

REPORTABLE

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO. 1647 OF 2007

Raju Premji

.... Appellant

Versus

Customs NER Shillong Unit

.... Respondent

WITH
CRIMINAL APPEAL NO. 956 OF 2009
(Arising out of SLP (Crl.) No. 2047 of 2008)

Arun Kanungo

.... Appellant

Versus

D. Pakyntein

.... Respondent

JUDGMENT

S.B. SINHA, J.

Leave granted.

1. These two appeals involving common questions of law and fact are directed against a judgment and order dated 6th September, 2007 passed by a Division Bench of the Gauhati High Court in Criminal Appeal Nos. 3(SH) of 2006 and 4)SH) of 2006 affirming a judgment of conviction and sentence

dated 21st June, 2006 passed by the learned Special Judge, NDPS, Shillong in Criminal (NDPS) Case No.26/2003 whereby both the appellants were convicted under Section 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short 'the NDPS Act') and were sentenced to undergo rigorous imprisonment for ten years each and to pay a fine of Rs.1,00,000/- each; in default of payment of fine, to further undergo a rigorous imprisonment for one year.

2. Appellant Raju Premji (A-4) was a resident of Shillong. He, however, had been carrying on business in shoes in West Bengal. Appellant Arun Kanungo (A-3), however, is a resident of Meghalaya. They along with two other accused, namely Yashihey Yobin (A-1) and Lishihey Ngwazah Ngwazah (A-2) were prosecuted for commission of offences under the NDPS Act.

3. Before placing on record the factual matrix of the matter, we may notice that whereas accused Nos. 1 and 2 have been convicted for possession of 380 gms. of heroin, appellants herein were convicted under Section 25 of the Act for abetment thereof as they purported to have associated themselves with finding prospective buyers in disposing of the contraband.

4. The prosecution case in brief is that D. Pakyntein, PW-11, an Inspector in the Office of the Commissioner of Customs, NER Shillong, received an information from Special Operation Team of Meghalaya Police through N.K. Bhandari, PW-4, at about 7.50 p.m. on 19th August, 2003 that one Yasihey Yobin of Dum Dum, Nogthymmai, accused No.1, had kept some heroin at his residence and if a search is conducted immediately, the contraband may be recovered. Thereafter Pakyntein contacted R.M. Chyne, Superintendent (PW-7), B. Kar, Inspector (PW-2) and N.K. Bhandari, PW-4. All of them proceeded towards the residence of accused No.1 to conduct the search. On reaching there, they met the members of the Special Operation Team alongwith Yobin. After the particulars of Yobin were ascertained, his house was searched in presence of independent witnesses R.V. Dkha, PW-3 and D. Khyriem, PW-8, in course whereof he took out one suitcase wherein he had allegedly kept the packet of heroin. However, no heroin was found therein. On interrogation on the spot, Yobin informed that his brother-in-law, Lisihey Ngwazah, accused No.2, must have removed the same. He instructed his wife to contact him and ask him to come back immediately with goods. Accused No.2 after sometimes turned up with a black bag on his shoulder. On being asked, he opened the bag and took out the contents thereof which included one suit case cover of camouflage denim made of synthetic fabric and one green polythene bag, on opening whereof, one

plastic packet containing white powder wrapped with two pieces of English newspaper was recovered.

5. Indisputably, however, the information was received by M. Kharkrang, Additional Superintendent of Police, PW-9, from his source who informed that he had been offered to sell drugs by some people and they have to meet him at Keating Road, whereupon plain clothes policemen were posted, who nabbed the appellants therefrom. They were brought to the office of the Superintendent of Police. Physical search was made of the appellants but nothing was found. They were interrogated whereupon they allegedly disclosed that the drugs were in possession of accused No.1.

At that point of time, the Customs Officers were informed. Whereas the police officers reached the village of accused No.1 first, the Customs Officers joined them later.

6. Appellants herein were in the custody of the police officers since evening of 19th August, 2003. Their custody was handed over to the customs officers.

