

*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: 06.01.2014
Date of Decision: 10.01.2014
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+ CRL.A. 830/2010

K.R. VENGADESWAR Appellant

Through: Mr Bhupesh Narula, Adv.

versus

THE NARCOTICS CONTROL BUREAU Respondent

Through: Mr Satish Aggarwala with
Mr Sushil Kaushik, Adv.

CORAM:
HON'BLE MR. JUSTICE V.K.JAIN

JUDGEMENT

V.K.JAIN, J.

On 31.08.2004, Mangal Dass, Intelligence Officer in Narcotics Control Bureau received a secret information that one person, namely Dilbagh Singh, a resident of Chandigarh, would reach New Delhi Railway Station between 4.00 PM to 5.00 PM in his car bearing Registration No. DL 6 CG 9691 and will be carrying heroin concealed in the dicky of the said car for delivering the same to his customers near reservation office at New Delhi Railway Station. The said information was submitted by Shri Mangal Dass to his senior officer and a search authorization in his favour was issued by the Superintendent of NCB. On receiving the search authorization, the complainant visited the place

where Dilbagh Singh was to arrive, called two witnesses and requested them to remain present. At about 4.30 PM, Dilbagh Singh, driver of car bearing Registration No. DL 6 CG 9691, reached there, opened the dicky of the car and handed over a dark blue rexine bag to the appellant Shri K.R. Vengadeswar. On search of the bag handed over to the appellant, six polythene bags were found in it. A small quantity of the product was taken out from all the six bags. On testing with the help of the field testing kit, the product gave positive test of heroin. All the six bags were, therefore, duly seized, after drawing two samples from each of them. On search of the dicky of the car, a green bag containing 25 bags was found lying in it. The substance in those bags, on being tested with the field testing kit, gave indication of being heroin and, therefore, all the 25 bags, out of which 11 contained off white colour powder and remaining 14 contained brown colour powder were seized, after drawing two samples from each of them.

This is also the case of the complainant that the appellant voluntarily made statements under Section 67 of NDPS Act, 1985, on 31.08.2004 and 01.09.2004 admitting recovery of heroin from him as well as its seizure by the officials of NCB. It was opined by Central

Revenue Control Laboratory (CRCL) that the samples sent to them for analysis were of diacetylmorphine (heroin).

2. The appellant was charged under Section 21(c) read with Section 29 of NDPC Act and he pleaded not guilty to the charge. The prosecution examined as many as 11 witnesses, including the complainant Mangal Dass and the public witness Shri Subhash. No witness was examined in defence.

3. Vide impugned judgment dated 12.04.2010 and order on sentence dated 20.04.2010, the appellant was convicted and sentenced to undergo rigorous imprisonment for 10 years and to pay a fine of Rs. 1 lakh or to undergo simple imprisonment for a period of 6 months in default of payment of fine for offence punishable under Section 21 (c) of NDPS Act. Identical punishment was awarded to him under Section 29 read with Section 21 (c) of the said Act. Being aggrieved, the appellant is before this Court by way of this appeal.

4. PW-11 Subhash stated that on 31.08.2004, when he was waiting for a relative to come at New Delhi Railway Station, some police officers came to him and told him that one vehicle of white colour would be reaching there. He further stated that the vehicle reached the spot at about 4.00 PM, one person came out of the vehicle and took out

a green bag from the dicky of the vehicle. From the aforesaid bag, the officers recovered six bags containing brown colour powder. The officer asked the person who came out of the vehicle to conduct further search of the vehicle and on such search being conducted, a plastic bag of white colour was taken out. Twenty five (25) bags containing brown colour powder were recovered from the said plastic bag. The witness identified the appellant who was present in the Court at the time of his deposition and also identified his signatures on documents such as Panchnama Ex.PW2/D, search warrant Ex.PW-4/B, RC, Ex.PW2/D1 and paper slips Ex.P26 and P129.

