

IN THE HIGH COURT AT CALCUTTA
Criminal Miscellaneous Jurisdiction
Appellate Side

Present:

The Hon'ble Justice Debangsu Basak

And

The Hon'ble Justice Md. Shabbar Rashidi

CRA (DB) 85 of 2022

With

CRAN 1 of 2022

Govender Savithree @ Cindy

Vs.

The Union of India, NCB, KZU

For the Appellant : Md. Habibur Rahaman, Adv.

For the Union of India : Mr. Arun Kumar Maity (Mohanty), Adv.
 NCB : Mr. Jasojeet Mukherjee, Adv.

Hearing Concluded on : February 2, 2023

Judgement on : February 16, 2023

DEBANGSU BASAK, J.:-

1. The appellant has assailed the judgement of conviction and order of sentence dated March 8, 2022 passed by the learned Additional Sessions Judge cum Judge under NDPS Act, Barasat, North 24 Parganas in Special Case No. N-171 of 2015.

2. By the impugned judgement of conviction and the order of sentence, the learned trial judge has convicted the

appellant to suffer rigorous imprisonment of 10 years along with a fine of Rs. 1 lakh for the offence punishable under Section 21 (c) of the Act of 1985 and to suffer rigorous imprisonment of 10 years along with a fine of Rs. 1 lakh for the offence punishable under Section 23 (c) of the Act of 1985 and to suffer further imprisonment of 3 months on each count in the event of default of payment of the sum of Rs. 1 lakh imposed under Sections 21 (c) and 23 (c) of the Act of 1985.

3. At the trial, the prosecution had contended that, acting on a specific input, a team of Narcotics Control Bureau (NCB) of Kolkata zonal unit entered the Kolkata airport on September 8, 2015 and detained the appellant arriving in Kolkata from Dubai by an Emirates flight. The luggage of the appellant had been searched whereupon, the appellant was found to be carrying 3.75 kg of cocaine. The appellant had confessed that she received the consignment from a Brazilian citizen and was knowingly carrying the luggage containing the drugs. Search and seizure process had been completed on September 8, 2015. Notice under Section 67 of the Act of 1985 had been issued to the appellant. The appellant had made a voluntary statement where she disclosed that she was supposed to deliver the consignment to an identified person at

an identified location. In terms of such information given by the appellant, the team of NCB with the consent of the appellant had moved along with the appellant to the disclosed address for follow-up actions. However, the designated person could not be found. The appellant had been arrested on September 8, 2015. Original sample seized had been sent to the chemical examiner Central Forensic Science Laboratory for chemical test. The chemical report had been received which stated that, the seized materials were cocaine.

4. NCB had submitted a petition of complaint before the learned jurisdictional Court. The Court had framed charges as against the appellant on June 16, 2016 under Sections 21 (c) and 23 (c) of the Act of 1985. The appellant had pleaded not guilty to the charges and claimed to be tried.

5. At the trial, the prosecution had examined 6 witnesses and relied upon various documentary and material evidences. The appellant had examined herself at the trial as a defence witness.

6. Learned advocate appearing for the appellant has submitted that, since the appellant had been proceeded against under the Act of 1985, law mandated that scrupulous compliance must be insisted upon. He has relied upon **2009**

Volume 12 Supreme Court Cases 161 (Union of India versus Bal Mukund and others). He has relied upon ***1999 Volume 3 Supreme Court Cases 172 (State of Punjab versus Baldev Singh).***

7. Learned advocate appearing for the appellant has submitted that, law requires the Court to appreciate defence version and decide its veracity in accordance with law.

8. Learned advocate appearing for the appellant has referred to the deposition of 6 prosecution witnesses. He has submitted that, PW 1 did not investigate the case at all although he submitted the petition of complaint before the Court. He has referred to the deposition of PW 2 and contended that, she was not telling the truth. According to him, PW 2 had never gone to the spot at the airport. Referring to PW 3, he has contended that, he did not enquire about the personal identity of the independent witnesses although he collected the witnesses. He has contended that, there is a doubt as to whether, the seized articles had been kept at the malkhana or not. He has contended that, the witnesses claimed to be independent, were actually stock witnesses.

