

IN THE HIGH COURT OF DELHI AT NEW DELHI

CRL.L.P. 353 of 2012

NARCOTICS CONTROL BUREAU Petitioner
Through: Mr. Rajesh Manchanda, Advocate.

versus

ANJU TIWARI & ANR. Respondents
Through: Mr. Sanjiv Kumar with
Mr. S.K. Santoshi, Advocates.

CORAM: JUSTICE S. MURALIDHAR

ORDER
05.11.2014

1. The Petitioner, Narcotics Control Bureau ('NCB'), seeks leave to appeal against the impugned judgment dated 13th January 2012 passed by the learned Special Judge – NDPS in Sessions Case No. 156 of 2008 acquitting the Respondents, Anju Tiwari and Rakeshnath Tiwari, for the offences under Sections 21 and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 ('NDPS Act').

2. The case of the prosecution is that on 28th June 2008 Mr. R.R. Kumar, Superintendent, NCB, DZU (PW-1) received a secret information that Anju Tiwari, Accused No. 2 (A-2) (Respondent No. 1 herein) was indulging in trafficking of heroin and was receiving Afghan origin heroin from a Punjab based supplier and delivering it to Nigerians in Delhi. As per the information, A-2 was

likely to supply huge quantity of heroin to one Nigerian lady near D-6, Kiran Garden, Main Matiala Road, Uttam Nagar on 28th June 2008 between 8 to 9 pm and that the contraband would be carried in one colour Indica car belonging to her associate Rakeshnath Tiwari, Accused No. 3 (A-3) [Respondent No. 2 herein].

3. Pursuant to the aforesaid information, PW-1 issued a search authorization on 28th June 2008 in favour of the Intelligence Officer, Mr. Y.R. Yadav (PW-2) for the search of the car and another search authorization in favour of Mr. P.C. Khanduri (PW-8) for the search of the house of A-2 at No. 294, DDA, Pocket-1, Phase-II, Dwarka. At around 6.45 pm on 28th June 2008, a raiding team comprising PW-2, PW-8, Jai Bhagwan, Ajay Kumar (PW-3) and Ms. Rajni Karki (PW-5) left the office of NCB and reached the spot at main Matiala Road, Uttam Nagar at about 8 pm. It is stated that two public witnesses, Ramkaran s/o Mr. Gagan Singh and Shiv Dayal s/o Late Mr. Ram Swarup had voluntarily agreed to join the NCB team as independent witnesses.

4. It is stated that at about 8.30 pm one African woman came on foot from the Najafgarh road side and stopped in front of Shop No. D-6, Kiran Garden, Uttam Nagar and that after about ten minutes one white colour Indica car came from the Najafgarh road side and

stopped near the African lady and that one Indian lady aged about 30 years alighted from the front seat of the said car and started talking to the said African lady. After a while the Indian woman is asserted to have handed over one white cloth handbag to the Nigerian woman. At that point of time the raiding party apprehended the Nigerian woman, A-2 and A-3.

5. It is stated that the accused declined to get themselves searched before a Magistrate or Gazetted Officer. They were then searched. While no contraband was recovered from A-2, a white cloth bag handed over by A-2 to the Nigerian woman was recovered and found to contain four transparent polythene packets having off white colour powder in it. When tested with the field testing kit it tested positive for heroin.

6. The said packets were marked A, B, C and D and were weighted separately. The weight of the each of the packets was one kg. Two samples of 5 gram each were drawn from each of the packets and separately sealed and marked A1-A2, B1-B2, C1-C2 and D1-D2. The packets containing the remaining heroin were separately packed in a cloth pullanda and sealed.

7. Thereafter, PW-8 and Jai Bhagwan along with A-2 reached her

residence at Flat No. 294, DDA Pocket-1, Phase-II, Dwarka. One lady Constable, Sunil Kumari of Police Station (PS) Dwarka (PW-10) and one public witness, Anand Singh s/o Zile Singh (PW-9) are stated to have voluntarily joined the search of the residence of A-2. Upon search US\$ 30,000 was recovered from an almirah. Since no satisfactory explanation was provided by A-2, a reasonable presumption was drawn that the said amount was acquired from the sale of heroin. The said amount was also sealed and deposited in the *malkhana*.

8. It is asserted that A-2 and A-3 gave their voluntary statements under Section 67 of the NDPS Act admitting to their complicity. In her statement under Section 67 NDPS Act, A-2 is stated to have disclosed that her husband Krishan Kumar Tiwari, Accused No. 4 (A-4) was lodged in Tihar Jail since 2004 in a murder and abduction case. A-2 herself was facing eviction proceedings and financial difficulties. In one of her visits to Tihar Jail, A-4 is stated to have told her that he had developed contacts with the drug mafia in Tihar Jail and that if she could deliver heroin to Nigerians, she could earn enough money. A-2 disclosed that in the third week of June on the instructions of A-4, A-2 had received 3 kg of heroin from someone in Punjab and that she had handed over it to one Nigerian lady at Uttam Nagar. She had again received 4 kg of

heroin from the Punjab supplier. On the morning of 28th June 2008 she had received payment of US\$ 30,000 from the Nigerian lady at Metro Station, Nawada and that in the evening, A-2 along with her cousin (A-3) had gone to Matiala Road to deliver the heroin to the Nigerian lady. It was at that stage that A-2 was intercepted by the NCB officials.

