

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO. 192 OF 2017

Gunasekaran Pillay @ Guna	...Appellant
Versus	
Union of India and Anr.	...Respondents

ALONGWITH
CRIMINAL APPEAL NO. 193 OF 2017

Ravindran Karapaya @ Ravi	...Appellant
Versus	
Union of India and Anr.	...Respondents

Mr. Dilip Mishra for the Appellant in APEAL No.192 of 2017.

Mr. Ayaz Khan for the Appellant in APEAL No. 193 of 2017.

Ms. Amita Kuttikrishnan for the Respondent No.1-UOI.

Mr. S.V.Gavand, A.P.P for the Respondent No.2-State.

CORAM : REVATI MOHITE DERE, J.
DATE : 17th MARCH, 2021

ORAL JUDGMENT :

1. By these appeals, the appellants have impugned the judgment and order dated 09/01/2017 passed by the learned Special Judge (Narcotic Drugs and Psychotropic Substances Act, 1985) ('NDPS Act' for short) in

NDPS Special Case No. 71 of 2009 by which, the appellants were convicted and sentenced as under:

- for the offence punishable under Section 8(c) r/w 22(c) of the Narcotic Drugs and Psychotropic Substances Act, 1985, to suffer rigorous imprisonment for 14 years and to pay fine of Rs.1,50,000/-, in default to undergo further simple imprisonment for 6 months;
- for the offence punishable under Section 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 to suffer rigorous imprisonment for 14 years and to pay fine of Rs.1,50,000/-, in default, to undergo further simple imprisonment for 6 months;
- for the offence punishable under Section 9A r/w 25A of the Narcotic Drugs and Psychotropic Substances Act, 1985 to suffer rigorous imprisonment for 10 years and to pay fine of Rs.1,00,000/-, in default, to undergo further simple imprisonment for 6 months;

All the aforesaid sentences were directed to run concurrently.

2. The prosecution case in brief is as under :

The complaint is lodged by Mr. Kishore S.Hate (PW-1), an Intelligence Officer who was attached to the Narcotics Control Branch, Mumbai ('NCB' for short), at the relevant time. According to the

complainant – PW-1 - Mr. Hate, Mr. Sanjay Sinha (PW-2), the Investigating Officer received specific intelligence that two Malaysian Nationals, namely, Ravindran Karapaya @ Ravi and Gunasekaran Pillay @ Guna, residing at Flat No.601, Building No.3, Mercury Co-operative Housing Society, Sector 2C, Thakur Village, Kandivali (East), Mumbai 400 101, have stored substantial quantity of Methamphetamine, a psychotropic substance and Ephedrine, a controlled substance, under the NDPS Act, in the said premises and that the said contraband was procured by them from the factory of 'M/s Sakha Organic Pvt.Ltd.', situated at Village Moxi, District Vadodara, Gujarat. The said intelligence was reduced into writing by PW-2 – Mr.Sanjay Sinha and placed before the Zonal Director of the NCB, who directed the complainant PW-1 – Kishore Hate to form a team and take necessary action under the said Act.

3. Pursuant thereto, a team of officers was formed and the team proceeded to Kandivali (East), alongwith the raiding material i.e. field testing kit, NCB seal etc. On reaching the building at about 11.30 a.m., the officers called two panchas and appraised them of the intelligence received, the purpose for visiting flat No.601, and requested them to witness the proceedings as panch witness. The panchas agreed to do so. The personal search of all the officers was offered to the panchas; pursuant to which, the

panchas searched the officers. Except the raiding material, nothing was found with the officers. Thereafter, the Security Personnel Mr. Chandrakant Desai – PW-17 was called to witness the seizure. The said witness PW-17 – Chandrakant Desai was informed of the purpose of visit. Accordingly, all proceeded to the said flat i.e. flat No.601. The said flat was found locked from outside. On inquiry with PW-17 - Mr. Chandrakant Desai, it was revealed that the flat was owned by Mr. Vipin Gupta (not examined) and that it was given to two Malaysian Nationals on Leave and License. The officers of the raiding party called Mr. A.M.Deshmukh, a member of the committee and also informed him the purpose of their visit. Mr. Deshmukh is alleged to have informed that Mr. Vipin Gupta, owner of the flat, was out of India and that, the society does not keep a duplicate key with them.