9. Learned advocate appearing for the appellant has submitted that, PW 4 stated in cross-examination that he

could not show any document that he was present at the airport. He had stated that no female officer was there at his office and that he was not present at the time of recording of the statement at the airport. According to the learned advocate appearing for the appellant, PW 5 was a stock witness. He has also contended that, there were contradictions between the testimonies of prosecution witnesses and PW 6.

10. Referring to the testimony of the appellant, learned advocate appearing for the appellant has submitted that, the appellant retracted her statement. The retracted petition had been filed on September 23, 2015. She had stated that, the arresting officer asked her not to speak in the Court and as such she did not speak to the judge on the first date. She had claimed that the NCB officer had extorted her to sign on blank papers. Referring to the examination of the appellant under Section 313 of the Criminal Procedure Code, learned advocate appearing for the appellant has submitted that, the appellant contended that, she never disclosed her identity and that she only had one small handbag with her. No contraband had been seized from her. She had never carried a trolley bag. No notice had been served upon her. She had never given any

statement before any officer. NCB officer had extorted her to sign on blank papers. NCB officers had never disclosed their identity to her at the time of the interception.

11. Learned advocate appearing for the appellant has referred to Section 50 of the Act of 1985 and contended that non-compliance of the mandatory provisions vitiates the trial. In support of such contention, he has relied upon **2011 Volume 12 SCC 207 (State of Delhi Versus Ram Avatar), All India Reporter 2002 Supreme Court 1810 (Beckdon Abdul Rahman versus State of Kerala)** and **1999 Volume 3 Supreme Court Cases 172 (State of Punjab Versus Baldev Singh)**.

12. Learned advocate appearing for the appellant has contended that, provisions of Section 52A of the Act of 1985 have not been complied with. In support of such contention, he has relied upon **2016 Volume 3 Supreme Court Cases 379 (Union of India versus Mohan Lal)**. He has submitted that, the trial started on June 16, 2016. Examination of prosecution witnesses had started on February 2, 2017. Thereafter, in the year 2018 with an ulterior motive, the concerned officer had made an application for inventory before the magistrate. He has contended that, the process of making

such applications and result in sampling and certification cannot be left to the whims of the officer concerned.

13. Referring to the statement of the appellant recorded under Section 67 of the Act of 1985, he has submitted that, a conviction should not be based on the basis of a statement recorded under Section 67 of the Act of 1985 without any independent corroboration particularly when the statement had been retracted. In support of such contention, he has relied upon **2009 Volume 12 Supreme Court Cases 161 (Union of India versus Bal Mukund and others)** and **2013 volume 2 Supreme 689 (Tejinder Singh @ kaka versus State of Punjab).**

14. Learned advocate appearing for the appellant has submitted that, benefit of doubt should be extended to the appellant. In support of such contention, he has relied upon **2014 Volume 6 Supreme 655 (Umakant and another versus State of Chhattisgarh).**

15. Learned advocate appearing for the NCB has submitted that, acting on a specific information, officers of NCB had detained and ultimately arrested the appellant. Commercial quantity of cocaine had been seized from the possession of the appellant. NCB had observed all provisions

of law in conducting the raid, investigations, and adducing evidence at the trial. The prosecution had been able to establish the guilt of the appellant beyond reasonable doubt. The appellant had failed to make out any ground for interference with the impugned judgement of conviction and the order of sentence.

16. PW 1 had lodged the complaint before the Court on March 1, 2016 against the appellant. He had tendered the complaint which was marked as Exhibit 1 at the trial. In cross-examination, he had stated that he had no idea about the contents of the petition of complaint. He had no personal knowledge about the incident of search and seizure.