5. The complaint came in the witness box as PW-2 and stated that on receipt of the secret information referred above, he submitted the same to his Superintendent Mr R.R. Kumar, obtained search authorization from him, took the seal of NCB from Shri P.L. Verma, Superintendent of NCT and reached the spot. He called two independent witnesses, namely, Rakesh and Subhash from the spot and requested them to remain present to witness the search proceedings. At about 4.30 PM, a white Lancer Car bearing registration No.DL 6 CG 9691, reached near current reservation office of New Delhi Railway Station Paharganj Side. After the car was parked, the appellant came

near the car, whereupon the car driver (Dilbagh Singh, co-accused of the appellant) opened the dicky of the car and handed over a dark blue bag to him. He further stated that on being asked as to whether they want the search of the car as well as their personal search to be carried out before a Magistrate or a Gazetted Officer, that being their legal rights, both of them stated that did not want such search to be carried out in the presence of a Magistrate or a Gazetted Officer could take the said search. He then opened the bag and found six packets containing brown colour powder filled in them. On testing, the said powder gave positive result of heroin. He thereafter seized the powder after drawing two (2) samples each from all the six (6) packets and duly sealed them with the seal of NCB. According to the witness during the course of search a gunny bag was also recovered from the dicky of the car and on opening the said bag it was found to contain twenty-five (25) packets. Fourteen (14) packets contained brown colour powder whereas eleven (11) packets contained white colour powder. Small quantities were taken out from all the packets, which on being tested with the help of Field Test Kit, gave positive result of heroin and, therefore, the said packets were seized after drawing samples from all of them and being duly sealed.

6. PW1, Shri P.L. Verma, had handed over the seal of NCB to the complainant on 31.8.2004. The seal was returned to him on the same date and the case property was also deposited with him. PW3, Shri H.K. Pandey, stated that on 31.8.2004, the appellant appeared before him and made his voluntary statement exhibit PW3/B. The appellant being tired, was allowed to take rest and another summon was issued to him on the same date. Pursuant to the said summon he again appeared before him on 1.9.2004 and made a statement exhibit PW3/D.

PW4, Shri R.R. Kumar, was posted as Superintendent in NCB on 31.8.2004 and on the aforesaid date, the complainant placed before him the secret information which he had received to the effect that one Dilbagh Singh would come to New Delhi Railway Station in his vehicle No.DL6C-G-9691 to deliver narcotic drugs to someone near Railway Station. He has also identified the signatures of his Zonal Director on the aforesaid information exhibit PW4/A. The search warrant was issued by this witness on the basis of the aforesaid information.

PW5, Shri D.K. Bedi, was working as Chemical Examiner in CRCL at the relevant time. He analyzed the samples sent to CRCL and found the same to contain diacetylmorphine (heroin). The percentage of

diacetylmorphine in the four (4) samples analyzed by him was found to be 63.5, 66, 77.4 and 74.5 per cent respectively.

7. In his statement under Section 313 Cr.P.C., the appellant denied having gone to New Delhi Railway Station on 31.8.2004, and having accepted a bag containing heroin from Mr. Dilbagh Singh. He also denied the recovery of heroin from the dicky of the car in his presence. He claimed that his signatures were taken on blank papers and he was made to sign by giving beatings to him.

8. The decision of the trial court has been assailed by the learned counsel for the appellant on the following grounds:

- a. The second public witness, namely Rakesh, who otherwise was a stock witness of NCB has not been produced in the witness box.
- b. The presence of PW11, Subhash, at the gate of the Railway Station is highly doubtful and, in any case, the version given by him is not similar to the version given by the complainant, Shri Mangal Dass.
- c. No one from the shops or stalls around the place heroin is alleged to have been recovered was joined as a witness to the search and recovery.
- d. No one from the parking lot was joined as a witness.
- e. The owner of the vehicle Simran Chopra was not examined.

- f. The appellant is shown to have been arrested on 1.9.2004 though the recovery is alleged to have been effected from him on 31.8.2004.
 - g. The appellant was tortured so as to extract confession from him and the said confession was later retracted by him.
 - h. The appellant was arrested from Chandigarh and implicated in this case.
 - i. Notice under Section 50 of the Act was not recovered in the search of the appellant.
 - j. The colour of the bag according to PW11 was green, whereas according to PW2 it was of blue colour.
 - k. According to the complainant, out of 25 packets found in the dicky, 14 contained brown powder and 11 contained white powder, whereas according to PW-11, all of them contained brown powder.
9. As regards non-production of Rakesh, a perusal of the trial court judgement would show that he was not found residing at the given address. Therefore, no adverse inference can be drawn against the complainant on account of his not being examined as a witness. It was contended by the learned counsel for the appellant that since pursuant to the summon issued to him at the very same address Rakesh had appeared before the Officer of NCB for making statement under Section