4. Pursuant to the said information, a duplicate key maker, Mr. Surendra (not examined) was called to the spot and the lock on the said premises i.e. Flat No.601 was opened, with his help. The NCB officers in the presence of Mr. A.M. Deshmukh, Mr. Chandrakant Desai and the panchas, conducted search of the said 2 BHK flat and found two clear polythene bags containing white coloured powder, lying in the middle drawer of the wooden wardrobe, in the master bedroom. A small quantity

of powder was removed from one of the bags and was tested with the help of the testing kit. The said powder tested positive for Methamphetamine, a psychotropic substance. The said bag was found to be weighing 7 kgs (of Methamphetamine). Accordingly, samples were collected and seals were put and signatures were obtained on the said samples.

5. Thereafter, the second polythene bag was opened and a small quantity of a white coloured powder was removed from the said bag and was tested with the help of the testing kit. The said powder tested positive for Ephedrine, a controlled substance under the NDPS Act. The said bag was found to be weighing 5 kgs. Similarly, samples were also taken from the said bag, seals were put and signatures were obtained on the said samples.

6. On further search of the wardrobe, some plastic bottles, plastic containers containing some chemical substance were recovered. The said chemicals were also tested, however, they did not show any presence of any narcotic drug or psychotropic substance or any controlled substance under the NDPS Act. On search of another bedroom, certain documents were seized in the presence of the panch witnesses and accordingly, panchanama was drawn on the spot.

7. It appears that both the aforesaid appellants i.e. Ravindran Karapaya @ Ravi and Gunasekaran Pillay @ Guna alongwith another co-accused Xie Jing Feng @ Richard had already been arrested by the Ahmedabad Zonal Unit on 21/11/2008, in connection with seizure of 1.5666 kgs of Methamphetamine, from them, in a Toyota vehicle, on Mumbai-Baroda Highway. Accordingly, photographs of the appellants were called for by the NCB, Mumbai from the NCB, Ahmedabad Zonal Unit, for showing the same to the witnesses. After investigation, complaint was filed as against the appellants and accused No.3 Xie Jing Feng @ Richard (the said accused No.3 absconded after his arrest, before the trial could commence). The Trial Court framed charges as against the appellants, to which, they pleaded not guilty and claimed to be tried.

8. The prosecution, in support of its case, have examined 19 witnesses i.e. PW-1 – Kishore Hate, Intelligence Officer, who seized the contraband and investigated the case and filed the complaint; PW-2 – Sanjay Sinha, Intelligence Officer who received the secret information and reduced the same into writing i.e. the intelligence note at Exh.81; PW-3 – Prakash Anthony, Intelligence Officer, Mumbai who conducted the search of godown at Bhiwandi (Nothing incriminating was found in the said

godown); PW-4 – Shrikant Phansekar, Intelligence Officer, who prepared the panchanama of godown at Bhiwandi on 06/12/2018 and recorded the statement of PW-5 (as noted above, nothing incriminating was seized from the godown at Bhiwandi); PW-5 – Dnyaneshwar Gupta, the owner of Toyota vehicle in which appellants were found with the Methamphetamine (Gujarat case). It appears that the appellants alongwith accused No.3 had hired PW-5's vehicle for transporting the psychotropic drug. The said witness is not concerned with the present C.R.; PW-6 - V.M.Jaiprakash, the godown in-charge where the samples and muddemal property was deposited; PW-7 - Sanjay Patel, the Investigating Officer of the NCB at Ahmedabad, who seized the contraband on 28/11/2008 from the vehicle, in which the appellants were travelling. The said witness has deposed about the arrest of the appellants on 28/11/2008, at Vadodara. The said witness was examined only to show that the appellants had disclosed to him, that they were staying in Mumbai; PW-8 – Rakesh Singh, the said witness had taken the premises i.e. flat No.601 on rent from the original owner of the flat Mr.Vipin Gupta, on Leave and License basis. According to the said witness, he had sub-let the said premises i.e. flat No. 601 to the appellants on Leave and License basis; PW-9 – Shridhar Sarvankar is the Security Personnel of Evershine Paradise Co-operative Housing Society. The said witness was examined to show that the appellants were staying in