17. A lady constable of NCB had deposed as PW 2. She had stated that on September 8, 2015, at about 7:30 AM, she went to the airport with the team of NCB. They had reached the airport at about 8 AM. She had stated that, there was the trolley suitcase in the hand of the appellant. The trolley suitcase had 2 cavities whereupon 2 packets were recovered. The 2 packets had some powder. She had performed guard duty of the appellant. She had identified the appellant in Court. In cross-examination, she had stated that the appellant

was intercepted where checking of bag and baggage was going on.

18. PW 3 had received specific information about the appellant. He had stated that, on receipt of specific information that the appellant, a South African National along with a specified passport number was arriving at Kolkata from Dubai by flight EK 570 on that date and was carrying huge quantity of drugs in her luggage bag. He had intimated about the same to his superior. He had tendered such written intimation to his superior in evidence which was marked as Exhibit 2. His superior had directed him to proceed as per law. He had then formed a team including one lady officer and proceeded to the airport at around 7:30 AM and reached the airport at around 8 AM.

19. PW3 had stated that, after reaching the airport, the team had approached 2 persons to be witnesses of the activity to be done by the team. Such witnesses had disclosed their names. Then, the team of NCB along with the independent witnesses had mounted surveillance at the Lounge in front of the international arrival of the airport. After arrival of the passengers of the flight EK 570 they had started checking the boarding passes of the passengers and around 8:45 AM they

had found the appellant carrying a boarding pass of the same name. The appellant had been asked about her identity which she disclosed showing her passport. The number of her passport was the same as that of the information that NCB had received. They had found that the appellant was carrying one trolley suitcase of pink and silver colour with a luggage tag. They matched the luggage tag with the baggage claim card which was with the appellant and found the same to be matching. Thereafter, they had asked the appellant to cooperate with the team during the search. The trolley suitcase had been opened in front of 2 independent witnesses and the team found that there was a false cavity in the bottom of the suitcase. The small portion of the upper layer of the cavity was cut and had been pasted with cello tape. The cello tape had been removed and it was opened and the team found that there was some white coloured powder substance. A small portion of such powder had been tested with the drug detection kit carried by the team whereupon, the powder tested positive to the test of cocaine. Then the upper layer of the false cavity of the suitcase had been removed and it was found that there were 2 packets concealed inside it. Both the packets had been weighed by the electronic weighing machine

carried by the team and found to be 1.9 kg and the other to be 1.85 kg totalling 3.75 kg.

20. PW 3 had stated that, one notice under Section 50 of the Act of 1985 had been issued in his presence wherein, the appellant was informed that she had the legal right to tender a personal search before any magistrate or gazetted officer duly empowered under Section 42 of the Act of 1985. The appellant had been informed that one gazetted officer was already present there. He had tendered the notice under Section 50 of the Act of 1985 which was marked as Exhibit 3. Subsequently, the appellant had voluntarily handed over currencies of different countries and her identity related documents, travel documents and two mobile phones. Thereafter, the team had seized the entire contraband and the mobile phone sets and documents as well as currencies from the appellant.

21. PW 3 had stated that one sample of 5 g in duplicate from each of the packets totalling 4 samples were drawn and all the seized articles and samples were properly labelled and signed by the seizing officer, himself and the appellant and the independent witnesses. The search cum seizure had been completed at 15:00 hours on September 8, 2015 at the spot. A

seizure list had been prepared in which he signed. The seizure list had been tendered in evidence and marked as Exhibit 4. Then for further investigations, notice under Section 67 of the Act of 1985 had been served upon the appellant. A copy of such notice had been tendered in evidence and marked as Exhibit 5. Appellant had recorded a voluntary statement. The appellant had been arrested at 20:30 hours on September 8, 2015 at the office of the NCB, Kolkata. The arrest memo had been tendered in evidence and marked as Exhibit 6. The seized alamats had been kept in the NCB godown. On the next date, seized alamats along with the samples had been produced before the learned Court. Then 2 original samples had been sent to the Central Forensic Science Laboratory after endorsement of the learned Court. The forensic examination report dated November 23, 2015 had been received in due course along with the forwarding letter which were tendered in evidence and marked as Exhibit 7. He had tendered the relevant entries of the godown register which was marked as Exhibit 8. The relevant entries of the movement of the seized goods had been tendered and marked as Exhibit 9. He had tendered the material exhibits being the seized cocaine, the remnants of the original sample, sealed packets of documents