67 of the Act, the address given by him cannot be said to be incorrect and he has been deliberately withheld by the prosecution. I, however, find that the notice dated 31.8.2004 issued under Section 67 of the NDPS Act was delivered to Rakesh on that very date, meaning thereby that it was handed over to him on the spot and was not served upon him at the address provided by him to the complainant, i.e., D-36, Nanakpura, New Delhi-110022. Rakesh appeared of his own before PW6-Rajeshwar Singh on 3.9.2004 and gave the same address in his statement exhibit PW6/A. Therefore, it cannot be said that the aforesaid summon was served upon Rakesh at the address provided by him to the complainant. If a witness gives a wrong address to the NCB officer, and consequently it is not possible to produce him in the witness box, no adverse inference against the prosecution can be drawn on account of his not being examined as a witness. Since Rakesh has not been examined as a witness, no view on the allegation that he was a stock witness of NCB can be taken since it would be necessary to give an opportunity of explanation to him before he can be said to be a stock witness, on account of his having appeared as a witness in another case of NCB.

10. A careful scrutiny of the deposition of PW11 would show that the version given by him in the court is not in conformity with the version given by the complainant, Mangal Dass. Though both PW11 as well as PW2 have stated that the person who came out of the vehicle, i.e., Dilbagh Singh, had taken out a bag from the dicky of the car, this witness did not specifically say that the aforesaid bag was handed over by the car driver to the appellant. He, however, corroborates the complainant as regards recovery of twenty-five (25) packets from the dicky of the car and also identified the appellant, thereby proving the presence on the spot and arrest from there.

As regards discrepancy in the colour of the bag, that, to my mind, is wholly immaterial. No one is expected to remember the colour of the bag when he is examined after about six (6) years of the incident. It is true that according to the complainant fourteen (14) packets contained brown powder and eleven (11) packets contained white powder whereas according to PW11 all the twenty-five (25) packets found in the plastic bag contained brown powder, the aforesaid contradiction cannot be said to be material considering that the witness was examined on 8.2.2010 whereas the drug is alleged to have been recovered on 31.8.2004. Such minor variations here and there are quite natural and are bound to be

noticed in case of truthful witnesses. It is only in the case of tutored witness that the statements flow parrot-like without even natural variations. I, however, find merit in the contention that the presence of the PW-11, at the main gate of the Railway Station is unnatural and somewhat improbable, since a person who goes to Railway Station to receive someone would wait at the platform and not at the main gate, since he cannot be sure, from which gate, his guest would exit and what would be the transport, if any, used by him.

11. Be that as it may, even if the testimony of PW11 is altogether excluded from consideration and the case of the prosecution is examined on the hypothesis that he was not joined in the search, the testimony of the complainant alone is sufficient to prove the guilt attributed to the appellant particularly when it finds ample corroboration from the statement of the appellant recorded under Section 67 of the Act. An officer is as competent a witness as any other person and no taint is attached to his testimony only on account of his being such an officer. If his testimony appears to be reliable and inspires confidence, the Court would be fully justified in acting upon such a testimony, particularly when it finds corroboration from other facts and circumstances of the case. In the case before this Court, the deposition of the complainant

finds corroboration not only from the statement made by the appellant under Section 67 of the Act, but also from the deposition of PW-1 Shri P.L. Verma, who handed over the seal of NCB to him and PW-8 Shri R.R. Kumar before whom the secret information received by the complainant was placed and who issued the search warrant on the basis of the aforesaid secret information. As observed by the Supreme Court in Sumit Tomar versus State of Punjab [2012 (10) Scale 507], in a case under NDPS Act, in the absence of any animosity between the accused and the official witnesses, there is nothing wrong in relying upon their testimonies.

