

IN THE HIGH COURT OF DELHI AT NEW DELHI

CRL.REV.P. 517/2008

DILBAGH SINGH

..... Petitioner

Through Mr. T.L. Garg, Advocate.

versus

D.R.I.

..... Respondent

Through Mr. Shishir Aggarwal, proxy counsel
for Mr. Satish Aggarwala, Advocate.

CORAM:

HON'BLE DR. JUSTICE S. MURALIDHAR

1. Whether Reporters of local papers may be
allowed to see the judgment? No
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in Digest? Yes

ORDER

14.05.2009

1. This revision petition challenges the order dated 4th June 2008, passed by the learned Special Judge, New Delhi in SC No.14-A/2008 titled “*Directorate of Revenue Intelligence v. Rohit Goel & Ors.*” holding that there was prima facie sufficient material to proceed against the petitioner and the other accused under Section 29, 21(c) read with Section 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS Act). It also challenges the order dated 4th June 2008 framing charges against the petitioner and two other co-accused for the offence of entering into a criminal conspiracy to possess and transport heroin inter-state 14.871 kgs net heroin (having percentage 60.1% to 64.7%) from one place to another place in front of house No.60, H-3 Block, Vikas Puri, Delhi, thereby committing an offence punishable under

Section 21(c) read with Section 29 NDPS Act and also substantively under Section 29 NDPS Act.

2. According to the Respondent Directorate of Revenue Intelligence (DRI) at around 6 p.m. on 8th September 2007, a secret information was received by Madan Singh, Investigating Officer (IO) DRI that a person aged around 34 years old would bring some narcotic drug in a Opel Corsa car bearing registration No. PB 08 AN 6133 for delivery to a person of African origin person around 36 years of age, who would be coming in a Tata Indica car bearing registration No.DL 4 CU 3270 at the main entrance road adjacent to park, opposite to house No.60 of H-3 Block, Vikas Puri, Delhi between midnight and 12.30 a.m. on 9th September 2007. The said information is stated to have been reduced into writing and placed before the senior officers.

3. On receipt of this information, the officers rushed to the spot and associated two *panch* witnesses. It is alleged that at around 12.05 a.m. on 9th September 2007 the Tata Indica Car bearing the aforementioned registration number arrived at the spot. It was being driven by a Sikh person, i.e., the petitioner herein. The person of an African origin, i.e., the co-accused Kouassi Nguessan Williams (Williams) was in the rear seat of the said Tata Indica car. It was parked at the spot on the main entrance road of H-3 Block, Vikas Puri adjacent to the park opposite to the said house.

4. At around 12.15 am an Opel Corsa car bearing registration No. PB 08

AN 6133 came to the spot. It was driven by co-accused Rohit Goel. His mother, Santosh Goel was occupying the front seat of the said car adjacent to Rohit Goel. Rohit Goel picked up two black coloured polythene carry bags from the rear seat of the Opel Corsa car and quickly transferred the same to the rear seat of the Tata Indica car occupied by co-accused Williams. At that point in time, the officers of the DRI intercepted both the vehicles. The occupants of the Opel Corsa car tried to prevent the DRI officers from stopping their car. They started shouting as a result of which local residents started gathering there. Since the place was not suitable to conduct the search, the accused persons were taken to the DRI Office at the 7th floor, Drum Shaped Building at I.P. Estate, New Delhi. There the accused persons were served with notice under Section 50 of NDPS Act at about 1.30 am on 9th September 2007. The bags were found to contain 14.871 kg heroin.

5. During the investigation, the statements of petitioner and other co-accused were recorded. According to the respondent DRI, the petitioner inter alia stated that he was aware that the drugs were to be delivered to co-accused Williams and that Williams used to hire the said car very often. The case of the DRI is that the petitioner was also part of the conspiracy to possess and transport the narcotic drug.

6. The petitioner was enlarged on bail by this Court by an order dated 28th November 2008 passed in Bail Application No. 1777 of 2008. Inter alia this Court was of the prima facie opinion that the petitioner could not be said to be aware that heroin was to be transferred in a bag to the

passenger he was carrying in the car.

7. Counsel for the petitioner submits that the trial court erred in not in fact considering the case of the petitioner and merely going by the case of the DRI to form an opinion that there was a sufficient material to proceed against the petitioner for the aforementioned offences. It is submitted that the facts stated by the prosecution even when accepted at face value do not even bring out a prima facie case against the petitioner for possession of the narcotic drug much less for transporting it. Even before the car which the petitioner was driving could move, the DRI officers arrived at the spot. The petitioner throughout was sitting only in the front seat. He could not be said to be in conscious possession of the drug in question. It is submitted that the petitioner retracted the statement made by him under Section 67 of the NDPS Act on the ground that it was not voluntarily made. It is submitted that in terms of the decision of the Supreme Court in *Noor Aga v. State of Punjab 2008 VII AD (S.C.) 435*, the retracted statement of the petitioner under Section 67 of the NDPS Act cannot form a substantial piece of evidence. It is pointed out that the statement of the co-accused Williams, recorded also under Section 67 of the NDPS Act, does not indict the petitioner at all. In the circumstances, it there was not even a prima facie case made out for proceeding against the petitioner for the aforementioned offences.