9. In his statement under Section 67 NDPS Act, A-3 is stated to have revealed that after reaching the main Matiala Road A-2 handed over one bag to one Nigerian lady. He disclosed that A-2 had told him that she was carrying some illegal articles with her and therefore, he should run away. The three accused were arrested on the basis of the seizure of the contraband and the samples drawn from the substance recovered were sent to the Central Revenue Control Laboratory ('CRCL').

10. The further case of the NCB is that the independent witnesses were also summoned and their statements under Section 67 NDPS Act were recorded. All the incriminating evidence was put to the accused persons and their statements under Section 313 Cr PC were recorded.

11. A-2 and Nnoyim A.H. (A-1) were charged for the offences

punishable under Section 21 read with Section 29 of the NDPS Act. A-3 was charged with the offence under Section 29 of the NDPS Act.

12. Since A-1 was declared to be a terminally sick patient by the All India Institute of Medical Sciences (AIIMS), the High Court by its order dated 9th April 2009 directed that she be released on bail and be deported to Nigeria and that the trial against her be separated and adjourned *sine die*. Consequently, the trial Court proceeded against A-2 and A-3.

13. The trial Court negatived the plea of the Respondents that the provisions of Section 42 of the NDPS Act were not complied with. As regards the recovery of the contraband, the trial Court noticed that the summons issued to the independent witnesses, i.e., Ramkaran and Shiv Dayal were returned unserved with the remarks that their respective addresses did not exist. In addition, Dr. S.P. Singh, Handwriting Expert (DW-1) was engaged by A-2 for comparing the purported signature of Shiv Dayal on the seizure memo (Ex.PW2/D) and that appearing on his statement under Section 67 NDPS Act (Ex.PW-8/J). Initially DW-1 gave his opinion that the two signatures did not match, on the basis of the photocopies of the documents. Subsequently, during his deposition

in the Court, DW-1 was permitted to examine the original documents (EX.PW-2/D and Ex.PW8/J) and after doing so, “he again confirmed that the signatures of Shiv Dayal purportedly on the said two documents are not of the same person.” The trial Court accepted the plea of learned counsel for the accused that the witnesses Ram Karan and Shiv Dayal were “fictitious persons”. In the absence of any satisfactory explanation by the prosecution regarding the discrepancies in the signatures, it appeared that the signatures of the said witness appearing on the statement under Section 67 NDPS Act (Ex.PW8/J) and on the seizure memo (Ex.PW2/D) were not that of the same person and therefore, it was inferred that the said signatures had been manipulated by the NCB officials.

14. As regards the seizure of US\$ 30,000, Anand Singh (PW-9) did not support the case of the prosecution. PW-10 could not be said to be independent witness. No conviction could be returned only on the basis of the statement of A-2 under Section 67 NDPS Act, particularly when the conduct of the NCB officials proved on record was “not beyond reproach.”

15. This Court has heard the submissions of Mr. Rajesh Manchanda, learned counsel for the Petitioner and Mr. Sanjiv

Kumar, learned counsel for the Respondents.

16. The main thrust of the submissions of Mr. Manchanda was that even if the NCB was unable to get the independent witnesses to depose in Court the conviction could be based on the corroborated testimonies of the official witnesses. Mr. Manchanda placed reliance on the decision of this Court in *Gita Lama Tamang v. State of (GNCT) of Delhi 2006 (3) JCC (Narcotics) 197*, and of the Supreme Court in *Sarjudas v. State of Gujarat AIR 2000 SC 403* and *Iqbal Moosa Patel v. State of Gujarat (2011) 2 SCC 198*.

17. A perusal of the statement of Ram Karan s/o Shri Gagan Singh under Section 67 NDPS Act (Ex.PW-2/M) shows that his address is given as A-95, Kiran Garden, Uttam Nagar, New Delhi. The address given in the statement under Section 67 NDPS Act by Shiv Dayal on 30th June 2008 (Ex.PW8/J) is A-4/35, Mohan Garden, Uttam Nagar, New Delhi. According to Mr. Manchanda, since both were residents of Uttam Nagar it was but natural that they were associated with the raid.

18. The trial Court record has been perused. It appears that on 2nd August 2010 the trial Court summoned Y.R. Yadav, (PW-2) and all “public witnesses”. On the next date, i.e., 23rd August 2010, the

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Court noticed that summons issued to Ram Karan and Shiv Dayal had been received back with the report that “addresses are not traceable.”