It is now borne out from the record that whereas all the accused made two statements each on 20th August, 2003 purported to be under Section 67 of the Act. So far as accused No.4 is concerned the statements made by him were marked as Exts 17 and 18 whereas those of the accused No.3 are concerned, they were marked as Exts. 13 and 14. A formal first information report was lodged only in the afternoon of 20th August, 2003. All the accused persons were formally arrested at 4.30 p.m. They were subjected to further interrogation and both the appellants made a third statement on 21st August, 2003 which were marked as Exts. 19 and 15 respectively. They were produced before the Magistrate on the same day.

Whereas accused No.4 retracted from his confession on 4th November, 2003, other accused including accused No.3 retracted therefrom while making their statements under Section 313 of the Code of Criminal Procedure.

7. A charge sheet was filed against the appellants for commission of offences under Section 21, 28 and 29 of the Act on 21st November, 2003. They were convicted, as stated aforesaid. Appeal preferred by them before the High Court have been dismissed by the reason of the impugned judgment.

Accused Nos. 1 and 2 have not preferred any appeal before this Court against the judgment of the High Court.

8. Mr. U.U. Lalit, senior counsel and Mr. Vikas Mahajan, Advocate, in support of these appeals would raise the following contentions :-

- a. The purported statements having been made by the appellants before the authorized officers while in custody, the same were hit under Section 26 of the Evidence Act, 1872.
- b. Keeping in view the fact that the accused were not summoned to make any statement and such statements were made when they were in custody, the same were wholly inadmissible in evidence.
- c. In any event, the appellants having retracted from their earlier statements, no reliance could have been placed thereupon in absence of any corroboration in material particulars.
- d. Even if the statements made by the accused are taken into consideration, they purported to have offered sale of the contravention to one Bhiya Ji,, who had not been put on trial, although summoned, the impugned judgments are liable to be set aside.

9. Ms. Shrabani Chakrabarty, learned counsel appearing on behalf of the respondent, on the other hand, urged:-

- a. Appellants having made statements before the officers of the customs authorities who were not police officers in terms of Section 67 of the Act, bar in regard to inadmissibility of the statement as contained in Section 26 of the Evidence Act, 1872 would not apply.
- b. Statements of the appellants having been corroborated by the statements of other accused persons, the impugned judgment is unassailable.
- c. Accused Nos. 1 and 2 having been found to be in possession of the contraband and the appellants having been found to have abetted them in commission of the crime, it was for them to offer reasonable explanation in relation thereto.

10. Chapter III of the NDPS Act provides for prohibition, control and regulation. Chapter IV provides for offences and penalties.

Section 8 of the Act inter alia prohibits certain operations, except for the purposes mentioned therein. Section 21 provides for punishment for contravention in relation to manufactured drugs and preparations. Section 28 provides for punishment for attempt to commit offences. Section 29 provides for punishment for abetment and criminal conspiracy.

11. The Act provides for stringent punishment. Where a statute confers drastic power and provides for stringent penal provisions including the matter relating to grant of bail, the conditions precedent therefor must be scrupulously complied with.

An information was received by the police authorities. The police officers were empowered officers within the meaning of the provisions of the NDPS Act. They were required to reduce the same into writing so as to apprise the higher officers thereabout. No search warrant or authorisation was obtained. Some plain clothes policemen were posted. In the own words of prosecution witnesses and particularly those of PWs. 9 and 10, M. Kharkrang, Additional Superintendent of Police, S.I. N. Thapa, respectively, the appellants were nabbed. Raid was conducted inter alia by S.I. N. Thapa, PW-10. They were taken in custody and brought to the office of PW-9. Even then they were not asked to make any statement. They were not even

summoned. Their persons were searched without complying with the provisions of Section 50 of the Act. They were evidently interrogated. Only on interrogation they disclosed about the address of accused No.1. In the aforementioned situation, it is difficult to comprehend as to why the customs officers had to be informed. The police officers could themselves carry out the search and seizure. They being empowered therefor should have exercised their own jurisdiction. Customs Officers, we would assume, were invested with the powers of an Officer Incharge of a Police Station in terms of a Notification issued under Section 53 of the NDPS Act, but that does not mean, the police officers were denuded of their jurisdiction thereunder.