seized from the possession of the appellant and the 2 sealed packets of the seized cocaine weighing an aggregate of 3.75 kg. The appellant had been identified in Court by PW 3. PW 3 had been cross-examined at great length on behalf of the appellant. Nothing favourable had been extracted from the cross-examination of PW 3.

22. The Intelligence Officer had deposed as PW 4. He had corroborated the statements made by PW 3. He had identified the appellant in Court. He had been cross-examined on behalf of the appellant. Again nothing favourable to the appellant had been extracted from the cross-examination of the PW 4.

23. The independent witness present on September 8, 2015 had deposed as PW 5. He had stated that, he was posted at the Kolkata airport as Air Customs Officer on such date. He had corroborated the evidence of PW 1 to 4. He had identified his signatures on the various Exhibits both documentary and material.

24. An officer of the NCB team had deposed as PW 6. He had corroborated the oral testimonies of PW 1 to 5. He had stated that, a notice under Section 50 of the Act of 1985 was issued to the appellant and that, the appellant replied thereto. The notice under Section 50 of the Act of 1985 had been

tendered in evidence and marked as Exhibit 3 while the reply had been marked as Exhibit 3/1. He had stated that no personal search of the appellant had been conducted as the appellant voluntarily handed over all the belongings to the team of NCB. He had stated that, in response to the notice under Section 67 of the Act of 1985 the appellant made a voluntary statement confessing her guilt and further stated that, she was to deliver the consignment to a particular person at a particular place. Pursuant to such declaration, the NCB team had, along with the appellant proceeded to the disclosed place which was found to be one hotel. The manager of the hotel had been informed whereupon, such manager told the NCB team that, a person had booked a hotel room and that such person had left the hotel. After waiting for some time, since such person did not turn up, the mobile number given by such person to the manager was tried to be contacted when it was found to be switched off. He had tendered the voluntary statement of the appellant in evidence which was marked as Exhibit 10. He had stated that, the appellant had been arrested on September 8, 2015. He had identified the appellant in Court.

25. On conclusion of the evidence of the prosecution, the appellant had been examined under Section 313 of the Criminal Procedure Code. The appellant had tendered herself as defence witness. As DW 1 she had stated that, she submitted a letter dated September 23, 2015 before the Court. Such letter had been tendered in evidence and marked as Exhibit A.

26. The prosecution had established the following at the trial: –

- (i) PW 3 of NCB had received specific information relating to movement of drugs by a particular flight in which the appellant would be arriving at Kolkata.
- (ii) PW 3 had submitted the input to his superior officer (exhibit 2) whereupon, the superior officer had asked him to proceed in accordance with law.
- (iii) NCB team had arrived at the Kolkata airport at around 8 AM. They had approached 2 persons to be witnesses in the activity whereupon they agreed.
- (iv) NCB team and the independent witnesses had mounted surveillance at the Lounge in front of the international arrival of the airport. On arrival of the passengers of flight EK 570 the team had started

checking the boarding passes of the passengers and around 8:45 AM they had found the appellant. When asked, the appellant had disclosed her identity. Appellant was carrying one trolley suitcase of pink and silver colour. NCB team had matched the luggage tag with the baggage claim card which was with the appellant and found the same to be matching.

(v) The trolley suitcase of the appellant had been opened in front of 2 independent witnesses and a false cavity in the bottom of the suitcase was found. It had been found that, a small portion of the upper layer of such cavity was cut and pasted with cello tape. Such cello tape was removed and white coloured powder substance had been found. A small portion of the powder had been tested with the drug detection kit carried by the NCB team and it tested positive for cocaine.