19. In the case of *Gita Lama Tamang v. State of (GNCT) of Delhi 2006 (3) JCC (Narcotics) 197* (supra) the record revealed that the independent witnesses were not traceable. In other words there is nothing to indicate that in the said case the addresses were themselves not traceable. If, as in the present case, the addresses of the independent witnesses to the seizure of the contraband were demonstrably fictitious then it creates doubt as to whether such persons were in fact present at the spot and whether they volunteered to be part of the raiding party.

20. Mr. Manchanda submitted that even if the evidence of the independent witnesses is kept aside, the conviction could be based on the statements of the official witnesses and that this case should be treated as one where there is no independent witness. There are several cases where the prosecution does not involve any independent witnesses. In such an event it may be possible to argue that the official witnesses cannot be disbelieved only because independent witnesses were not examined. However, the situation is different where independent witnesses are named; they are shown

to have been present during the raid and their statements are shown to have been recorded under Section 67 NDPS Act by giving their addresses.

21. A similar situation had arisen in *Nnadi K. Iheanyi v. Narcotics Control Bureau 2014 VIII AD (Delhi) 1* where again the court pointed to an abject failure on the part of NCB to produce the *panch* witness for examination in the Court and observed that the responsibility to produce such witness cannot be shifted on the accused. It was further observed that failure of NCB to produce the *panch* witness led to a "serious unexplained doubt whether such a witness in fact existed."

22. Mr. Manchanda submitted that a huge quantity of heroin worth several lakhs had been seized in the present case and this fact should weigh with the Court in convicting the Respondents. He further submitted that the NCB would not needlessly implicate the Respondents if they were not in fact involved in the crime.

23. The Court would like to observe that conviction cannot depend only on the fact that a huge quantity of heroin is shown to have been seized. Also, the argument that the prosecution will not needlessly implicate innocent persons does not impress the Court.

The NCB has to discharge the burden of proving beyond reasonable doubt that it is the Respondents who are guilty of the offences with which they have been charged. Since the NCB has presented a version in which independent witnesses are stated to have participated throughout the raid, the NCB has to satisfactorily explain how and why the addresses given for such witnesses has turned out to be non-existent and they have not been produced in Court. No effort appears to have been made by the NCB to ascertain the correct addresses and summon the independent witnesses. That was not the responsibility of the Court. In the circumstances, the only inference that was possible to be drawn was that the said witnesses and their addresses did not exist.

24. Turning to the seizure of the US\$ 30,000, one of the independent witnesses to its seizure was Anand Singh (PW-9). He did not support the prosecution at all. In his examination-in-chief, he stated that “I had not seen any proceedings conducted by the police officials in the premises of Anju Tiwari.” He further stated that “he asked me write on a blank paper and he also told me the contents which had been written by me as per his diction.” The other witness was Sunil Kumari (PW-10), a police officer.

25. There was also a serious discrepancy regarding the signatures of

the so-called independent witness Shiv Dayal on the seizure memo (Ex.PW-2/D) and on his purported statement under Section 67 NDPS Act (Ex.PW-8/J). They were shown by DW-1, a handwriting expert, not to be of the same person.

26. On the voluntariness of the statements of the Respondents under Section 67 of NDPS Act, the trial Court noticed that as far as A-2 was concerned, in her statement under Section 313 Cr PC she stated that no summons were served upon her. The NCB had forcibly taken her from her house to their office and they mercilessly gave beatings to her cousin brother co-accused Rakeshnath Tiwari (A-3). She got scared and as per the dictation of the NCB officials, she wrote the statement in her own handwriting and signed it. This was substantiated by the medical report of A-3 (Ex.PW-2/A) prepared by the doctors of Safdarjung Hospital after the jail officials of Tihar Jail had refused to admit him on the ground that there were injuries on his body which were not mentioned in his medical report prepared by the NCB officials after arresting him. The medical report clearly shows that A-3 had a swelling and abrasion on his forehead and bruises all over his back and on his knee. The injuries noted in the said report substantiated his statement given under Section 313 Cr PC that his head was banged against the wall by the NCB officials and that he was beaten mercilessly by them at their

office. Consequently, the conclusion drawn by the trial Court as to the statements of the Respondents under Section 67 NDPS Act not being voluntary, cannot be faulted.

27. The decisions in *Iqbal Moosa Patel v. State of Gujarat* and *Sarjudas v. State of Gujarat* (supra) reiterated settled principles but on the facts of those cases are of no assistance to the Petitioner.

28. No ground has been made out for grant of leave to appeal.

29. The petition is dismissed. The trial Court record along with a certified copy of this order be returned forthwith.

S. MURALIDHAR, J.

NOVEMBER 05, 2014
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