12. Why the police authorities should have transferred the case to the customs authorities defies any logic. It is admitted that appellants were taken to Village Nonghymmai of which the accused No.1 was a resident by the police officers including PWs. 9 and 10. Customs Officers joined them much later. Search of the house of accused No.1 was not carried out by the customs officers exclusively. All police officers present joined in the search. Evidently the search was made after sunset. As information was received by PW-9 at about 6.30 pm; as is evident from the statement by him before the Court he left the house of accused No.1 at about 10.00 p.m. while

the customs officers had still been carrying on some other formalities. All four accused were brought to the police station for further interrogation and on the next date the customs officers informed the police officers that both of them were required to be arrested. It is at that time that their custody was handed over to the customs officers.

13. PW-7, R.M. Chyne, indisputably was the officer before whom the purported statements were made. There is nothing on record to show that any summons were served on them. No such summon had been brought on record.

14. It had been accepted that no deal was found to have taken place. The accused persons and the informant were only talking amongst themselves. He could not have even heard their conversation. Admittedly the informant was one Bhaiya Ji. He had not been examined for which no explanation has been offered.

15. Admittedly three statements were taken from each of the accused. The first one was a narrative one. The second was in question and answer form. The third statement was taken admittedly after the formal First Information Report was lodged.

16. It stands admitted that the officer concerned, R.M. Chyne, PW-7, thought that the accused could be examined times without number unless they make replies to their satisfaction.

17. The application of the provisions of Section 67 of the Act is required to be considered in the aforementioned factual backdrop. It reads as under :-

“Section 67 - Power to call for information, etc.

Any officer referred to in section 42 who is authorised in this behalf by the Central Government or a State Government may, during the course of any enquiry in connection with the contravention of any provisions of this Act,--

(a) call for information from any person for the purpose of satisfying himself whether there has been any contravention of the provisions of this Act or any rule or order made thereunder;

(b) require any person to produce or deliver any document or thing useful or relevant to the enquiry;

(c) examine any person acquainted with the facts and circumstances of the case.”

18. An empowered officer, therefore, is entitled to examine any person acquainted with the facts and circumstances of the case, inter alia during the course of any enquiry in connection with the contravention of any provision of the Act. As the term ‘enquiry’ is not defined under the NDPS Act, its

meaning assigned in Section 2(g) of the Code of Criminal Procedure as also in an etymological sense and the manner may be held to be applicable.

19. From the very beginning concededly the appellants were in the police custody. They were put to interrogation by the police officers. They were not free persons. They were under orders of restraint and thus would be in the custody of the police officers. Any statement made by them while in custody of a police officer would be inadmissible in evidence in terms of Section 26 of the Indian Evidence Act, 1872, which reads as under :-

“26. Confession by accused while in custody of police not to be proved against him - No confession made by any person whilst he is in the custody of a police-officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person.

Explanation - In this section "Magistrate" does not include the head of a village discharging magisterial functions in the Presidency of Fort St. George or elsewhere, unless such headman is a Magistrate exercising the powers of a Magistrate under the Code of Criminal Procedure, 1898 (V of 1898).”

20. The customs officer as per the Notification issued by the Central Government was an officer incharge of the police station. All powers available to an officer incharge of a police station, therefore, were available to him. One of the attributes of the power of an officer incharge is a power

to investigate into a commission of cognizable offence. He can also file a charge sheet.