12. Though in his application dated 30.9.2004, the appellant alleged that he was brought from Chandigarh to Delhi, taken to NCB Office, beaten there and asked at gun-point to sign a statement, no such allegation was made by him when he was earlier produced before the learned Metropolitan Magistrate for obtaining his remand. As observed by the Supreme Court in K.I. Pavvnni versus Assistant Collector [(1997) 3 SCC 721, the burden is on the accused to prove that the confessional statement made by him was obtained by threat, duress or promise, though the burden on him is not as high as on the prosecution and if the accused is able to prove the facts which create a reasonable doubt in the

mind of the Court that the confession was involuntary or was made under threat, coercion or duress, the onus would shift on the prosecution to prove that it was made voluntarily. However, no such facts have been proved by the appellant as would create a reasonable doubt in the mind of the Court with respect to the voluntary nature of the confession made by him. There is no evidence of the appellant having actually been beaten and tortured by NCB. Had he been tortured by NCB he would have made a complaint to this effect when he was produced before the Metropolitan Magistrate for the first time and he would also have sought his medical examination.

In his statement under Section 67 of the Act, the appellant gave various personal details such as his being the only surviving son of his father, his having only one daughter, her husband working in Singapore with her son as well as the name of his son-in-law and grandson. The information of this nature could not have been available with PW3 who recorded the aforesaid statement of the appellant. Besides giving the aforesaid personal information, the appellant also admitted that he had received six (6) KG of brown sugar from Dilbagh Singh at New Delhi Railway Station on 31.8.2004, both of them were arrested and the contraband was seized from them. It was held by the Hon'ble Supreme

Court in Kanhiya Lal versus Union of India [AIR 2008 (SC) JCC (Narcotics) 23] that as long as the statement such as a statement under Section 67 of the NDPS Act was made by the accused when he was not under arrest, the bar under Section 24 to 27 of the Evidence Act would not operate and it is only after he is placed in the position of an accused that such a bar will come into play. It was further held that since the officers vested with the power of an officer in charge of a police station under section 53 of the NDPS Act are not police officers, within the meaning of Section 25 of the Evidence Act, a confessional statement recorded by such an officer, in the court course of an investigation of a person accused of an offence under the said Act, is admissible in evidence against him. However, before acting upon such a statement, the Court needs to be satisfied that the statement was made without any inducement, coercion, threat, promise or on account of use of any improper means.

13. As regards not joining any witness from the shops or stalls around the place where the heroin is alleged to have been recovered or from the nearby parking lot, in my view, no such attempt was required considering that the complainant had already joined two public witnesses, namely, Subhash and Rakesh in the NCB team. As regards

failure to examine Simran Chopra, owner of the vehicle in which Dilbag Singh had come to the Railway Station, it has come in evidence that she was not found residing at the given address. In any case, her deposition could be relevant qua Dilbag Singh, not qua the appellant before this Court. As regards the date of arrest of the appellant, there was nothing illegal in arresting the appellant only on 1.09.2004 after recording his statement under Section 67 of the Act. This is not a case of ante-dating the arrest by arresting a person on an earlier date and showing his arrest on a later date. This is an admitted case of the prosecution that the appellant was in their custody since 31.08.2004 though he was formally arrested on 01.09.2004. As regards non-recovery of notice under Section 50 of the Act in the personal search of the appellant, since only one copy of the notice was prepared and the appellant responded to the notice on that copy itself, there could be no question of any copy of the notice being found in his personal search.

14. Though the case of the appellant is that he was arrested from Chandigarh and implicated in this case, no material has been produced by him to substantiate the plea taken by him. There is no evidence of the appellant having made any complaint stating therein that he was arrested from Chandigarh. Had he been arrested from Chandigarh,

either he or someone related or known to him would certainly have made a complaint to this effect, on coming to know that the appellant has been arrested on commission of a serious offence which entails imprisonment for a minimum period of 10 years.

15. For the reasons stated hereinabove, I find no good ground to interfere with the conviction of the appellant and the substantive sentence awarded to him. However, in the facts and circumstances of the case, it is directed that in the event of the appellant failing to deposit the fine imposed upon him, within one week, he shall undergo simple imprisonment only for a period of 15 days. The appeal stands disposed of accordingly. One copy of this order be sent to the concerned Jail Superintendent for being served upon the appellant. The Lower Court Record be sent back along with a copy of this order.

JANUARY 10, 2014
bg/b'nesh

V.K. JAIN, J.