(vi) Upper layer of the false cavity of the suitcase was removed and 2 packets had been found concealed inside it. A small portion of the substance

was tested when the result had come as positive for cocaine.

- (vii) Both the packets had been weighed and found to be 1.9 kg and 1.85 kg aggregating 3.75 kg.
- (viii) Notice under Section 50 of the Act of 1985 had been served upon the appellant being Exhibit 3 and she replied that to being Exhibit 3/1. Appellant had declined to take the search of the NCB team. She had also declined to be searched in presence of a magistrate or a gazetted officer. She had voluntarily handed over articles in her possession. A seizure list of such articles had been prepared which was marked as exhibit 4.
- (ix) Notice under Section 67 of the Act of 1985 had been served upon the appellant being Exhibit 5. She had responded thereto being Exhibit 10.
- (x) In her voluntary statement, she had disclosed that she was to deliver the consignment to a designated person at a designated place. Pursuant to such statement, the appellant had been taken to the designated place to search for the designated person. Such person could not be found.

- (xi) Appellant had been arrested on September 8, 2015 by memo of arrest being Exhibit 6.
- (xii) On September 19, 2015, the seized articles along with the appellant had been produced before the learned court. The 2 original samples had been sent to the Central Forensic Science Laboratory after endorsement by the learned court.
- (xiii) The report of the Central Forensic Science Laboratory had been tendered in evidence and marked as Exhibit 7.
- (xiv) Exhibit 7 has established that, the seized powder from the possession of the appellant was cocaine. Narcotics of commercial quantity had been seized from the possession of the appellant.
- (xv) The deposit of the seized narcotics in the godown had been established by Exhibit 8 and its movement by Exhibit 9. Remnants of the samples taken at the place of occurrence as well as the remaining portion of the seized cocaine had been produced in court being Material Exhibits VII and VIII.

27. In *Bal Mukund and others (supra)* the conviction had been based solely on self-confession of other co-accused. In such circumstances, the Supreme Court has held that conviction should not be based merely on the basis of a statement without any independent corroboration, especially when the confession was retracted. In the facts of the present case, the confessional statement of the appellant had been recorded prior to the arrest of the appellant.

28. In *Tejinder Singh @ kaka (supra)* the Supreme Court has found major discrepancies in the testimony of prosecution witnesses as also registration of the First Information Report on the basis of information furnished by the informant. In that case, the Trial Court had relied upon extra judicial confession for the purpose of convicting the accused. Moreover, the Supreme Court has found that, the chain of events have not been proved by the prosecution to bring home the guilt of the accused.

29. The case of the prosecution as against the appellant had been proved at the trial independent of the confessional statement of the appellant. The purported retraction of the confessional statement had been made after a period of time

and the purported retraction can be said to be an afterthought.

30. It has been contended on behalf of the appellant, that, provisions of Section 50 of the Act of 1985 had been infringed. In support of such contention, reliance has been placed on ***Ram Avatar (supra)***, ***Beckdon Abdul Rahaman (supra)*** and ***Baldev Singh (supra)***. In the facts and circumstances of the present case, no body search of the appellant had been carried out. Therefore, Section 50 of the Act of 1985 has no manner of application in the facts and circumstances of the present case.

31. ***Mohan Lal and another (supra)*** has taken judicial notice of the fact that most States did not have proper storage facilities for the seized narcotics. It has noted that, though there was an effective mechanism for upkeep and effective management of contraband and also an accountability mechanism, Governments miserably failed to effectively implement it. It has issued several directions to the Central Government and State Governments to set up storage facilities within 6 months.