21. A constitution Bench of this Court in State of Punjab v. Baldev Singh, [(1999) 6 SCC 172], held as under :-

“28. This Court cannot overlook the context in which the NDPS Act operates and particularly the factor of widespread illiteracy among persons subject to investigation for drug offences. It must be borne in mind that severer the punishment, greater has to be the care taken to see that all the safeguards provided in a statute are scrupulously followed. We are not able to find any reason as to why the empowered officer should shirk from affording a real opportunity to the suspect, by intimating to him that he has a right “that if he requires” to be searched in the presence of a gazetted officer or a Magistrate, he shall be searched only in that manner. As already observed the compliance with the procedural safeguards contained in Section 50 are intended to serve a dual purpose — to protect a person against false accusation and frivolous charges as also to lend creditability to the search and seizure conducted by the empowered officer. The argument that keeping in view the growing drug menace, an insistence on compliance with all the safeguards contained in Section 50 may result in more acquittals does not appeal to us. If the empowered officer fails to comply with the requirements of Section 50 and an order or acquittal is recorded on that ground, the prosecution must thank itself for its lapses. Indeed in every case the end result is important but the means to achieve it must remain above board. The remedy cannot be worse than the disease itself. The legitimacy of the judicial process may come under a cloud if the court is seen to condone acts of lawlessness conducted by the investigating agency during search operations and may also undermine respect for the law and may have the effect of unconscionably compromising the

administration of justice. That cannot be permitted.”

22. We would, for this purpose, assume that such confessions are not hit with Section 25 of the Evidence Act, 1872 but even then they must receive strict scrutiny.

This Court in Kanhaiyalal v. Union of India, [(2008) 4 SCC 668], upon taking into consideration number of decisions, held as under :-

“43. The law involved in deciding this appeal has been considered by this Court from as far back as in 1963 in *Pyare Lal Bhargava case*. The consistent view which has been taken with regard to confessions made under provisions of Section 67 of the NDPS Act and other criminal enactments, such as the Customs Act, 1962, has been that such statements may be treated as confessions for the purpose of Section 27 of the Evidence Act, but with the caution that the court should satisfy itself that such statements had been made voluntarily and at a time when the person making such statement had not been made an accused in connection with the alleged offence.”

23. Whether a confessional statement is voluntary and free from any pressure must be judged from the facts and circumstances of each case.

This Court in Mohtesham Mohd. Ismail v. Spl. Director, Enforcement Directorate, [(2007) 8 SCC 254], has held as under :-

“20. We may, however, notice that recently in Francis Stanly v. Intelligence Officer, Narcotic Control Bureau, Thiruvananthapuram this Court has emphasised that confession only if found to be voluntary and free from pressure, can be accepted. A confession purported to have been made before an authority would require a closer scrutiny. It is furthermore now well settled that the court must seek corroboration of the purported confession from independent sources.”

In Noor Aga v. State of Punjab and another, [2008 (9) SCALE 681],

this Court held:-

“102. Section 25 of the Evidence Act was enacted in the words of Mehmood J. in *Queen Empress v. Babulal* [ILR (1884) 6 All. 509] to put a stop the extortion of confession, by taking away from the police officers as the advantage of providing such extorted confession during the trial of accused persons. It was, therefore, enacted to subserve a high purpose.”

24. In any event if they were in custody of the police officers as also the customs officers, although they were not accused in strict sense of the term, any confession made by them would not be admissible in terms of Section 26 of the Evidence Act, 1872.

25. Learned counsel has relied upon a decision of the Kerala High Court in Kochan Velayudhan v. State of Kerala, [AIR 1961 Kerala 8], wherein it was observed :-

“21. In Ramrao Ekoba v. The Crown, AIR 1951 Nag 237 Hemeon, J., held that:

"Although the failure to comply with the provisions regulating searches may cast doubts upon the bona fide of the officers conducting the search, there is nothing in law which makes the evidence relating to an irregular search inadmissible and a conviction based on such evidence is not invalid on that ground alone".

26. The confession was retracted by accused No.4 only after a few days. The learned Special Judge has taken into consideration the fact of such retraction. Taking into consideration the facts and circumstances of the case, we are of the firm opinion that confession cannot be said to have been made by the appellants voluntarily.

As the appellants were not found to be in possession of the contraband, the burden of prove never shifted on them.

27. For the reasons abovementioned these appeals are allowed. The appellants are directed to be released forthwith if not required in connection with any other case.

.....J.
[S.B. SINHA]

.....J.
[R.M. LODHA]

New Delhi.
May 6, 2009