the said premises i.e. Flat No.601; PW-10 – Shabbir Weshvikar, panch to the panchanama dated 21/12/2008, to show that the appellants were not co-operating with the investigation; PW-11 Vinodkumar Jain, Chemical Examiner, DYCC. The said witness has testified that the samples sent to him were Ephedrine; PW-12 – Vijendrakumar Tungalsingh, Chemical Examiner, DYCC, the said witness has testified that the samples sent to him were Methamphetamine; PW-13 – Bhushan Manjrekar, panch to the panchanama dated 06/12/2008 conducted at the godown at Bhiwandi (As noted above, nothing incriminating was found at the said godown at Bhiwandi); PW-14 – Yashodhan Wange, Zonal Director, NCB, who gave authorization to conduct the raid on 25/11/2008 on Exh.81 i.e. intelligence note; PW-15 – Sham Darekar, panch to the seizure panchanama dated 25/11/2008 in Flat No.601 at Kandivali (with respect to seizure of contraband); PW-16 – Sureshbhai Patel, Jailor of Vadodara Central Prison, the said witness was examined to show that the Intelligence Officers had gone to Vadodara Central Prison to record the statement of the appellants, however, the appellants had refused to give any statement; PW-17 – Chandrakant Desai, witness to the seizure of panchanama dated 25/11/2008 at Kandivali; PW-18 – C.A.Fernandes, Superintendent, NCB, Mumbai who authorized PW-1 to send second set of samples to Hyderabad for examination; PW-19 – Priyankar Ghosh, Chemical Examiner, CFSL,

Hyderabad who proved that the samples sent were Methamphetamine and Ephedrine.

9. After prosecution examined the aforesaid witnesses, the statements of the appellants were recorded under Section 313 of the Criminal Procedure Code. The defence of the appellants was, that the premises in question, in which contraband was found, did not belong to them and that, PW-8 Rakesh Singh had taken the said flat on Leave and License basis from one Vipin Gupta.

10. After considering the evidence on record, the learned Trial Judge was pleased to convict and sentence the appellants as stated aforesaid in para 1.

11. Learned Counsel for the appellants submitted that there is no material to connect the appellants with the alleged seizure of contraband on 25/11/2008, from flat No.601, Building No.3, Mercury CHS, Evershine Millennium Paradise, Sector 2-C, Thakur Village, Kandivali(East), Mumbai. They submitted that there is no material to show that the flat in question, was taken by the appellants on Leave and License basis from anyone, much less from Rakesh Singh (PW-8) and that, they were staying

in the said premises. Learned Counsel for the appellants further submitted that there is non-compliance of Section 42 of the NDPS Act and that, there was tampering of samples when the same were sent to the Chemical Analyzer. They further submitted that the Chemical Examiners who were examined by the prosecution, were not experts on the drug that was seized i.e. 'Methamphetamine' and 'Ephedrine'.

12. Learned Spl.P.P. supported the Judgment and Order passed by the learned Special Judge under the NDPS Act and submitted that no interference was warranted in the said order.

13. Having heard the submissions canvassed by the learned Counsel for the parties and after perusing the evidence on record and the documents thereto, the moot question that arises for consideration is, whether the prosecution has established that the appellants were occupying the premises from which the contraband was seized? With respect to the aforesaid, the evidence of PW-1 – Kishore Hate, PW-2 – Sanjay Sinha, PW-8 – Rakesh Singh, PW-9 – Shridhar Sarvankar and PW-17 – Chandrakant Desai would be relevant.

