & Ors., (2009) 12 SCC 161.a decision cited by the learned counsel for the respondent. It was observed by the Court as follows:

28. Where a statute confers such drastic powers and seeks to deprive a citizen of its liberty for not less than ten years, and making stringent provisions for grant of bail, scrupulous compliance with the statutory provisions must be insisted upon. While considering a case of the present nature where two persons may barely read and write Hindi, are said to have been used as carrier containing material of only 1.68% of narcotics, a conviction, in our opinion, should not be based merely on the basis of a statement made under Section 67 of the Act without any independent corroboration particularly in view of the fact that such statements have been retracted. Earlier in Francis Stanly vs. NCB, (2006) 13 SCC 210.the Supreme Court observed as under:

15. We are of the opinion that while it is true that a confession made before an officer of the Department of Revenue Intelligence under the NDPS Act may not be hit by Section 25 in view of the aforesaid decisions, yet such a confession must be subject to closer scrutiny than a confession made to private citizens or officials who do not have investigating powers under the Act. Hence the alleged confession made by the same appellant must be subjected to closer scrutiny than would otherwise be required.

16. We have carefully perused the facts of the present case, and we are of the opinion that on the evidence of this particular case it would not be safe to maintain the conviction of the appellant, and he must be given the benefit of reasonable doubt. The officers of the NCB who recorded the statement of the respondent under section 67 constituted the search party and were therefore interested in the success of the search. The statement, which is alleged to be a confession made

by the respondent, cannot therefore form the sole basis of the conviction. CRL. A. 419/1997 29.06.1995 by the respondent by writing a letter to the Magistrate on that date. That was the earliest effective opportunity which the respondent got to retract from the earlier statement. I am unable to uphold the contention of the learned counsel for the appellant that the respondent should have retracted at the time of his remand or should have entered the witness box to make a retraction. There is also no inordinate delay in the retraction. I therefore hold that there is no force in the contention of the learned counsel for the appellant that the trial court ought to have convicted the respondent on the basis of the statement made by him under section 67 of the NDPS Act.

23. The contention of the learned counsel for the appellant that the retraction made on 27.6.1995 was not a contemporaneous document but was smuggled into the record. It cannot be countenanced at this stage, particularly when it has not been backed by any proof. I have perused the trial court record and I find that the retraction forms part of the same and has been serially numbered (pages 243, 245). The trial court has also referred to the retraction in para 3 of its judgment. Moreover, no such argument appears to have been taken before the trial court.

24. For the aforesaid reasons I am of the view that the judgment of the trial court acquitting the respondent, Ramesh Kumar, should be upheld. I do so and dismiss the appeal filed by the Narcotics Control Bureau. (R.V. EASWAR) JUDGE MAY 29.2013 vld

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com