8. On behalf of the DRI, Mr. Shishir Aggarwal, the learned Advocate submits that at the stage of charge the trial court is not expected to minutely examine the evidence. It is only expected to ascertain if there

was material to form a grave suspicion against the petitioner for commission of the aforementioned offences. It is alleged that in view of the statement made by the petitioner made under Section 67 NDPS Act, there was sufficient material to charge him for the aforementioned offences. The question whether the confession was made voluntarily or not could be determined only at the trial. Reliance is placed upon the judgment of the Supreme Court in *Union of India v. Munna (2004) 7 SCC 178*.

9. The submissions have been considered. The case of the DRI is that the petitioner was driving the Tata Indica car which was parked at the aforementioned place, i.e., the main entrance road of H-3 Block, Vikas Puri. The petitioner admittedly was driving the said car but remained in the front seat while co-accused Williams was in the rear seat. The facts as narrated by the prosecution show that Rohit Goel who drove the Opel Corsa car dropped the two black coloured polythene carry bags in the rear seat of the Tata Indica car. The parcels therefore were not delivered to the petitioner who was sitting on the front seat of the Tata Indica car. It is co-accused Williams who was in the rear seat. In the circumstances, it cannot be said that the petitioner was in possession of the drug in question and clearly he was not in conscious possession thereof. Soon thereafter the team of DRI officers intercepted both cars. The Tata Indica car was stopped even before it moved. Thereafter, the petitioner could not be said to have even transported the drug.

10. The wording of Section 21 NDPS indicates that the offence gets

attracted only if at least one of the contingencies mentioned therein is attracted. On the facts of the present case, counsel for the DRI was only seeking to bring the present case under the offence of being in possession of a narcotic drug. Clearly, on the facts as narrated the petitioner was not in possession of the narcotic drug. The petitioner was not in any physical contact with the bags containing the drug in question. It was his co-accused passenger, Williams, who was sitting in the rear seat. The two polythene bags containing 14.871 kgs of heroin were dropped off on the rear seat. The Petitioner therefore could not have been proceeded against for the offences under Section 21 or Section 29 of the NDPS Act.

11. As far as the statement attributed to the petitioner under Section 67 of the NDPS Act is concerned, it was made on 9th September 2007. The petitioner retracted the statement on 26th September 2007. Although such retraction was filed in the court only on 8th October 2007, this delay in making the retraction cannot be said to be fatal to the defence of the petitioner. Even if the statement made under Section 67 of the NDPS Act is taken at its face value, the only statement relied upon by the prosecution is that the petitioner admitted to have known that the drugs were going to be delivered on the fateful day to co-accused Williams. The English translation of the precise words uttered by the petitioner reads as follows:

“Twice Williams had gone in my Taxi to sector 45 where he stayed in a hotel in Kabari Bazar, above the wine shop and I do not remember the name of

the hotel, for this also he paid me good amount. Sometime I had seen Williams taking bag from someone & I felt that he was doing something wrong, but I kept quite as he was paying extra fare. On 8.9.07 at about 11.30 Williams called me on phone & I reached Shahpur at 11.55. He was standing at outer ring road & Williams told me that at H-3 Block a person in the car had delivered the drugs to him & I had to take him in the car to H-3 Block & he would give me good amount. I took William to H-3 Block where William told me to park the vehicle at the main entrance near the park.....”

12. It is plain from the above statement that barring the words used by the petitioner that he knew that drugs going to be delivered, there is no other independent witness to prove this fact. The statement of the co-accused Williams also does not make any reference to the role of the petitioner herein. The further admitted position that the petitioner has retracted the above statement as not being voluntary.

13. In *Noor Aga v. State of Punjab* it was emphasized that in order to be admissible in evidence the statement under Section 67 must definitely be shown to be voluntary. In the present case, the DRI has failed to show that the statement made by the petitioner was in fact voluntary. The reliance upon the judgment in *Union of India v. Munna* is misplaced as it is distinguishable on facts. The petitioner in the instant case cannot be said to be in conscious possession of the heroin in question.

14. For all of the aforementioned reasons, this Court finds that the impugned order on charge and order framing charge against the petitioner is not sustainable in law and is accordingly set aside. The petitioner will stand discharged in the SC No.14-A/2008 titled “*Directorate of Revenue Intelligence v. Rohit Goel & Ors.*”. It is made clear that however the case will continue as far as the other co-accused are concerned.

15. The petitions stands allowed. A copy of this order be sent to the trial court concerned forthwith through a Special Messenger.

16. Order dasti.

S. MURALIDHAR, J.

MAY 14, 2009
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