14. It is the prosecution case, that PW-2 – Sanjay Sinha received

specific intelligence on 25/11/2008 that two Malaysian Nationals namely, Ravindran Karapaya @ Ravi and Gunasekaran Pillay @ Guna, residing at Flat No.601, Building No.3, Mercury Co-operative Housing Society, Sector 2C, Thakur Village, Kandivali (East), Mumbai 400 101, have stored substantial quantity of Methamphetamine, a psychotropic substance and Ephedrine, a controlled substance, in the said premises and that the said contraband was procured by them from a factory 'M/s Sakha Organic Pvt.Ltd.', situated at Village Moxi, District Vadodara, Gujarat. The said information was reduced into writing by PW-2 – Sanjay Sinha on the office computer i.e. intelligence note – Exh.81 and the same was placed before the Zonal Director PW-14 – Yashodhan Wange. PW-14 – Yashodhan Wange directed PW-1 - Kishore Hate to form a team and take necessary action. Pursuant thereto, a team was formed and the raiding team reached the spot at 11.30 a.m. Thereafter, the panchas were arranged. PW-17 – Chandrakant Desai, Security in-charge was also called. The said flat was found to be locked. On inquiry, it was learnt that one Vipin Gupta was the owner of the said flat and that, he had given the said flat on rent to two Malaysian Nationals. On being asked about the whereabouts of Vipin Gupta, the Committee Member Mr. A.M.Deshmukh informed that Mr. Vipin Gupta was out of India and that, they had no duplicate key. The officer of the raiding team called a keymaker Mr. Surendra and with the

duplicate key, so prepared, opened the lock of the said premises and entered the said premises. At this stage, it is pertinent to note that neither the keymaker Mr. Surendra nor Vipin Gupta, owner of the premises nor Mr. A.M.Deshmukh have been examined by the prosecution. On entering the premises, 7 kgs of Methamphetamine and 5 kgs of Ephedrine were seized. Samples were taken and articles were sealed and panchanama was drawn.

15. The evidence of PW-1 – Kishore Hate and that of PW-2 – Sanjay Sinha are on the similar lines.

16. PW-8 – Rakesh Singh was examined by the prosecution to show that he had let out the premises i.e. Flat No.601, to the appellants. A perusal of the evidence of PW-8 – Rakesh Singh shows that he is in the business of real estate, as an agent and is conducting the said business under the name as ‘My Space Property’, since 2008. He has stated that he was in the business of renting out warehouses/godowns/flats. According to PW-8- Rakesh Singh, in 2006, the appellants alongwith co-accused Richard (absconding) approached him for hiring a godown on rent, pursuant to which, he let out one godown at Prerna Compound, Dapola, Bhiwandi to the appellants and co-accused Richard. He has stated that while giving the said godown on rent to the appellants, he had not entered into any written

agreement with them and that the only condition was that they should pay him Rs.20,000/- per month, part from a security deposit of Rs.20,000/-. He has stated that the said amount was received by him in cash. PW-8 – Rakesh Singh has further stated that he had also sub-let a flat, bearing No.601, Building No.3, Mercury CHS, Evershine Millennium Paradise, Sector 2-C, Thakur Village, Kandivali(East), Mumbai, to the appellants for a period of 11 months. He has stated that he (PW-8) had taken the said flat on Leave and License basis from Vipin Gupta (owner of the said flat) and had sub-let the said flat to the appellants in the year 2007. According to PW-8 – Rakesh Singh, there was no Leave and License agreement for the said flat and that the appellant would pay him in cash, the rental compensation. PW-8 – Rakesh Singh has further stated that on 23/11/2008, two days prior to the secret information received by PW-2 – Sanjay Sinha, he received a phone call from the NCB and was asked whether he knew the appellants to which he replied in the affirmative. He had stated that PW-1 – Kishore Hate called him and inquired whether he had given the said flat No.601 on rent to the appellants and asked him to come to NCB office.

17. PW-8 – Rakesh Singh in his cross-examination, has admitted that under the terms and conditions of the Leave and License Agreement entered into between him and Vipin Gupta, he was not authorized to sub-let

the said flat or create any third party interest in the same. He has also admitted that he is aware that whenever any flat is given on rent to any person, prior approval of the Committee of the housing society is necessary, in which the flat is situated; and that information is also to be given to the local Police Station. Although PW-8 – Rakesh Singh has stated that he had personally informed the local Police Station of giving the flat on rent, no document has been placed on record in support of the same. Similarly, PW-8 has also admitted that with respect to the godown at Bhiwandi, rented to the appellants, there is no written agreement with respect to the same. A perusal of the evidence of PW-8 - Rakesh Singh, shows that PW-8 – Rakesh Singh had taken the premises i.e. flat No.601 on Leave and License basis from the owner of the premises, Vipin Gupta. Admittedly, no written agreement was entered into between PW-8 – Rakesh Singh and the appellants. Thus, except for the say of the said witness that he had sub-let the said flat bearing No.601 to the appellants, no document in support thereof, has been placed on record by the prosecution. Similarly, mere finding of some documents i.e. a xerox copy of one of the appellant's passport, cannot *per se* be said to be incriminating, in the absence of any other evidence showing that the appellants were residing in the said premises. Similarly, no document was produced by PW-8 – Rakesh Singh to show that a godown at Bhiwandi, was also given by him to the