32. In the facts of the present case, the contraband had been seized on September 8, 2015. Samplings had been done

on September 8, 2015. The seized articles including the contraband along with the samples had been produced before the learned court on September 9, 2015. Two original samples had been sent to the Central forensic science laboratory after endorsement of the learned court. We have not found any infraction of any provision of the Act of 1985 in the sampling and sending the sample for testing in the facts and circumstances of the present case.

33. The prosecution had produced 2 packets of the seized cocaine weighing 1.890 kg and 1.840 kg aggregating to 3.73 kg in court which were marked as Material Exhibit VII and VIII. Therefore, the question of the prosecution having failed to comply with Section 52A of the Act of 1985 does not arise.

34. Section 52A of the Act of 1985 has provided for disposal of seized narcotic drugs and psychotropic substances. Sub-Section (1) of Section 52A of the Act of 1985 has empowered the Central Government to specify such drugs, psychotropic substances, controlled substances or conveyances or class of narcotic drugs, class of psychotropic substances, class of controlled substances or conveyances be disposed of by such officer and in such manner as the Central Government may from time to time determine.

35. Sub-Section (2) of Section 52A of the Act of 1985 has prescribed that whenever drugs, psychotropic substances, controlled substances or conveyances has been seized and forwarded to the officer in charge of the nearest police station or to the officer empowered under Section 53, the officer referred to in sub-Section (1) shall prepare an inventory of the same and make an application, to any Magistrate for the purpose of certifying the correctness of the inventory so prepared; or taking, in presence of such Magistrate, photographs of such drugs or conveyances and certifying such photographs as true; or allowing to draw representative samples of such drugs or substances, in the presence of such Magistrate in certifying the correctness of any list of samples so drawn. Sub-Section (3) of the Act of 1985 has prescribed that where an application is made under sub-Section (2), the Magistrate shall as soon as may be, allow the application.

36. Sub-Section (4) of the Act of 1985 has permitted every court trying an offence under the Act of 1985 to treat the inventory, the photographs and any list of samples drawn under sub-Section (2) and certified by the Magistrate, as primary evidence in respect of such offence.

37. In a trial in respect of a charge under the Act of 1985, as is in any criminal trial, the prosecution can establish the charge by leading primary evidence and placing the seized contraband in its entirety before the trial court. In such a situation, the prosecution has to retain the entirety of the seized quantity of contraband and produce it at the trial. Section 52A has provided an alternative mechanism to the burden of the prosecution to produce the original seized contraband at the trial by allowing the prosecution to dispose of the seized contraband in accordance with the procedure prescribed under Section 52A of the Act of 1985 and lead evidence to establish the existence of the contraband notwithstanding its disposal before the conclusion of the trial. Sub-Section (4) of the Act of 1985 mandates the trial court to treat the inventory, photographs and any list of sampling drawn under sub-Section (2) and certified by the Magistrate as primary evidence in respect of such offence. Section 52A of the Act of 1985 on a plane creates a legal fiction of the evidences generated by following the procedure prescribed in sub-Section (2) as primary evidence. But for sub-Section (4) of Section 52A the prosecution would have been hard placed to

have such documents treated as primary evidence of the contraband seized.

38. *Umakant (supra)* has held that, if two views were possible on evidence adduced in case, one pointing to the guilt of the accused and other towards his innocence, the view which was favourable to the accused should be adopted. In the facts of the present case, the facts proved at the trial, does not accommodate two views.

39. In view of the discussions above, we have not found any ground to interfere with the judgement of conviction and the order of sentence passed by the learned trial judge. We affirm the same.

40. CRA (DB) 85 of 2022 is dismissed. In view of the dismissal of the appeal, nothing survives in the interlocutory application and therefore CRAN 1 of 2022 is also dismissed.

41. Period of detention of the appellant during investigation, trial and the pendency of the appeal shall be set off against the sentences imposed.

42. Trial court records along with a copy of this judgement

and order be remitted to the appropriate court expeditiously, for necessary action.

[DEBANGSU BASAK, J.]

43. I agree.

[MD. SHABBAR RASHIDI, J]