appellants on Leave and License. It may be noted, that nothing incriminating was found at the Bhiwandi Godown.

18. The prosecution examined PW-9 – Shridhar Sarvankar, Security Guard of the said society i.e. Evershine Paradise Co-operative Housing Society to show that the appellants were residing in the said flat No.601. He has stated that he was working as a security guard in building No.2 of Evershine Paradise Co-operative Housing Society, Kandivali (East) since 2005. He has stated that he was asked whether he knew the persons who resided in flat No.601, Building No.3, to which he replied in the affirmative. He has further stated that the officers asked him about the schedule of these persons to which, he replied that he did not know their timetable and that, they would come and go back in 10-12 days. He was asked if the said persons were accompanied by any woman to which he replied he was not aware. It appears that when the statement of the said witness was recorded, the photographs of the appellants were shown and that he identified appellants on the basis of the said photographs.

19. In the cross-examination, PW-9 – Shridhar Sarvankar has stated that when he first went to the NCB office, Bablu Mishra, another Security Guard was also present. He has admitted that he did not know on which dates, the occupants of flat No.601 and another Chinese person

would come to the flat and go back. He had also admitted that he personally did not know that the said two persons were occupying flat No.601 and that, one Chinese person was visiting the said flat. He has further stated that he had no record to show that those two persons (appellants) were occupying flat No.601. He has further admitted that PW-8 – Rakesh Singh would frequently come to the building and would ask whether any document or letter was received in his name. He has admitted that Rakesh Singh's letters were received in Building No.3 with the address of flat No.601. Thus, having perused the evidence of PW-9 – Shridhar Sarvankar, it cannot be said with certainty that the appellants were occupying the said premises and were staying in the same.

20. PW-17 – Chandrakant Desai was deputed as Field Officer through Security Agency at Mercury Housing Society. He has stated that he was present in the society on 25/11/2008 and was taking a round in the premises, when Mr. Deshmukh disclosed to him that a narcotic raid was to be executed. He had stated that he was informed that in the said flat, two Malaysian persons were residing and that there was contraband, namely, heroin with them. He has stated that pursuant thereto, he accompanied PW-1 - Mr. Kishore Hate and Mr. Deshmukh to flat No.601. He has further stated that the flat was locked and hence a keymaker was called to open the

said lock. He has further stated that except himself, Mr. Hate with his officers and Mr. Deshmukh, nobody entered the said premises. The said witness has deposed with respect to what was seen in the premises after it was unlocked. He has not deposed with respect to having seen the appellants in the premises at any point of time.

21. The aforesaid is the only evidence adduced by the prosecution to show that the appellants were occupying the premises. As noted above, the said material / evidence is not sufficient nor does it conclusively show that the appellants were occupying the said premises i.e. flat No.601, in which, the contraband was found. Thus, the prosecution has failed to prove beyond reasonable doubt that the appellants were occupying the premises from which the contraband was seized. As the appeals ought to succeed for the reasons stated aforesaid, it is not necessary to consider the other submissions advanced by the learned Counsel for the appellants.

22. Accordingly, the appeals are allowed and the judgment and order dated 09/01/2017 passed by the learned Special Judge (Narcotic Drugs and Psychotropic Substances Act, 1985) in NDPS Special Case No. 71 of 2009, convicting and sentencing the appellants as set out in para 1, is hereby quashed and set aside and they are acquitted of all the offences. The appellants be set at liberty forthwith, unless required in any other case.

Fine amounts, if paid, be returned to them, forthwith. Bail bonds, if any, stand cancelled.

REVATI MOHITE DERE, J.